

FOCUS

Keeping Up With Document Retention

By Ben T. Welch

Two thousand people were recently polled about common boredom triggers. The top vote-getters included – *yawn* – being stuck in traffic, standing in line at the post office, slow Wi-Fi, company meetings, washing the dishes, and the Kardashians. Remarkably, the list did not include discussing document retention policies, which only proves the poll did not survey enough attorneys.

All joking aside, while the topic of document retention is not exciting, it is very important for corporate counsel. You are the company's first line of defense, and your actions (or inactions) may save (or squander) significant time and resources, particularly when your company is embroiled in a lawsuit. The purpose of this article is to outline three practice pointers to keep your litigation ledger in the black and to protect you and your company.

First, establish a well-tailored document retention policy. This seems like a no-brainer, but the reality is that many companies overlook document retention altogether or adopt a generic policy that is ill-suited to their business. Document retention is governed by state and federal law and informed by industry standards as well as company preference. Bottom line: your company's policy should fit your company. If you don't yet have a policy, it may be prudent to create one. If you already have an existing policy, consider reviewing it to ensure it is both efficient and compliant.

Second, make sure your policy is enforced. Watching late-night infomercials is one of my guilty pleasures. One of my favorites involves a device used for cooking rotisserie chicken. After the promoter demonstrates how easy the device is to use, he exclaims: "Just set it and forget it!" While that advice may apply to counter-top rotisserie chicken, it is fatal to document retention because a policy is only as good as its enforcement.

Consider the following: a company has a serviceable document retention policy but also employs an officer who is, for lack of a better term, a digital pack rat. This officer keeps everything—drafts of discontinued documents, junk email and even old text messages on his company-issued phone. Later, when the company is sued, the officer is identified as a custodian of potentially relevant documents and is issued a litigation hold memorandum. When the data is collected, however, outside counsel discovers that this officer possesses more than 10 times the amount of data as all the other custodians. Through careful sifting, outside counsel winnows down the data prior to production; however, the officer's failure to comply with the document retention policy has now dramatically increased the company's legal costs.



This problem can be avoided. One way to avoid such problems is through education and training, especially with new employees. Another strategy is to make document retention non-discretionary. This means coordinating with your IT department to ensure that data is automatically destroyed at the appropriate time.

Automating your company's retention policy will not completely eradicate the digital pack rat—for they are tenacious species—but at least it will create an additional barrier of protection and increase the likelihood that your company's policy is enforced.

Finally, know when to suspend the policy. Most attorneys know that a litigation hold memorandum or "spoliation letter" will suspend the destruction of documents. The question is: when should this memorandum be issued? For a defendant, the memorandum is typically issued at the outset of litigation. But what about for a plaintiff? The general rule is that the duty to preserve evidence triggers when an organization reasonably anticipates litigation. See Maria Perez Crist, *Preserving the Duty to Preserve: The Increasing Vulnerability of Electronic Information*, 58 S.C. L. Rev. 7, 18 (2006). Accordingly, if your company is actively discussing litigation, even if only internally, you should consider suspending your document retention policy. Imagine the following

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Advancing Law Department Management; ACC Opens a Section for Legal Operations Professionals

By Catherine J Moynihan, Senior Director, Legal Management Services, ACC

Caught the buzz? The burgeoning legal operations function is getting noticed. Why the growth? General counsel are under pressure to run the department like a business. That means engaging in management practices such as:

- converging outside counsel and converting to better pricing models;
- disaggregating to match the work to the resource – in-sourcing some, out-sourcing other work;
- adjusting staffing assignments to calibrate cost to value and developing talent to meet more specialized needs;
- leveraging technology to become more efficient;
- and using metrics throughout – to make decisions, measure performance, and to demonstrate the value of the legal department.

That's a set of challenges for which a dedicated, business-focused "chief legal operations officer" (CLOO) can make all the difference.

Where are these legal ops professionals coming from? All sorts of directions. Many are legal executives who are stepping into legal operations positions in developmental rotations, honing their management skills on the path to becoming general counsel. Others are aggregating the role, acting on departmental efficiency and effectiveness needs, one after another, until they are the resident operations leaders. Some of these role-aggregators are lawyers, others are joining the legal department from other corporate functions – IT, procurement, finance, and of course operations management. Still others are moving in-house from operational roles in law firms, or from consulting firms.

We consider the rise of legal operations the latest development in the *ACC Value Challenge*. In the relentless quest to find ways to cut costs, improve predictability

of spending and achieve better outcomes, general counsel are establishing legal operations functions. And the ACC is proud to support these valuable members of the corporate legal department through the new *ACC Legal Operations* section.

The ACC Legal Ops section kicked off with a stand-alone conference in June 2015, and the excitement among attendees – new members of the new Legal Ops section – was palpable. They had arrived in a place of their own, an opportunity to convene and collaborate to address issues and opportunities of common interest, and "stop reinventing the wheel." The keynote speakers on the first day were two general counsel who have established legal ops functions in multiple companies: Mike Dillon of Adobe and Cam Findlay of Archer Daniels Midland – endorsing the value of the function and providing their advice about how to make a further impact, influencing the whole legal ecosystem, through the strength of association.

The conference breakout sessions took the cue and went forward. To provide a flavor of what these legal ops pros have started in on, here's the current round up of *Interest Group* projects:

- **External Resource Management:** conducting a survey of members' metrics to assess vendor performance and value-added services – input to a forthcoming handbook for vendor management with recommended metrics, processes and practices.
- **Metrics & Analysis:** pulling together a metrics directory, covering far more territory than vendor management. There's also a survey of law firm's internal metrics in the works, with an eye toward assessing and influencing the role of client satisfaction in law firm performance measurement. And just wait until they come out with better building blocks for AFAs.

- **Process & Project Management:** plans to collect and publish curricular materials for internal training.
- **Internal Resource Management:** working on a "tool box" and training for those in legal ops start-up mode.
- **Technology & Tools:** aims to establish a "benchmark" technology road map for a corporate legal department. Participants will look to connect ACC members who have experience using a wide-variety of tech platforms and ways to build a "tech toolkit" a.k.a., buyers' guide to corporate legal tech.
- **Strategic Planning:** mounting a training course on strategic planning specific to legal departments and legal operations, to be followed by a compilation of useful templates.

What's even more exciting is the way members are seeing what's possible under the section for legal ops professionals. While originally functionally focused, members have recently formed *industry-focused* Interest Groups (medical manufacturing and insurance) and three new *Regional Groups* – including one for members based in Europe – bringing the total to nine groups that convene quarterly. Plus, members are making use of the ACC Legal Ops website – using the online *Forum* for ad hoc referrals and benchmarking, checking the *News & Announcements* page for curated articles about law department management and developments in the legal industry, and taking advantage of the first-ever dedicated legal ops job listing site and resources in the *Career Center*.

Whether you have legal ops professionals in your department who can participate in the new section or not, the whole membership stands to gain expertise in law department management as these advanced practitioners produce resources, training material and more. Together, they form the voice of this new function, articulating

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best practice not only in law department management, but also in structuring the legal ops function itself. And some are pushing the boundaries – beta testing new technology in order to influence what vendors produce, and, under the banner of the

ACC Legal Ops section engaging with law firm associations to forge new policies and procedures for more efficient and effective collaboration. Meanwhile, general counsel and other law department colleagues can focus on adding strategic value to the cor-

poration, as trusted advisors who benefit from the credibility that comes with a well-run legal function.

Contact Catherine Moynihan at Moynihan@acc.com.

ACC News

2016 ACC Annual Meeting: Call For Programs Now Open

Truly by in-house counsel, for in-house counsel, the majority of programming at the ACC Annual Meeting (October 16-19, San Francisco, CA) comes directly from ACC committees and individual members. Contribute to the continued success of this event by submitting your program ideas for the 2016 meeting. Submissions are due January 4. Learn more and take advantage of early bird registration at am.acc.com.

Two Days of Advance Learning and Networking

The all-new ACC Mid-Year Meeting will be held April 10–12 in New York, NY. This conference will offer advanced level education and networking across three topics that are critical to the success of today's in-house counsel: Contracting Skills & Strategies, Corporate Governance & Board Service Best Practices, and Financial Industry Compliance & Data Management. For more information, visit www.acc.com/mym.

Mind Your Business

To become a trusted advisor for business executives, it's imperative for in-house counsel to understand the business operations of your company. Attend these business education courses offered by ACC and the Boston University Questrom School of Business to learn critical business disciplines and earn valuable CLE credits:

- Mini MBA for In-house Counsel (February 22-24, May 10-12 (Los Angeles, CA))

All programs take place in Boston unless otherwise noted. Learn more and register at www.acc.com/businessedu.

ACC Europe Annual Conference: Super Early Bird Rate Ends 1 February

Join us in Rome for the 2016 ACC Europe Annual Conference: Be The Best You Can Be! Strategies, insights and tools to maximise your effectiveness as an in-house lawyer (22-24 May) to hear how to Lead the Law, Lead the Business and most of all Lead Yourself to achieve your potential. Focused at all levels within the in-house community, the conference will provide expert guidance, General Counsel insights, and senior business thought leadership all designed to help you develop your own strategies for maximising your career. The programme will include interactive workshops, plenaries and coaching opportunities. Learn more and register at <http://www.acc.com/europeconference>.

ACC Value Champions: Nominations Due February 5

Have you implemented management practices that drive value for your company? Whether you reduced spending, improved predictability or achieved better legal outcomes, ACC wants to hear from you. Submit your nomination today to get the recognition you deserve. For more information or check out the past ACC Value Champions, visit www.acc.com/valuechampions.

Learn How to Negotiate More Effectively

ACC and Arent Fox have partnered to bring you powerful new contracts negotiation tools. Visit the ACC Contracts Portal to gain practical tips and insights, including international trade issues in supply and acquisitions agreements. Learn more at <http://acc.com/contracts/negotiations>.

New Thought Leadership Videos

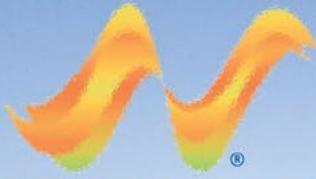
ACC and our alliance partner, NAVEX Global, have teamed up once again to bring you a series of short videos providing practical information on specific ethics and compliance topics. These three to five minute videos feature one-on-one interviews with ACC members who understand the challenges compliance professionals face. The most recent series focuses on conflict of interest:

- Conflict of Interest: Tips for Resolving a Conflict of Interest
- Conflict of Interest: Tips for Business Leaders
- Conflict of Interest: Recognizing and Disclosing

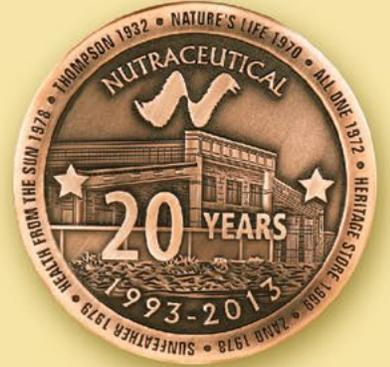
[Watch them today.](#)

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exchange at a deposition involving your company's CEO:

Opposing Counsel: "When did you first discuss filing this lawsuit?"

CEO: "About two years ago."

Opposing Counsel: "That was more than a year before you actually filed the suit?"

CEO: "Correct."

Opposing Counsel: "When did you issue a litigation hold memorandum?"

CEO: "About a month before the lawsuit was filed when we hired outside counsel."

Opposing Counsel: "So even though you were actively discussing a lawsuit two

years ago, you continued to destroy documents for 11 months prior to issuing an internal hold?"

CEO: (*glaring at corporate counsel*) "I suppose so."

This is an all-too-common scenario. The obvious problem is that if potentially relevant documents are being destroyed while a party is preparing for litigation, it raises the issue of spoliation, which in turn could lead to discovery sanctions and even dismissal of the case. One way to avoid this risk is to know when to suspend document retention protocols. This is critical for corporate counsel because litigation is often anticipated long before engaging outside counsel. When in

doubt, err on the side of retention. Documents can always be destroyed, but once destroyed, they cannot be recovered.

In conclusion, document retention may not be the most exciting part of your job, but a well-structured document retention policy, diligently enforced and strategically suspended, is critical for a well-run company. Keep this in mind next time you're stuck in traffic, standing in line at the post office, or just watching the Kardashians.

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