How to Organize Company Data before Litigation Arises Checklist

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A Checklist of the key actions that an organization and its counsel should take so that the organization is prepared for future electronic discovery (e-discovery) obligations when litigation arises.

Know the Organization's Legal Obligations

- **Understand the broad scope of permissible discovery.** The Federal Rules of Civil Procedure (FRCP) require organizations to make several disclosures during litigation, such as:
  - at the beginning of litigation, the parties must produce or describe the categories and location of documents (including **electronically stored information** (ESI)) that are relevant to the subject matter of the dispute and which they may use in the proceeding (FRCP 26(a)(1)); and
  - parties served with **requests for production** or non-parties served with **subpoenas** must produce responsive documents unless they object to the disclosure (for example, on the grounds that responsive documents are protected from disclosure by the **attorney-client privilege** or the **work product doctrine**) (FRCP 34 and 45).
- **Review the applicable law in the relevant jurisdiction.** There is a growing body of US federal case law and local rules addressing parties' e-discovery obligations. Individual US states may have their own e-discovery rules governing litigation in state courts (see, for example, California's Electronic Discovery Act).
- **Implement a preservation protocol hold when litigation is reasonably anticipated.** A party generally must:
  - preserve all relevant and reasonably accessible ESI (and other information) as soon as it reasonably anticipates becoming involved in litigation or a government investigation (see Practice Note, Duty to Preserve Evidence (Federal)); and
  - issue a written **litigation hold** notice to direct employees to preserve (and refrain from destroying or modifying) relevant records and ESI (see Standard Document, Litigation Hold Notice).

  For more information on preservation and litigation holds, see Preserving Documents and Electronically Stored Information Toolkit and Litigation Hold Toolkit.

Put a Records Management Program in Place

An organization should maintain a comprehensive records management program to:

- Reduce the amount of ESI the organization stores.
- Simplify the process of locating and **collecting** relevant ESI.

Under FRCP 37(e), a party that loses relevant ESI may be sanctioned if it did not take reasonable steps to preserve it. An effective records management program should:

- Comply with the various federal, state, and local laws governing the preservation of ESI and other material.
- Be written down in a **document retention policy** (see Standard Document, Document Retention Policy).
- Set out procedures for:
  - preserving backup tapes as necessary; and
  - permanently destroying ESI, which may sometimes exist even after being deleted from one location.
- Require an immediate freeze on routine records destruction once the preservation duty is triggered.

For more information about information governance, see Practice Note, Information Governance: Establishing a Program and Executing Initial Projects.

Determine Where the Organization Stores Its ESI

- **Create a data map.** To comply fully with future e-discovery obligations, the organization must know what ESI it has and how to access it. This can be achieved by creating a "data map" that identifies:
  - the various ESI sources and locations;
  - the retention periods for different types of ESI; and
  - which ESI is not reasonably accessible (such as ESI maintained by a third party **cloud computing** vendor).
- **Keep the data map current.** The organization's in-house counsel and information technology (IT) personnel should work together to periodically update the data map.
- **Consult with the relevant professionals.** In connection with the data-mapping process, the organization must identify the professionals who maintain the organization's ESI. ESI professionals may include the organization's IT or records management personnel and third party vendors who manage the organization's offsite data storage. These individuals can help the organization:
  - locate the ESI; and
  - preserve the ESI when it has a duty to do so.

Assemble a Record Retention Team

Organizations should have an e-discovery retention team in place well before litigation arises. Each team member ideally should have a basic understanding of:

- The organization's discovery obligations.
- Where the organization stores its ESI.
- The identities of the organization's anticipated ESI custodians.

Possible team members and examples of their respective responsibilities include:

- **In-house counsel.** The organization's in-house counsel typically send out the initial litigation hold notice (see Standard Document, Litigation Hold Notice).
- **IT personnel.** IT personnel help ensure ESI is preserved.
- **Records management administrators.** Records management administrators usually stop the organization's routine document destruction activities when the organization has a duty to preserve.
- **Department heads and human resources personnel.** Department heads can identify key custodians and instruct their subordinates to preserve relevant information. Human resources personnel typically manage incoming and departing employees subject to a litigation hold.
- **Outside counsel and vendors.** Once litigation is reasonably anticipated, outside counsel and vendors can develop and implement preservation, collection, review, and **production** protocols.

Establish an E-Discovery Plan

The organization should have a plan in place to ensure that it complies with its e-discovery obligations as soon as it reasonably anticipates litigation or a government investigation. The e-discovery team should lead the efforts to implement the plan. Among other things, the e-discovery plan should set out:

- Procedures to alert all e-discovery team members as soon as litigation or a government investigation involving the organization commences or is reasonably anticipated.
- Steps to immediately halt the routine destruction of potentially relevant ESI and other materials, including:
    - interviewing key employees and custodians of relevant information to find out the categories and location of potentially relevant ESI and other documents they possess;
    - issuing a written litigation hold notice that instructs all employees who may possess relevant information to preserve it;
    - requiring the preservation of backup tapes containing potentially relevant ESI; and
    - directing the e-discovery team members or their agents to monitor compliance with the organization's litigation hold.

Train Employees on Records Preservation

Organizations should train their employees on how to properly preserve relevant ESI and other documents so that employees can immediately and correctly preserve this data on receipt of a litigation hold notice. Failing to do so may result in the inadvertent destruction of relevant information and subject the organization to sanctions. For various resources on spoliation sanctions, see Sanctions Toolkit.

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