

Spring 2002

The Need for a Records Retention Policy

By Maria E. Recalde

Every company should have in place a records retention policy to reduce the legal risks associated with the failure to control and manage its records, and to encourage the responsible treatment of such records. The mere process of developing a policy tailored to the company's particular business will raise awareness of important issues that might not otherwise be considered. Leaving such issues unattended could have devastating consequences for the company (e.g., whether there are any legal requirements for retaining certain types of documents for a specific time – businesses in a regulated industry, like banking or health care, need to consider specific laws aimed at that industry). Not only can a business lose certain rights as a result of its failure to maintain appropriate records, but it may expose itself to liability and sanctions for its deliberate destruction of documents when litigation, government investigation or audit is pending, imminent or reasonably foreseeable.

This article identifies some of the categories of records that should be considered in developing a records retention policy as well as the respective retention periods typical to those records. It is not, however, intended to be exhaustive. Indeed, a records retention policy should be customized, with the assistance of the company's legal counsel and financial advisors, to meet the unique needs and the legal requirements related to its specific industry and/or activities, at both federal and state level.

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Tax Return Records

With timely filing of returns, retaining the supporting documentation for ten years should cover tax audits. Keep in mind, however, that supporting documentation should be retained (or at least be retrievable) as long as it may be relevant to the company's taxes. In addition, although a ten-year retention period may be good for most purposes, certain records should be retained indefinitely (e.g., records relating to cost, depreciation and other adjustments to the basis of property). The company's tax advisor should be consulted regarding any special IRS requirements and situations that may affect the company's retention of records for tax purposes.

Real Estate Records

Real estate records, including those relating to improvements to real property, should be retained permanently. One of the reasons for such retention period is that for real estate matters the statutes of limitations (which prescribe the time periods during which legal actions may be initiated) that may apply to real estate matters can be very long (e.g., twenty years).

Intellectual Property Records

All records relating to the company's intellectual property rights, including any intellectual property agreements

with its employees or independent contractors, should be kept permanently. Intellectual property rights can always be challenged.

Employment Records

Retention requirements applicable to employment records are primarily found in regulations implementing federal and state laws. Federal laws that relate to employment records, such as payroll records, generally specify overlapping requirements and thus must be analyzed to determine the longest retention period applicable. In addition, consideration should be given to all applicable statutes of limitations. For example, in addition to complying with the applicable federal and state record retention laws, employee records should be retained for the length of the employee's tenure with the company, plus at least the longest statute of limitations period that may apply to an action brought against the company (i.e., six years). If an action is filed, documents should be retained throughout the action, including any appeals.

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Export Control

By Dennis J. Kelly

America's concerns for its safety and the security of its borders have heightened dramatically in the aftermath of the September 11, 2001 attacks. The U.S. government has devoted enormous time and money to national security and the protection of America's borders and populace.

The current environment naturally leads to renewed enforcement of laws governing the export of arms, goods and services, data and technology, and transfer of financial assets. Several laws administered by different agencies regulate the broad field of export control. The Arms Export Control Act (Arms Act), administered primarily by the Secretary of State, governs the licensing of exports and imports of defense articles and services. The Export Administration Act (EAA), administered by the Department of Commerce (Bureau of Export Control), governs the export and licensing of dual-use goods and technology, *i.e.*, items with both commercial and military uses such as computers and telecommunications devices. The Trading with the Enemy Act (TWEA) controls trade and commerce with foreign nations and entities. The Department of Treasury's Office of Foreign Asset Control regulates trade with specially designated nations and transfers of financial assets in international business transactions.

Exporters generally know when something is munitions or defense related services. Identifying a good or technology as both commercially and militarily useful tends to be a comparatively more difficult task. Knowing whether a company is doing business with an enemy or prohibited country or designated person or entity can be a challenging task to all but those sophisticated in U.S. export and international controls. If you are exporting anything or are transferring money or assets in international

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transactions, you should regularly consult a lawyer familiar with the export control laws.

Indeed, an export violation could lead to devastating consequences. If the conduct is deemed willful, *i.e.*, voluntary and purposeful violation of a known legal duty, the Acts referred to above provide for severe maximum criminal penalties: ten years imprisonment, and fines ranging from \$250,000 to \$1 million for each violation or five times (5x) the value of the export.

The EAA is particularly perilous because it also proscribes violations that are knowing, but not willful. The distinction is not without controversy, but in the District of Massachusetts, the U.S. Attorney's Office agrees that a "knowing" violation requires proof that the exporter knew the item required an export license. Criminal penalties for a "knowing" violation include incarceration up to five years and a fine up to \$50,000 or five times the value of the export, whichever is greater. A pending bill to amend the Export Act would eliminate the "knowing" (lesser) criminal violation, but dramatically increase fines for each willful violation. Maximum fines for each willful violation could reach \$1 million for individuals, \$5 million for corporations, or ten times the value of the export, for both.

The export control laws also carry civil penalties ranging from \$10,000 (EAA) to \$500,000 (Arms Act) for each violation. Debarment is the often exercised administrative penalty.

Re-exports of items exported from the United States to a country are also

covered by the EAA. Failure to report to the Department of Defense re-exports by original buyers and consignees, learned after the original export, is a felony violation.

Exporters, and indeed even shippers, freight forwarders and others assisting the export process, must do due diligence to ensure that the country destination or the end-user does not appear in the myriad of "black lists" maintained by the various executive agencies regulating exports, *i.e.*, the State, Commerce and Treasury Departments. Failure to review these lists can lead to export violations, the consequence of which can be criminal, civil or administrative proceedings. Of course, such proceedings are costly, no matter the outcome.

An ounce of prevention certainly is worth a pound of cure. The exercise of due diligence and careful vigilance of each export transaction could avert these risks and costs. Consultation with attorneys expert in the field is absolutely advised. Establishing a legal compliance program also minimizes the risk of engaging in knowing or willful violations. Such programs usually consist of employee education and training concerning legal and regulatory requirements; procedures for reporting violations internally; a compliance "officer" designated to receive complaints and oversee the program; and a policy by the company to investigate and remediate violations timely.

The current political climate in the United States and abroad guarantees increased Government vigilance and enforcement of export control laws and regulations. A word to the wise should be sufficient. ■

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How to Protect Elderly or Disabled Family Members

By Brian D. Bixby

If you are not presently looking out for a dependent or elderly family member or relative, it is likely that someday you will be. As people live longer, and as family members tend to move further away, people are more often in need of help, with no one available to supply it. Whenever possible, it is best to plan in advance for a situation like this, whether you are a person who is more likely to need help or one who is more likely to be in a position of having to provide the assistance.

Planning for these inevitabilities is difficult only in actually getting around to the task. People too often put things off, but as we learned on September 11, unexpected events can intercede, not that getting older is unforeseeable.

Both the caregiver and the recipient are well served if there is a Durable Power of Attorney in place. With such a document, one can specify who should make financial decisions on her behalf, if at some point she cannot handle things herself. In Massachusetts, another important document is called a "Health Care Proxy," in which one can indicate who should make medical decisions if needed, and whether or not certain types of treatment should be provided or withheld if there is no chance of recovery. Documents such as Durable Powers of Attorney and Health Care Proxies can help avoid the expense and inconvenience of having to petition the Probate Court for a Guardianship or Conservatorship.

It is also important to have a Will in place. The Will should specify who is

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to receive items upon death, and who will be in charge of the Estate. If the Estate is large enough, a Trust should be considered, as that can help streamline the estate administration process and in many cases avoid probate.

Planning for the possibility of spending months or years in a nursing home or similar facility can also result in substantial benefits. What is sometimes referred to as Medicaid planning can help protect assets and make one eligible for financial assistance from the government much earlier. A burial contract can make sure that your wishes are followed and that funds are set aside for that purpose.

Long-term care insurance should also be considered, although it is often prohibitively expensive if not purchased early enough. It is the type of insurance one hopes is never needed, but if it is, the benefits are substantial. Some policies even cover at-home care.

If the value of the assets is over \$1 million, tax planning should also be considered. Many caregivers are in a fiduciary relationship with respect to the person whose assets are being protected. Under certain circumstances, gifting can be an effective means of reducing taxes and protecting assets. However, to avoid accusations of conflict of interest or improper self-dealing, expert advice should be obtained. In addition, all transfers should be carefully documented. Gifts by a guardian or conservator require Court approval.

Make this the year that you take wise steps to protect yourself for appropriate family members. Once you decide to do it, it is neither difficult nor expensive to have all of the necessary safeguards in place. ■

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Corporate Records

Some corporate records, such as the articles of incorporation, are generally filed with the Secretary of State for the state of incorporation and thus are public records of which copies can be obtained from the State at any time. Generally, however, other corporate records, (e.g., minutes books and shareholder-related records) should be retained for at least ten years, along with any records supporting the company's policies and procedures.

A records retention policy should address paper as well as electronic records. In addition, it should cover both original records and copies. Once the policy is in place, records should be systematically destroyed in accordance with the policy, and never in a haphazard or selective manner. The destruction of records must stop immediately when the company receives a notice of pending or imminent audit, government investigation or litigation, even when destruction is permitted under its records retention policy.

While it is a somewhat time consuming task, businesses need to attend to the development and implementation of a records retention policy that is consistent with applicable legal requirements and the efficient conduct of normal business. Maintaining unnecessary records costs space, time and money. If records are not kept long enough or are improperly destroyed, however, businesses may be subject to fines, penalties or other legal consequences at a greater cost. ■

Inherited Real Estate: Now what?

By Carl J. Izzo, CRE

Many times people become recipients of legacies or gifts that may include vacant land or other real property that they are unfamiliar with or unsure how to manage. These gifts do not usually include an instruction manual or even a suggested course of action from the donor. The recipients must decide, without having any experience or direction, about an investment that may have a significant affect on them and their families. In many cases, these decisions must be made during a time in their lives when emotions may be strained and clear thinking is not always possible. A real estate counselor can be very important and helpful to beneficiaries during these times.

Vacant Land

Many individuals that become "instant land owners" are unaware of the rules and regulations regarding land development. They may feel so overwhelmed with all that's involved with development that they choose to sell or dispose of the land at less than its fair market value simply because it is easier. Individuals not experienced with land development or property management are at a disadvantage. They have an obligation and a responsibility to do what is in the best interest of all parties involved.

Should the property be appraised? What are wetlands regulations? What is the ConComm? 21E? . . . Developing raw land means that these questions and many more must be addressed before marketing the real estate. Although the process seems very confusing, the steps to follow are well defined.

An important first step is determining the sites' highest and best use. A real estate counselor will recommend that a feasibility study including a survey, wetlands study, conservation review, preliminary environmental site assess-

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ment and a fair market value appraisal be done for the site. The highest and best use analysis will be completed during the appraisal of the property.

The cost and time needed to complete the entire process are dependent on the size of the site, location, the number of studies needed and the results from each study. The feasibility study allows the owners to make an informed decision about the future of the property.

Improved Real Estate

Unless you are a real estate investor, you probably don't have any reason to keep up with the latest rules and regulations pertaining to real estate. The average person purchases three or four homes during his lifetime, usually made on an "as needed" basis and for personal use. During these times an individual considers many factors when selling his current residence and purchasing a new one. The local neighborhood, school systems, location of shopping, hospitals and transportation are some considerations as well as the type and style of the dwelling to be purchased. These items are all very important since they have a direct impact on one's lifestyle.

When a person inherits real property, there are a number of added considerations. In most cases, beneficiaries inheriting property are already well established and do not need or want the added responsibility of additional real property. They would rather sell the real estate and invest the proceeds in a less time consuming investment. While this seems like a logical and prudent course to take it is

Focus

Focus is published three times a year by Burns & Levinson LLP for clients and friends of the firm. This newsletter provides general information and does not constitute legal advice.

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not always as easy as it sounds. Selling the asset is not very difficult; however, getting all beneficiaries to agree on the price and terms of sale sometimes is. Once again, emotions may play a major role in the decision process.

For these reasons beneficiaries should consider engaging a real estate counselor familiar with the issues arising from inherited property to work with the family to form and implement a plan for the real estate. The beneficiaries should devote their time on matters of the family such as the tangible assets and not on the real estate. The real estate counselor can arrange for the sale of the real estate and follow the process from beginning to end. In the case of property that was being managed by the donor, the real estate counselor can assume the responsibility of property management and keep the family out of a potentially difficult situation. ■