

Houston Metropolitan Paralegal Association
February 10, 2015

Litigation: The First 48 Hours

How you handle the beginning of a lawsuit impacts your ability to win.

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Litigation: The First 48 Hours

- **Four Steps to Take With New Litigation:**
 - Preserve *evidence*
 - Protect *the privilege*
 - Investigate *the facts*
 - Coordinate *with outside counsel*

Evidence Preservation

Evidence Preservation

In the absence of litigation . . .

- **Document Retention Policy :**
The Permissible Destruction of Documents
 - Manage large volumes of data
 - Impractical to store indefinitely
 - Potential harm of stale legacy data

Evidence Preservation

Suspend document retention policy when there is a **reasonable likelihood** of litigation or investigation:

- Lawsuit filed
- Credible threat of lawsuit
- Amicable resolution breaks down
- Demand letter
- Complaints
- Significant injury
- Plans to file lawsuit
- Outside counsel hired

Evidence Preservation

- What happens if evidence is not properly preserved?
 - Sanctions
 - Adverse inference
- Arthur Anderson, a cautionary tale.
- A lackadaisical attitude can be as bad as intentional destruction.

Evidence Preservation

- “**Document**” Preservation is a misnomer -- think “**Evidence**”
 - computers, emails, shared drives, file cabinets, desk drawers
- Often overlooked:
 - Voicemail
 - Instant messages
 - Text messages
 - Social Media
 - Home computer
 - iPhones / iPads
 - Cloud storage
 - Third Parties
 - Personal email accounts
 - Flash drives

Evidence Preservation

- Preservation is costly.
- How to manage the scope to control costs:
 - Duty to preserve all “potentially relevant” evidence
 - Proportionality – small claim vs bet-the-company
 - Evidence that is difficult or costly to preserve
 - Unreadable legacy data
 - Data not typically stored or preserved
 - Reach agreement with opposing counsel
 - Seek protective order
 - Rule of Thumb: ***Will actions be viewed by court as reasonably diligent?***

Evidence Preservation

- Preservation Checklist:
 - Work with IT to disable automatic deletion protocols
 - Identify 30b6 witness
 - Identify custodians
 - Legal Hold Memoranda (amend and supplement when needed)
 - Work with IT to Collect / Preserve
 - Audit preservation throughout (spot check)
 - Confirm that all custodians have preserved potentially relevant evidence
 - Issue periodic reminders to custodians (quarterly)
- KEEP DETAILED RECORDS

Evidence Preservation

- Elements of an effective Legal Hold Memoranda:
 - Describe litigation, potentially relevant facts, custodians
 - Outline duty to preserve
 - Request information on additional custodians, locations of evidence
 - Amend or supplement legal hold when appropriate
 - Require signed acknowledgement

Evidence Preservation

- Process for lifting a legal hold
 - Hold quarterly meetings to review all legal holds
 - Lift hold when litigation is complete
 - No longer a reasonable expectation of litigation
 - Case is complete (including any appeals)
 - Settlement
 - Helpful Tips:
 - Get guidance from outside counsel
 - Notify opposing counsel / get agreement where appropriate
 - Include provision in settlement agreement

Protect the Privilege

Protect the Privilege

- Common Misconceptions
 - CC'ing an attorney will make an email privileged
 - Any communications with inhouse counsel are privileged
 - Inhouse counsel can't be called as a witness
 - Any documents prepared by inhouse counsel are privileged
 - It is difficult to waive the privilege
 - Adding "privileged" disclaimer to signature of an email will protect it from production
- **WRONG!**

Protect the Privilege

- Attorney-Client Communication
 - Communication to/from attorney
 - Made in confidence
 - For purpose of obtaining legal advice

Protect the Privilege

- Nuances of Attorney-Client Communication Privilege
 - Inhouse attorneys may act in non-legal capacities
 - Non-legal discussions are not privileged
 - Try to segregate business / legal communications
 - CC'ing an attorney on an email does not make it privileged
 - Communication must be made confidentially
 - Talking in public
 - Including third parties on emails or in meetings
 - Privileged communications must be treated differently
 - Non-boilerplate “privilege” language
 - Use key language court will recognize – seeking/providing legal advice

Protect the Privilege

- Attorney Work Product
 - Document
 - Created by attorney
 - In anticipation of litigation

Protect the Privilege

- Nuances of Attorney Work Product
 - “Document” is interpreted broadly
 - Notes, diagrams, memoranda, analysis, charts, etc.
 - Extends to anyone acting in legal capacity
 - Paralegals, legal assistants, experts or consultants hired by legal
 - Experts hired by business team may not be covered
 - Documents prepared by business team only covered if done at the direction of counsel
 - Maintaining confidentiality is critical – disclosure to third party may waive protection
 - Clearly label and keep separate from “evidence” to avoid inadvertent production.

Protect the Privilege

- Tips for protecting the privilege
 - Educate officers and employees
 - Be careful of inhouse counsel non-legal duties
 - Pick up the phone
 - Treat privileged communications differently
 - Negotiate claw-back agreement with opposing counsel

Investigation & Fact Gathering

Investigation & Fact Gathering

- Common problems with fact gathering in the early stages of litigation:
 - Rushed and haphazard
 - Reactive to the necessities of the litigation
 - Unwillingness to give appropriate weight to “bad” facts
- Consequences:
 - Miss opportunities to self-correct
 - Fail to accurately assess company’s exposure
 - Inaccurate estimation of costs

Investigation & Fact Gathering

- Conduct a new litigation investigation as early as possible:
 - Determine early on whether lawsuit / investigation poses a serious risk to company
 - Comparative credibility of witnesses
 - Find “bad documents” early
 - Accurately assess the strengths and weaknesses of your case.
 - Get a better understanding of potential costs
 - Likelihood of success on dispositive motions?
 - Settlement opportunities?

Investigation & Fact Gathering

- Elements of an effective investigation
 - Delegate investigation to outside counsel?
 - **Pro:** preserve relationships within company, independence, experience, avoids duplication later on
 - **Cons:** Costs, inhouse counsel has better knowledge of business/company
 - Learn as much as you can before you start asking questions.
 - Create an investigation road map
 - Begin with the key witness?
 - Don't be afraid to ask hard questions
 - BE OBJECTIVE – try to see the facts from the eyes of a judge/juror

Investigation & Fact Gathering

- Interviewing Potential Witnesses -- Preliminaries
 - Never interview alone
 - Give *Upjohn* warning:
 - You represent the company, not the witness
 - The discussion is privileged, but the privilege belongs to the company
 - The company may choose to waive privilege
 - Take careful notes
 - Be careful to keep notes/analysis separate from evidence to avoid inadvertent production

Investigation & Fact Gathering

- Interviewing Potential Witnesses – What You’re Looking For:
 - Assess witness demeanor
 - Keep in mind that innocent people can look guilty (and vice versa)
 - What impression will this person make on a judge/jury?
 - Does the witness’s account make sense?
 - Usually, the truth makes sense.
 - Don’t be afraid to ask dumb questions.
 - Are there conflicts or contradictions in the witness’s account of the facts?
 - Are there internal inconsistencies in witness’s story? (most relevant)
 - Are there inconsistencies with other witnesses? (not unusual)
 - Does the witness’s story change?

Investigation & Fact Gathering

- Interviewing Potential Witnesses – Expectations
 - You are not Sherlock Holmes
 - Real life doesn't work that way
 - Example of Serial Podcast
 - Your goal is to arrive at an understanding of the strengths and weaknesses of your case.
 - Be careful not to . . .
 - Overestimate strengths
 - Underestimate weaknesses
 - Example – 93% of people think they are above-average drivers

Coordinate With Outside Counsel

Coordinate With Outside Counsel

- Costs – conflicting incentives
 - Both inhouse and outside counsel want to win.
 - But outside counsel has a conflict of interest when it comes to costs.
- How to manage costs
 - Discuss expectations at the outset – is this a “must win” case?
 - Budget
 - Impossible to accurately predict litigation costs.
 - But budgets serve as a good tool to keep tabs on legal spend.
 - Review bills carefully – don’t be afraid to complain

Coordinate With Outside Counsel

- Outside counsel can help you manage your client:
 - Good cop, bad cop
 - Help client make strategic decisions
 - Pride/fear/anger impair strategic thinking.
- Insist that you have adequate time to review filings prepared by outside counsel.
- Know when to get out of the way

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Conclusion

- Preserve *evidence*
- Protect *the privilege*
- Investigate *the facts*
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Questions?