IN FOCUS

CORPORATE LITIGATION WEBSERIES

Tackling E-Discovery Before Regulators and Government Investigators

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Preparation

- Critical
  - Need to react quickly, properly
  - Potentially severe sanctions
    - Obstruction of justice
    - SOX 802
    - Monetary sanctions
  - Conduct judged against policies and practice

Preparation

- Business policies
  - Document management policies
    - Document retention guidance
  - Mobile device usage, phones, cameras
  - IM, voicemail usage
  - Web-based usage
  - Home technology usage

Preparation

- Business practices
  - Ensuring policy compliance
  - Training
  - Audits
  - Staying current
    - Update based on legal and technological developments

Preparation

- Litigation response procedures
  - Data mapping
    - Focus on high-risk systems
  - Data systems
    - Automatic deletion issues
  - Contacts
    - Legal
    - Business
    - IT
    - PR

Investigation Response Checklist

- **Who** is likely to have relevant information?
  - Get organizational charts; create lists; interviews
- **What** information is relevant?
- **Where** are the data located?
  - Data mapping; identify servers/laptops/etc.; e-mail, file/print servers, databases, distributed data; voicemail; home computers, PDAs, back-up tapes
  - The “Morgan Stanley” problem
- **When** is the relevant time frame?
  - Historical only? Current data? Ongoing?
- **How** must the data be handled?
  - HIPAA

What to Think About and Do When the Subpoena First Arrives

- Key issues to consider in the crucial early hours and days after learning of a governmental investigation
  - Preserving documents and suspending routine destruction practices

What to Think About and Do When the Subpoena First Arrives

- Halt the routine disposal of documents and electronic data
  - Locate where responsive data exists
  - Discussions with IT employees
  - PCs; networks; servers; emails
  - PDA's; laptops; zip drives; voice mail
  - Turn off automatic deletion features
  - Analyze what must be done to preserve

What to Think About and Do When the Subpoena First Arrives

- Preservation Memo
  - Importance
  - Characteristics of memo
    - Broad description of documents retained
    - Third parties who possess company docs
    - Recipients of memo acknowledge receipt
    - Re-issue memo periodically
    - Audit employees' compliance
    - May be discoverable

What to Think About and Do When the Subpoena First Arrives

- Back-up media
  - Continue to recycle back-up media?
  - Discuss up front with government
  - Zubulake factors
    - Make mirror image of computer system
    - Retain all then-existing back-up tapes for the relevant personnel
    - Catalog any later-created documents in a separate electronic file

What to Think About and Do When the Subpoena First Arrives

- Documentation of ongoing steps to preserve documents
  - Why
  - How
  - Contemporaneous documentation may help to show later that good faith efforts were made

What to Think About and Do When the Subpoena First Arrives

- Departing employees
  - Must have a procedure in place prior to receipt of subpoena
  - Responsive documents on computers
  - Practice of wiping clean departing employees computers
  - Image drives before they are recycled

Issues and Actions to Consider When the Government Executes a Search Warrant

- Make contact with the search site
- Consent
- Examine the warrant
- Speak to and collect information from the government agents
- Send employees home and advise them of their rights
- Monitor the search

Issues and Actions to Consider When the Government Executes a Search Warrant

- Protect privileged documents
- Documents needed to operate the business
- Alert company's media spokesperson
- Inventory list of seized materials
- Post-search inventory and debriefing

Managing Costs and Risk During the Collection and Production Process

- Chain of custody
- Don’t corrupt the data
- Preserve data in a way that will facilitate subsequent production
  - What about “metadata,” embedded data?
- Consider potential data problem areas
  - Proprietary systems
  - Databases
  - Encrypted data?
  - Web-based content?

Differences With Civil Litigation

- Even higher risks
- Even faster timeframe
- Even less margin for error
- Greater likelihood of resolving burden issues earlier

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