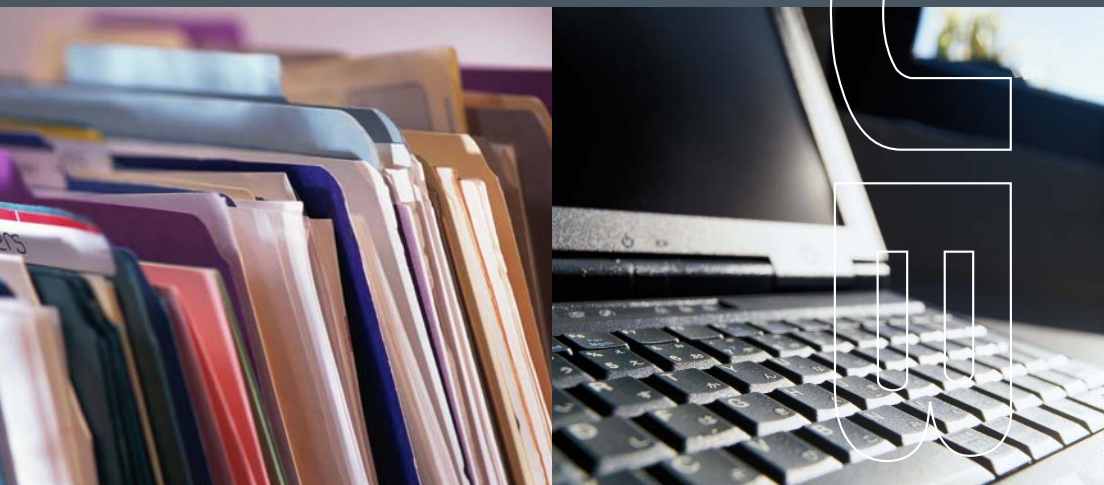




A Media Company's Guide to Records Management

*Important Considerations When
Evaluating Document Retention Practices*



It's Chubb. Or it's Chance.

Q

I

C

W

W

**A MEDIA COMPANY'S GUIDE TO
RECORDS MANAGEMENT**

**IMPORTANT CONSIDERATIONS WHEN
EVALUATING DOCUMENT RETENTION
PRACTICES**

Prepared by

Baker & Hostetler LLP

TABLE OF CONTENTS

Introduction	2
Key Document Retention Considerations	4
Electronic Data and Amendments to the Federal Rules of Civil Procedure	6
Document Ownership.....	8
Defamation and Invasion of Privacy	10
Journalists' Privilege/Confidential Sources.....	12
Illegally Obtained Information	14
Requests for Consumer Data.....	16
Working with Insurance Carriers.....	17
About the Authors.....	19

INTRODUCTION

Media companies are in the business of information. They trade in documents and traffic in confidences. It is no wonder, then, that they face document retention challenges that few other companies face. Thanks to recent changes to the Federal Rules of Civil Procedure on “e-discovery,” there is no better time for media companies, from large national conglomerates to small regional publishers, to reassess their document retention practices.

Any document retention policy must confront competing legal and journalistic interests. On the one hand, publishers may want to retain their notes and other documents for eternity—to assist with follow-up stories, for example, or to track down old sources. But archiving notes and other work product may be legally troublesome if subpoenaed in litigation. The stakes are raised when retained documents contain information identifying confidential sources. The potential for public sparring over these issues was brought into high relief in 2005 when special prosecutor Patrick Fitzgerald subpoenaed the notes of reporters Judith Miller and Matthew Cooper in the Valerie Plame leak investigation. Although disposal of reporters’ notes at the time a story is written can make weathering a subpoena easier, notes often prove helpful in defending defamation actions when they provide contemporaneous evidence of the journalism under scrutiny.

Most media companies do not maintain formal, written document retention policies for their newsrooms. Many conglomerates trust their publishing operations to establish their own document retention procedures. Many companies choose not to put their procedures in writing but, instead, discuss the practices during seminars and meetings. Others simply eschew having a policy altogether.

This guide highlights the possible legal ramifications of various approaches. It does not espouse “best practices” because there is no single best practice for document retention. Nor does it advise companies to change how they

gather and report information. Instead, it provides a framework for media companies to evaluate document retention procedures in order to best position themselves as potential litigants within the bounds of the law.

KEY DOCUMENT RETENTION CONSIDERATIONS

Although media companies may differ over the need for or wisdom of implementing a formal document retention policy, they uniformly agree that document retention procedures, formal or otherwise, should be designed to avoid undermining their fundamental objective—namely, producing quality journalism. The following points, which are explored in more detail in this guide, may be helpful to news organizations when reviewing or designing document retention procedures:

- ***Document ownership.*** Determining who owns documents is a critical first step in addressing document retention issues. For example, some media companies adhere to the position that a writer’s notes are “owned” by the writer, whereas others view notes as company property.
- ***Flexibility.*** Any document retention policy should be flexible enough to apply to the full spectrum of newsroom employees, from reporters or editors who work every day at their desks on breaking news to investigative journalists with a long-term horizon.
- ***Consistency and effectiveness.*** Document policies that include disposal of documents should be followed consistently. Discarding some documents but not others of like kind raises spoliation concerns. Document disposal must also be performed effectively; e.g., merely deleting electronic documents may not actually ensure the effective disposal of the documents, since copies may be digitally archived elsewhere. In addition, a document retention policy should also take into account other compliance efforts within the company to ensure consistent application of the policy.

-
- ***Confidential sources.*** Documents containing information that would divulge the identity of a confidential source may deserve unique treatment in a document retention policy because the effective disposal of these documents can avoid protracted subpoena contests.

 - ***Allocation of risk in future litigation.*** Retained documents might serve useful purposes in future defamation actions but pose a substantial litigation risk in opposing a subpoena for notes, outtakes, or other editorial documents.

 - ***Retention policy at the onset of litigation.*** Once a lawsuit is filed, or there is reason to believe a lawsuit will be filed, different document retention procedures may come into play. Failure to preserve documents at this juncture could risk charges of spoliation that can have a detrimental impact on the litigation and may even lead to possible criminal and civil penalties.

ELECTRONIC DATA AND AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

Document management during the age of the typewriter involved file cabinets and trash cans. In the electronic age, document management practices often fail to keep up with ever-advancing technology. The December 1, 2006, amendments to the Federal Rules of Civil Procedure (“e-discovery amendments”), while not substantively changing the law on discovery of electronic data, have brought the issue into sharper focus.

The goal of the e-discovery amendments is to recognize the importance of electronically stored information and to streamline the methods for retrieving that information. Although the new rules create additional duties to track and produce information—duties that in-house and outside counsel will likely shoulder—media company employees will need to understand where their electronic data is stored and to regularly and effectively discard any data that they would rather protect from exposure during litigation.¹

The e-discovery amendments make clear that documents subject to production in litigation include not only email, but also voice mail, editorial document management systems, system backup tapes, flash drives, MP3 players, computer-edited video including b-roll, and any other electronic data. To avoid expensive and burdensome retrieval and review of potentially relevant documents, media companies should *consistently and effectively* dispose of unneeded documents. *Consistently* means that document disposal should be done at regular intervals, such as weekly, monthly, or bi-annually. *Effectively* means that documents, whether paper or electronic, are discarded thoroughly and are not recoverable. In the electronic world, this task can be daunting.

¹ See, e.g., Fed. R. Civ. P. 37(f) (stating that “a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.” The Committee Notes following the rule state that “good faith may require that a party *intervene to suspend certain features of the routine operation of an information system* [emphasis added] to prevent loss of information subject to preservation obligations.”) Ignorance of a company’s electronic data systems resulting in destruction of relevant information likely will *not* insulate a party from sanctions.

Although computer systems can be pre-programmed to ensure that data is deleted on a regular basis, companies often rely on employees to “do the cleaning” as they did when their notes were stored in a drawer. Concerns about archived emails are especially true of email stored in Web-based email accounts such as Yahoo, Hotmail, and Gmail that employees may use for work-related communications. Thus, even with automated “sweeping” systems, media companies should recognize that writers and editors will amass data that cannot be managed without personal attention.

Even when data is regularly discarded, failing to ensure its ultimate disposal can present liability issues. Hitting the “delete” key on a computer is not necessarily enough, as the information may disappear from plain view but may be retrievable through forensic recovery. Media companies that outsource their information technology support should provide clear directives to their vendors regarding document management. Companies should coordinate with information technology experts to ensure that beneficial technology does not come back to haunt the company in the courtroom.

DOCUMENT OWNERSHIP

One of the first questions media companies face when deciding how to manage documents is who owns them. Although the answer is simple for most business records, it is a more complex issue in the journalism world, where media companies maintain differing views on ownership of editorial documents—such as reporters’ notes—sometimes even within the same organization.

The traditional approach, derived from the “guild” concept (which arose in an age when journalists were considered professionals in their own right without formal association with a publication), holds that each journalist owns his or her notes. The *Los Angeles Times* subscribes to this position and maintains that notebooks, and their contents, belong to the journalist. Many media companies, however, follow work-for-hire principles and consider the work product of a journalist-employee to be owned by the employer. For example, the Boulder *Daily Camera* sued its former reporter Allison Krupski in 1997 for taking her notes regarding the Jon Benet Ramsey murder investigation when she left her job with the newspaper. According to the company’s lawyer, the documents were obtained by an employee on the newspaper’s time and with its funds and, thus, belonged to the paper. Who owns documents may become even murkier when the lines between employment and private use blur; for example, when journalists write blogs hosted by private services under their own names.

For many companies, policies on journalists’ notes are not carved in stone. In 1969, *The New York Times* asserted ownership over reporter Earl Caldwell’s notes of interviews with Black Panthers in *Branzburg v. Hayes*, subjecting the company to liability but affording it legal standing to back Caldwell in court. In 1978, *The Times* claimed ownership of reporter Myron Farber’s notes related to a physician’s alleged murder of his patients. When the special prosecutor subpoenaed the notes of Judith Miller from *The Times* and Matt Cooper from *Time* magazine, *The Times* persuaded prosecutors that Miller’s handwritten notes belonged to her alone. *Time* asserted ownership over Cooper’s notes and eventually turned them over.

Each approach to document ownership has advantages and disadvantages for a media company. The modern approach enables media companies to:

- Maintain control of the journalist's notes and other work product if the journalist leaves the organization;
- Facilitate the operation of a consistent document management program, as the company would have ownership and ultimate control over the documents; and
- Avoid confusion over ownership or control of the notes and other documents when the employee uses company computer systems to store work product.

On the other hand, the traditional approach grants journalists autonomy over their work product; gives the journalist, not corporate executives, the sole responsibility to decide whether to withhold the notes from a subpoena; and allows companies to avoid liability if a journalist is subpoenaed for notes and refuses to turn them over, as *The Times* was able to do with respect to Judy Miller.

Whichever approach a media company takes, it should consider who owns documents created by its editorial staff long before a document request or subpoena comes its way.

Special Treatment for Freelance Writers

Many media companies view document ownership differently for freelance writers. Although freelance writers, who are usually treated as independent contractors, may assign their rights in their final work product to media companies, their notes, drafts, and outtakes are typically considered the writer's property. Media companies may not be able to directly control how freelance writers retain documents, yet many companies extend their document retention recommendations to them.

DEFAMATION AND INVASION OF PRIVACY

Any document retention policy must take into account the value of journalists' notes when defending defamation or invasion-of-privacy claims. Notes can provide contemporaneous evidence of solid journalistic practices and rebut claims that a journalist could have investigated further before publishing allegedly defamatory statements. A reliable paper trail can be persuasive evidence to undermine charges that a media defendant acted negligently or with actual malice.

The mere act of disposing of notes can produce uncomfortable scrutiny during litigation. In one recent libel action, a journalist testified that although he could not remember the exact date he had discarded his notes, he had disposed of them within days of writing the allegedly libelous article and months before the lawsuit was filed. But because he could not testify

that he had followed a company or personal policy regarding discarding his notes, the plaintiff was able to raise the inference that the journalist purposely destroyed his notes after questions were raised about the accuracy of the article.

On the other hand, retaining notes for later use in a libel case is not always beneficial. Notes that are incomplete or that do not quote a source word-for-word can be harmful in defending a defamation claim, as plaintiffs will attempt to mischaracterize the notes as evidence of sloppy journalism or fabrication of quotes. Gratuitous information in the notes may open additional avenues of discovery for a libel plaintiff to pursue, which, of

Handling Subsidiaries

In this era of consolidation, media companies may contemplate whether to implement a one-size-fits-all document retention policy. Some companies have chosen to apply their document retention efforts across all of the company's media holdings. The benefit of one policy is consistency throughout the company. The drawback is that many companies have diverse holdings, including newspaper, television, magazine, and Internet, where a one-size policy would not fit all. Most companies surveyed for this guide leave it up to each subsidiary or unit to determine whether to enact a policy and, if enacted, what the terms of the policy should be.

course, can be costly to defend. As discussed earlier in the section on Document Ownership, retaining notes may also be detrimental if a media company is served with a subpoena. (See page 8.)

If a media company determines that notes should be retained, it should consider the time period for retention. Retaining notes forever for potential use in a libel action is not necessary. Most states apply a one- or two-year limitations period for filing libel suits. Invasion-of-privacy claims, where recognized, sometimes have longer limitations periods. Once the applicable statute-of-limitations period has expired, the weighing of the benefits and harms may shift dramatically.

JOURNALISTS' PRIVILEGE/CONFIDENTIAL SOURCES

Journalists often staunchly defend their right to protect notes and other editorial materials when requested by a third party, especially when the government is the party seeking the information. The media view such requests as an incursion on First Amendment rights and detrimental to a free and independent press. Where confidential sources are involved, the stakes are even higher. No media organization wants to breach a promise of anonymity made to a source, particularly when it can be sued for doing so.

Although many states and the District of Columbia have enacted statutory protections for journalists, recent federal cases make clear that similar safeguards, long recognized in the federal courts since *Branzburg v. Hayes*, may be eroding. Absent a federal “shield” law, journalists may find that periodic disposal of notes and editorial documents are the best option to protect against compulsory production. Increasingly, companies are advising journalists to regularly dispose of their notes, as well as to avoid accumulating *anything* that may identify confidential sources. The *Los Angeles Times* states in its Ethics Guidelines that journalists “should be extremely circumspect about how and where they store information that might identify an anonymous source. Many electronic records, including email, can be subpoenaed from and retrieved by non-newsroom employees.” Of course, if no record has been generated, then companies cannot be compelled to turn over documents that do not exist. With this thought in mind, media company practices may include the following:

- Using cash instead of debit or credit cards when meeting with confidential sources to minimize a paper trail.
- Directing confidential sources to call telephones with trunk lines so the only record is a call to a main number, and not an extension.
- Trading regular cellular phones for pay-per-use phones that do not generate a call log.

-
- Avoiding email communications with confidential sources, especially through Web-based accounts such as Hotmail, Yahoo, and Gmail, where document retention is beyond the control of the news organization.

 - Minimizing retention of receipts, even for reimbursement purposes.

A media company's approach to this issue may well turn on whether it is worried more about compulsory document production or about defamation or invasion-of-privacy claims. A company more concerned about the former may emphasize disposing documents; a company more concerned about the latter may emphasize retaining documents. Although there is no right answer, whichever approach is taken should be one that fosters quality journalism—the fundamental objective for news organizations.

ILLEGALLY OBTAINED INFORMATION

Classified information or information obtained illegally by a third party and then provided to the media poses unique document retention issues. Such information is often the lifeblood of investigative journalism, but retaining, using, or publishing this information may violate state and federal laws.

Historically, publishing or broadcasting information that may have been illegally obtained by a third party has caused few ramifications. Punishment for those who publish truthful information, the Supreme Court has held, is prohibited by the First Amendment “absent a need of the highest order.” In 2001, the Supreme Court, in *Bartnicki v. Vopper*, applied this concept to the federal wiretapping law, holding that speech of public importance that discloses the contents of an illegally intercepted communication is protected under the First Amendment even if the publisher knows or has reason to know that the information was illegally obtained. Lower courts, however, have construed the First Amendment protection narrowly. The U.S. Court of Appeals for the District of Columbia Circuit has held that if the publisher of illegally obtained information has an independent duty not to disclose the information, it may be liable under wiretap statutes. Other courts have found liability when the publisher was directly involved in illegally procuring the information.

What does this mean for media companies that may come into possession of “illegally obtained” information? The federal wiretap act penalizes not only the *publication* of information illegally obtained under the statute (subject to the limitations in *Bartnicki*), but also the “*use*” of the information. Mere possession of the information may not establish liability, but any “*use*” of the information (such as for identifying new leads) could cause problems. Retaining the information, therefore, may lead to inadvertent “*use*” that, even if never published, may create liability. Companies may want to clearly identify and designate for special treatment documents containing “illegally obtained” information.

Retention of classified information also has raised concerns in recent years. Statutes criminalizing receipt and publication of classified information, such as the Espionage Act of 1917, have received fresh attention from prosecutors and judges. In refusing to drop charges against two lobbyists charged with disclosing classified information to the press, a federal court in 2006 became the first to decide that the Espionage Act can apply even to those who *receive* classified information.

The obvious concern for media companies is the possibility that prosecutors next could turn their sights on journalists who receive classified information leaks. Media companies may also want to designate special treatment for documents containing classified information.

REQUESTS FOR CONSUMER DATA

Media companies gather and store significant amounts of information about their readers in proprietary databases. The data usually comprise basic contact information, such as the name, address, telephone number, and email address of a subscriber, as well as details about the customer's subscriptions. Companies that operate Web sites often retain additional data about subscribers, such as Internet protocol (IP) information, postings made by the user, and tracking details of the Web pages viewed and advertisements clicked on by the user. This information, which is gathered at some cost, can only become more valuable to media companies as they compete for readers and advertising dollars on the Internet. Search engine operators such as Google, Yahoo, and others are also known to store considerable user data on their servers.

Section 230 of the Communications Decency Act of 1996 provides broad immunity for providers of "interactive computer services" so that the provider cannot be liable for content posted by third parties on Web sites. But the Act does not protect against subpoenas for information about third parties. The major search engines regularly turn over consumer data in response to subpoenas. Targeted requests for information about a particular user or set of users are difficult to defeat. One area of exception has been subscriber lists, which some courts have excluded from disclosure, recognizing that the First Amendment affords subscribers a cloak of anonymity to protect them from undue harassment concerning their reading habits.

The only sure way to prevent compulsory production of all consumer information is to periodically destroy the data. Media companies are often reluctant to do this, however, as it may run counter to their marketing instincts. Moreover, in the view of many companies, the production of consumer data does not implicate the same journalistic principles as turning over notes or revealing confidential sources.

WORKING WITH INSURANCE CARRIERS

Insurance policies covering claims for defamation, invasion of privacy, trademark and copyright infringement, and other exposures help protect insureds from potentially costly damage awards and legal fees. Insurance also assuages fear within newsrooms that would otherwise stem the free flow of information to the public.

An insurance policy typically imposes certain obligations on an insured that should be reviewed when considering document retention practices. For example, a document may constitute a “claim” requiring notice to the insurance carrier. A “claim” may include:

- A written retraction demand,
- A written demand for monetary damages or injunctive relief (or an intention to hold the insured liable for either),
- Formal proceedings against the insured, such as judicial or administrative proceedings, or
- A written request to “stop the clock” or waive the statute of limitations for a potential claim.

Timely reporting of claims helps protect coverage for the insured. A media company can also protect its coverage by cooperating with requests by the insurance carrier in evaluating the claim. This may include providing certain documents to assist review of potential liabilities. Failing to properly maintain documents related to the claim may affect rights under an insurance policy, as an insured is usually required to avoid any activities that may prejudice the defense of a claim, the underwriter’s position, or the potential or actual rights of recovery in connection with a claim.

One exception to that rule involves confidential sources or privileged matter. A media company’s rights under most policies, including those written by

the Chubb Group of Insurance Companies, cannot be prejudiced by its refusal to reveal the identity of a confidential source or to produce journalists' notes or other information obtained through research when the company has asserted a claim of journalist's privilege or other First Amendment, statutory, or common law privilege relating to the protection of newsgathering activities.

The notice requirement under an insurance policy will likely parallel obligations to preserve and retain certain documents in anticipation of litigation. A policy may impose additional obligations on an insured regarding document retention. If a company chooses to formulate a document management policy, it should consult its insurance carrier to ensure that the company's document retention practices are consistent with the carrier's requirements.

Subpoena Coverage

With the potential for protracted litigation involving subpoenas to newsrooms, insurance carriers, including the Chubb Group of Insurance Companies, offer news media liability coverage that assists with the costs incurred in subpoena contests. Although sound document retention policies can help minimize exposure whenever a news organization is involved in litigation—either as a party or non-party—insurance can help protect against the unexpected and unbudgeted litigation costs that may arise from subpoenas seeking newsroom documents.

ABOUT THE AUTHORS

Bruce W. Sanford is a partner in the Washington, D.C., office of Baker & Hostetler LLP. *American Journalism Review* called him one of the most accomplished press lawyers in the nation. He has defended more than 1,000 libel, intellectual property, and First Amendment cases throughout the United States, Canada, and abroad. He serves as general counsel to the Society of Professional Journalists, the largest and oldest organization of journalists in the United States, and he has represented most of the leading national news media and book publishers. He is the author of *Don't Shoot the Messenger: How Our Growing Hatred of the Media Threatens Free Speech for All of Us* (The Free Press) and *Libel and Privacy* (Aspen Publishers).

Bruce D. Brown is a partner in the Washington, D.C., office of Baker & Hostetler LLP. He is a former newsroom assistant to David Broder at *The Washington Post* and federal court reporter for *Legal Times*. He practices law primarily in the areas of libel defense, pre-publication review, newsgathering, copyright, and civil rights. His published work has appeared in *The Washington Post*, *The American Lawyer*, *The Economist*, *Legal Times*, and *The Wall Street Journal*. He is a graduate of Yale Law School and Stanford University, and he has a Master's degree in English literature from Harvard University, where he was a Mellon Fellow in the Humanities.

Mark I. Bailen is a partner in the Washington, D.C., office of Baker & Hostetler LLP. He is a litigator with an emphasis on commercial litigation and media-related matters. He represents print and broadcast clients in the areas of libel and privacy defense, pre-broadcast and pre-publication review, newsgathering, copyright, and First Amendment rights. He is a graduate of New York University Law School and Cornell University.

Laurie A. Babinski is an associate in the Washington, D.C., office of Baker & Hostetler LLP. She practices in the litigation group with an emphasis on First Amendment matters. She is a graduate of Northwestern University School of Law and Pepperdine University.



Chubb Group of Insurance Companies

www.chubb.com

This document is advisory in nature. It is offered as a resource to be used together with your professional insurance and legal advisors in developing a loss control program. This guide is necessarily general in content and intended to serve as an overview of the risks and legal exposures discussed herein. It should not be relied upon as legal advice or a definitive statement of law in any jurisdiction. For such advice, an applicant, insured, or other reader should consult their own legal counsel. No liability is assumed by reason of the information this document contains.

For promotional purposes, Chubb refers to member insurers of the Chubb Group of Insurance Companies underwriting coverage. Chubb, Box 1615, Warren, NJ 07061-1615.

Form 14-01-0970 (Ed. 1/08)