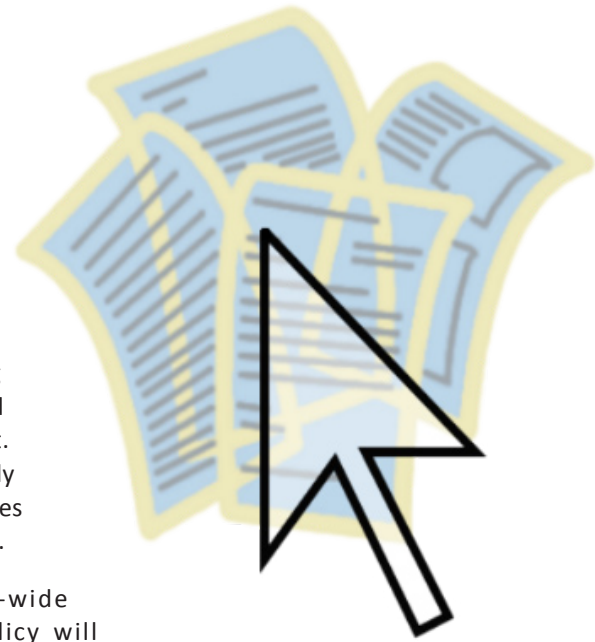


# The Top 10 Reasons to Have a Document Retention Policy

BY STEVEN J. O'NEILL, ATTORNEY AT LAW



**10** A document retention policy is really a **document destruction policy** designed to routinely purge useless, unnecessary or outdated documents. A document retention policy could protect you against charges of destruction of evidence or obstruction of justice.

**9** A document retention policy will lower document storage costs.

**8** In addition to new Federal Court classification of Electronically Stored Information (ESI), legal rules have long defined a “document” as including all of its electronic copies or “data compilations.” This means that everything on your computers or network including your email, document drafts and even deleted files can potentially be seen by an adverse party in civil litigation/arbitration or by the government in an investigation. Your computer is like an elephant - it never forgets what you did with it.

**7** Spoliation has nothing to do with sushi. Spoliation is the intentional destruction of evidence. However, conscious awareness that an act done will destroy evidence is enough to make it an intentional destruction. A party can be sanctioned by a court or arbitrator for spoliation. Sanctions can range from fines, to an adverse inference (if you destroyed it then it must have been unfavorable), to even having your case dismissed. In a criminal or administrative context you might be charged with the felony of obstruction of justice. See 18 U.S.C. §1505.

**6** By the time you realize that you have a legal problem it is often too late to get rid of any documents, including the smoking guns, without a claim of spoliation.

**5** Once you are aware that you are in a legal dispute, the simple act of overwriting a computer back-up tape or upgrading your computer server may subject you to successful claims of spoliation. If you start cleaning up your computer with software such as

“WipeInfo” or “Evidence Eliminator” you are going to be found out by a good computer forensics expert. Even continuing to regularly rotate computer backup tapes may be viewed as spoliation.

**4** A written organization-wide document retention policy will define when various types of records and documents can be destroyed. The policy should have a business purpose and be based on a variety of legal requirements such as the Internal Revenue Code, ADEA, FLSA, ERISA, FMLA, Immigration and Control Act, OSHA, FICA, FUTA, HIPAA and various state and local requirements.

**3** Before a legal dispute arises, documents destroyed according to a reasonable and consistently followed document retention policy will not likely raise spoliation issues. Destruction policies should be suspended when a dispute arises or notice of an investigation is given. Consult with an experienced attorney.

**2** A document retention policy will permit you to remove all electronic traces of deleted files and emails in a **legally defensible way**.

**1** It can save you money. A document retention policy can reinforce the habit of storing documents according to their destruction date; without further handling or review such documents can be safely purged. A document retention policy can lead to a consistent contemporaneous “flagging” of documents that might be protected by privilege, confidentiality or trade secret protections; this can lower attorney review time in the event legal troubles arise. Should a legal dispute arise, your adversary will likely ask for all relevant documents including electronic documents (especially if you are seeking the same); cutting the sheer mass of documents that must be reviewed and disclosed can significantly reduce attorney review time and potentially avoid the discovery of a smoking gun.

## ABOUT THE AUTHOR

Steven J. O'Neill is an experienced litigator with extensive knowledge of computer data systems architecture, electronic records issues and eDiscovery law. He has presented numerous seminars on these topics throughout the U.S. His practice areas include business law, litigation and technology law focusing on eDiscovery, Information Governance, Privacy, and Information Security Compliance. He is admitted to practice in state and federal court in MA and CT and available to serve clients nationally.

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