

IN-HOUSE COUNSEL CHECKLIST FOR HANDLING ELECTRONICALLY STORED INFORMATION

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WHEN THE DUTY TO PRESERVE ESI IS TRIGGERED

- Company has notice that litigation is likely to be commenced; **or**
- An unequivocal threat of litigation is made, as opposed to generalized complaint about company's product, service, or practices; **or**
- A demand to preserve ESI has been made by a potential litigation adversary; **or**
- Litigation has been filed.

WHAT MUST BE PRESERVED

- ESI in all forms, including metadata, from company sources and key individuals.
- ESI from current employees *and* those who depart after duty to preserve has been triggered.
- ESI back-up media.
- Hard drives from computers of key individuals, even if change in operating system is made after duty to preserve has been triggered.

HOW ESI IDENTIFICATION AND COLLECTION PROCESS SHOULD BE HANDLED ONCE DUTY TO PRESERVE TRIGGERED

- Identify key individuals likely to have relevant information about the dispute and advise them in writing to preserve all such information, whether in hard or electronic form.
- Confer with internal IT staff ASAP to determine what kinds of ESI company generates and how it is preserved. Companies often have multiple databases. Counsel must understand company's operating systems. Prepare a written data map of what company has and how it will be preserved.
- Consider retaining outside forensic IT expert to develop and implement plan.
- Disable operation of policies related to destruction of ESI and hard documents with respect to relevant categories of ESI, if they can be segregated.
- Perform key word search terms on company databases to identify documents responsive to discovery requests. Consider seeking agreement with adversary about set of search terms.
- Provide discovery requests from adversary both to IT staff and to key individuals with responsive info. In response to discovery requests, interview key individuals about what information they have. What counsel says to company employees may be privileged, but they will have to be able to explain steps they took to identify and collect responsive information if challenged.
- Understand what each individual in the process is doing to identify and collect responsive ESI. Don't rely on anyone's blanket assertion of compliance with your request. If you can't explain to yourself how the data were identified and collected, you won't be able to explain it to a judge.
- Consider costs of preserving and collecting ESI demanded by adversary in relation to what is stake in dispute. Efforts need only be reasonable. Depending on the case, key search terms and interviews with key personnel may not both be required. If adversary demands more than you consider reasonable, consider demanding cost shifting.

WHY DISCHARGING ESI DUTIES PROPERLY IS SO IMPORTANT

- Monetary sanctions against in-house counsel, outside counsel, and company.
- Issue preclusion, or even terminating, sanctions.
- Bar disciplinary proceedings for misrepresentations to court or intentional or reckless destruction of documents.

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