

Litigation Preparedness: A Checklist For Corporate Counsel

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According to a recent survey, only seven percent of corporate counsel attorneys rate their companies as prepared for the electronic discovery amendments to the Federal Rules of Civil Procedure. The survey results are not surprising since many in-house legal departments have taken a back seat and let outside counsel manage their discovery needs. However, the risks associated with spoliation of electronic discovery are starting to bring corporate counsel into the driver's seat as the road to the collection of evidence may begin well before the retention of outside counsel to handle litigation.

Where should corporate counsel start? The following list, while not exhaustive, provides some tips and recommended practices that are essential to a corporation's litigation preparedness.

1. Maintain Document Retention Policies And Practices.

Every company should have a comprehensive, regularly audited document retention policy. The policy not only sets forth the procedures for the uniform and timely destruction of documents – both electronic and paper – but also establishes a consistent plan that is applied company-wide. A good document retention policy coupled with vigilant enforcement may be a company's best defense against claims of spoliation of evidence. The Federal Rules offer safe harbor for companies that lose data during the routine, good-faith operation of their electronic information systems. See FRCP 37(f). The "routine" requirement may be evidenced, in part, by a document retention policy. Counsel should review the company's retention program to ensure that it is current, applies to all employees in all locations, and is regularly monitored and enforced.

2. Understand The Corporation's Electronic Information Systems.

Case law underscores the need for outside counsel to become familiar with their client's electronic information and data retention architecture. See *Phoenix Four Inc. v. Strategic Resources Corp.*, 2006 U.S. Dist. LEXIS 32211 at * 16-17 (S.D.N.Y. 2006) and *Zubulake v. UBS Warburg, LLC*, 229 F.R.D. 422, 432 (S.D.N.Y. 2004). The responsibility is even greater for in-house counsel who often provide a necessary link between the company's information technology (IT) department and outside counsel. Thus, corporate legal departments should develop a solid working relationship with the company's IT department and an understanding of the company's IT systems. Such an understanding is vital to the successful imple-

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mentation of a document retention policy and will prove invaluable in evaluating preservation efforts in litigation.

3. Implement And Monitor Litigation Hold Procedures, When Appropriate.

The notion of document and information preservation is not something new to corporations. Several regulations impose preservation requirements on certain companies for the retention of documents and, in some cases, impose criminal penalties for their unlawful destruction. At common law, a company has a duty to preserve documents and electronic data when it "knows or reasonably should know" that information may be relevant to pending or anticipated litigation. *Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003). Once litigation is anticipated, a party must suspend its routine document retention/destruction policy and put in place a litigation hold to preserve what it knows, or reasonably should know, is relevant to the action. See *Hynix Semiconductor, Inc. v. Rambus*, 2006 U.S. Dist. LEXIS 30690, *66-67 (N.D. Cal. 2006) and *Samsung Elecs. Co. v. Rambus*, 2006 U.S. Dist. LEXIS 50007, *96-99 (E.D. Va. 2006).

Corporate counsel must determine appropriate trigger points for "anticipation of litigation" and develop litigation hold procedures to implement upon such triggers. See *Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc.*, 2007 U.S. Dist. LEXIS 15277 at *23-24 (D. Co. March 2, 2007); see also *Heng Chan v. Triple 8 Palace Inc.*, 2005 U.S. Dist. LEXIS 16520 at *16 (S.D.N.Y. 2005) (counsel has an obligation to monitor compliance with the company's preservation obligations). Counsel should be proactive and ensure that litigation hold procedures are being complied with.

4. Communicate With Key Custodians And Key Data Stewards.

When practical, counsel should communicate face-to-face with key players to make sure that they understand the seriousness of the preservation obligation and the consequences of destruction of potentially relevant evidence. Counsel should inquire about the potential witnesses's personal practices for document management and retention and determine whether it is consistent with company policy and determine whether the individual keeps potentially discoverable material on sources that are not online with the company's computer systems (e.g., home computer, PDA, pocket drive, etc.) Most importantly, counsel must explain the custodian's ongoing preservation obligation. A written litigation hold notice should be sent to these individuals that reminds them of their responsibilities under the company's document retention policy and specifically cautions them to refrain from altering, modifying or deleting potentially relevant information.

Counsel should also communicate with the "data stewards" – the IT staff who manage the resources on which key players create/store corporate data. Discuss whether it is appropriate or necessary to take a mirror image of the relevant storage devices and make sure that any auto-delete functionality is disabled. Counsel and IT should make sure that relevant active files are not deleted, converted to backup tape, or otherwise downgraded. Metadata should be preserved, even if the determination has not yet been made to produce it.

5. Establish An E-Discovery Committee.

In-house counsel should consider putting together a team with representatives

from the IT department, records management, corporate compliance and the legal department to develop and implement an action plan for litigation involving electronic discovery. This team will be responsible for keeping the legal department apprised of procedural or staff changes that impact document retention policies, including any litigation holds in place. The IT representatives would advise of the latest technologies acquired by the company that impact data storage or relate to the company's document retention program.

Counsel may also want to interview and train potential Rule 30(b)(6) witnesses, ideally members of the committee who have knowledge and can effectively articulate their expertise with all aspects of the company's computer processing and storage capabilities.

6. Implement A Plan To Maintain Data Formats And Map Data Sources.

Electronic information can be maintained in a variety of formats and on multiple types of media. Corporate counsel should work closely with the IT department to determine how information is preserved and whether data is converted or degraded for storage or archival purposes. Counsel should also be aware of the range of potential sources for relevant information and collaborate with IT to develop a "data map" which profiles the company's sources and locations of electronically stored information. A data map can set out in detail the company's different active data creation and storage systems and give valuable insight into the potential cost – in terms of time and money – of preserving and collecting the information. Data mapping profiles may include details about:

- the applications and file types in use at the company, including details on proprietary or unique applications and integrated databases – particularly business-critical applications or those which are likely targets of discovery;
- the range of electronic communications, such as: email, instant messaging, voicemail, and Voice Over Internet Protocol applications, and including details about server organization, physical locations, and backup protocols for each;
- network storage and file servers, including information about server organization, physical location, and backup protocols;
- workstation distributions and configurations;
- remote user set-up (i.e., are employees able to VPN in from their home computers?);
- distribution and use of mobile devices, including laptops and PDAs, with specific attention to whether data on such devices is captured or "synced" in any formal fashion.

7. Establish A Collection Methodology So That Responsive Data Can Be Securely Stored Prior To Processing, Review And Production.

There are several collection methodologies and technologies that can realize significant cost savings for corporations. In-house counsel should explore these techniques to determine if they are right for the company. For example, corporations can establish a "black box" service on which duplicate copies of relevant emails are automatically stored. The black box reduces the risk of deletion. If the company is involved in multiple pieces of litigation where the same documents are at issue, counsel may want to consider building a

central data repository. Document repositories can save the corporation time and money as the company may need to review the documents only once and information about the documents such as relevance, privilege, Bates stamps and redactions can all be retained and reused in subsequent litigation.

8. Determine What Information Is Not Reasonably Accessible Due To Undue Burden Or Cost.

While the general rule is that parties may obtain discovery on any matter relevant to the claims or defenses involved in the case, see FRCP 26(b)(1), the rules offer limitations where data sources are not reasonably accessible due to undue cost or burden. See FRCP 26(b)(2)(B). However, even if the data sources are deemed not reasonably accessible, the court may still order production and set conditions on the requested production, including cost shifting. See FRCP 26(b)(2).

A data map will assist counsel in the determination of whether data sources are arguably not reasonably accessible. Counsel should also discuss the potential cost and burden with their IT department and a data collection specialist to determine whether selective restoration or sampling of inaccessible data is appropriate. For some data, restoration may still be cost prohibitive given the amount at stake in the litigation.

9. Take Proactive Steps To Prevent The Potential Inadvertent Production Of Privileged Documents.

The sheer volume of electronically stored information that may be produced in litigation increases the risk of inadvertent production of privileged or protected documents. However, there are steps that corporate departments can take prior to litigation to reduce the risk of inadvertent production. If practical, privileged documents can be segregated, coded, or tagged in the ordinary course of business thereby reducing the risk that they will be commingled with non-privileged data. Boilerplate tags and footers that read "attorney-client privilege" may be insufficient to identify a protected document, particularly if the tag is automatically and indiscriminately applied to every email generated from a particular user.

10. Communicate Regularly With Outside Counsel.

In-house counsel must fully understand the company's preservation, collection and production procedures relating to electronically stored information and be able to discuss them with their outside counsel. This is particularly important in the beginning stages of litigation when the parties meet and confer under Rule 26(f). In-house counsel may want to be present during this conference to assist outside counsel. Of course, the extent of counsel's involvement may vary depending upon the size and complexity of the case, the amount of the controversy, the location of the litigation and the volume of potentially relevant data.

As corporate counsel get more involved in the corporation's litigation matters and document retention policies and practices, they will feel more confident and comfortable with the electronic discovery-related changes to the Federal Rules of Civil Procedure. Education and communication are two keys to litigation preparedness. Both will make certain that the legal department can make reasonable and defensible choices regarding the collection, preservation and production of documents in litigation.

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