
Ethics for In-House Counsel – Document Preservation & Privilege Issues

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Navigate Cross-Border Disputes

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In-House Counsel's Duties Regarding Document Preservation

Ethical Obligation: Duty to Preserve

- New York Rule of Professional Conduct 3.4(a)(1)
 - A lawyer shall not: suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce
- New York Rule of Professional Conduct 3.4(a)(3)
 - A lawyer shall not: conceal or knowingly fail to disclose that which the lawyer is required by law to reveal

Triggering Document Preservation

- Federal Rules of Civil Procedure and most civil practice rules, including in New York, are silent on when the duty to preserve documents is triggered
- *Common law governs*

Triggering Document Preservation: Duty to Preserve

- More often than not, arises *before* litigation is filed:
 - The duty to preserve material evidence arises not only during litigation, but also during the period before litigation when “a reasonable party in the same factual circumstances would have reasonably foreseen litigation.”
 - *CBF Industria de Gusa S/A v. AMCI Holdings, Inc.*, (S.D.N.Y. Aug. 18, 2021)
 - A party “is obligated to preserve...all evidence that could be relevant to litigation that the [the party] should have known could be forthcoming.”
 - *Stanbro v. Westchester Cnty. Health Care Corp.*, (S.D.N.Y. Aug. 27, 2021)
- When was litigation reasonably anticipated and deemed to have been on notice of a credible threat of litigation?
- Factual Inquiry
 - “The point when a duty to preserve evidence is triggered turns on the specific facts and circumstances of the case.”
 - *Vanoil Completion Systems, LLC v. PTC Do Brasil Tecnologica Em Petroleo LTDA*, (W.D. La., Nov. 30, 2020)

Document Preservation Duty - Triggering Factors

- Staff exchanging emails re preservation of documents and previous involvement in the same litigation
 - *Bagley v. Yale University* (D. Conn. 2016)
 - *Funk v. Belneftekhim* (E.D.N.Y. 2020)
- Labeling materials * Attorney Work Product*
 - *Siani v. State Univ. of New York* (E.D.N.Y. 2010)
 - *Cornelisse v. United States* (S.D.N.Y. 2012)
- Proactively gathering evidence for a potential claim
 - *Fast v. GoDaddy.com LLC* (D. Ariz. 2022)
- Receiving correspondence about grievance or requesting investigation
 - *Castro v. Smith*, (S.D.N.Y. Aug. 22, 2023)
- Sending “cease and desist” letter
 - *RF Abrams Insurance v. Law Offices of C.R. Abrams* (C.D. Cal. 2022)
- Hiring counsel and conducting internal investigation
 - *Zimmerman v. Poly Prep Country Day School* (E.D.N.Y. 2011)

Triggering Document Preservation: Other Triggering Factors

- Nature and specificity of the complaint or threat
- Party making the claim (Aggressive? Litigious?)
- Business relationship between the accused and accusing parties
- Whether the threat is direct, implied or inferred
- Strength or value of potential claim
- Likelihood that data relating to the claim will be lost or destroyed
- Significance of the data to the known or anticipated legal issues
- Whether the company has learned of similar claims
- Press/industry coverage of the issue either relating to the company or to others in the industry

Sanctions - Failure to Preserve Electronically Stored Information (“ESI”)

- **FRCP 37(e) (adopted 12/1/15):** Failure to Preserve Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:
 - (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
 - (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may: (A) presume that the lost information was unfavorable to the party; (B) instruct the jury that it may or must presume the information was unfavorable to the party; or (C) dismiss the action or enter a default judgment.

Document Preservation & Privilege

Issues for In-House Counsel

FRCP 37(e) – (continued)

- Does not change the common law duty or triggers to preserve relevant information;
- Authorizes sanctions or curative measures that the court may employ where information that should have been preserved was lost and the findings the court must make to impose them:
 - (1) a duty to preserve ESI must have arisen; (2) the ESI must be lost or destroyed; (3) the ESI was lost or destroyed as a result of the party's failure to take reasonable steps to preserve it; (4) the ESI cannot be attained through any other source; (5) prejudice
- Provides for proportionality, reasonableness and uniform standard
- **Example:**
 - ***Fast v. GoDaddy.com LLC* (D. Ariz. 2022)**: sanctions imposed for deletion of Facebook posts and message with intent to deprive; but proportionate to prejudice suffered by adversary (adverse inference/forensic review of devices; not dismissal)

Document Preservation Duties – Third Parties

- Duty to preserve applies to Third Party Information if a party has: “the right, authority, or the practical ability to obtain” the non-party’s documents constitutes sufficient control.
 - *Conservation Law Foundation, Inc. v. Shell Oil Co.* (D. Conn. 2023)
- Notify third parties that have relevant documents
 - *Luellen v. Hodge*, (W.D.N.Y. 2014) (defendant had sufficient control over third party bank documents to direct their preservation)
 - *Funk v. Belneftekhim* (E.D.N.Y. 2020)

Document Preservation Duties – Third Parties

- A majority of courts decline to hold a party liable for third party spoliation
 - *GenOn Mid-Atlantic v. Stone & Webster* (S.D.N.Y. 2012)– (party had obligation to cause third party FTI to preserve its information, but not liable for shortcomings of its actual production)
 - *Ronnie Van Zant, Inc. v. Pyle* (S.D.N.Y. 2017) (party is only liable for a third-party spoliation if the third party is within the control of the party)
- Third party best practice:
 - When duty is triggered, consider relevant documents held by third parties over which you have the practical ability to obtain (accountant, lawyers, consultants) and provide preservation notice

Document Preservation – Best Practices

- Establish a policy for reporting threats of litigation
 - Should cover all lines of businesses
- Create a written policy regarding the decision-making process
 - Identify legal team for task; should have direct reporting from business lines
 - Written policy defining a preservation decision-making process is one factor in demonstrating reasonableness/good faith
- Consistently Reevaluate
 - Establish system for monitoring developing disputes
 - Ensure lines of business forward updated information; reevaluate with new information
- Establish litigation hold/suspend routine document retention/destruction policies upon reasonable anticipation of litigation

Attorney-Client Privilege and In-House Counsel

Federal Rule of Evidence 501 provides: “The common law — as interpreted by United States courts in the light of reason and experience — governs a claim of privilege”

General principle

- Attorney-client privilege protects:
(1) a communication, (2) made between **clients** (or their agents) and their **attorneys** (or their agents), (3) in confidence, (4) for the purpose of obtaining or providing legal assistance for the client.

-Restatement (Third) of The Law Governing Lawyers § 68

Elements of Privilege: “Client” and “Attorney”

- Who is the “client”?
 - Client is the corporation, not its employees
 - Who at the “client” can participate in a privileged communication? (without waiver)
 - Control Group Test
 - Subject-Matter Test
- Who is the “attorney”?
 - Includes agents or representatives of the attorney
 - E.g., paralegals, investigators, consultants, experts, accountants ... as long as communication is made “for the purpose of obtaining legal advice from the lawyer”

Elements of Privilege: “Legal Advice”

- What is “Legal Advice”?
 - How does attorney-client privilege apply to in-house lawyers who often wear multiple hats? (officer, investigator, business advisor)
- Business vs. Legal Advice
 1. Could a non-lawyer perform a given task?
 2. For what purpose was the lawyer contacted?
 3. Did either the client or lawyer give any indications regarding their understanding of the nature of the lawyer’s role?
- Attorneys with multiple functions: the privilege protects the attorney wearing his/her *legal* hat, not *business* hat

“Legal Advice” v. Business Advice – Recent Cases

- When are In-House Counsel (“IHC”) communications NOT Protected by Attorney-Client Privilege?
 - ***IHC communications re employee termination – Business Advice***
 - *Smith v. Bd. of Educ. of City of Chicago*, (N.D. Ill. June 19, 2019)
 - ***IHC and PR firm communications re “talking points” – Not Legal Advice***
 - *In re Signet Jewelers Ltd. Sec. Litig.*, (S.D.N.Y. 2019)
 - ***Communications among IHC, outside counsel and employee re legal exposure – Legal Advice was NOT Primary Purpose***
 - *In re Aenergy, S.A.*, (S.D.N.Y. 2020)
 - ***IHC communications to gather financial information for price negotiation – Business Advice***
 - *Urban 8 Fox Lake Corp. v. Nationwide Affordable Hous. Fund 4, LLC*, (N.D. Ill. 2020)

“Legal Advice” v. Business Advice – Recent Cases

- When are In-House Counsel (“IHC”) communications NOT Protected by Attorney-Client Privilege? (continued)
 - ***Copying IHC on communications with PR personnel – Not Legal Advice***
 - *Kinzer v. Whole Foods Mkt., Inc.*, (D. Mass. Feb. 7, 2022)
 - ***Communications re pricing methodology issues for regulatory compliance purposes – Not Legal Advice***
 - *LD v. United Behavioral Health*, (N.D. Cal. Oct. 3, 2022)
 - ***Communications to committee including IHC for regulatory compliance advice – Not Legal Advice***
 - *City of Roseville Employees' Ret. Sys. v. Apple Inc.*, (N.D. Cal. Aug. 3, 2022), motion for relief from judgment denied sub nom., *In re Apple Inc. Sec. Litig.*, No. (N.D. Cal. Sept. 12, 2022).

Attorney-Client Privilege in Investigations

- *Upjohn v. United States*, 449 U.S. 383 (1982) – attorney-client privilege attaches to communications by employees made to attorneys in order to provide legal advice to corporation
- *Upjohn* warnings - inform employees that the conversation is privileged; the privilege belongs to corporation, not employees
 - Provide warning before interview
 - Give ORAL warning, but use prepared statement
 - Make record that warnings were given (creation of contemporaneous memo)

Questions? Please contact us!



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