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DO'S AND DON'TS OF DOCUMENT RETENTION

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Brown Winick

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I. DOCUMENT RETENTION POLICIES

- A. What is a "document retention policy" and why do I need one?
1. Definition: Systematic way to review, retain and destroy documents; Applies to original and all copies of the documents
 2. Purposes:
 - a. Business efficiency:
 - frees up space – electronic and physical
 - if enforced, allows you to quickly locate important documents
 - reduces time you/employees spend handling and retrieving documents
 - b. Litigation
 - keeping the correct documents to enforce claims (ie: copy of signed contract in breach case, documents needed to prove debt due)
 - Intentional destruction ("spoliation") can undermine your position in the litigation
 - c. Compliance with state and federal laws/regulations
- B. How long should I keep certain documents?
1. Employment records – dependent upon the type of document
 2. Tax Audit – can be audited for up to 6 years, so should keep tax-related documents for 8 years, although you should keep your tax return permanently
 3. Health and Safety (ie: OSHA) – regulations contain specific requirements, dependent upon number of employees, certain industries and other factor
 4. Environmental records – Environmental Protection Agency rules govern if your business produces or handles hazardous materials or waste or your business produces, processes or stores certain chemicals
 5. HIPAA (Health Ins. Portability and Accountability Act) – medical and health related records, includes handling of insurance records

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6. Statutes of Limitations for filing a lawsuit (Iowa)
 - a. Personal injuries – 2 years
 - b. Products liability – 15 years from date product was purchased, leased, bailed, or installed for use or consumption unless expressly warranted for a longer period of time
 - c. Medical malpractice – 2 years from discovery
 - d. Written contracts - 10 years
 - e. Oral contracts/property injuries – 5 years
 - f. Claim for wages – 2 years
7. General considerations:
 - a. Are the documents a basis for supporting or disproving legal claims?
 - b. Do the documents support tax deductions/expenditures?
 - c. Do the documents explain a business decision?
 - d. Do the documents prepare for future expansion? (ie: documents that would be important in a later due diligence situation)

C. Enforcement of a Document Retention Policy

1. DRP Manager
2. Written policy
3. Instruction to Employees – make sure they read and understand
4. IMPORTANT: If the policy is not enforced, or only partially enforced, a Court could expose your company to adverse inferences in litigation and possibly criminal penalties depending on the documents.

D. Electronic Documents and Document Retention

1. Consult with IP person for this part of your policy – even when we delete something, its not always “gone”.
2. Emails: Educate employees about risk of electronic communications; Courts treat them like other paper documents, so your policy should have a specific way of maintaining/organizing emails
3. Hard drives, disk drives – should be backed up; do not destroy unless in compliance with the policy because these things often contain items that we no longer have in “paper” form.
4. Web pages – it is possible to obtain copies or “prints” of web pages that are no longer active; should retain “old” copies/prints of web pages once they are updated; if you conduct deals through your website, you should retain these just as you would any other contract; Check with your web hosting company to determine what records they maintain

II. LITIGATION – NOW WHAT?

A. Duty to Preserve Evidence

1. “Knew or should have known” of potential or existing litigation
2. Suspend the policy as soon as you know of any potential or existing litigation; policy should be suspended only as to relevant or potentially relevant documents

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3. If there have been previous actions where certain types of evidence were relevant, should think twice about destroying similar documents when a similar situation arises, even if litigation does not seem imminent

B. What happens if we destroyed evidence that is relevant to the litigation?

1. Eighth Circuit law

a. Is the document retention policy reasonable considering the facts and circumstances surrounding the records at issue? (i.e.: is a three year policy sufficient for this type of document?)

b. Have lawsuits or complaints been filed concerning the types of records at issue? If so, what is the frequency and magnitude of those lawsuits or complaints?

c. Was the document retention policy instituted in bad faith?

d. Court requires evidence of intent to destroy for purposes of obstruction or suppressing the truth in order to impose sanctions.

e. The duty to preserve is not necessarily imposed as soon as the party "should have known" of possible litigation. Instead, the Court also requires evidence of bad faith or mal-intent.

f. The opposing party must also be prejudiced by the destruction.

g. Court has distinguished between pre-litigation and post-litigation destruction. Continued destruction after litigation commences is not allowed and is highly sanctionable.

h. Example cases

2. Iowa law

a. Was the document destroyed pursuant to a reasonable document retention policy?

b. Was the destruction intentional?

c. Did the party have knowledge that the potential evidence was relevant to existing or potential litigation?

d. Did the destruction prejudice the opposing party?

e. Would the evidence have been admissible?

f. Example cases

3. Possible Sanctions for failing to preserve/spoliation of evidence

a. Discovery sanctions

-Payment of reasonable expenses, including attorneys' fees, incurred relating to the particular discovery dispute;

-An order stating that certain facts are taken to be established for purposes of the action;

-An order refusing to allow the disobedient party to support or oppose certain claims or defenses;

-An order prohibiting the disobedient party from introducing certain matters into evidence;

-An order striking out pleadings or parts thereof;

-An order staying proceedings until an order is obeyed;

-An order dismissing the action or part thereof;

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-An order rendering judgment by default against the disobedient party; and/or

-An order treating as contempt the failure to obey an order.

b. Prohibit the use of duplicative evidence

c. Adverse jury instruction. The form adverse instruction in Iowa is as follows:

(Name of party asserting the conclusion) claims that (name of party) has intentionally [altered] [destroyed] [failed to produce] evidence consisting of (describe evidence). You may, but are not required to, conclude that such evidence would be unfavorable to (name of party).

Before you can reach this conclusion, (name of party asserting the conclusion) must prove all of the following:

1. The evidence exists or previously existed.
2. The evidence is or was within the possession or control of (name of party).
3. (Name of party)'s interests would call for production of the evidence if favorable to that party.
4. (Name of party) has intentionally [altered] [destroyed] or [failed to produce] the evidence without satisfactory explanation.

For you to reach this conclusion, more than the mere [alteration] [destruction] [non-production] of the evidence must be shown. It is not sufficient to show that a third person [altered] [destroyed] [is withholding] the evidence without the authorization or consent of (name of party).

d. There is *no separate cause of action* for spoliation of evidence (whether intentional or negligent) under Iowa law.

C. Electronic Discovery issues

1. Courts have enacted new rules and requirements that force the parties to address the discovery related to electronic documents early and often.
2. Produce electronic documents or "ESI" as they are kept in the usual course of business or it must be organized and labeled to correspond with the categories in the request.
3. Producing party can assert that it is unable to produce the ESI because of undue burden and costs. The Court then has to weigh the factors related to the cost and burden of production v. the need for such documents (ie: are there less

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burdensome ways to obtain it? Is it duplicative information?, resources of the parties, etc.)

4. Best Practices: "The Sedona Principles"

- a. Parties should confer early in the discovery regarding the preservation and production of ESI and seek to agree on the scope of each party's rights and responsibilities.
- b. Discovery requests for ESI should be clear and any responses or objections should disclose the scope and limits of the production.
- c. Parties should act reasonably and in good faith. However, it is unreasonable to expect parties to take every conceivable step to preserve all potentially relevant ESI.
- d. Parties responding to discovery are better situated to evaluate the procedures, technology and methodology for preserving and producing their own ESI.
- e. If a requesting party believes the responding party's steps to preserve and produce its ESI were inadequate, the requesting party bears the burden of proving the inadequacy.
- f. The costs and burdens of retrieving and processing ESI can include the disruption of business and information management activities.
- g. Absent a showing of special need and relevance, a responding party should not be required to preserve, review or produce deleted, shadowed, fragmented or residual ESI.
- h. A responding party can satisfy its good faith obligation by using electronic tools and processes to preserve and produce relevant ESI (i.e.: data sampling, searching, use of selection criteria).
- i. Metadata may be considered part of the required "reasonably usable form" when its appropriate and necessary to allow the receiving party the same ability to access, search and display the information as the producing party.
- j. Absent an objection, agreement or court order, the responding party bears the costs of producing the ESI, unless its not reasonably accessible in the regular course of business. If it's not reasonably accessible, the costs can be shifted to the requesting party or shared by the parties.

III. QUESTIONS

EMPLOYMENT RECORDS – RETENTION POLICY GUIDELINES

- Documents related to recruitment (ie: job orders to employment agencies, advertisements, test papers, physical exam results) – 1 year from date of personnel action to which the record relates
- Documents related to apprenticeship programs in a recognized trade or craft (ie: applications) – 2 years or the period of the apprenticeship, whichever is longer
- Documents related to employee selection (ie: applications, resumes, any employment inquiries, promotions, demotions, transfers, training selections, layoffs, recalls or discharges) – 1 year from date of the personnel action to which the record relates
- INS I-9 forms (Employment Eligibility Form) – 3 years from date of hire or 1 year from date of termination, whichever is later
- EEO-1 form (for employers with 100 or more employees) – 1 year
- Written affirmative action plans, including supporting documents, evaluations and compliance documents – 5 years
- Written training agreements (including summaries of applicant qualifications, job criteria or descriptions, interview notes, identification of minority and female applicants) – retain for duration of training program
- Documents related to compensation (ie: payroll records, hour records, collective bargaining agreements, individual contracts under FLSA, sales and purchase records, records of wage deductions) – 3 years from date of creation
- Employee benefit plans and any related memorandums regarding seniority or merit systems – duration of plan and at least 1 year after termination of the plan
- Basic information supporting plan descriptions (including vouchers, worksheets, receipts, resolutions, participant elections and deferrals) – 6 years after date of filing
- Documents related to charges of discrimination (ie: personnel records containing charges of discrimination) – until final disposition of charge or action
- Personnel records of involuntarily terminated employees - 1 to 2 years from date of termination (may need to maintain longer if the employee was under contract)
- Records regarding complaints of handicap discrimination and requests for reasonable accommodation – 3 years from date of request/complaint
- Documents related to leaves of absences (ie: FMLA, employee notices, policies, premium payments of benefits, dispute records, medical certifications, etc.) – 3 years from end of leave period
- Documents related to drug and alcohol testing (ie: records of results, refusal documentations, calibration documents, summaries, etc.) – 5 years from date of test results
- Medical records of employees – duration of employment plus 6 years (must be in a secured location with controlled access)



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Baskerville and Schoenebaum, P.L.C.**

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www.brownwinick.com

Rebecca A. Brommel, Attorney at Law

Rebecca A. Brommel is a member of BrownWinick and is the Chair of the firm's Marketing Committee. Becki assists clients in the area of litigation. Becki has represented clients in state and federal court and in various state administrative tribunals. Becki's litigation experience includes business contract disputes (including covenants not to compete and declaratory actions), seller-purchaser disputes, collection matters, business lease disputes and judicial review of administrative actions. In addition, Becki has assisted clients in requesting changes of administrative rules and other actions involving state administrative tribunals. Becki has serviced clients in a number of industries, including health care, agriculture, manufacturing, construction and various services industries.

Becki has researched and written articles regarding document retention policies, spoliation of evidence issues and other litigation-related topics. Becki has also spoken at BrownWinick's client seminars regarding the importance of document retention policies.

Becki is active in bar association activities. As co-chair of the Young Lawyers Division Professional Development Committee, Becki helps organize the annual Nuts and Bolts Seminar as well as the Law Over Lunch series, both of which are aimed at assisting young lawyers with various aspects of their practice. Becki has also served as Social Committee Chair for Polk County Women Attorneys. As one of the Social Committee Chairs, Becki assisted in organizing the Fifth Annual Season of Change Auction to benefit the Young Women's Resource Center. In addition, Becki is a member of the American, Iowa and Polk County Bar Associations. She is currently the President of Polk County Women Attorneys and a member of the Des Moines Metro Women's Chamber Alliance.

Becki also devotes her time to the community. She is a graduate of the Greater Des Moines Leadership Institute, and as a member of the 2006-2007 class, participated in the building of a playground in the Kids Kingdom area of the Blank Park Zoo. In addition, Becki continues to serve as an advisor to the hall committee and youth group leader at Immaculate Conception Church in St. Marys, Iowa. Becki has also been a Career Day presenter and assisted with the middle school mock trial team at Interstate 35 Community Schools.

Becki graduated, *magna cum laude*, from Drake University in 1998, obtaining her B.A. in Political Science and Sociology. She received her J.D. in 2001 from Drake Law School, graduating *with highest honors*. At Drake Law School, Becki was Order of the Coif and a recipient of the Dwight D. Opperman Scholarship. Becki was admitted to the Iowa bar in 2001.

Representative Cases

Royal Financial v. Iowa Lottery, State of Iowa
Polk County, Iowa District Court

Obtained a favorable settlement for Royal Financial in a lawsuit against the State of Iowa and the State Lottery involving the TouchPlay lottery program. After the State authorized the creation of the TouchPlay program, Royal Financial invested substantial amounts to purchase, install and maintain over 1,700 TouchPlay machines statewide. The State banned the program less than a year later, causing Royal Financial to lose much all of its investment.

Birchansky Real Estate, et al. v. St. Luke's Hospital, et al.

Successfully represented St. Luke's Hospital before the Iowa Supreme Court in the judicial review of the Iowa Department of Health's denial of Birchansky Real Estate's request for a Certificate of Need to open an outpatient surgical facility. Birchansky attempted to utilize an exception to Iowa's Certificate of Need law to become the successor to an ambulatory surgery center operated by St. Luke's Hospital. The Supreme Court unanimously



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Practice Areas

Administrative Law
Agribusiness
Litigation / Trial Law

Industries Served

Agribusiness and Livestock
Financial Institutions
Healthcare Providers

Education

Undergraduate:
Drake University
*B.A., magna cum laude in Political
Science and Sociology, 1998*

Legal:

Drake University
J.D., with highest honors, 2001

Admitted

Iowa, 2001

agreed that the agency properly denied Birchansky's request.

Satellite Piracy

We represented a nationally recognized satellite television company in its efforts to curb satellite piracy. Specifically, we filed approximately seventy-five federal court lawsuits against individuals accused of stealing our client's satellite signal and programming. The cases resulted in favorable settlements and judgments, including one case tried to a successful result.

Enforcement of Right of First Refusal

We represented a national outdoor advertising company in a lawsuit to enforce a right of first refusal to purchase commercial property contained in a billboard lease. Following a non-jury trial, the court determined that our client was entitled to specifically enforce the right of first refusal and was entitled to purchase the property over the objections of another party whose purchase offer had been previously accepted by the owner.

Agricultural Equipment Dealership Termination

We represented a large agricultural and construction equipment financing company with respect to the termination of an agricultural equipment dealership in northern Iowa. The dealership was involved in a variety of wrongful conduct including the submission of fraudulent retail installment contracts to our client, which our client funded. We filed a federal court lawsuit against the President of the dealership and obtained a judgment against that individual for over twelve million dollars. We also filed over a dozen lawsuits against other individuals believed to have been involved in assisting the dealership's wrongful conduct and we obtained numerous favorable settlements with those individuals.

Negligent Construction of Dairy

We represented the owner of a dairy facility in eastern Iowa in a lawsuit against the engineer and general contractor for the negligent design and construction of the dairy. We successfully defended the engineer's motion for summary judgment after which the case settled on favorable terms.

* Past results are reported to provide the reader with an indication of the type of litigation in which we practice and do not and should not be construed to create an expectation of result in any other case as all cases are dependent upon their own unique fact situation and applicable law.

Memberships / Associations

Polk County Bar Association
Member

Iowa State Bar Association
Member; Litigation Section; Young Lawyers Division, Executive Commission,
2004-Present

American Bar Association
Member; Litigation Section

Des Moines Metro Area Women's Chamber Alliance
Member

Polk County Women Attorneys
Member; Board, 2006-Present; President, 2008

Order of the Coif

Publications

Co-authored (with Leanna Whipple), "Strategies to Protect Yourself Against Lawsuits"
Ethanol Producer Magazine (May 2007)

"The Importance of Document Retention Policies"
Ethanol Producer Magazine (November 2006)

Author: Note, "A Constitutional and Statutory Assessment of Civil Forfeiture on an Intoxicated Driver's Vehicle: Should Iowa Follow the 'Get-Touch Approach'?"
49 Drake Law Review 641 (2001)

Speaking Engagements / Seminars

Document Retention and Destruction in Iowa
May 06, 2009

Clarion Hotel & Convention Center, Cedar Rapids, Iowa

Make sure your document retention program is litigation-ready. Find out exactly which records to keep and which ones you can destroy. Get to know the retention rules, so you can save on unnecessary storage costs.

Document Retention and Destruction in Iowa
March 31, 2009

Holiday Inn Downtown, Des Moines, Iowa

If you get sued, will your document retention program work for you - or against you? Make sure your document retention program is litigation-ready in an age of e-discovery, audits and increased regulation.

Expert Witnesses

November 13, 2007

Iowa State Bar Association / Young Lawyers Division

Becki Brommel, an attorney at BrownWinick, will be speaking on "Expert Witnesses" on a one-hour telephone CLE in the Law Over Lunch Series sponsored by the Young Lawyers Division of the Iowa State Bar Association.

Dumpster Diver's Guide to Document Retention

December 04, 2006

BrownWinick Employment Law Client Seminar

Do's and Don'ts of Document Retention

May 03, 2006

BrownWinick Client Seminar - Legal Strategies to Protect and Grow Your Business

Newsletter Articles

Knowing When and What Documents to Maintain Can Keep Your Business Out of Trouble
Newsletter: The Legal Monitor, July, 2006

Subpoenas: Your Rights and Obligations

Newsletter: The Legal Monitor, June, 2005

BrownWinick News / Events

December 04, 2006 2006 Employment Law Client Seminar

The Employment Law Practice Group at BrownWinick hosting their 1st Annual 2006 Employment Law Client Seminar on Monday, December 4, 2006 at the Hilton Garden Inn, Johnston, Iowa.

September 15, 2006 Brommel Participated in the Greater Des Moines Leadership Institute 2006-2007 Class

The determination of the need for legal services and the choice of a lawyer are extremely important decisions and should not be based solely upon advertisements or self-proclaimed expertise. This disclosure is required by rule of the Supreme Court of Iowa.

BrownWinick

In 1951, a tax-law specialty firm opened its doors in downtown Des Moines, Iowa. Its modest size hid lofty ambitions: to help its clients build on a strong foundation, and to put businesses from Iowa, the Midwest and around the country on a powerful footing for growth and competitive success.

Today, half a century later, those ambitions continue to act as our compass. BrownWinick has grown to become one of the region's preeminent business-focused law firms, boasting a broad range of legal services and an impressive client list that includes both large, well-known corporations and energetic start-ups.

As BrownWinick has grown, the firm's areas of practice have also grown to better serve the varied and ever-changing needs of our clients in a rapidly evolving regulatory and business environment. From our roots in tax law, the firm has expanded into areas including litigation/trial law, agribusiness, banking, construction law, government relations, securities law, pensions and profit sharing, administrative law, environmental law, health law, business and corporate law, employment and labor law, workers' compensation law, bankruptcy law, public utility regulation - energy and telecommunications, international business transactions, real estate law, wills, estate and probate law, patent, trademarks and copyright law.

The firm's client base has grown and expanded, as well. BrownWinick serves as counsel to service, manufacturing, and commercial corporations, health care providers, doctors, governmental agencies and quasi-governmental agencies, banks, bank holding companies and other financial institutions, corporations and partnerships, trade associations, construction, renewable fuels, agribusiness, pharmaceutical and nutraceutical, retail, insurance, real estate and estates and trusts. Our attorneys represent entities and individuals in numerous facets of the law, including corporate, commercial, transactional, labor, securities and litigation matters.

BrownWinick's firm commitment to business makes us more than a source of sound, skilled legal counsel. It makes us a powerful strategic partner, one with the vision, perspective and commitment to position your business for the challenges you face today — and on the road ahead.

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