TEXAS LITIGATION SOLUTIONS

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LITIGATION HOLDS, PART 2: TRIGGER EVENTS

The October 2010 newsletter provided a broad overview of litigation holds – internal procedures to preserve relevant information when suit is anticipated or filed -- particularly as they relate to the preservation of electronic data. It also introduced the concept of the hold letter, a written notice to all appropriate persons in an organization that litigation is anticipated and that certain categories of documents and other records must be preserved, regardless of the type of media and method of storage involved. This article revisits litigation holds with a discussion about recognizing and analyzing events that may trigger a hold. Identification of triggering events and analysis of the duty to preserve are the first two steps in the litigation hold process. Broadly defined, issuing a litigation hold is appropriate not only when suit has been filed, but also whenever litigation reasonably may be anticipated. There are certain specific events that are known triggers for initiation of the hold process.

Known Trigger Events

The following list is not exclusive, but common events that should trigger the litigation hold process include: receipt of pre-litigation correspondence such as a "preservation letter" from a party who may (or has) sued you or a notice of the intent to sue; internal creation of a list of potential opponents before filing suit; retention of counsel or experts in anticipation of suit; circulation of internal "document hold" memoranda; knowledge of industry-wide litigation to which you also may be susceptible; partial settlement of a claim; receipt of a letter requesting an explanation for not hiring or, for example, asserting contract breach; or the imminent appearance of a suit. Other triggers include pre-litigation discussions, demands, agreements, or mediation; notice provided to an insurance carrier; claims filed with an administrative agency; substantive conversations with supervisors and others about a possible suit; deposition testimony from other cases; or congressional or legislative inquiry.

When a triggering event occurs, organizations should have procedures in place for identifying and analyzing the event and formulating an appropriate (cont'd page 2)

RECENT CASE OF INTEREST

Philip M. Adams & Assocs., LLC v. *Winbond Electronics Corp.*, No. 1:05-CV-674 TS, 2010 WL 3767318 (D. Utah Sept. 16, 2010). Plaintiff accused defendant Micro-Star International Corporation Ltd. ("MSI") of failing to preserve certain emails and other relevant evidence and brought a motion for sanctions. In concluding that MSI had a duty to preserve the evidence at the time of its destruction, the court observed that suits involving other entities had served as industry-wide notice of potential litigation, and that MSI's involvement in prior suits should have provided it with ample experience regarding its obligation to preserve evidence. Ultimately, the court determined that an adverse inference instruction to the jury was appropriate.

LITIGATION HOLDS, PART 2 (CONT'D)

response. It is a good idea to have a committee or point person charged with review and analysis of triggering events, but it is also important to educate other key individuals, including IT staff, department heads, committees and officers, about the significance of such events. All employees should receive some instruction regarding litigation hold triggers and be asked to recognize and timely report possible fact situations or events that could be triggering events.

Trigger Event Analysis

The standard for analysis of triggering events and the onset of a duty to preserve is not black and white. Therefore, when examining potential triggers, determining your duty to preserve may best be served by employing a "knew or should have known" standard; that is, determining whether a reasonably prudent person should have recognized litigation was coming.

Whether you utilize the point-person or committee approach to trigger event analysis, those who are charged with evaluating potential triggers need to be familiar with the organization's history of litigation and investigations, and be educated to timely recognize any potential trigger events. The best candidates to do the analysis are members of your in-house legal department. If there is no in-house legal team, a CFO, CIO, or compliance officer may be the best choice, because you need someone (or some group) who has broad general knowledge of the organization. No matter who undertakes trigger event analysis, the process must be driven by people with significant organizational authority to command cooperation and compliance.

Trigger analysis requires the point person or committee to engage in fact finding, the success of which depends on timely and appropriately directed reporting of possible trigger events by employees, departments, and officers. To that end, it is important that employees, especially key personnel, learn how to recognize trigger facts, regardless of whether those employees play any role in subsequent assessment of the triggering event.

Legal analysis of possible trigger events also requires considerable documentation, particularly if you conclude that no litigation hold is necessary: If it turns out there is litigation, the court may ask why you did not institute a hold, and you will want to be able to show why your decision was reasonable. At a minimum, documentation of trigger-event legal analysis should include a record of all relevant facts, a comparison with known trigger events, and a well-reasoned and clearly articulated conclusion as to the necessity -- or lack thereof -- of the hold.

Drawing Conclusions

As discussed briefly in the October newsletter, an organization should choose to issue a written litigation hold whenever litigation may be reasonably anticipated. While that standard provides some guidance as to the duty to preserve and level of scrutiny required for trigger event analysis, recent court decisions have more clearly defined the importance of meeting the standard. The importance of litigation holds and the trigger event identification and analysis that precede them cannot be overstated. Organizations may suffer severe court-imposed consequences if they destroy or otherwise fail to preserve documents and records that are, or should have been, the subjects of a hold.

In the 2010 *Pension Committee v. Banc of America* case, the trial court said, "[C]ourts have a right to expect that litigants and counsel will take the necessary steps to ensure that relevant records are preserved when litigation is reasonably anticipated, and that such records are collected, reviewed, and produced to the opposing party." *Pension Committee v. Banc of America*, 685 F.Supp.2d 456, 461 (S.D.N.Y. 2010). When such steps are not taken, "the integrity of the judicial process is harmed and the courts are required to fashion a remedy." *Id* at 462. Because failing to issue a written litigation hold

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when necessary likely will result in relevant information being destroyed, that failure may constitute gross negligence (*Id.* at 465), which can result in the imposition of harsh sanctions. *Id.* at 496-97.

In two newsletters, we have discussed the initial steps in the litigation hold process: identifying triggering events, analyzing the preservation duty, determining the scope of the litigation hold, and composing the hold letter. Future topics will include enforcement, modification, and monitoring of the litigation hold, including making the decision to remove a hold when appropriate.

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