

Document and ESI Retention: Professional and Other Responsibilities of In-House Counsel

January 16, 2018

Michael J. Duvall
Susan A. Mitchell
601 South Figueroa Street
Suite 2500
Los Angeles, CA 90017-5704
D +1 213 892 2818
michael.duvall@dentons.com
D +1 213 243 6189
susan.mitchell@dentons.com

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

- Litigation, and activities "in anticipation of litigation," implicate a number of Rules of Professional Conduct involving **competence** and **communication** (CRPC 3-100, 3-110; ABA Model Rules ("MR") 1.1, 1.4)
- Rules of Professional Conduct apply to **all** members of the State Bar
 - "Law firm" definition includes in-house counsel if more than one lawyer in the "department"
 - "Registered In-House Counsel" under California Rules of Court, Rule 9.46
 - Work for "qualifying institution"
 - Be a member in good standing of some state bar
 - Provide services only for institution, not employees
 - Register, renew annually, notify CA State Bar of any change in employment
 - Meet MCLE requirements



But My Law School Did Not Teach Predictive Coding

- Calif. Rule Prof. Conduct 3-110 "competence" obligations "*evolve as new technologies develop and become integrated with the practice of law*" (CA Formal Op. 2015-193; see MR 1.1 Comment 8)
- Formal Op. 2015-13 and MR 5.1 & 5.3 make clear that lawyers with "managerial authority" in "firm" maintain supervisory responsibility for e-discovery competence of subordinates, non-lawyers; or lawyers must engage a firm or person to provide e-discovery expertise



Competence & Confidentiality: Is Your Sensitive Data Adequately Protected?

- CA Interim Op. 08-0002 cites MR 1.6(c): Sensitivity and privacy of data affect extent of "confidentiality" obligations, and level of technological sophistication of security protection for data
- Attorney's "reasonable efforts" to prevent unauthorized disclosure of confidential information transmitted over the internet **requires a "case by case" process to systematically assess and address cybersecurity risks** (ABA Formal Op. 477R, June 2017)
- Certain classes of data protected by statute or regulation -- "PII", "PHI", and PI data transmitted from EU may require higher levels of data security (Comm. 18 to MR 1.6(c))



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 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



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?
 - Internal Investigation?



When Is the Obligation to Preserve Triggered?

Case Law

- *In re Napster, Inc.*, 462 F. Supp. 2d 1060 (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
 - Model Rule 5.3 & Comments 2, 3, and CA Formal Op. 2015-13 require appropriate management of non-lawyers who collect or manage ESI
- 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 can be **valuable**
 - Think of it as preparing your defense

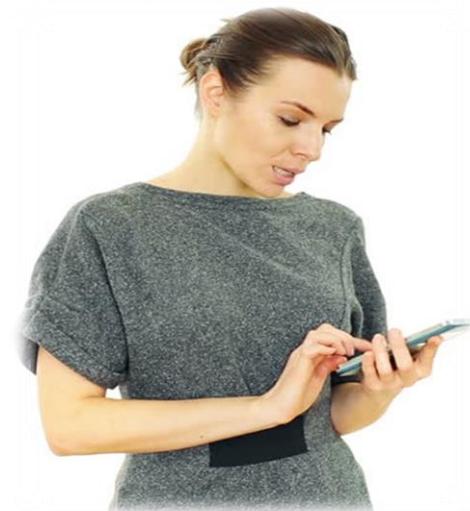


Litigation Holds: *Where Are the Documents?*

- 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?
 - Collection methodology may implicate ethical responsibilities for case-appropriate technological sophistication (CRPC 3-110; MR 1.1)
- 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

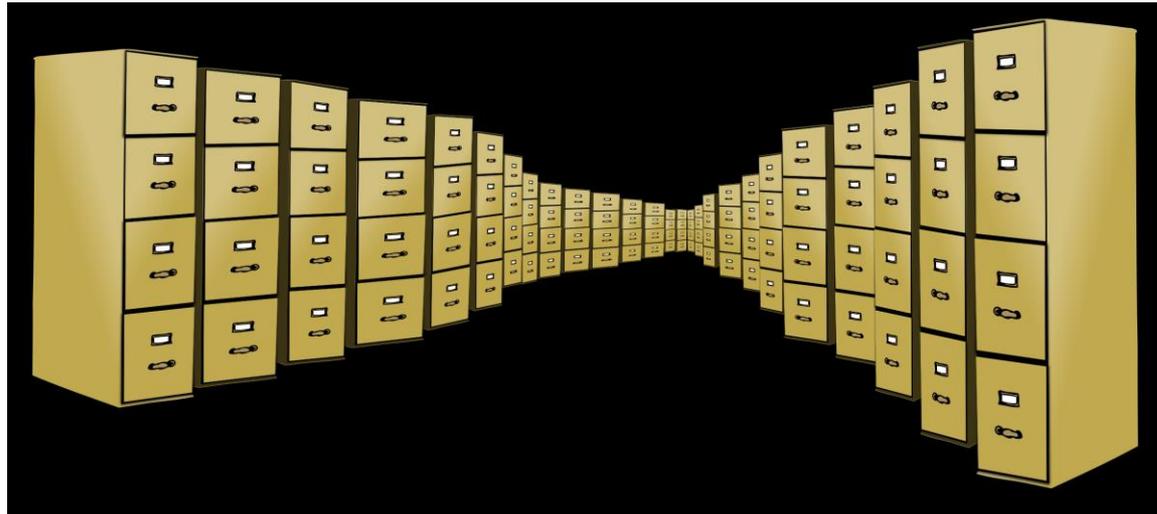
Litigation Holds: *Where Are the Documents?*

- Does your company permit BYODs for business purposes?
 - Personal laptops, cellphones, tablets, blackberries, removable media
 - Is business done -- **or discussed** -- through text, IMs, social media, blogs?
 - *City of San Jose v. Sup. Ct.*, 2 Cal. 5th 608 (2017) (employees' use of personal emails to conduct official business subject to disclosure)
 - *NuVasive, Inc. v. Madsen Med.*, 2016 WL 305096 (S.D. Cal. 1/26/16) (jury can hear evidence that employer failed to preserve key employee text messages)
- The proverbial boxes in the engineer's garage
- Subcontractors, vendors and other third parties



Advance Planning: *Where Are the Documents?*

- Does your company have a **Records Retention Program**?
 - If not, why not?
- Is it **updated**?
- Legal department may have ethical obligation to advise on implementation decision (CRPC 3-110; MR 1.1 Comm. 8)
 - A New Year's Resolution: Implement **before** your next audit, governmental investigation, litigation, etc.



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

- Content is Key
 - Be specific
 - Describe case, allegations, parties, subject matter, **relevant time period**
 - Give employees **examples** of potential ESI that may be on their devices (email, voicemails, texts), on shared drives, in databases
 - Involvement of IT personnel may be an ethical necessity (MR 1.1 Comm. 8)
 - **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 or texts
- Remember: **CYA**

What Are Your Company's Information Governance Policies and Practices?

- ACC's 2017 "Model Information Protection and Security Controls for Outside Counsel Possessing Company Confidential Information"
- Joint effort of counsel and IT personnel
 - Auto-deletion, recycle and wipe, etc. policies
 - Policies may well have changed over the time period relevant to the litigation -- 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



- May be counsel's duty to advise on necessity (Comm. 18 to MR 1.6(c))

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)
 - Consider ethical obligation for technological competence relative to this decision (MR 1.1 & Comm. 8)
- 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



Communications: Privilege and Confidentiality

- Not the same thing; privilege is narrower, but legal protection is 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?



Promoting Smart, Strategic, and Privileged Communications

- Direct communications about a case, an investigation, etc. **to you**
 - Increases likelihood communication will have ACP or WP protection
 - Discourage non-privileged "chatting" about a case by employees
 - 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"



Promoting Smart, Strategic, and Privileged Communications

- "Problem" employees
 - In-house counsel's duty is to the company, not employees -- same is true of officers and directors, in their individual capacities (MR 1.13(f))
 - Employees may be obligated to assist in company's internal investigation; but if there is a reasonably potential divergence of employee and company's interests, you need to tell employees you represent the company, not them as individuals (*Upjohn* warning; Comm. 10 to MR 1.13(f); MR 4.3; CRPC 3-600(D))
 - In some circumstances, pool counsel may be necessary

Questions?

Speaker Biography



Michael Duvall is a member of Dentons' Litigation and Dispute Resolution practice, focusing on consumer class actions, insurance litigation, and administrative enforcement actions. Michael represents public and private companies primarily in the food and nutrition, insurance, financial services and real estate industries. He regularly defends these companies in consumer fraud and unfair competition class action. He also defends these and other organizations in product liability and employment class actions.

Michael has defended approximately 100 class actions including successfully trying a consumer class action, arguing appeals in federal and state courts throughout the country and briefing multiple cases to the United States Supreme Court.

Michael's practice also includes insurance coverage and bad faith litigation, administrative investigations, examinations and enforcement actions, and related counseling of clients.

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.

Speaker Biography



Susan Mitchell is the US Engagements Partner and Deputy General Counsel. She is 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.

Thank you

大成 DENTONS

Michael J. Duvall
Dentons US LLP
601 S. Figueroa Street
Suite 2500
Los Angeles, CA 90017-5704
United States
(213) 892-2818
michael.duvall@dentons.com

Susan A. Mitchell
Dentons US LLP
601 S. Figueroa Street
Suite 2500
Los Angeles, CA 90017-5704
United States
(213) 243-6189
susan.mitchell@dentons.com

Dentons is the world's largest law firm, delivering quality and value to clients around the globe. Dentons is a leader on the Acritas Global Elite Brand Index, a BTI Client Service 30 Award winner and recognized by prominent business and legal publications for its innovations in client service, including founding Nextlaw Labs and the Nextlaw Global Referral Network. Dentons' polycentric approach and world-class talent challenge the status quo to advance client interests in the communities in which we live and work. www.dentons.com.