

# Litigation Ethics: Obligations and Potential Pitfalls for In-House Counsel

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## Litigation Ethics Rules Apply to Both Outside and In-House Counsel

- California Rules of Professional Conduct apply to **all** members of the State Bar (and members of other Bars registered in CA)
  - CRPC 1-100(A), (B)-2; CA Rule of Court 9.46
- Litigation, and activities "in anticipation of litigation," implicate a number of Rules of Professional Conduct involving **competence** and **communication**
- Rapidly evolving technologies, and cyber-risks, may inform your decisions about marshaling internal and external resources for discovery



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## But My Law School Did Not Teach Predictive Coding . . .

- Model Rule 1.1, "Maintaining Competence," requires lawyers to "keep abreast of changes in the law *and its practice, including the benefits and risks associated with relevant technology . . .*" (Comment 8)
- Model Rule 5.3, "Responsibilities for Non-Lawyers," requires lawyers with "managerial authority" to ensure the "firm" has reasonable assurance that non-lawyers provide services compatible with lawyer's professional obligations (Comments 1 - 3)
- CA Formal Op. 2015-193 requires attorneys who represent clients in litigation either to be **competent in e-discovery or associate with others who are competent**



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## Is Your Sensitive Data Adequately Protected?

- ABA Formal Op. 477 (May 2017) says attorney's "reasonable efforts" to prevent unauthorized disclosure of confidential information under Model Rule 1.6(c) (Confidentiality of Information) **requires a process to systematically assess and address cybersecurity risks**
- Opinion further states that Model Rule 1.4 (Communication) **may require a lawyer to discuss security safeguards with client, for "highly sensitive confidential client information"**
- HIPAA, Graham-Leach-Bliley and other statutes **may require higher levels of data security**



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## Why Else Should You (In-House Counsel) Care About *Litigation Ethics*?

- **Sanctions** for Failure to Preserve / Spoliation of Evidence
  - *Rosen v. St. Joseph Hosp. of Orange Cty.*, 193 Cal. App. 4th 453 (2011)  
(remedies for spoliation by third party served with subpoena include contempt, monetary sanctions, attorney discipline, and adverse evidentiary inferences against litigant who benefits from the spoliation)
  - *GN Netcom, Inc. v. Plantronics, Inc.*, 2016 WL 3792833 (D. Del. 2016)  
(sanctions imposed for manager's deletion of emails)
  - *Jones v. Bremen High Sch. Dist. 288*, 2010 WL 2106640 (N.D. Ill. 2010)  
(sanctions imposed for failure to timely impose litigation hold and to giving interested employees unfettered discretion to collect documents)
  - FRCP 37(e) (sanctions may be imposed if reasonable steps to preserve not taken)
  - CCP, e.g., sections 2023.030 & 128.5



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## Litigation and Legal Holds: *When Do You Need to Issue a DND Notice?*

- *Matthew Enter. v. Chrysler Grp.*, 2016 WL 2957133 (N.D. Cal. 2016)  
(duty to preserve attaches when litigation is foreseeable)
- Circumstances requiring DND could include:
  - Filing of Action
  - Administrative Proceeding
  - Government Investigation
  - Demand Letter
  - Third-Party Subpoena
  - Demand on Third Party?
  - Anticipation of Litigation?



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## When Is the Obligation to Preserve Triggered? Case Law

- *In Re Napster, Inc.*, 462 F. Supp. 2d 1060, 1070 (N.D. Cal. 2006)  
(duty to preserve attaches when party "should reasonably have believed that litigation against it was probable")
- *Lueter v. State of California*, 94 Cal. App .4th 1285 (2002)  
(litigant's demand to non-party can trigger duty)
- *Johnson v. United Servs. Auto. Ass'n*, 67 Cal. App. 4th 626 (1998)  
(a "specific request to preserve accompanied by an offer to pay the cost or otherwise bear the burden of preserving" can give rise to a third party's duty to preserve)

## How To Assess Your Company's Preservation Obligations and Burdens

- Extent of duty to preserve depends on **specific facts of matter** and Rule 26 "proportionality" evaluation
  - Both often difficult to assess at an early stage
- Keys:
  - Relevancy
  - Proportionality
- Preservation obligation is **broader** than production obligation
- Ethically appropriate assessment of potential ESI sources
- Ethically appropriate communication with employees about HOW to preserve

## Litigation Holds: *Who Has Documents?*

- Start with key custodians
  - Remember to **update** DND notices as you learn of more custodians, or as scope of allegations/defenses change
- Identification requires preliminary evaluation of allegations and defenses
- Employee interviews to determine likely sources of documents
  - Drill down in each Department
  - "Pack rats"-- they're dangerous, but **valuable**
  - Think of it as preparing your defense



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## Litigation Holds: *Where Are the Documents?*

- Work with key managers and IT to identify sources (not just employee emails)
  - Identify shared drives and network drives
  - What data may be in cloud-based services?
- Identify databases used by functional organizations or support organizations
- Identify types of reports that can be generated from databases
  - May be necessary also to learn what *cannot* be generated
- Identify and **memorialize** process for collection, including employee questions, responses, IT assistance

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## Litigation Holds: *Where Are the Documents?*

- BYODs: personal laptops, cellphones, tablets, iPhones, blackberries
  - Is business done -- **or discussed** -- through text, IMs, social media, blogs
- Personal emails
  - *City of San Jose v. Sup. Ct.*, 2 Cal. 5th 608 (2017) (city employees' use of personal emails to conduct official business subject to disclosure)
- The proverbial boxes in the engineer's garage . . .
- Subcontractors, vendors and other third parties



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## Litigation Holds: *What Goes in the DND Notice?*

- Content is Key
  - Be Specific
  - Describe case, allegations, parties, subject matter, **relevant time period**
  - Give **examples** of potential ESI types on employees' devices (email, voicemails, texts) or on shared drives/in databases
  - **Non-exclusive** list of "document" types
- Identify Law Department and IT POCs for questions
- Tip: make sure employees WAIT for collection, rather than forwarding emails
- Remember: **CYA**

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## Litigation Holds: What Are Your Company's Information Governance Policies and Practices?

- Work with IT and Counsel
  - Auto-deletion, recycle and wipe, etc. policies
  - Policies may well have changed over the relevant time period -- important to capture historical practices
- Backup and Disaster Recovery Systems
  - Business reasons to have them
  - Legal reasons to have them
    - Insurance
    - Financial institutions
    - Medical industry



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## Backup and Disaster Recovery Systems: Litigation Impact

- If you have them, you probably need to keep them
  - *Zubalke v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004)
- Courts can order search and production for "good cause"
  - FRCP 26(b)(2)(B)
  - CCP § 2031.310(b)(1)
- Suspend rolling deletion protocols?
  - Too costly?
  - Get opposing counsel's agreement and/or court approval to do business as usual



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## Communications: Privilege and Confidentiality

- Not necessarily the same thing; privilege narrower, but often stronger
- Internal communications with in-house counsel *might* be privileged
  - "Jack of all trades:" are you acting in a legal or business capacity?
  - Are you giving legal advice?
  - Is litigation anticipated?
  - Are there others (non-employees) involved? Consultants?
  - Are employees talking amongst themselves, at your direction?



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## Promoting Smart, Strategic, and Privileged Communications

- Direct communications about a case, an investigation, etc. *to you*
  - Increases likelihood communication will be privileged
  - Employees chatting about a case probably are not privileged
  - Solution: consider regular meetings
- Limit group to those who "need to know"
  - Think hard about the distribution list
  - But must err on side of inclusion
  - Litigation hold notice should instruct "DO NOT FORWARD"
- Encourage verbal communications:
  - "Call me," not "email me"



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## Promoting Smart, Strategic, and Privileged Communications

- "Problem" employees
  - In-house lawyer's duty is to the company, not individuals
  - Employees may be obligated to assist, but you may need to tell them you represent the company, not their individual interests
  - In some circumstances, pool counsel may be necessary
- External Communications
  - Likely will not be privileged
  - Run through outside counsel
    - PR firm example

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# Questions?

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## Speaker Biography



**Michael Duvall** is a member of Dentons' Litigation and Dispute Resolution practice, focusing on class actions, business and commercial litigation, appeals and administrative enforcement actions.

Michael has defended dozens of class actions including successfully trying a consumer class action, has successfully argued several appeals in federal and state courts throughout the country and has briefed multiple cases to the United States Supreme Court.

Michael regularly represents both public and private companies in the insurance, real estate, food, pharmaceutical and telecommunications industries. He defends those companies in class actions alleging consumer fraud and unfair competition; in product liability class actions; in employment, trade secret and employee classification disputes; and in shareholder and corporate governance disputes. Michael's cases regularly involve alleged violations of federal and state consumer protection laws, including the Real Estate Settlement Procedures Act (RESPA), the Racketeer Influenced and Corrupt Organizations Act (RICO), the Fair Credit Reporting Act (FCRA), the Fair Debt Collection Practices Act (FDCPA), the Fair Housing Act (FHA), California's Unfair Competition Law (UCL) and California's Consumers Legal Remedies Act (CLRA).

Michael also regularly represents victims of domestic violence in pro bono matters and was named a Volunteer of the Year for the Legal Assistance Foundation of Chicago for 2016.

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## Speaker Biography



**Susan Mitchell** is the US Engagements Partner and a Los Angeles-based litigator whose primary practices are commercial litigation and representation of federal contractors in government investigations and enforcement proceedings. She has extensive experience in federal and California state court litigation involving allegations of breach of contract, fraud, unfair competition, wrongful termination and other business disputes.

Ms. Mitchell has managed litigation in several False Claims Act (FCA) cases, including representation of one of the defendants in the landmark Supreme Court case of *Allison Engine Co. v. United States ex rel. Sanders*. She has conducted more than 50 internal investigations, and successfully represented contractors in more than 20 investigations by the Department of Defense (DOD) Office of Inspector General, the National Aeronautics and Space Administration (NASA) Office of Inspector General, the Defense Criminal Investigative Service (DCIS), the Naval Criminal Investigative Service (NCIS) and the National Reconnaissance Office (NRO). She advises clients on reporting under the Federal Acquisition Regulation (FAR) Mandatory Disclosure Rule, and compliance issues under the FCA, the Anti-Kickback Act, the Foreign Corrupt Practices Act and other federal statutes and regulations.

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# Thank you



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