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## Having a Document Retention Policy: No Longer an Option

In the good old days, before computers and e-mail, all documents existed on paper and were stored in files.

The standard practice was to keep records on-hand for two to three years and then store them off-site for between five and eight years. It was a very simple paradigm. It is not so simple anymore.

Technology has improved the timeliness and speed of our communications, and the ability to store and retrieve them for future use. Letters, PDFs, faxes, e-mails, voicemails, text messages — they all get stored. But for how long, and in what format?

If you don't already have an answer to this question, you could be setting yourself up for liability down the road. The decisions you make today with respect to document retention affect not only your current business operations, but also your ability to prevent litigation, avoid sanctions, and protect your rights in the future.

As the case notes column in this newsletter illustrates, defending yourself in litigation can be made easier or more difficult based on how you manage your electronic data. Once embroiled in litigation, "we cannot find the documents" is not an acceptable defense. It is insufficient to assert that documents were not destroyed "intentionally." It will not be enough that you thought about a document retention policy. Once you are facing litigation, you must either be able to produce the relevant requested documents, or show a very good reason why they cannot be located — e.g., they were destroyed pursuant to your document retention policy.

**To effectively manage your electronic data, we recommend these eight tips, explained more fully below:**

- Maintain records of all types of hardware and software in use.
- Maintain records of the location of

all electronic data the company has.

- Create a document retention and destruction policy, including back-up and archival procedures, storage facilities, record custodians and a destroyed documents "log book."
- Create an employee technology use program, including procedures for written communication protocols, data security, employee electronic data storage and employee termination and transfer.
- Document all data retention policies.
- Train employees on a regular basis on data retention policies.
- Conduct audits of data retention policies and practices.
- Create and implement a litigation response team that can quickly alter any document destruction policy.

A document retention policy, tailored to your current document management needs but with an eye to the future,

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can have many benefits. First, it takes the guesswork out of determining what to keep and what to discard. A document retention policy makes it more likely that you will have documents in defense of any claim made against the company, or in support of any claim made by the company. It makes retrieving those documents easier and more economical. It gives clear direction on what to do during litigation. And, your ability to respond promptly to any threat of litigation with the supporting documents and relevant information, implies litigation readiness which can lead to early settlement. Further, you may be protected from sanctions if you discover during the course of litigation that your company destroyed certain documents in good faith pursuant to your policy.

**Developing a document retention policy takes time, will require many revisions, and may require the involvement of your IT staff. In preparing such a policy, there are a number of considerations:**

*What media needs to be stored?*

Take inventory of your electronic data. Does your company have internal e-mail, digital voicemail, direct faxes, a document management system, BlackBerries, laptops, cellular telephones? Does all of that media need to be stored? For example, some companies have a policy that no digital voicemail is to be stored on the telephone system. Instead, should a voicemail message need to be retained, it is either transcribed and retained as a document file, or copied and stored on the server as a .wav file.

But, remember, a document retention policy should not be limited to electronic data. Instead, a comprehensive policy will cover employment documents, accounting and corporate records, legal records, and paper and electronic records.

*In what manner should it be stored?*

Storing information on back-up tapes and storing those tapes off-site or in a vault can be an expensive proposition if you have to restore those tapes. But storing electronic data solely on servers within your office may not be effective either: should you have an office fire, or other catastrophe affecting the servers, you may lose all of your data, including any documentation useful in defense of a claim.

*Is data stored on portable electronic devices?*

If data is stored on laptops, BlackBerries or other portable electronic devices, consider whether the user should be required to “synch” the device to the company server on a daily or weekly basis, to ensure that the data is backed up and retrievable in the event of loss or failure of the device.

*Would filters facilitate the data capture and storage?*

Depending on your IT environment, there may be e-mail filters that can be configured to automatically capture and store messages that, for example, contain sexually explicit language. These messages may be useful in defending against certain workplace claims – e-mails about which management never would have known but for the filter. In a small company, this might not be necessary, but for a large company, with many employees at different levels, this might be a worthwhile investment.

*How long should the records be maintained?*

Some records, like federal tax returns, should be kept permanently. Employment records should be kept for the entire duration of the employment, and then for at least five years after the employee leaves the company. Contracts, land records, and intellectual property documents are among the most important documents a company has and, therefore, must be considered in preparing the document retention policy.

Having a document retention policy, however, only gets you halfway to the goal. The policy must be implemented to have any effect. Accordingly, the policy must be written, it must be disseminated throughout the company, it must be explained to your employees, and it must be followed. But once it is, it will assist you in defeating legal claims and in avoiding sanctions.

**For assistance in drafting a document retention policy, please contact Bethany Schols at 312.516.4403 or [bschols@schwartzcooper.com](mailto:bschols@schwartzcooper.com).**

# Profile of a Trial Lawyer: Richard G. Schultz

*From the United States Attorney's Office to Schwartz Cooper Chartered, Dick Schultz's more than 40 year career in the law has been as varied as it has been accomplished.*

His meticulous preparation and aggressive manner made him stand out early in his career. As a young Assistant U.S. Attorney during the "Chicago Seven" conspiracy trial in 1969, Dick doggedly pursued the criminal conviction of seven men accused of inciting riots at the 1968 Democratic National Convention in Chicago through a trial that became a media spectacle. Dick employs that same tenacity as the consummate litigator, advocating on behalf of the firm's clients and their business interests.

One of the firm's most experienced trial attorneys, Dick has over a hundred trials and numerous appellate arguments before the Illinois Supreme Court, the Seventh Circuit Court of Appeals and the Illinois Appellate Court. He successfully represents our clients in all manner of disputes, in businesses and industries that include construction, franchising, property management, real estate development, and banking. In addition, Dick has been a special assistant attorney for the Metropolitan Water Reclamation District of Greater Chicago, the Illinois Department of Children and Family Services, the Chicago Board of Election Commissioners and the Chicago Transit Authority.

Among his many successes, Dick won a jury trial recovering \$350 million for a franchisor client. After the conclusion of the trial, Dick established that the opposing counsel had presented false evidence. He obtained an order, affirmed by the Appellate Court, requiring the opposing party to reimburse the franchisor approximately \$2.5 million in attorneys' fees.

Dick is known for steadfastly pursuing the interests of each client with that same zeal. For example, he was recently successful in defeating claims brought under the Fair Debt and Collections Practices Act and Truth in Lending Act, arguing that the claims were barred by the statute of limitations. When the plaintiff refiled those same claims as a pro se litigant (that is, acting on one's own behalf without an attorney), Dick did not merely seek dismissal of the new filing, but actually sought sanctions against the plaintiff to compensate his client for the fees incurred in responding once again to those meritless claims. Even after taking into account the leeway granted to pro se litigants, the court granted the motion for sanctions.

Born into a hardscrabble childhood in Chicago's West Side, Dick has lived his life and professional practice by the old adage "work hard and play hard." From small county courthouses to the nation's highest court, and safaris in Africa to excursions down the Amazon, Dick has done it all. This work ethic, talent, and experience translates into effective, efficient, and focused representation of the firm's clients in litigation and trial matters.

**For more information about Dick Schultz, please visit [www.schwartzcooper.com](http://www.schwartzcooper.com).**

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other production flaws, produced no e-mails dated prior to 2003. The United States claimed that it could not produce e-mails dated prior to 2003 as they had been transferred and stored on magnetic tape and their restoration would be time-prohibitive, taking over 30 days, and would be cost-prohibitive, costing between \$85,000 and \$150,000. Further, the United States pointed to the more than 80 boxes of material it had already produced, which contained some e-mail correspondence, and claimed that the missing e-mails were most likely contained in e-mails produced from the accounts of various members in the group. Accordingly, that which was already produced was sufficient and the back-up tape restoration would likely produce only duplicative records.

The court held that the United States had a duty to preserve evidence from the time of the filing of the REAs, as that was when it should have reasonably anticipated litigation. Thus any relevant e-mails or other documents in its possession on or after July 2002 should have been preserved for production during discovery. The United States was not relieved of its obligation to preserve evidence and produce materials responsive in discovery “merely because [the party] has chosen a means to preserve evidence which makes ultimate production of relevant

documents expensive.” The court also held that a party cannot “reap the business benefits of such technology and simultaneously use that technology as a shield in litigation.”

The presumption is that the party responding to discovery must bear the expense of complying with the requests. In assessing whether shifting the cost to the requesting party is appropriate, a court will attempt to balance the likelihood that the restored documents will prove relevant with whether the cost of the restoration places an undue burden on the defendant.

In this particular case, the court found a compromise. The court ordered the United States to restore only a portion of the tapes at its expense, as a sampling to determine if there was any additional relevant information to be gained from the restoration and, consequently, to determine the necessity for additional restoration. This phased approach, the court determined, also gave it an opportunity to engage in a more meaningful benefit-burden analysis, should AAB seek restoration of additional documents.

**In determining how to store documents and media, the following should be considered:**

**Ease of storage.** A process that includes multiple steps, with multiple storage locations,

should be avoided unless absolutely necessary. Such a process would not be easy to follow. Instead, it would require many people to implement, which means many points at which the process is susceptible to failure.

**Cost of storage.** The cost of storage should be considered at the outset, to avoid choosing a procedure too expensive to maintain in the long run.

**Protection from loss offered.** Documents and media being stored need to be protected from fire, flood, and other types of loss. While it is unlikely that a court would impose a sanction for failing to preserve documents lost in a fire, it would nonetheless be difficult or even impossible to litigate where all the documents in support of or in defense of a claim had been destroyed.

**Ease of retrieval.** A storage system that requires a multi-step retrieval process from multiple locations may also not be the most effective solution.

For example, rapid retrieval of information is imperative in responding to a motion for a temporary restraining order or a preliminary injunction.

**Cost of retrieval.** As the United States found out in this case, the cost of retrieval is generally borne by the owner of the documents. Documents and

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# CASE NOTES...

## AAB Joint Venture v. United States

**In developing a document retention policy, a company must carefully consider not only the cost of storing the electronic media, but also the cost of restoring that media and the cost of preserving it.**

Determining how a company will preserve documents and electronic media is an important consideration, with long-term consequences. These consequences are seen most vividly in the discovery process during litigation.

A company has a duty to preserve evidence when the company reasonably should know that the evidence may be relevant to anticipated litigation, not just ongoing litigation. The scope of this duty extends to e-mail and back-up tapes. Thus, in developing a document retention policy, a company must carefully consider not only the cost of storing the electronic media, but also the cost of *restoring* that media and the cost of preserving it. Despite the potentially enormous expense associated with restoring electronic media stored on back-up tapes, a party may be ordered to do so if a court finds that it has failed to produce responsive documents and failed to preserve documents in readily ascertainable format upon reasonable anticipation of litigation.

In *AAB Joint Venture v. United States*, AAB entered into a contract with the United States government to design and construct a storage and logistics base in Israel. AAB's bid and thus ultimate contract price was based upon the information provided to AAB by the United States concerning the geography of the area and the conditions of the land and subsurface in the request for quotation. Upon beginning construction, AAB discovered that the subsurface was not as it had been represented, which necessarily increased AAB's costs. In July 2002, AAB filed with the United States requests for equitable adjustment ("REA"), to compensate it for the increased cost. Ultimately, this increased cost, as well as other discrepancies in the information provided, became the subject of litigation.

In responding to discovery requests, the United States, among many other production flaws, produced no e-mails dated prior to 2003.

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***Taking the time to consider all storage options may save a lot of money and aggravation in the long run.***

# Letter from the Editor

We hope you enjoyed this first issue of the Schwartz Cooper Trial Notebook. We strive to include content that is relevant to our readers and hope you found the topics in this issue to be of interest.

If you have suggestions for topics that you would like us to discuss, please contact Bethany Schols at [bschols@schwartzcooper.com](mailto:bschols@schwartzcooper.com) or Heather Kramer at [hkramer@schwartzcooper.com](mailto:hkramer@schwartzcooper.com).

We appreciate your feedback and look forward to hearing from you.

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media should never be stored in a manner from which it is too costly to retrieve them when it becomes necessary to do so.

Unlike in *AAB v. United States*, courts will not always search for a compromise to the expensive and burdensome task of retrieving stored information. Accordingly, taking the time to consider all storage options may save a lot of money and a lot of aggravation in the long run.

*AAB Joint Venture v. United States*, 2007 WL 646157 (Fed. Cl., Feb. 28, 2007).

## Recent Decisions of Interest to Employers

Employers, take note: federal courts in Illinois and other jurisdictions recently have rendered the following decisions affecting employers with 15 or more employees. The FMLA decisions affect only employers with 50 or more employees.

### Full Pay Not Required for “Light Duty” Work Under FMLA

Because the FMLA does not require any particular wage rate for an employee on medical leave of absence, an employee who returns to “light duty” work after an illness or an on-the-job injury need not be paid at the employee’s former pay rate if the employee is unable to physically perform the functions and duties of his or her former position.

### Consider FMLA Leave for Employees Exhibiting Unusual Behavior

Sudden bizarre behavior of a worker who had been a “model employee” may constitute “clear abnormalities in behavior” sufficient to put the employer on notice that the employee has a serious health condition, thus triggering FMLA coverage.

### No Right to Witness for Non-Union Employees

Non-union employees do not have the right to a witness during an investigative interview that might lead to discipline. Union employees still have such rights.

**For further information regarding the topics described above, please contact Joan M. Eagle at 312.845.5439 or [jeagle@schwartzcooper.com](mailto:jeagle@schwartzcooper.com).**

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