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Managing the Early Stages of Commercial Litigation: Critical First Steps

WHAT TO DO TO START PREPARING FOR DISCOVERY

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Initial Communications Within The Company

- ◆ Preliminary Steps
- ◆ Litigation Hold
- ◆ Witnesses and Records
- ◆ Retaining Counsel
- ◆ Internal Investigation
- ◆ Electronic Discovery: Early Issues

Preliminary Steps

- ◆ Contact experienced litigation counsel
- ◆ Identify key witnesses
- ◆ Identify key documents
- ◆ Protect the attorney/client privilege

Issue A Litigation Hold

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

Scope of Litigation Hold

- ◆ What categories of documents and materials
- ◆ Which departments or functions
- ◆ Which individuals
- ◆ Suspension of routine document retention/destruction policy

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 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 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 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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Document Implementation of Litigation Hold

- ◆ Needed if preservation issues are challenged
- ◆ Demonstrate that reasonable and appropriate steps were taken

Identifying Key Witnesses

- ◆ Educate that unprivileged communications are potentially discoverable
- ◆ Educate them on how to make communications privileged
- ◆ Educate about potential for creating discoverable “paper trails” (email, IM, voice mail)
- ◆ Don’t discuss case with anyone other than a lawyer for the company

Identifying Key Records

- ◆ Documents within the company's "possession, custody or control"
- ◆ Includes documents the company has
- ◆ Can include documents held by others e.g.,
 - Test: if company has a legal right to obtain documents from that entity on demand
 - For example, affiliates, contract partners

How to Preserve Third Party Records

- ◆ Written request to third parties to preserve relevant documents and follow-up

OR

- ◆ Collect the third party's relevant documents

Retaining Counsel: Joint vs. Separate Representation

- ◆ Determine whether any individuals require separate counsel
- ◆ Does a conflict of interest exist or is one likely to arise?
 - Under the laws of most states, a conflict of interest exists:
 - If the representation of one client will be directly adverse to another client, or
 - If there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to
 - (i) another client, a former client,
 - (ii) a third person or
 - (iii) by a personal interest of the lawyer

Retaining Counsel: Joint vs. Separate Representation - *continued*

- ◆ Absent a conflict of interest, a lawyer may represent both the corporation and any of its directors, officers, employees, members, shareholders or other constituents

Terms of Joint Representation and Waivers

- ◆ Advise individual defendants of terms of joint representation in writing
- ◆ Obtain advance waivers allowing counsel to continue to represent the company in event a conflict later develops

If a Conflict Subsequently Develops...

- ◆ If a conflict subsequently develops, lawyer must withdraw from the representation of one of the clients
- ◆ In limited circumstances, lawyer may be required to withdraw from both representations
 - Individual defendant may seek to disqualify counsel from continuing to represent the corporation based on confidential, privileged information the individual disclosed to counsel during joint representation

Joint or Separate Counsel: Pros and Cons

- ◆ More cost-effective to have joint representation
- ◆ Joint Representation signals to the individual defendant that the company does not believe his or her interests are at odds with the company's interests
- ◆ Retaining separate counsel from the outset avoids risk of subsequent conflict and disqualification
- ◆ Corporation may arrange for separate counsel for individual employees or directors, even when no conflict of interest is apparent

Joint or Separate Counsel: Pros and Cons - *continued*

- ◆ Enter formal or informal joint defense agreement to facilitate sharing of information
- ◆ Separate counsel will have an undivided interest in representing the individual employee/director, which may aid in fact-finding process
- ◆ Corporate prosecution guidelines may penalize corporations for entering into joint defense agreements

Joint or Separate Counsel: Pros and Cons - *continued*

- ◆ Some government agencies regard joint defense agreements as evidence of a lack of cooperation by corporation

Determine Whether an “Internal Investigation” Should be Conducted

- ◆ Lawyer fact-finding/report to management/board
- ◆ Pending civil suit may attract the attention of regulators
- ◆ Government investigation
- ◆ Internal assertions of wrongdoing without civil suit or Government inquiry

Internal Investigation: Pros

- ◆ Enables management to examine options and respond effectively
- ◆ Enables management to decide whether to make disclosure to the government
- ◆ Enables management to decide what remedial action to take

Internal Investigation: Cons

- ◆ Could unearth damaging information that could be subject to discovery
- ◆ Cost can be high
 - Legal fees
 - Lost management and employee time
 - Frighten employees

Protect the Privilege

- ◆ Important to take great care in the investigation/report
- ◆ If possible, do not disclose written report to third parties
- ◆ Lawyer, not non-lawyers
- ◆ Use outside counsel (less perceived bias)
- ◆ Written engagement letter
- ◆ *Upjohn* warnings to employees

Preservation of Privilege: *Upjohn*

- ◆ Giving the “*Upjohn*” warnings is an important means of preserving privilege during an internal investigation
- ◆ The *Upjohn* warning is based on the US Supreme Court’s decision in *Upjohn Co. v. United States*, where the Court recognized fundamental elements that a corporation must prove in order to secure the attorney-client privilege
- ◆ Can deliver the warnings orally

Preservation of Privilege: *Upjohn* - continued

- ◆ Key points to cover with employees at the outset of an interview during an internal investigation:
 - The communication is made for the purpose of obtaining legal advice for the corporation
 - The communications are made to counsel at the direction of corporate superiors
 - The subject matter of the communication is within the scope of the employee's corporate duties
 - The communication is not to be shared beyond those persons who need to know its contents

Upjohn Warning

◆ The following is an example of an *Upjohn* warning:

“As you may already know, company management has asked you to speak with us as part of our inquiry into this matter (describe broadly). The reason for this interview is to help us, as the company’s lawyers, to gather information and provide the company with good legal advice. We represent the company in this matter and do not represent you personally. This interview is protected by the attorney-client privilege, and we ask that you do not discuss it with anyone other than the company’s lawyers. However, the privilege belongs solely to the company, and the company may decide to waive the privilege and disclose the substance of the interview at a later date. If the company chooses to waive the privilege, it may do so without your consent. Do you have any questions before we begin?”

Electronic Discovery: Early Attention to E-Discovery is Critical

- ◆ Avoid mistakes that can lead to costly sanctions
- ◆ Given continued evolution of e-discovery case law regarding handling of electronically stored information (“ESI”), in-house counsel should remain up-to-date on recent developments in e-discovery to ensure company protocols address those issues

Electronic Discovery: Early Issues

- ◆ Determine Identity of Key Records Custodians, including former employees
- ◆ Litigation Holds: 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 sources of electronically stored information
 - Ensure that such sources are properly preserved
 - Is there any non-standard electronically stored information and/or archived material?

Electronic Discovery: Early Issues

- ◆ Do you need to hire an outside vendor to manage the document production?
- ◆ Is any data in the physical possession of a third party agent?
 - Examples:
 - Outsourced functions such as payroll or human resources
- ◆ Contact such organizations ASAP to ensure information is not deleted, overwritten or destroyed
- ◆ Is any data maintained outside the United States?
- ◆ Consider placing someone in charge of ESI issues and preparing a written plan documenting the preservation, collection, review and production of ESI

Mayer Brown Speakers



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