Litigation Hold Quick Reference Guide

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Follow these steps as soon as a reasonable person would anticipate litigation:

- **Part 1: Investigate**
  - Step 1: Notify IT Professionals and your staff to: (1) cease deleting ALL data; and (2) preserve existing data (i.e relevant hardware (which may still have data even if deleted) and metadata) during investigation.
  - Step 2: Imagine that you are opposing counsel. What information would you want to prove your case? Be realistic – it will allow you to identify problem areas at the beginning of the process so they can be dealt with.
    - Outline: (1) Who – is involved or has data; (2) What – data is available and relevant; (3) Why – has the dispute arisen and what documents are involved, (4) When – did the dispute arise and how far do you have to go back to preserve the relevant data, and (5) Where – is the data located (electronically and physically).
  - Step 3: Interview all of the key players. Investigate the claim with each of them. Take their deposition, so to speak. This will help you identify the documents which need to be held and provide a better understanding of the claim when litigation starts.
    - Ask who the key and tangential players are (remember they will be asked this question in deposition). A judge will not like it if you utilize only the list you created to decide whose information to keep if a key player later identifies someone else.
    - Ask what they perceive to be the key and tangential documents, where they are located, and how have they been stored.
      - Consider paper document types: (1) signed documents; (2) handwritten notes; (3) calendars; (4) accounting\tax records; (5) bills\statements from vendors; (6) correspondence; (7) memos; (8) company policies; (9) deeds\leases; (10) HR files; (11) marketing materials and presentations; (12) requests for proposal; and (13) billables\payables records. Also ask if there is anything not on the list or unique to the circumstances or your company.
      - Consider electronic document types: (1) desktops – saved to the C: drive; (2) laptops; (3) home computers; (4) flash drives; (5) PDA's; (6) cell phones (IM and photographs); (7) CD-Roms; (8) voicemails; (9) audio recordings; (10) GPS devices; and (11) "black boxes." Also ask if there is anything not on the list or unique to the circumstances or your company.
        - Note: you are the one that has been to a seminar on document retention. Don't assume interviewees realize the importance of disclosing that there is information stored on their home computer or a flash drive. They also may not realize the importance of drafts that may be on back-up material available now.
      - Discuss outside sources of documents that may be relevant. Documents in the hands of auditors, accountants, payroll companies, lawyers, or others are within your control and therefore must be kept. If the outside source is unaware, it may delete your documents under its retention policy.
    - Ask what the relevant date range is for the data involved in the dispute.
  - Step 4: Warn of the importance to keep data. Make sure each key and tangential player is aware of the need to retain documents and should they have any doubts they should ask before deleting anything.
  - Step 5: Know your data. If you don't have a document retention policy and an excellent understanding of where your data is kept, you must interview your IT Professionals to gain that knowledge. You cannot rely upon them alone.
  - Step 6: Plan your search terms. Make an overly broad list of terms, phrases, and names associated with the claim for use with IT Professionals to perform searches for data.
- **Part 2: Collect**
  - Step 1: Paper Documents
    - Create a repository. Consider scanning and saving such documents electronically to consolidate with electronic data. Be careful with color documents if you cannot scan them in color.
    - Collect the documents. Make sure those collecting the information understand the importance of the task. Implement collection from outside sources too, such as auditors, document storage facilities, clients, and attorneys.

- Step 2: Electronic Documents
  - Communicate. You must be on the same page with your IT Professionals. One of the biggest sources of difficulty in implementing an effective litigation hold is inadequate understanding between management and IT Professionals.
  - Create a repository. Work with your IT Professionals to choose a backed-up location for the collected data.
  - Decide about Metadata. Identify the documents or information for which metadata may be relevant and make sure your IT Professional understands which data requires that the metadata be kept.
  - Choose search parameters. Work with your IT Professionals to determine how searches can be performed to collect the relevant data based on search terms you have identified.
  - Collect the data. Work with your IT Professionals to collect the data and be available for questions. MAKE SURE COLLECTION TAKES PLACE AT ALL RELEVANT LOCATIONS AND OFFICES.
  - Retain Software. Keep software needed to access data collected and held for the litigation hold.

❖ **Part 3: Follow-up**

- Step 1: Collect new data. Though you are going to catch the vast majority of relevant data and documents at the time the hold is instituted, there is the potential for additional data to develop or be found after the hold is instituted.
- Step 2: Stay on top of it. Whether you are the business owner, in-house counsel, or outside counsel, make sure the data is collected and that your client follows the hold. Keep records and send reminders because you need to be able to show that you have followed up if asked by a judge.

❖ **Part 4: Make a Deal**

- As soon as opposing counsel is involved, strike a deal on the parameters of electronic discovery. Enter agreements on: (1) what will be preserved; (2) how it will be preserved; (3) the date range of preservation; (4) search terms; (5) what format data will be preserved in; (7) how it will be produced. See Fed. R. Civ. P. 26(f) and commentary (even in state court cases this will be helpful). BE DETAILED. IF YOU MISS SOMETHING AND DELETE IT, THE CONSEQUENCES ARE BAD!

❖ **Part 5: Utilize and Produce Data**

- Step 1: Make use of the data. Utilize the documents to help deponents themselves with the communication because opposing counsel will attempt to use it, or worse, he will get them to contradict it.
- Step 2: Manage your costs of production. Producing electronic data can be very expensive. Consider hiring an outside vendor to assist. They can de-duplicate data to avoid attorney time reviewing repetitive documents and may be able to perform the privilege review at a lesser cost than counsel.
- Step 3: Conduct a privilege review. While "claw-back" and "snap-back" provisions exist at both the state and federal level, do not rely on them because: (1) you never know whether the judge will allow you to pull back the data; and (2) opposing counsel will most certainly review the information, deduce its value, and attempt to get it from another source.
- Step 4: Protect and redact protected information and that of third parties in your possession: (1) trade secrets; (2) social security numbers; (3) drivers licenses; (4) HIPAA; and others.

Michael Kelsheimer's practice focuses on commercial and employment litigation. His experience as a former briefing attorney for the United States District Court coupled with his extensive experience in commercial and employment disputes has enabled Michael to successfully secure favorable verdicts and judgments in a wide variety of commercial cases for businesses and professionals engaged in multiple industries as well as the defense of all types of lawsuits. Michael's efforts have included cases involving race and sex discrimination, collections, deceptive trade, employment discrimination, fraud, fraudulent transfer, negligence, real estate titles, and enforcement of contracts in state and federal courts as well as through binding arbitration.

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