Reports from the Data Revolution: Managing Challenges & Litigation Risk

ACC St. Louis Chapter

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Welcome to the Data Revolution

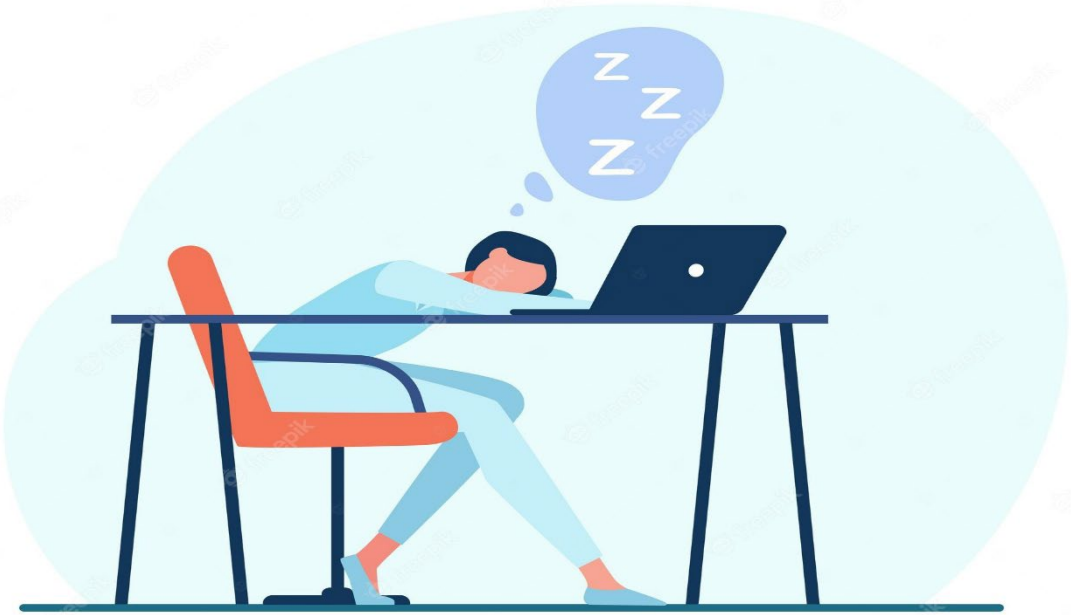
- AI: Will look at the use of generative AI in the field of litigation and will look at the various proposals to regulate AI
- Virtual Meeting Recording: Discuss the pros and cons of recording virtual meetings and lay out best practices
- Employee Devices: Examine the particular litigation risks of employees using personal devices to do company business and suggest responses

Generative AI and The Law

- The most interesting and potentially important development for the legal profession is the ongoing revolution in generative AI
- The AI revolution will find you and your industry
- Disruptions in varied industries: from call centers to Hollywood
- WGA and SAG-AFTRA strikes are partly driven by fears of loss of creative jobs to AI

The Most Important Takeaway on AI

- Don’t go to sleep in the middle of the AI revolution. Keep on top of technical and legal developments



Important Disclaimer and Definition

ChatGPT says:

- Artificial Intelligence, or AI, refers to the simulation of human intelligence in machines. In litigation, AI utilizes advanced algorithms and data analysis to perform tasks that traditionally required human expertise.
- It includes various subfields like Natural Language Processing and Machine Learning, which enable machines to process and understand legal data.

AI and Litigation

ChatGPT says:

- First and foremost, AI enhances legal research. It can sift through vast amounts of legal literature in seconds, providing lawyers with up-to-date and comprehensive information.
- AI is a game-changer in document review and e-discovery, automating tasks that once took months, reducing costs, and improving accuracy.

AI and Litigation con't

- "It's essential to see AI in action. We'll look at some real-world examples of its applications.
- [Share case studies and examples of successful AI implementations in litigation.]"
- Examples: a judge in the UK just used it to generate part of a written opinion and proclaimed it "jolly useful", and the disastrous—two attorneys were sanctioned for delivering an AI-written brief that less usefully was rife with fake case citations.
- Not just for grunt work—predict outcomes to improve strategy

The Regulation Revolution—In process

- Head of OpenAI in May asks Congress for regulation
- Multiple bills filed to regulate AI
- Senate Majority Leader Schumer holds talks with Big Tech
- States getting involved, too

What Will Congress Do?

- Schumer Approach: Consensus-seeking with Big Tech
- Go Big Approach: Warren/Graham want to regulate Big Tech and AI
- Go Slow Approach: Blue Ribbon Commission
- Focus on AI: Blumenthal/Hawley want commission that focuses on AI

AI Abroad—What Other Countries Are Doing

- EU has already passed legislation classifying different types of AI
- Israel represents laissez faire approach
- Italy banned ChatGPT, now focused on worker impact
- China is building on existing legislation targeting deepfakes, wants to encourage tech but require truthful content

Thoughts about AI and Litigation

- AI can help litigators manage documents and assemble facts, and it will only get better at those tasks:

- **But it can never replace the human qualities that make us persuasive in and out of court—the heart of litigation**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Virtual Meeting Recording—Why Do It?

- Training and Education
- Capture Brainstorming Sessions
- Replace meeting minutes
- Accurately capture client requests

Virtual Meeting Recording—Why Do It? Really, why?

- Training and Education
  - For actual training, recording makes sense
- Capture Brainstorming Sessions
  - Creates more problems than it solves
- Replace Meeting Minutes
  - Not worth the storage and more difficult review
- Accurately capture client requests
  - Not useful after contract is signed-writing should govern scope

Don’t Record Virtual Meetings—Here’s Why

- Litigation—Don’t ever create a record you don’t need
- Consent—For widespread workforce, risk of violating all-party consent laws is real
- Ethical and HR Concerns—sensitive counseling and disciplinary meetings

Retention

- No general legal requirement that recordings of virtual meetings be kept for any length of time
- Technical challenges in crafting different retention periods for recordings
- HIPAA: mandated retention and encryption
- Law firms: mandate retention—five or six years
- Size of recordings argues against lengthy retention
- Risk of employee recording

Retention and Litigation

- Once you've decided to retain, have you created a record that will need to be retained in response to legal disputes?
- Preservation? Reasonably anticipated or expected litigation
- "Expected to be relevant"—Sedona Conference
- While it may be expensive or burdensome to preserve recordings, it is also risky to purge while litigation is threatened—tread carefully

Virtual Meeting Recordings—Best Practices

- Have clear guidelines on *what* may be recorded, and make the list specific and short
- Also require permission to record and require manager consideration
- Have clear guidelines on who handles the recording and where stored
- Shorter retention timeframe?
- Carefully consider retention issues in face of anticipated litigation; may exclude from hold if certain that recordings are duplicative
- Educate employees on recording policies and track compliance

Employee-Owned Devices—Problem Scenarios

- A litigation issue, but broader than just litigation
- Small medical practice, but a lot of family devices used
- Company defending a lawsuit preserves data on its own servers, but crucial texts are lost on employee-owned devices
- Disgruntled employee is recording virtual meetings and upends HR investigation

The Consequences

- Doctors: the costs of complying with subpoena soar and government patience wears then, making eventual settlement of kickback claims harder and more expensive
- Company: Instead of prevailing on summary judgment, the company finds itself defending a motion for sanctions
- HR: The company is in an uproar as one simple investigation becomes three

Litigation Consequences of BYOD

- Employee is terminated, sends legal hold notice to former employer
- Supervisor texts regarding the employee on his own device
- Company sends preservation notice to supervisor, but doesn't mention texts
- Texts were deleted, as supervisor admits at his deposition
- Motion for sanctions claims that company had duty to preserve texts on supervisor's **personal** phone

Deciding the Motion for Sanctions

- Three part test for spoliation:
  - Party must have controlled the evidence and had duty to preserve at time of destruction
  - Evidence must have been intentionally destroyed
  - Party destroying evidence must have acted in bad faith
- ***Does an employer "control" work-related data on an employee-owned device?***

Court says "Yes"

The Court's Decision—Determining Control

- To determine control, Court uses four-factor test:
  - Did the employer issue the devices?
  - How frequently were devices used for company business?
  - Did the employer have a legal right to access comms from devices?
  - Do company policies address access to comms on personal devices?
- Employer says it couldn't control the phone because it had no legal right to access it. Alternate test is whether it was practically able to access the phone. Court rejects both tests.
- Court looks at facts that employees regularly used phones for business and company knew it to find control.

Finding Bad Faith and Determining Sanctions

- The Court found the supervisor created the messages in response to a legal hold notice, knew he had duty to preserve
- The company's notice called for preserving e-mails, not texts, which demonstrated intentionality and bad faith
- Because of proximity of the texts to the legal hold and the role of the supervisors, can conclude that destroyed texts would have helped the plaintiff
- As a sanction, Court denies company's motion for summary judgment

The Easy Solution to the BYOD Problem

ONLY COMPANY OWNED DEVICES FOR COMPANY WORK

The Easy Solution Has Problems

- BYOD is attractive to both employers and employees
  - Employers like the cost-savings and the access to employees
  - Employees don’t want two phones
- Even a company-issued device policy can be abused: executive leaves for competitor and eventually returns company phone, but only after wiping it

Second-Best—IT Management of BYOD

- BYOD, but employees who want to use devices for work must submit to robust IT management
- Firm policy must be clear and clearly communicated
- Only managed devices can connect
- Use audits to make sure every connecting device is known
- Require any use of a device not issued or managed by IT for company business be reported

Employee Devices and Litigation

- Be inclusive and holistic—once you've identified a potential relevant custodian, make sure litigation hold includes everything
- If you are BYOD or have any holes in your policies or compliance, hold preliminary tech profile interviews with custodians:
  - Identify all devices used to conduct company business
  - Determine current location
  - Was any data created or saved on any of those devices?
- Don't forget social media—did employees DM about business?

QUESTIONS?