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RECORDS RETENTION: THE FOUNDATION OF A MANAGEABLE E-DISCOVERY PROCESS

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It goes without saying that the volume and types of electronically stored information ("ESI") held by companies has increased dramatically over the past decade. It is also axiomatic that a party's obligation to produce documents, including ESI, in litigation generally includes all responsive documents within its "possession, custody or control." The confluence of seemingly ever-increasing amounts of ESI with the liberal discovery standards prevalent across federal and state courts in this country create the potential for overwhelming ESI productions. Corporate counsel, therefore, must carefully consider the universe of documents retained by their organization in the ordinary course of business to proactively manage the scope and cost of potential discovery in the future (once litigation has begun or is reasonably anticipated, of course, an organization's retention obligations may be heightened).

Although the courts and policymakers continue to work through the implications of ESI for discovery practice, certain best practices have emerged. One of the most influential guides is the Sedona Conference's "Principles Addressing Electronic Document Production." Significantly, the Sedona Principles note the crucial role of document retention policies in e-discovery, arguing that a well-designed retention policy may help a responding party develop reasonable, defensible practices to reduce the scope and cost of e-discovery. An organization, for example, may develop policies to "establish the principal source of discovery material, thus reducing the need to routinely access and review multiple sources of likely duplicative data, including backup tapes," and thereby limiting its production to "only those materials that are reasonably available to it in the ordinary course of business." An established and reasonable retention policy, moreover, may help establish an organization's good faith (and avoid sanctions) in the event that a document or ESI relevant to litigation is destroyed before production.

An organization's rules with respect to the destruction of documents and ESI, of course, are central to any document retention policy. As a threshold matter, the courts, including the Supreme Court in its decision in Arthur Andersen LLP v. United States, have consistently held that an organization may require its employees to destroy documents in the ordinary course of business, even if one of the purposes of doing so is to prevent outsiders from gaining access to the documents in the future (again, assuming that litigation is not underway or reasonably anticipated). The question, therefore, is when documents and ESI can and should be discarded.

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RECORDS RETENTION (cont'd)

Although the answer to that question will depend on the unique circumstances of each company, the Sedona Conference, in its "Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age," states that, in general, "appropriately managed information is retained only so long as it has value to an organization or is required by law or regulation to be maintained." Setting aside for the moment obligations imposed by law, certain classes of documents may be advisable to retain for long periods or even permanently—such as insurance policies, due diligence documents, governmental permits and associated applications, or documents resolving litigation or government enforcement actions. Other classes of documents may be more likely to provide third parties with information to support a claim, rather than to exculpate the company. The decision whether the benefits of preserving a certain class of documents outweigh the legal risks and technical costs of doing so will often be a complex analysis requiring input from a company's business or financial personnel, informational technology staff, and outside counsel.

Legal obligations to retain documents are also often complex. In the environmental arena, for example, federal, state and local regulations often impose a variety of overlapping records retention requirements covering subject matters as varied as industrial discharges to the air and water; the condition of storage tanks located at a property; the handling, storage or disposal of hazardous substances; and the management of stormwater runoff. As demonstrated by EPA's compliance assistance tools, a single industry sector may be subject to record retention obligations dealing with a variety of environmental media pursuant to several regulatory programs. These obligations, moreover, may be modified by the terms of a permit or other agreement between an organization and its regulators. Failure to comply with legally-imposed retention requirements may often constitute a basis for civil penalties or other enforcement actions.

The development of a records retention policy is often complex, costly and time-consuming. It is nonetheless well-recognized as an important foundational step in the management and production of ESI. And the development of a retention policy is also an ongoing process in itself: Even if your organization has established a policy, it should be updated as the business needs and litigation risks of your company change over time.