

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



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

F.R.C.P. 26 (b)

(b) Discovery Scope and Limits.

Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General.

Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rules 26(b)(1), (ii), and (iii).

(2) Limitations.

Parties may obtain discovery regarding *any matter, not privileged, that is relevant to the claim or defense of any party . . .*

number of depositions and by order or local rule, the court frequency or extent of use of es and by any local rule shall be ought is unreasonably source that is more convenient, discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Rule 26(c).

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

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