



CGOC SPRING SERIES

The State of the Art in Retention and Legal Holds

Founded by



## From The Outside Looking In:

How Outside Counsel Can Manage the Court's  
Expectations and Client's Needs on Preservation  
and Retention

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## Agenda

- Introduction
- Court Expectations
- Preparation for E-Discovery: Policies, Plans and Procedures

## The Expanding Electronic Workplace

- Today, a "large" corporation can be expected to generate in excess of 1 million e-mails daily. Over 80% of corporate communication is through e-mail.
- Less than 3% of ESI is converted to paper.
- Nearly 97% of business information is created in electronic form --- and rising.

## Types of Electronic Documents and Data Potentially Subject to Electronic Discovery

- E-mail (including attachments)
- Word processing documents
- Spreadsheets
- Presentation documents
- Graphics
- Animations
- Images
- Audio, video and A-V recordings
- Voicemail
- Text messages

## Sources of Electronic Documents and Data Potentially Subject to Electronic Discovery

- **Databases**
- **Networks**
- **Computer systems, including legacy systems (hardware and software)**
- **Servers (network, departmental, e-mail, fax, etc.)**
- **Archives**
- **Back up or disaster recovery systems**
- **Tapes, discs, back-up zip, jaz and tape drives, thumb drives and other storage media**

## Still More Sources of Electronic Data Potentially Subject to Electronic Discovery

- **Business and/or home desktop or laptop computers (i.e., "hard drives")**
- **"Deleted files"**
- **"Metadata"**
- **Internet and Intranet data, including Internet Service Providers**
- **Personal digital assistants**
- **Handheld wireless devices**
- **Mobile telephones**
- **Paging devices**
- **Audio systems, including voicemail**

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## Why We Get in Trouble

- **Volume & Accessibility**
  - The sheer volume of ESI may be the most striking distinction between it and every previous form of data.
- **Replication**
- **Transcripts/recordings**
- **"Deletion" a misnomer**
- **Ancillary information**
- **"Legacy" data**
- **Backup media**

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## Amended Federal Rules of Civil Procedure

- ESI is discoverable information
- Need robust knowledge base of electronic environment early
- Preservation expectations
- Early disclosure of facts concerning ESI
- Production format and scope
- ESI: Accessible v. "Inaccessible"
- Privilege considerations
- Discovery plans include ESI
- "Safe harbor" protection or good-faith standard for retention/preservation
- Risk of improperly handling ESI: Sanctions

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## Case Management Orders

- *In re Seroquel Prods. Liab. Litig.*, 2007 WL 219989 (January 26, 2007, M.D. Fla. 2007)
  - **Case Management Order requiring parties to:**
    - List of metadata fields to be provided during production
    - Also allows plaintiffs' counsel to conduct informal interviews of IT personnel
    - List of company databases
  - **Court Default Standards**
    - District Court of Kansas
    - District Court of Delaware
      - Designation of ESI Liaison
      - Designation of ESI Coordinator

## Reasonable Inquiry into Collection

### *Qualcomm Inc. v. Broadcom Corp.*, 2008 U.S. Dist. Lexis 911 (S.D. Calif. 2008)

- **Key Issues**
  - Good faith
  - Rule 26(g) – reasonable inquiry
    - Reliance on client personnel likely insufficient
    - Must challenge questionable results
    - Cannot simply accept unsubstantiated assurances

## Sanctions - Preservation

### *Zubulake v. UBS Warburg, 229 F.R.D.422 (S.D.N.Y. July 20, 2004)*

- Defense counsel gave repeated written and oral preservation instructions, but failed to: request data from key employee; give hold instructions to another; adequately communicate with another about how files retained; or safeguard backup tapes
- Court called client's failure willful; presumed information relevant
- Adverse inference sanction
- Jury awarded \$29.2 million (\$20.1 punitives)

## Zubulake: Lessons Learned

- **Active supervision of preservation steps is required**
- **Issue and periodically reissue the document hold instructions**
- **Communicate directly with key players**
- **Instruct all employees to produce relevant files**

## Sanctions - Preservation

### *United States v. Philip Morris USA, Inc.,* 327 F. Supp. 2d 21 (D.D.C. 2004)

- Case Management Order required preservation of relevant data
- Defendants "became aware" after 2 years that system e-mail deleted monthly – continued deleting
- Employees not following company's internal procedures ("print and retain")
- Philip Morris a "particularly sophisticated corporate litigant"
- Violators held high-level positions

## Sanctions – Preservation and Collection

### *In re Metro. Opera Ass'n, Inc. v. Local 100* 212 F.R.D. 178 (S.D.N.Y. 2003)

- Defendant labor union committed a variety of electronic discovery violations, including:
  - Failed to implement a systematic procedure for document retention and preservation
  - Delegated production to someone who did not understand the scope of electronic discovery
  - Failed to give adequate instructions to client about their discovery obligations
  - Failed to produce e-mails in a timely manner
  - Failed to supplement false response
- The court rejected the lesser types of sanctions and imposed the severest sanction - judgment against defendant

## Sanctions – Preservation and Collection

### ***Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., 2005 WL 679071 (Fla. Cir. Ct., 15<sup>th</sup> Cir. Mar. 1, 2005)***

- Morgan Stanley certified its document production was complete—later determined to be erroneous
- Discovered thousands of backup tapes maintained by Morgan Stanley which needed to be searched
- The court found that Morgan Stanley repeatedly misrepresented the circumstances under which discovery was proceeding – adverse inference instruction granted
- The court reversed the burden of proof as to the fraud charges, forcing Morgan Stanley to prove its innocence

## Sanctions - Preservation

### ***MasterCard International, Inc. v. Moulton, 2004 WL 1393992 (S.D.N.Y. 2004)***

- In this trademark infringement case, defendants waited until five months after the suit was filed before taking any steps to preserve e-mail evidence.
- Even though the court found the defendant did not act in bad faith by deleting the e-mails, sanctions were applied in the form of an adverse jury instruction due to defendant's gross negligence.

## Perils of Self-Collection

- ***Samsung Electronics Co., Ltd. v. Rambus, Inc.*, 439 F. Supp. 2d 524, 565 (E.D. Va. 2006)**
  - Not sufficient to just tell employees "save relevant documents"
- ***Wachtel v. Healthnet, Inc.*, 2006 WL 3538935 at \*8 (D.N.J., Dec. 6, 2006)**
  - Reliance only on certain business people within company to search and identify responsive documents was insufficient
- ***United States v. O'Keefe*, 2008 WL 449729 (D.D.C. Feb. 18, 2008)**
  - Sufficiency of search terms based on Fed. R. Evid. 702 -Expert testimony

## Outside Counsel's Responsibilities

- **Confirm / monitor immediate preservation steps and communication**
- **Make reasonable inquiry into collection and results**
- **Monitor identification, collection and production**
- **Knowledge of electronic environment and technology**
- **Develop lines of communication**

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## Risks and Costs of Failing to Prepare Now for E-Discovery Down the Road

- Increased costs of compliance with discovery
- Embarrassing/damaging information that should have been purged is retained and produced
- Relevant data is not retained or not produced
  - Sanctions for spoliation/destruction
    - Monetary sanctions
    - Adverse inference instruction or other ruling against interest
    - Potential criminal penalties associated with government investigations or audits

## Policies, Processes and Plans

- **Records Retention (Information Management) Policy**
- **Preservation (Litigation Hold) Policy and Process**
- **E-Discovery Plan**

**CREATE POLICIES THAT CAN BE FOLLOWED**

## Impact of Early Decisions in Information Management

### **Understanding the Electronic Environment – QUICKLY**

- Types and categories of data
- Platforms
- Retention schedules
- Storage media and policies
- Key custodians of data

## Impact of Early Decisions in Information Management

- Accessible v. "Not Reasonably Accessible"
- Gathering and Collecting Data
- Implementing Reliable Preservation Processes
- Defines what information should be available

## Best Practices in Information Management

- Robust retention program that includes ESI (**what** information is created, **where** is it located and who is knowledgeable)
- Maintain datamap of information systems
  - Includes all types of hardware and software in use and the locations of all electronic data
  - Outlines flow of data into and out of the company

## Records Retention Policy

- **Goals**

- Curb tendency of employees to retain significant volumes of electronic documents when there is no business or legal reason
- Enable organization to quickly identify and isolate information
- Educate employees on what information should be created
- Provide "safe harbor" from sanctions for nonproduction or spoliation

## Records Retention Policy

- **Must take a cross-discipline approach**

- IT
- Records management
- Legal
- Senior Management

## Elements of a Sound Information and Records Retention Policy

- **Must Identify**
  - What type of information is generated, per business unit
  - Where the information is stored
  - How the information is stored
  - Who is knowledgeable about the information and the manner it is kept
- **Policy should allow you to efficiently determine scope of production AND scope of preservation**

## Elements of a Sound Information and Records Retention Policy

- **Define the company's information and how it is to be treated**
- **Develop procedures / cycles for systematic creation, storage, recycling or destruction**
- **Communicate the policy to all employees and have the policy readily accessible**
- **Establish monitoring and enforcement plan, including periodic compliance reviews**

## Policies, Processes and Plans – Litigation Hold

- **Preservation of Data**
  - When to start preserving information
  - Scope of preservation
  - Communication of preservation notice

## Litigation Hold Practical Considerations

- **Establish procedures for suspension of ordinary destruction practices**
  - Identify third parties that need to be notified
  - Describe process for suspending normal destruction and identify individuals responsible
- **Establish protocol for implementing preservation steps**
- **Establish method of periodically communicating notice of legal hold to all necessary individuals**
- **Establish protocol to document steps taken to effectuate legal hold**
  - Persons contacted
  - Date collected and index of information collected
- **Interview key custodians (catch information falling outside of routine systems)**
- **Establish process for lifting the legal hold**
- **Privilege considerations**

## Litigation Hold Best Practices

- Be prepared to disclose preservation steps
  - Best Practice: Document the steps you take to preserve ESI, including:
    - When the hold was initiated and by whom
    - The custodians and sources involved
    - Audit and monitoring steps taken to ensure compliance
    - The date of preservation reminders
    - The collection protocol (includes instructions on how to collect if done by individual employees)
  - Best Practice: Document steps and decisions surrounding collection process

## Policies, Processes and Plans – E-Discovery Response Plan

- **Suspend** document destruction policy
- Distribute **preservation notice** to employees and third parties
- Assemble electronic discovery **response team**
- Create an **inventory** of hardware and software
- Identify **witnesses**
- Consider **forensically sound image** of hard drives from key individuals or other sources
- Determine **method** of document review and production

## Compliance Guidelines For In-House Counsel

- **Ten steps a company should take to comply with electronic discovery obligations**
  - Maintain and communicate a well-thought-out records retention policy – involve legal, IT, records managers and senior management
  - Implement and monitor records retention policy
  - Create datamap of electronic environment
  - Set up a discovery response plan and team
  - Maintain litigation hold policy and database
  - Routine communication of litigation holds
  - Make sure in-house counsel is educated about ESI
  - Make sure outside counsel is educated about ESI
  - Implement preservation steps quickly
  - Proceed cautiously with collection of ESI and document steps and decisions



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- Marie Lona is a litigation partner in Winston & Strawn's Chicago office and is the chair of the firm's e-Discovery and Electronic Information practice group. She is highly experienced in e-discovery matters in large, complex litigation from assessment and retention through production and admissibility. She assists clients in simplifying the often complex world of electronic information in anticipation of and preparation for major litigation-oriented activities. Ms. Lona routinely provides seminars to corporations concerning electronic information. She also is a member of the Sedona Conference working group, Electronic Document Retention and Productions.
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