

**Electronic Data Obligations
& Records Management**

Presenter
James L. Oakley
Partner
Thompson Coburn Fagel Haber

Thompson Coburn LLP d/b/a Thompson Coburn Fagel Haber **THOMPSON COBURN
FAGEL HABER**

What are Records?

Recorded history of the enterprise

Evidence of what the corporation does
and how it does it

Have identifiable business value or
satisfy some external requirement

Thompson Coburn LLP d/b/a Thompson Coburn Fagel Haber **THOMPSON COBURN
FAGEL HABER**

**What is Records
Management?**

The systematic control of records
throughout their life cycle

or

A process to effectively manage records
to reduce the expense and risk of
liability associated with the
maintenance of those records.

Thompson Coburn LLP d/b/a Thompson Coburn Fagel Haber **THOMPSON COBURN
FAGEL HABER**

Discussion

- I. Management of Electronic Records in Litigation & Litigation Preparedness
- II. Implementing An Effective Corporate Record Management Policy

Thompson Coburn LLP d/b/a Thompson Coburn Fagel Haber

**THOMPSON COBURN
FAGEL HABER**

I. Electronic Records In Litigation

Thompson Coburn LLP d/b/a Thompson Coburn Fagel Haber

**THOMPSON COBURN
FAGEL HABER**

What is the Problem?

Businesses exchange over 90% of their daily communications in electronic format

Recent Study: 93% of corporate documents are created electronically

Thompson Coburn LLP d/b/a Thompson Coburn Fagel Haber

**THOMPSON COBURN
FAGEL HABER**

The Electronic Document Dilemma

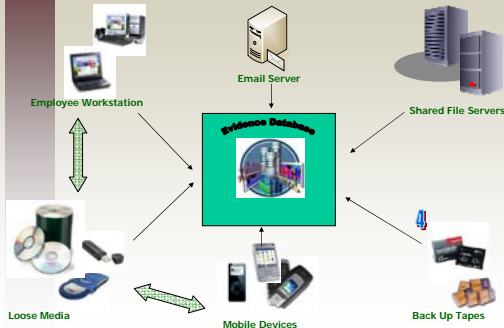
- 1 MB = Small Novel
- 5 MB = Complete Works of Shakespeare
- 500 MB = CD-Rom
- 1 GB = Pickup Truck of Books
- 120 GB = Library floor full of academic journals



Thompson Coburn LLP d/b/a Thompson Coburn Fagel Haber

**THOMPSON COBURN
FAGEL HABER**

Where Data Resides



Thompson Coburn LLP d/b/a Thompson Coburn Fagel Haber

**THOMPSON COBURN
FAGEL HABER**

Why is There So Much of It?

- Replication
- Electronic Communications Are Primary Tools for Communication
- Delete Does Not Mean Delete
- Storage is Easy and Cheap
- Legacy Data
- Backup Media

Thompson Coburn LLP d/b/a Thompson Coburn Fagel Haber

**THOMPSON COBURN
FAGEL HABER**

Document Preservation Duty to Preserve

Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a “**litigation hold**” to ensure the preservation of relevant documents

Thompson Coburn LLP d/b/a Thompson Coburn Fagel Haber

**THOMPSON COBURN
FAGEL HABER**

Litigation Hold Concepts

- Reasonably anticipates litigation
 - Depends on factual circumstances
 - Judgment call must be made
- Must suspend routine document destruction policies
- Must preserve “relevant” documents
 - Identify subject matter
 - Identify locations
 - Process to preserve

Thompson Coburn LLP d/b/a Thompson Coburn Fagel Haber

**THOMPSON COBURN
FAGEL HABER**

Why Should You Care?

- Impair or bar defense to defensible claim
 - *Morgan Stanley*
- Required to pay monetary sanctions
 - *Qualcomm*
- Criminal penalties if government involved
 - *Arthur Anderson*

Thompson Coburn LLP d/b/a Thompson Coburn Fagel Haber

**THOMPSON COBURN
FAGEL HABER**

Importance of Preservation and Cost of Destruction

Penalties Include:

- Costs of restoring deleted data
- Monetary sanctions for deleting data
- Adverse inference instructions
- Default judgment or dismissal of case

Thompson Coburn LLP d/b/a Thompson Coburn Fagel Haber

**THOMPSON COBURN
FAGEL HABER**

Discoverable Electronic Records in Litigation

- “Electronically Stored Information”
 - Not Documents
 - Anything that is accessed through use of software operating in conjunction with hardware
- Common Examples
 - E-mails, instant messages, voicemails stored as .wav files, any electronic file type, company databases (credit/financial system)

Thompson Coburn LLP d/b/a Thompson Coburn Fagel Haber

**THOMPSON COBURN
FAGEL HABER**

Discoverable Electronic Records in Litigation

- Metadata and System Information
 - Metadata is detailed record of the “life” of a document
 - “Every Microsoft Excel, Word, and PowerPoint document contains a variety of information that remains present, but hidden, until you remove it or someone else extracts it. And therein lies the problem: If you plan on sharing or publishing your Office document, you may be sharing more than you intend.” – PC Magazine.

Thompson Coburn LLP d/b/a Thompson Coburn Fagel Haber

**THOMPSON COBURN
FAGEL HABER**

Discoverable Electronic Records in Litigation

- What is in Metadata?
 - Track Changes: Inserted or deleted text you thought was gone
 - Comments
 - Your name, initials, e-mail address, company or organization's name
 - The names of previous document authors, document revisions, versions
 - The name of your computer and network server or drive on which you saved the document
 - Template information, hidden text, macros, hyperlinks, routing information

Thompson Coburn LLP d/b/a Thompson Coburn Fagel Haber

**THOMPSON COBURN
FAGEL HABER**

Components of Litigation Preparedness Plan

- Understanding what the electronically stored information is
- Understanding where it resides
- Having a plan to preserve it
- Having a strategy to harvest it

Thompson Coburn LLP d/b/a Thompson Coburn Fagel Haber

**THOMPSON COBURN
FAGEL HABER**

The Causes Of Adverse Litigation Consequences

- Destruction of data and evidence
- Inconsistent enforcement of document retention policy
- Failure to identify and produce electronic evidence
- Failure to monitor compliance throughout life of litigation hold

Thompson Coburn LLP d/b/a Thompson Coburn Fagel Haber

**THOMPSON COBURN
FAGEL HABER**

What If I Just Deleted It?

“Safe Harbor” Provision

Deleting data is permitted if

- done pursuant to a document destruction policy AND
- not in violation of “litigation hold”

Thompson Coburn LLP d/b/a Thompson Coburn Fagel Haber **THOMPSON COBURN
FAGEL HABER**

Destruction of Electronic Records

- Don't Do It
- Trying to Hide/Delete the “Smoking Gun”
 - **It will be found**
 - Hiding damaging information can be worse than the act of creating it
- Destruction impairs your own defense or affirmative claim

Thompson Coburn LLP d/b/a Thompson Coburn Fagel Haber **THOMPSON COBURN
FAGEL HABER**

II. Corporate Records Management

Thompson Coburn LLP d/b/a Thompson Coburn Fagel Haber **THOMPSON COBURN
FAGEL HABER**

Develop and Implement

BE REALISTIC: The policy must meet the organization's needs so that the organization and its employees will actually follow it.

Thompson Coburn LLP d/b/a Thompson Coburn Fagel Haber

**THOMPSON COBURN
FAGEL HABER**

Elements of a Records Management Policy

- A. Creation
- B. Acceptable / unacceptable use policy
- C. Protection of confidential information
- D. Privacy / ownership issues
- E. Retention / destruction

Thompson Coburn LLP d/b/a Thompson Coburn Fagel Haber

**THOMPSON COBURN
FAGEL HABER**

A. Policy Governing Creation of Corporate Records

Thompson Coburn LLP d/b/a Thompson Coburn Fagel Haber

**THOMPSON COBURN
FAGEL HABER**

Content Management

1. Assume that every document will be read or published on the front page of the Chicago Sun-Times
2. Make sure all documents are accurate as all documents will be misconstrued
3. Avoid commenting on potential liability and never create documents commenting on pending litigation
4. Deal with bad documents immediately
5. Limit dissemination of documents to those who need to know

Thompson Coburn LLP d/b/a Thompson Coburn Fagel Haber

**THOMPSON COBURN
FAGEL HABER**



Thompson Coburn LLP d/b/a Thompson Coburn Fagel Haber

**THOMPSON COBURN
FAGEL HABER**

Social Media & the Modern Enterprise

- Content is no longer limited to the workplace
- Consistent usage policies for social media
- Corporate concerns
 - Right of employee privacy
 - Copyright and trademark infringement



Thompson Coburn LLP d/b/a Thompson Coburn Fagel Haber

**THOMPSON COBURN
FAGEL HABER**

B. Acceptable/Unacceptable Use of Company Resources

Thompson Coburn LLP d/b/a Thompson Coburn Fagel Haber

**THOMPSON COBURN
FAGEL HABER**

Acceptable / Unacceptable Use Policy

- Use of Resources
- Company Ownership
 - Be aware of employees considering files “personal”
 - One of the most troublesome areas as these records may be outside of the records management procedures

Thompson Coburn LLP d/b/a Thompson Coburn Fagel Haber

**THOMPSON COBURN
FAGEL HABER**

C. Confidential Information

Thompson Coburn LLP d/b/a Thompson Coburn Fagel Haber

**THOMPSON COBURN
FAGEL HABER**

Trade Secrets & Other Proprietary Materials

- Policy should identify sensitive documents
- Policy should identify controls for sensitive documents
- If you want documents to remain confidential then treat them so
- Proper handling of Attorney-Client communications

Thompson Coburn LLP d/b/a Thompson Coburn Fagel Haber **THOMPSON COBURN
FAGEL HABER**

D. Privacy / Ownership

Thompson Coburn LLP d/b/a Thompson Coburn Fagel Haber **THOMPSON COBURN
FAGEL HABER**

Privacy/Ownership Issues

- Establish ownership of records/data
 - Be aware of employees considering files “personal”
 - One of the most troublesome areas as these records may be outside of the records management procedures

Thompson Coburn LLP d/b/a Thompson Coburn Fagel Haber **THOMPSON COBURN
FAGEL HABER**

E. Retention / Destruction Policy

Thompson Coburn LLP d/b/a Thompson Coburn Fagel Haber

**THOMPSON COBURN
FAGEL HABER**

Retention / Destruction

- Statutes of limitation as a guide for records retention periods (IL):
 - Written contracts: 10 years
 - Oral agreements: 5 years

Thompson Coburn LLP d/b/a Thompson Coburn Fagel Haber

**THOMPSON COBURN
FAGEL HABER**

Privacy/Ownership Issues

- Establish ownership of records/data
 - Be aware of employees considering files “personal”
 - One of the most troublesome areas as these records may be outside of the records management procedures

Thompson Coburn LLP d/b/a Thompson Coburn Fagel Haber

**THOMPSON COBURN
FAGEL HABER**

Retention / Destruction

- The period of time may be different in different states. Written contracts:
 - Illinois: 10 years
 - Ohio: 15 years
 - New York: 6 years
 - California: 4 years
 - UCC §2-725: 4 years

Thompson Coburn LLP d/b/a Thompson Coburn Fagel Haber

**THOMPSON COBURN
FAGEL HABER**

Retention / Destruction

- Destruction Procedures
 - Performed on a regular and continuous basis in accordance with retention periods and applicable law (*e.g.* shredding)
 - Review and sign-off of documents to be destroyed
 - Retain list of destroyed documents
 - www.archive.org

Thompson Coburn LLP d/b/a Thompson Coburn Fagel Haber

**THOMPSON COBURN
FAGEL HABER**

Implementation

- To be successful, employees who are subject to the policy must be convinced of its value and negative ramifications.
 - Appoint responsible people for running the records management policy
 - Educate employees
- Team Approach

Thompson Coburn LLP d/b/a Thompson Coburn Fagel Haber

**THOMPSON COBURN
FAGEL HABER**

Compliance

- Compliance should be audited periodically
- Continual training of employees and management
- Periodic reaffirmation of policy by employees
- Regular updates to policy to reflect changes in the law

Thompson Coburn LLP d/b/a Thompson Coburn Fagel Haber

**THOMPSON COBURN
FAGEL HABER**

- P** Proactive document retention/destruction policy is your safeguard.
- R** Remember to reinforce your policy.
- O** Organizational knowledge is key to implementing appropriate policy.
- T** Training and retraining are essential to an effective policy.
- E** Electronically stored information must be appropriately managed
- C** Controls in place today prevent ramifications of "Real Life Stories."
- T** Tools of electronic medium can be assets, not liabilities.
- I** Initiative prevents future problems.
- O** Observe the status of your organization's compliance.
- N** No one is above complying with the organization's policy.

Thompson Coburn LLP d/b/a Thompson Coburn Fagel Haber

**THOMPSON COBURN
FAGEL HABER**
