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Document Retention: Avoiding Sanctions in the Digital Age

*by Derek J. Haynes, Partner
Porter Scott Attorneys*



Digital advances and legal amendments over the last several years have increased the importance of preserving employee data. Gone are the days of simple paper files. There are now almost unlimited mediums on which data is stored and communicated. This shift adds unique challenges to an already important consideration for employers: properly preserving documents for future, yet unknown litigation.

Practical Considerations

Adequate document preservation practices will save time and money in handling future litigation and will help avoid exposure to monetary sanctions.

Successful litigation requires sufficient evidence. Even if the facts and law support the employers' position, employers can still face liability if they do not have the documentation needed to prove their position. Instituting adequate document retention practices will go a long way towards ensuring employers have that evidence.

Adequate document retention practices not only help employers prove their positions, they also help prevent devastating penalties. One such penalty is known as a "spoliation instruction". Employers have an affirmative obligation to preserve all potentially relevant evidence as soon as it is "reasonably foreseeable" that litigation is forthcoming. Employers rarely violate that obligation intentionally. It typically happens by mistake. That mistake, however, can be costly. Courts can issue a spoliation instruction at trial. The judge advises the jury that the employer destroyed evidence and

instruct the jury to presume that the evidence was unfavorable to the employer. That instruction can lead a jury to conclude that the employer is hiding evidence that would have resulted in liability even if that evidence was actually entirely mundane.

Adequate document preservation practices are particularly important in employment litigation. Employers generally possess most of the records relevant to the lawsuit, including personnel documents and, usually, lengthy email files and numerous texts. The burden is on employers to preserve those items and produce them as part of any lawsuit. Doing so can be time consuming and expensive. Adequately preserving the documents even before learning of a lawsuit will reduce those commitments.

Mandatory Preservation

Document retention is more than practically important. It is required. Several California laws require employers to retain specific employment-related documents for current and former employees. The Fair Employment and Housing Act and the Labor Code require that employers maintain copies of all personnel documents, applications, timesheets and paystubs for as many as two or three years.

Practically though, employers should keep the records even longer. Recent statutory amendments now allow former employees to wait as many as four years before filing

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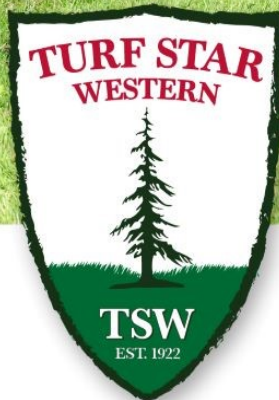
*(Please let us know if you have particular issues or questions you would like to see addressed in a future edition of the *Update*.)*

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FROM THE PRESIDENT

BY CHERYL SMITH, PRESIDENT



Today's Fees Secure the Future of Your District

Every public cemetery district must set fees for its services. Health & Safety Code §9068 provides that *"the board of trustees shall adopt a schedule of fees for interments in cemeteries owned by the district and for other necessary and convenient services"*. Section 9068 also requires that your board *"adopt a schedule of fees for nonresidents * * * at an amount that at least equals the amount of fees charged to residents or taxpayers and shall include a nonresident fee of at least 15 percent of that amount"*. In addition, Health & Safety Code § 9053 grants cemetery districts the ability to *"sell accessory and replacement objects that are necessary or convenient to interments, including but not limited to burial vaults, liners, and flower vases,"* of course excluding monuments and/or markers.

Inherent in setting fees is determining how they are calculated. Every business, including cemetery districts, must identify and calculate its costs to provide the product or service. In our case, that includes at a minimum the cost of the plot or niche, labor involved in the burial and maintaining the cemetery, and indirect or overhead charges including such

items as office staff, buildings and facilities, irrigation systems, roadways, fences and so forth. Has your district identified, calculated, and updated those costs? Of course, that's just for the plot or niche being used—where is the money coming from to pay for the land and necessary development to replace that plot or niche? (Bear in mind, endowment care income is only for the care and maintenance of cemeteries—not acquisition and development of property.) Should your current prices include at least some amount needed to buy or develop future replacement property?

Health & Safety Code §9065 requires every district to create an Endowment Care Fund and collect contributions to that fund in amounts no less than those specified in Section 8738. Section 9065 also authorizes a district to deposit funds from any other source into the fund, and explicitly prohibits the spending of Endowment Care Funds for any purpose. Section 9065 further requires that income from the fund be placed into an Endowment Care Income account, which may be used *"solely for the care"* of cemeteries. It's clear that these funds are intended for purposes differ-

ent than those discussed in the paragraph above. But most districts' Endowment Care Funds are woefully short of generating income sufficient to maintain cemeteries far into the future. Not only must your district charge fees to cover today's costs and future expenditures, your district must also regularly review and adjust required Endowment Care contributions.

Property taxes are becoming increasingly tenuous as a revenue source. Counties are enlarging districts (or their spheres of influence) yet withholding any additional tax revenues from those enlarged territories. Where will the money come from to provide services to those additional residents? Clearly it is up to each district to set fees that contemplate and include future costs, even if that future is years and years away. Your district's fees today must secure the future of your district.

Unfortunately, most districts have little idea of their current actual costs.

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Dustin Blanchard

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dblanchard@nstractor.com



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Document Retention: Avoiding Sanctions in the Digital Age

(Continued from page 2)

lawsuits against their former employers. Employers should preserve all employment records for at least that same four-year period.

Implementing Adequate Preservation Practices

All of these considerations are especially important as employers now regularly store data electronically. One click can quickly and permanently delete that data. Many employers also institute automatic-delete functions where emails and other data are automatically deleted after they go unused for a certain period of time.

Implementing an appropriate document retention policy is the first step to protect against such lost or deleted information. A document retention policy provides companies with the blueprint for document retention. The details of any such policy will vary depending on the particular work environment. However, generally, the policy should detail the logistics of retention, including the individuals tasked with implementing the policies, list the types of documents that

must be retained and how long those documents should be retained, based on California's retention laws. The policy should also explain the preferred format (for example, whether .doc or .pdf is preferred), location (for example, a certain external hard drive), and any other practical preferences.

The information included above is only a general discussion of what should be included in a document retention policy. The details of any such policy will vary depending on the nature of each employer's business. Employers should consult with their IT Departments or consultants to learn more about their technological capabilities and limitations. They should also consider consulting with an attorney to help draft the policy and address unique considerations.

Derek Haynes is a Partner with the law firm of Porter Scott. He specializes in defending claims against public agencies. Derek can be reached at:

916-929-1481, or
dhaynes@porterscott.com.



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For more information please contact:

Jennifer Peters at
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Visit our website at www.gsrma.org



Cemetery or Graveyard?

By Bob Hunt

What's the difference between a "cemetery" and a "graveyard", or is there any difference?

I suspect that these days most of us use the terms "cemetery" and "graveyard" interchangeably. However, the use of "graveyard" has become less common over the decades, and it is heard most often today when used by older folks of my generation, usually from more rural areas. But is there a difference and does it matter?

It might. Historically the terms may well have indicated social status. Aside from wanting precision in our language use, the two words spring from different burial practices. The origin of "graveyard" is not all that clear, although some claim it derives from early Germanic words meaning "garden" and "to dig." More important is how the term was used, and what it may have signified. During the Dark Ages and continuing for many centuries through the Middle Ages European nobility and wealthy Christians wanted to be interred inside a cathedral, church, abbey, monastery, or the like, frequently in a crypt or under the floor. Those from lower rungs of the social ladder were buried in the "churchyard", usually an enclosed area outside the church but adjacent to and part of the institution's property. The use of

churchyards for burial continued for many centuries and became known as "graveyards." Graveyards are generally quite small compared to today's cemeteries simply because churchyards themselves are small.

Most of us are familiar with typical scenes of tilting, weather-worn headstones surrounding historic European churches. Similar garden-like graveyards are fairly common sights in New England as well, although fewer such graveyards exist in the West.

(Further down the economic scale were "potter's fields". Potter's fields were for the burial of unknown or indigent persons and, notably, were not even then referred to as "cemeteries." And, finally, there were "charnel houses." A charnel house is a vault or building where human skeletal remains are stored. They were often built near churches for depositing bones that are unearthed while digging graves, and many continue in use today. How does your district deal with unidentified bones you discover?)

Certainly a "cemetery" is also a place where the dead are buried. The word is derived from medieval Latin "cimiterium" which itself comes from the Greek *koimeterion* meaning "resting place." "Cemetery" came to be used by



Christians as a place of interment, rather than its original meaning as a place to sleep or rest. With the Industrial Revolution of the nineteenth century populations throughout Europe and the U.S. exploded. "Graveyards" simply lacked the capacity to inter the millions of deaths the growing populations created. Thus, burial grounds located away from a church came into being and were referred to as "cemeteries". Although many are affiliated with a particular church or religion, many are secular with no religious affiliation.

Here in the West today most burial grounds are "cemeteries", if we refer to them properly. We have few "graveyards". Nonetheless, in my travels of the past few years tracing my ancestors I have discovered that many pioneer cemeteries are still referred to as "graveyards." If my pioneer forbearers chose to call their burial grounds "graveyards," who I am to disagree?

GOLDEN STATE RISK MANAGEMENT AUTHORITY ANNUAL CONFERENCE 2022

GSRMA Announces 16th Annual Conference

GSRMA is excited to announce that plans for its 16th Annual Conference are moving ahead. The conference will be held March 24th and 25th, at Rolling Hills Resort in Corning, CA. The Conference will feature Keynote Speaker Paul Krismer doing a session on Resiliency in the Midst of Uncertainty, while our other speakers will be doing a variety of informative sessions.



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From the President

(Continued from page 4)

In the absence of that information, where do you start when developing the price list? Many, if not most, districts set their fees by comparison with other districts—a starting point, but certainly not an acceptable substitute for calculating your costs. Comparisons are difficult because of the large number of variables. Do you compare with neighboring districts? With private cemeteries? Do you compare by number of interments? Are some fees rolled together, others not? Should your lack of land, or your wealth of acres and

acres of undeveloped property, or bulging bank accounts be considered in setting prices?

Every district establishes its own fees, and they vary widely up and down the state. Based on the most recent PCA surveys of our members, average district fees have been calculated for a variety of cemetery charges. All member districts participating in the survey, from the smallest with very few interments to the largest with 300+ annual interments, are included in these averages.

The information in the following table is only a general reference. But remember, your numbers may vary considerably from these averages and, therefore, your fees should as well. Your goal should be creating income sufficient to build reserve resources necessary to sustain your district for years to come.

(This data is further broken down into six categories based on each district's number of annual interments. That information is available to members on the PCA website—calpca.org.)

(Continued on page 12)

Ask Bob . . .

By Bob Hunt

Question:

I want to fire a guy. What do I do?

DON'T TAKE ANOTHER STEP--call your Human Resources professional or your agency's attorney!

Unfortunately, this is a question we get far too often and too late.

There are, of course, any number of reasons for terminating an employee. Those differing reasons may require different actions. Is the employee simply unable to perform his or her duties? Why? Lack of knowledge, experience, or education? Or is that employee well qualified but not performing for some other reason? Has the employee violated the law? Have your agency's policies or practices been violated?

Whenever I get one of these phone calls, these are some of the questions I need to have answered before I can provide guidance. Be sure you have considered the situation and are prepared to answer and fully explain your responses. If you aren't clear in your own mind about these things, you're not going to get very good advice.

In nearly all situations leading up to termination of an employee, there must be sufficient documentation in the file. "Sufficient" varies with the specific facts of each instance.

Let's first address performance issues. When performance is deficient, there must be considerable documentation showing that the employee was informed of his or her unacceptable performance. This might include notes memorializing oral counseling you gave the employee, memos specifically identifying deficiencies and what the employee must do to correct them, performance evaluation forms reviewed with the employee, and perhaps a formal Performance Improve-

ment Plan ("PIP"). In all cases, it is crucial that the documentation show that the employee was told specifically how his or her performance was lacking, what needed to be done to correct those issues, and the result if performance failed to improve sufficiently. (NOTE: A detailed 5-page letter written when you wish to terminate attempting to create a record will **not** take the place of contemporaneous documentation created throughout the person's employment.)

Another performance issue (which crosses over into violation of agency policy) is the employee whose actions demonstrate a lack of interest in the job. For example, the employee may frequently be tardy, have excessive unexcused absences, the employee may repeatedly have failed to locate, mark out and verify burial locations, disappear from the workplace, or be on his or her phone all the time. Here again the file should contain evidence that the employee was orally counseled, received written reprimands and warnings, and failed to correct the problems.

Many issues fall under the rubric of policy violation. For example, the employee may have physically threatened a co-worker, recklessly drove an agency vehicle, was rude or disrespectful to a member of the public or co-worker, used drugs while at work, and so forth. Once again, before termination is appropriate there must be sufficient documentation in the personnel file demonstrating that you attempted to correct the behavior.

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From the President

PCA Member's District Averages			
Average Number of Acres 23			
Average Number of Cremation Burials 50		Average Number of Full Casket Burials 57	
Interment Fees		Other Charges	
Single Casket Plot Fee	\$1,083	Open & Close Single	\$752
Double Casket Plot Fee	\$1,850	O/C DD 1	\$902
Cremation Plot Fee	\$564	O/C DD2	\$709
Infant Plot Fee	\$379	O/C Cremation	\$341
Single Niche Plot Fee	\$1056	O/C Infant	\$300
Double Niche Plot Fee	\$1298	O/C Single Niche	\$223
Ossuary Interment Fee	\$316	O/C Double Niche	\$284
Endowment Care Single Full Plot	\$309	Vault – Ring Liner	\$577
Endowment Care Double	\$430	Vault – Garden/Lawn	\$651
Endowment Care Cremation Plot	\$225	Vault – Plastic	\$597
Endowment Care Infant	\$170	Vault – Cremation	\$451
Endowment Care Single Niche	\$192	Vault – Infant	\$282
Endowment Care Double Niche	\$265	Vault – Fiberglass	\$165
Endowment Care Ossuary	\$119	Vault – Oversized	\$1,547
Disinterment – Single	\$2,227	Transfer of Burial Rights	\$60
Disinterment – Double	\$2,805	Marker Setting – Single	\$227
Disinterment – Cremation	\$580	Marker Setting – Double	\$282
Disinterment – Niche	\$473	Single Upright	\$306
Disinterment – Infant	\$765	Double Upright	\$347
Fee for Weekend Service	\$624	Vases	\$42
Non-Resident Fee	\$442	Handling Fee	\$250

(Continued from page 10)

Many districts review and revise their fees every year—a highly recommended practice. This past year the cost to operate our cemeteries has increased greatly. At my district the practice for many years has been to increase fees approximately 5% each year. The reason behind this is to have funds in the future needed to maintain our grounds once the capacity is full.

Remember, today's fees should be set to secure the future of your district for years to come.

Let me take this opportunity to wish you and yours a very Merry Christmas and a safe, healthy and Happy New Year!

Cheryl

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Ask Bob . . .

(Continued from page 10)

Finally, there are violations of law. Understand that for purposes of this general discussion there are two categories of law—civil and criminal. Generally, civil violations may result in monetary penalties and claims by an injured party; criminal violations (both misdemeanor and felony) may bring monetary fines, restitution, and jail or prison sentences.

For example, California law prohibits sexual harassment—an employee who sexually harasses a co-worker has violated not only the law and but certainly your agency policy. This is a civil violation. There are many levels of seriousness of sexual harassment depending on the circumstances of each case; some instances may require only a serious written reprimand, others immediate termination. (*Workplace investigations,*

addressed in the last issue of the Update, will guide the employer in handling these cases.)

On the other hand, physically assaulting another person is a criminal violation (but may also subject the aggressor to civil penalties). Theft, possession or use of illegal drugs are also criminal violations. In many cases, a serious criminal violation merits immediate termination of employment.

Another crucial component is how terminations are handled. Again, the specific circumstances of each case will dictate proper actions to take. However, be aware that Government Code §54957 requires that as a condition of your governing body holding a closed session to hear “specific complaints and charges” against an employee he or she must be given advance written notice. Failure to comply renders any action taken by the board “null and void”, po-

tentially leading to a claim of wrongful termination if the employee has been terminated on the basis of the board’s un-noticed action.

Hopefully the above only hints the risks involved in terminating an employee. Clearly, my response to this question touches only the very highest peaks of this complex issue. If nothing else, it warns you that terminating employees is a minefield waiting for missteps. However, I hope that one message is clear: manage your employees, document their performance (both good and bad) throughout their employment, and make sure any action you take is substantiated with necessary supporting documents.

To wrap up where I began--before you take any action, immediately CONTACT YOUR HUMAN RESOURCE PROFESSIONAL OR YOUR AGENCY’S ATTORNEY.

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- February 16, 2022 — PCA Region One Seminar, Cottonwood, CA**
- March 10–11, 2022 — CAPC Annual Conference, Monterey, CA
- March 16, 2022 — PCA Training Day & Equipment Show, Roseville, CA
- March 24–25, 2022 — GSRMA Annual Conference, Corning, CA
- April 6, 2022 — PCA Regional Seminar, Visalia, CA**

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