

# ❖ Deals, Due Diligence and Disaster Recovery

## Is There a Gap in Your Plan?

by Gary D. Levine of Two Step Software, Inc.

**Natural disasters, terrorism,** massive power grid failures, as well as more localized events such as a fire, major water damage or an ordinary car accident can interrupt the normal course of business. But when these types of events bring the closing of a key financial transaction to a standstill, clients have little understanding if their high-powered law firm failed to include the client's corporate records in the firm's disaster recovery plan. Imagine trying to explain to your client why you can't render a "clean" legal opinion on the fully-diluted capitalization table because both the stock record books and the original board minutes have been lost.

### Corporate Records and Disaster Recovery

Over the years, clients have asked their outside counsel to act as the trustee of the original corporate minute books. It's not unusual for a large law firm to hold thousands of original minute books and add hundreds more each year. Susan Preston, Of Counsel at Davis Wright Tremaine LLP, explains: "We're a very document-oriented industry, and our clients expect us to do everything we can to maintain and preserve their important records. . . . Anything less would be unacceptable to both our clients and our firm." Clients assume that their law firms have developed well-designed plans for records management. And while most law firms have adopted disaster recovery plans that would ensure that the firm would be able to continue to operate in the event of a significant business interruption, there is usually a major gap in these plans. Few, if any, have taken into account the minute books that are casually collected in a quasi-"records room" or "corporate library." They are frequently in transit from attorney to paralegal offices, to client meetings or to offsite storage, just slipping between the cracks of the records management system and the backup procedures.

**"The loss of the corporate minute books or stock records would clearly halt the closing of a major financial transaction."**

The corporate records that are left out of these plans are the historical minute books, the complex ownership ledgers and copies of other legal records for the firm's clients. If these records were lost or destroyed in a catastrophic event, the client company might not be able to easily continue with its business. As Hugh Totten, a partner at Perkins Coie LLP, comments, "Corporate records should be treated with the same diligence and respect as a company's most valuable asset."

While general business activities such as sales, manufacturing or R&D could certainly continue, the loss of the corporate minute books or stock records would clearly halt the closing of a major financial transaction or postpone the start of the due diligence process. Since the sale of a business, a public offering or the next round of financing are some of the most important events in the life of a company, anything that would slow down or increase the level of risk in these types of transactions would be unacceptable to a client. And no transaction would be expected to continue as usual if the complete set of corporate records were unavailable. As Paul Blumenstein, Of Counsel at DLA Piper Rudnick Gray Cary US LLP, puts it: "If a company cannot pinpoint, with 100 percent accuracy, how many shares are outstanding, who owns them, who has rights to purchase additional shares and under what terms and conditions, that creates a big complication affecting any kind of financing transaction or business combination."

With the existence of new technologies now widely available and specifically designed for assisting law firms and legal departments with maintaining complete digital copies of their minute books and ownership records, the costs to avoid these types of potential risks are very low. J. Patrick Ovington, Vice President, General Counsel of Datastream Systems, Inc., explains: "As caretakers of the company's assets, we're obligated to make arrangements in case of a disaster. In fact, that's typically the time when corporate records could be most important."

After looking at the risk-benefit analysis, it may no longer be acceptable for firms to fail to adopt appropriate disaster recovery plans that ensure that their clients' corporate records are always available and that important financial transactions would not be stopped or slowed down due to the loss of a client's corporate records.

### Considerations Prior to Creating a Plan

Before creating your specific plan, take the necessary time to develop a cross-functional team and consider why you are doing this, what your expectations are, and what type of plan would fit within your organization and your current resource and technology constraints. The following list highlights some of the key components that should be considered as you develop your framework for a successful disaster recovery plan for client corporate records:

**Determine the goals for your disaster recovery plan by considering your priorities and what types of specific events should trigger the proposed plan.**

**Review your firm's current disaster recovery plan to see what areas are already covered, which ones are not**



included, and how your clients' corporate records fit within the current framework.

Determine the specific types of corporate records that would need to be recreated in the event of an unexpected loss considering the complete life cycle of a company.

Discuss what would be considered reasonable for disaster recovery response times for recreating corporate records.

Consider the different types of information systems and database applications that are available in the market to digitize, store, access and recover corporate records. To have the greatest chance of success over the long-term and for cost justification purposes, choose a system that can be used both to manage the everyday work of your corporate practice as well as for disaster recovery.

### Steps to Follow to Create a Plan

After reaching some level of consensus on the goals, content, methods and resource constraints, the standard steps for creating a corporate records DR plan are similar to developing other types of information management plans. For corporate records, they would include:

Organize the minute books and ownership records that will be part of the plan.

Select a standard portfolio of items that you will need to recreate, such as entity formation documents, minutes of meetings, lists of authorized people, ownership records, copies of filings, copies of contracts, evidence of IP assets, copies of previous closing binders and lists of upcoming critical dates.

Determine which technological solutions will work best with your internal systems to convert final historical records to digital scanned images, how to organize and store documents and related information and how to recover the information easily.

Develop a process to create your initial digital repository of existing information and documents and then to update the database as new corporate records are created.

Evaluate and test the plan at regular intervals and consider improvements.

### Your Safety Harness

While some people continue to drive every day without a seatbelt and certainly some high wire acts are far more exciting without a safety harness, in the business of law, it's not more fun to depend on your good luck to avoid a major business interruption. The current standard of care for business records is that information systems are regularly backed up and organizations prepare in advance for unlikely

scenarios like Y2K, 9/11 or Katrina. The same should be true for client corporate records that have been entrusted to a law firm. As stated by Corey Grauer, Vice President and General Counsel of Sterigenics International, Inc., "Unexpected loss or destruction of our . . . records would likely cause difficulty in . . . tracking the historically significant decisions by our shareholders and board."

With the increased availability of browser-based database applications for knowledge management, practice management and records management, the costs of introducing these types of systems have greatly decreased. At the same time, there is far greater awareness of their benefits. Any law firm that handles financial transactions for clients on a regular basis and holds hundreds of minute books and ownership records can no longer afford to operate without a disaster recovery plan that specifically includes their clients' corporate records.

About the author :: :: ::

**Gary D. Levine** is the President and Founder of Two Step Software, Inc., a leading provider of entity, ownership and minute book tracking solutions for law firms and corporate legal departments. Previously, he practiced law for nearly a decade in Boston, Massachusetts. He has authored numerous articles and is a frequent speaker on corporate practice management issues. Gary can be reached at: [glevine@twostep.com](mailto:glevine@twostep.com).



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**Call:** (800) 223-8900  
**Email:** [sales@twostep.com](mailto:sales@twostep.com)  
**Web:** [www.twostep.com](http://www.twostep.com)

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