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Managing the Early Stages of Commercial Litigation: Critical First Steps

**ELECTRONIC DISCOVERY FOR
COMMERCIAL LITIGATION CASES**

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Agenda

- ◆ How to Implement an Effective and Defensible Preservation Plan
- ◆ Tips for Reducing the Volume of ESI to be Collected and Produced in Your Case
- ◆ Creative Methods to Reduce the Costs Associated with Document Review

Immediate Issues

- ◆ Determine Identity of Key Records Custodians, including former employees
- ◆ Litigation Hold: Communicate nature of preservation obligations to key custodians as soon as possible
- ◆ Do any routine electronic data operations need to be suspended or altered?
- ◆ Identify other sources of electronically stored information
 - Ensure that such sources are properly preserved
 - Is there any non-standard electronically stored information and/or archived material?

Immediate Issues

- ◆ Data in the physical possession of a third party?
 - Examples: Outsourced functions (payroll, human resources), social media

- ◆ Is any data maintained outside the United States?
 - Impact of foreign laws?

- ◆ Consider placing someone in charge of ESI issues and preparing a written plan documenting the preservation, collection, review, and production of ESI
 - Prepare for Rule 30(b)6 deposition

- ◆ Need for an outside vendor?

Issue A Litigation Hold

- ◆ Obligation to preserve documents, including e-documents
- ◆ Litigation hold to suspend normal disposition or processing of records
- ◆ Must act reasonably promptly

Scope of Litigation Hold

- ◆ What categories of documents and materials
 - Subject matter and time frame
- ◆ Which departments or functions
 - Possession, custody, and control, which could include third parties
- ◆ Which individuals
 - “Key” records custodians

Content of Litigation Hold

- ◆ Identify relevant subject matters
- ◆ Identify forms/types of records
- ◆ Provide instructions on how to preserve records
- ◆ Provide contact information for questions

Example of a Quick Litigation Hold

Initial Litigation Notification & Evidence Preservation Notice

***Privileged & Confidential Attorney-Client
Communication & Work Product***

Date:

To:

Claim: [description from matter management system]

Action Required: **PLEASE IMMEDIATELY ENSURE THAT YOU AND YOUR STAFF RETAINS ALL POTENTIALLY RELEVANT EVIDENCE. Please see below for detailed information regarding the duty to preserve evidence. Further instructions will follow.**

Court rules and company policy require that you not destroy and that you take reasonable steps to preserve relevant evidence, including both paper and electronic documents and information. Relevant evidence may be in the form of files, correspondence, memoranda, notes, reports, photographs, electronic data and e-mails, diaries, any other written or recorded materials, and physical items that relate to this litigation or the allegations therein. Recipients of this notice should take appropriate, affirmative steps to preserve any such relevant documents, including notification to their staff and other persons who have or control such relevant evidence. **DO NOT DELETE ANY EMAIL OR ELECTRONIC DOCUMENTS (EVEN IF YOU ALSO HAVE A PRINTED COPY).** Any document retention policy that would otherwise apply to these items and that would otherwise permit their destruction is hereby suspended until further notice.

You need not ask Information Systems to interrupt the backup and recycling schedules or to turn off the email auto-delete function for relevant employees. The Responsible In-House Attorney will address both of these issues as appropriate.

Follow-up

- ◆ Ensure compliance
- ◆ Periodic reminders to custodians
- ◆ Continue assessment of adequacy of hold
- ◆ Refine the scope of the hold as necessary

Example of a Refined Litigation Hold

Appendix 1: Sample Litigation Hold

Attorney-Client Privileged Communication/ Attorney Work Product

Date: [Date]
To: [Insert particular departments and key players]
From: [Insert Lawyer Name]
Subject: Document Hold and Request-SUBJECT
DESCRIPTION

THIS MEMORANDUM CONTAINS IMPORTANT INFORMATION ABOUT HOW YOU SHOULD RETAIN AND FORWARD DOCUMENTS RELATED TO A LAWSUIT IN WHICH COMPANY HAS BEEN NAMED AS A DEFENDANT. PLEASE READ THIS MEMORANDUM IN ITS ENTIRETY AND COMPLY WITH ALL INSTRUCTIONS HEREIN.

The company has been served with a complaint filed by [plaintiff] concerning [subject].

UNTIL FURTHER NOTICE, ALL DOCUMENTS RELATING TO THE PLAINTIFF OR SUBJECT (AS FURTHER DESCRIBED BELOW) MUST BE KEPT AND MAY NOT BE DISCARDED, DELETED, ALTERED OR DESTROYED.

You must archive or otherwise save in an electronic format any such documents that might be automatically deleted from the computer systems. The company's record retention policy is hereby suspended with respect to the documents identified in this memorandum. Failure to abide by these requirements can result in serious penalties for the individual involved and for the company.

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The term "documents" includes both hard copies and electronic files, any final and draft correspondence, reports, memoranda, notes, charts, graphs, maps, presentations, photographs, calendars, emails and any hard copy or electronic data compilation from which information can be obtained, such as email, spreadsheets, SAP records, databases, PDA files, videos, CDs, etc.

Documents that must be kept include all documents relating to any of the following topics:

- (i) [List with particularity individual topics that are relevant]
- (ii) Any other document related to [subject].

YOU MUST CONDUCT A DILIGENT AND REASONABLE SEARCH OF ALL LOCATIONS WHERE RESPONSIVE DOCUMENTS MAY BE FOUND AND FORWARD THEM TO THE COMPANY'S LEGAL STAFF.

ATTORNEY-CLIENT PRIVILEGED COMMUNICATION/ ATTORNEY WORK PRODUCT

Places you should look for documents include, but are not limited to:

- Your work area (office, desk, etc.)
- Your filing cabinets
- Offsite document storage facilities
- Your computer's hard drive
- Your personal server space
- Any shared server space you use
- Your email inbox and sent mail folders
- Any email archives you have established
- Any floppy disks, CD-ROMs, ZIP disks or other electronic storage media
- Any PDA device

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Example of a Refined Litigation Hold- *continued*

- Your voicemail
- Anywhere else that you may have stored responsive documents

Copies of all responsive documents should be made and forwarded to LAWYER, no later than DATE. Documents in electronic format should be copied and forwarded in electronic format. If you have large volumes of responsive documents, please contact LAWYER to make arrangements regarding those documents. You should not forward original documents but you should continue to retain all such original documents until further notice. Any documents relating to your document search should be separately filed in a hard copy or electronic file that is named by reference to the subject litigation and the company legal staff case number contained in the subject line of this memorandum.

If an attachment is referenced in any document, please determine if the attachment is included in your production. If not, please try to locate such attachment. If there is any question about whether a document is responsive to this request, or is relevant, then you should include such document in what you forward. Likewise, even if a relevant file contains materials that normally would not or should not have been saved, all such materials should be submitted. It is not necessary for you to create or produce any documents that are not currently in existence. You should not alter, make marks upon, or edit any document or file that is responsive to this request.

Please distribute a copy of these instructions to anyone who may have documents that should be retained and forwarded to the company legal staff. Any such person must comply with the requirement to retain and forward such documents until further notice from the company legal staff.

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Attorney-Client Privileged Communication/ Attorney Work Product

Supervisors, you are responsible for ensuring that everyone in your area who might have responsive documents complies with these instructions. You are also responsible for ensuring the proper retention and forwarding of responsive documents belonging to employees who are transferred or who retire.

Please complete and sign the attached Document Hold Acknowledgement and Certification form even if you do not have any responsive documents.

If you have any questions regarding this memorandum or the litigation, please contact LAWYER. No documents relating to the litigation should be created or discussions regarding the litigation should take place unless cleared in advance by the company legal staff.

Thank you for your attention to this important matter.

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Example of a Refined Litigation Hold- *continued*

Attorney-Client Privileged Communication/
Attorney Work Product

DOCUMENT HOLD ACKNOWLEDGMENT AND CERTIFICATION

Date: _____, 2010

To: LAWYER

Subject: Document Hold and Production—
SUBJECT OF LITIGATION

(1) Describe the files searched, the sources of documents and documents found:

(2) Identify all persons who assisted you in the search for documents:

(3) Certifications (check all true statements):

I have taken the necessary steps to ensure that documents responsive to the request above will be preserved, and that normal document management practices will be suspended, pending further instructions from the company legal staff.

I conducted a document search that was reasonably designed to find responsive documents.

Copies of all electronic and hard copy documents that were located are attached.

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I have made separate arrangements to get copies of all documents that were located to company legal staff.

Based on a reasonable search, I did not find any responsive documents.

Signature

Print Name/Title

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How to Preserve Third-Party Records

- ◆ Written request (or notice) to third parties to preserve relevant documents and follow-up
- ◆ Collect the third party's relevant documents
- ◆ Don't forget content that has been outsourced or is hosted by a third party (e.g. social media sites)

Tips for Reducing the Volume of ESI to be Collected and Produced in Your Case

- ◆ Develop a reasonable, defensible strategy
 - Data sources, custodians, time frame, subject matter, file types, metadata
 - Use of automation
 - Phased, iterative process
- ◆ Present and defend your strategy
 - Negotiate the parameters
 - If no agreement, take it to court
- ◆ ESI volume drives cost
 - Use of technology to reduce collection

Creative Methods to Reduce the Costs Associated with Document Review

- ◆ Relevance and privilege review can be extremely expensive
- ◆ Use technology to facilitate review
 - Key words, concept clustering, predictive coding
 - “Presumptively privileged” protocol with automated generation of the privilege log
- ◆ Use attorneys appropriate for the likely sensitivity of the information being reviewed
 - Firm attorneys, staff attorneys, contract lawyers

Questions & Answers



Mayer Brown Speakers



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