

Discovery in Civil Litigation: a Primer for In-House Counsel

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Purpose of this Presentation

- Familiarize non- “serial” litigants with discovery
- Discovery involves:
 - Litigation holds
 - Collection of Relevant Documents
 - Production of Relevant Documents to the Opponent
 - Depositions

Litigation Holds

- When you receive notice of a litigation claim, you must preserve relevant documents FRCP 26(f)(2); Pension Committee
 - When does this duty arise?
 - When you become aware of the claim Pension Committee
 - What types of documents are relevant?
 - Documents related to the nature of the claim Sedona Conf. on Lit.
- Hold

What are the risks?

- The most frequent issue litigated in discovery arises out of claims of failure to preserve and spoliation of evidence
- Spoliation = failure to preserve and loss of relevant information

What Outside Counsel will do to Protect You

- Upon retention, outside counsel will advise you to place your relevant records on “hold”
- You will issue a written notice of the litigation to employees likely to have relevant information that they are to not destroy it
- Records retention procedures must be suspended on the relevant records until the litigation is resolved

How a Litigation Hold Works

- Legal and IT are responsible for instituting the hold with guidance from Outside Counsel
- Legal communicates and confirms acknowledgement of the hold with affected employees
- IT is responsible for ensuring that auto-delete functions are disengaged on relevant records
 - Key employee emails
 - Server data if you have an auto-retention system

What do you say in a “Hold” memo?

- Outside counsel will assist to ensure completeness
- The Hold Memo describes the claim and the type of records that must be preserved
- The memo should use language and be of a length that is effective for your organization
- **THE KEY IS EFFECTIVENESS**

Who gets the Hold Memo?

- People necessary to ensure that relevant records are not destroyed
 - Key players in the disputed subject matter
 - Employment dispute = personnel involved
 - Product liability = designers, regulatory affairs, product managers, sales people
 - IP litigation = inventors, designers, patent holders

When do you institute the Hold?

- With all deliberate speed upon learning of the claim:
 - The Hold can be instituted prior to service of a lawsuit
 - Issue the Hold shortly after you reasonably become aware of the claim

Why does Outside Counsel want you to issue the Hold promptly?

- You need to prepare for eventual motions related to discovery (the opponent, at some point, will claim you haven't produced all of your discoverable records)
- The "hold" date is discoverable
- Delay risks deletion (both intentional and unintentional)
- The Rules require Outside Counsel to confer with your opponent very quickly about the company's documents and preservation efforts

What happens next?

Collection

- Meeting with legal, IT, document custodians and outside counsel
- Hand-out: Heart-Tech II (example) meeting agenda
 - Discuss relevant employees and documents
 - Plan for interviews of relevant employees
 - Plan for collection of documents

Do employees collect their own data?

- No – custodian “self-selection” is discouraged
 - Attorneys will interview them and IT will collect their documents (Hand-out: employee interview checklist)

Prepare for Depositions on Preservation and Collection

- Opponents frequently seek depositions of the document/data collectors
 - DOCUMENT the process
 - SELECT EMPLOYEES (IT and document control) who will own the process and who accept their role as testifying witnesses
 - EDUCATE those employees on the need to produce them as witnesses and how to document and audit their work

THE COLLECTION PROCESS

- Collectors (IT and document control) document their work and what they collect
- Collectors produce the requested records to in-house legal
 - Collectors audit the completeness of their work
 - Legal reviews the process and confirms completeness
- Legal forwards records to outside counsel and preserves records related to the collectors' work

What happens to the Company's Records?

- Outside counsel reviews and produces relevant records to opposing counsel
 - RELEVANCE: broad
- What about trade secrets?
 - In-house and outside counsel will identify trade secret materials
 - Outside Counsel will obtain a protective order from the Court
 - Outside Counsel produces trade secrets with a “Subject to Protective Order” stamp

Outside Counsel's Commitments

- The Rules require that Outside Counsel conduct discovery with candor and veracity
 - Officers of the Court = Obligations to the Court and the Opponent
- The Rules also require that Outside Counsel keep client's property secure
 - Rules of Professional Conduct = Obligations to the Client
- The Rules also require that Outside Counsel keep communications with the client about the litigation confidential
 - Attorney-client Privilege = Obligation to the Client

DEPOSITIONS

Who gets deposed during discovery?

- Document collectors
- Key employees
- *Not* typically in-house counsel
- *Not* typically CEOs and executives

WRITTEN DISCOVERY

- Scope and Disclosures Required: FRCP 26
- Interrogatories: FRCP 33 (limit of 25)
- Requests for Production: FRCP 34
- Requests for Admission: FRCP 36

What Issues will the Opponent Raise?

- Lack of production of relevant records
 - Spoliation – may seek sanctions
- Lack of adequate searching in the documents collected
 - ESI: disputes related to keywords used to identify documents
- DELAY: delay in production hurts their efforts to use records in depositions and additional written discovery requests

Defending Discovery Disputes

- Started Early
- Take the Litigation Hold seriously and document efforts to enforce/monitor
- The company must be involved in collecting records/responding to discovery

And....

WORK HARD

"A court has a 'gut reaction' based on years of experience as to whether a litigant has complied with its discovery obligations and how hard it worked to comply."

- *Judge Shira A. Scheindlin, Jan. 15, 2010,*
- *Pension Committee ("Zubulake Revisited").*

Don't be Afraid: Be Effective

Questions?

Thank you

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