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So You Think You Will Sue or be Sued – The Litigation Perspective

By: Karen Spaulding

Companies face numerous issues when threatened with litigation. A company that anticipates these issues and tackles them prior to receiving a summons and complaint will position itself to effectively manage litigation risk. A company that does not may hurt its litigation position. This article is the first in a series covering three general litigation areas: pre-litigation, privilege, and discovery.

First, the series will address the phase before a lawsuit is filed, including the obligation to preserve electronic and physical evidence (litigation holds), and early case evaluation from the perspective of the potential plaintiff or defendant.

Second, the series will explore privileges and protections and how they may impact the decisions that companies make in the course of the litigation. We will address attorney-client privilege and work product specific to the oil and gas industry, joint defense agreements, and the treatment of documents by state and federal Open Records Act laws.

Third, this series will discuss recent revisions to the rules of civil procedure, as well as strategies to streamline the discovery of the exponentially expanding volume of electronically stored information (ESI). This final phase will also address how to reduce the time and expense in responding to discovery requests that companies may receive as a non-party.

If you have any additional topic that you would like us to discuss, feel free to reach out to a member of our litigation team.

Anticipation of Litigation and the Litigation Hold Letter

At some point, your company will end up in litigation. All parties to the case, including plaintiffs and defendants, have a duty to preserve documents and electronic records that may be relevant to pending or imminent litigation. This is usually initiated by the issuance of a "litigation hold letter." In-house or outside counsel often issues the letter and can help determine when to send the letter, who should receive it, and what materials to preserve. Counsel can also advise on document preservation techniques that avoid complications at trial.

The trigger for issuance of a litigation hold letter depends on the facts of the individual case. In general, courts require preservation of documents when litigation is "imminent." This may be an easy date to identify—in the case of an on-site accident—but may be harder to

identify in other disputes. Courts generally find that the duty arises when a company knows or should have known that evidence "may be relevant to potential future litigation."

The litigation hold letter serves two purposes: (1) to comply with state and federal rules on preserving evidence; and (2) to document that compliance. A litigation hold letter should provide enough information to ensure the preservation of all potentially relevant evidence and should provide guidelines on how to document compliance. Managers should take proactive steps throughout the litigation to ensure the materials are preserved.

Managers should work with counsel to identify all personnel with the potential to be custodians of relevant documents. For companies large enough to employ an IT department, once counsel has prepared the litigation hold letter and identified the relevant custodians, that department should place a hold on destroying: emails, texts, instant messages cloud-based files or other similar ESI, documents, data, computers, and tapes that contain information pertinent to the claims and defenses to be raised in the litigation. Smaller companies may want to discuss hiring a specialist to assist in the process.

In furtherance of the second goal, the IT department (or other designated employee) should take care to document the preservation process, in the event the opposing party or court asks for an explanation of these steps. The standard for preservation of evidence turns on what is reasonable under the circumstances of each individual case.

The failure to properly preserve and track documents consistent with the "reasonableness" standard can result in sanctions for "spoliation" of evidence. These sanctions can range from a finding of an adverse inference (in short, a finding against your company on an issue, claim, or defense), to outright dismissal of a claim or defense.

For example, an audio recording became the subject of a preservation dispute in Mueller v. Swift, the infamous case in which a Denver radio personality sued Taylor Swift over his dismissal from his job. After the radio personality had contacted both a criminal and civil attorney regarding the matter, he sent his attorney selected clips of a nearly two-hour recording between himself and his former employer. Upon sending the clips, the radio personality reportedly discarded his cell phone, spilled coffee on his computer, and tossed a non-functioning external storage drive that had a copy of the recording.

To the federal court, the radio personality's actions were plainly problematic. It sanctioned the plaintiff for spoliation because it was "abundantly clear" that litigation was evident (as evidenced by his contacting an attorney) the audio recording was relevant to disputed facts in the litigation, and Ms. Swift was prejudiced by the loss of evidence.

To avoid a similar fate, discuss your company's preservation obligations with counsel early and often. The duty to preserve documents lasts for the entirety of the litigation, including any appeal.

For further information regarding litigation hold letters or duties to preserve, please contact a member of our litigation team.