

Legal Logistics Nuts & Bolts Best Practices Series: Litigation Hold – Sorting Through Record Preservation Issues



eDiscovery Best Practices
Stephanie A. “Tess” Blair
Director, Morgan Lewis Resources Legal Logistics



Trigger of the Obligation to Preserve

Trigger



- “The obligation to preserve evidence arises when the party has *notice* that the evidence is relevant to litigation or when a party *should have known* that the evidence *may* be relevant to future litigation.” *Zubulake IV, infra.*

Trigger



- “The duty to preserve exists as of the time the party knows or reasonably should know litigation is foreseeable.” *Mosaid Tech., Inc.*

Trigger

- Duty applies to all potential litigants
 - See *Rambus, Inc. v. Infineon Techs. AG*, 220 F.R.D. 264, 286-87 (E.D. Va. 2004) (plaintiff, knowing that it was likely to commence patent litigation, could not institute systematic destruction of records during so-called “Shred Day”)
 - See *Institute for Motivational Living, Inc., et al. v. Doulos Inst. For Strategic Consulting, Inc.*, 2004 WL 2241745 (3d. Cir. 2004)(pro se litigant)

Trigger

- Duty exists in the absence of preservation order or discovery request.
 - *Keir v. Unumprovident Corp.*, 2003 WL 21997747 (S.D.N.Y. Aug. 22, 2003)(observing that parties have obligation to preserve even while negotiating preservation orders and scope of discovery)
 - *Capricorn Power Co. v. Siemens Westinghouse Power Corp.*, 220 F.R.D. 429 (W.D. Pa. 2004)(denying cross motions for preservation order).



Scope of Preservation

Scope of Preservation

The background of the slide features a blurred image of a person in a white shirt and tie, sitting at a table and reading an open book. The scene is lit with a warm, yellowish light, creating a professional and focused atmosphere. The image is partially obscured by a dark blue horizontal band that runs across the middle of the slide.

The rules of discovery have not changed; only the level of effort it takes to comply has changed.

Scope of Preservation



“While a litigant is under no duty to keep or retain every document in its possession . . . it is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request.” (*Zubulake IV*).



The Litigation Hold

The Litigation Hold



- Key Components:

- Subject

- Directive regarding preservation of potential discovery materials and electronic data

- Description of Scope

- Define potentially relevant information
 - Explain breadth of definition
 - Caution re: underinclusive v. overinclusive

- Definition of “Document”

- Expansive meaning includes hard-copy paper, electronic data, email and attachments, databases, drafts, notes, calendars, etc.

The Litigation Hold



- Specific Instructions to Halt routine destruction of each document type as appropriate: paper, email, text files, databases, etc.
- Instructions highly contingent on:
 - Sophistication of client's IT infrastructure
 - Client's IT resources
 - volume of implicated data
 - amount at stake in litigation
 - likelihood of discovery dispute
 - agreement of parties

The Litigation Hold



- Distribution list:
 - all “key players”
 - others with potentially relevant records
- Sender – someone with “corporate heft”
 - GC or in-house counsel
 - Company’s compliance officer
 - Other
- Identify who the employees can call for help
 - In-house contact
 - Morgan Lewis contact



Getting it Right: MLB Best Practices

The Morgan Lewis solution

Firmwide Best practices that emphasize:

- ✓ DEFENSIBILITY
- ✓ COST EFFECTIVENESS

A Good Litigation Response Plan . . .

- ☞ *Is defensible*
- ☞ Satisfies current *and future* discovery obligations
- ☞ Minimizes business disruption
- ☞ Is Efficient
- ☞ Is Cost effective

Formulating an eDiscovery Strategy: The Big Picture

- Be proactive: ask questions
- Assess the potential size of the matter
- Estimate the volume of data
- Identify your goal
- Explore your options

Litigation Response Plan Best Practices



- ↓ Define
- ↓ Identify
- ↓ Preserve
- ↓ Interview
- ↓ Harvest
- ↓ Process
- ↓ Review
- ↓ Produce

Legal Logistics Nuts & Bolts Best Practices Series: Litigation Hold – Sorting Through Record Preservation Issues



eDiscovery Best Practices
Stephanie A. “Tess” Blair
Director, Morgan Lewis Resources Legal Logistics