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Litigation Holds: Best Practices

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The Law of Preservation and Legal Holds





What is a Legal Hold?

- “Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a ‘litigation hold.’”
 - *Zubulake v. UBS Warburg* (“*Zubulake IV*”) 220 F.R.D. 212 (S.D.N.Y. 2003)
- “When a party is under a duty to preserve information because of pending or reasonably anticipated litigation, intervention in routing operation of an information system is one aspect of what is often called a ‘litigation hold.’”
 - *Fed. R. Civ. P. 37(f), Committee Notes (2006 amendments)*

Importance of Preservation

- “Aside perhaps from perjury, **no act serves to threaten the integrity of the judicial process more than spoliation of evidence.** Our adversarial process is designed to tolerate human failings – erring judges can be reversed, and recalcitrant witnesses compelled to testify. But, when critical documents go missing, judges and litigants alike descend into a world of ad hocery and half measures-and our civil justice system suffers.”
 - *United Medical Supply Co., Inc. v. United States*, 220 Fed. Cl. 257, 259 (Fed. Cl. 2007)

Preservation



Duty to Preserve

- The duty to preserve (preservation obligations) is not explicitly defined in the Federal Rules of Civil Procedure.
- The duty to preserve requires a party to **identify, locate, and maintain** information and tangible evidence that is relevant to specific and identifiable litigation.
- *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 522 (D. Md. 2010).

What is Required When Duty to Preserve is Triggered?

- The organization has a duty to undertake reasonable actions to preserve paper documents, electronically stored information (ESI), and tangible items that are relevant to the parties' claims and defenses and proportional to the needs of the case.
- Because perfection in preserving all relevant electronically stored information is often impossible, the standard is reasonableness – not perfection.
- Proportionality principles apply to all efforts to plan and implement preservation, and in the assessment of those efforts.
- FED.R.CIV. P. 26(b)(1). See FED.R.CIV. P. 37(e); The Sedona Conference, *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Production*, 19 SEDONA CONF. J. 1, 93–96 (2018)
- FED.R. CIV. P. 37(e) advisory committee's note to 2015 amendment (One “factor in evaluating the reasonableness of preservation efforts is proportionality.”)

FRCP 26(f)

- FRCP 26(f) addresses early preservation
- Conference of the Parties; Planning for Discovery
- *(2) Conference Content; Parties' Responsibilities.* In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(a); **discuss any issues about preserving discoverable information**; and develop a proposed discovery plan...
- *(3) Discovery Plan.* A discovery plan must state the parties' views and proposals on:
- (C) any issues about disclosure, discovery, **or preservation of electronically stored information**, including the form or forms in which it should be produced;

FRCP 37(e) – Sanctions for Failure to Preserve

- Failure to Preserve Electronically Stored Information
- If ESI 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**, 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

Safe Harbor Provision

- “Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.”
 - Fed. R. Civ. P. 37(e) Committee Notes (2006 amendments)

Duty to Preserve

The Duty Does Not Arise Upon:

- Vague rumor or indefinite threat of litigation
- Threat of litigation that is not credible
- Threat of litigation not made in good faith

What Can Trigger a Preservation Obligation?



Lawsuit



Arbitration



Government investigation



Administrative action



Demand letter



Post-employment obligation letter



Employee sensitive separations

Reasonable Anticipation of Litigation

What is reasonable anticipation?

- Reasonable anticipation arises when an organization (or person) is on notice of a credible probability that it will become involved in litigation, seriously contemplates initiating litigation, or when it takes specific actions to commence litigation.
- *The Sedona Conference Commentary on Legal Holds, Second Edition: The Trigger & The Process (2019).*

Reasonable Anticipation Standard

- The standard is an objective one, “asking not whether the party in fact reasonably foresaw litigation, but whether a reasonable party in the same factual circumstances would have reasonably foreseen litigation.”
- This evaluation is extremely case fact dependent.
- *Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311, 1320 (Fed. Cir. 2011); see also *Storey v. Effingham Cnty.*, 2017 WL 2623775, at *3 (S.D. Ga. June 16, 2017).

Legal Hold Best Practices



Legal Hold Best Practices Overview

- Have a policy
- Develop a procedure
- Is litigation anticipated
- Must it be in writing
- What should the writing include
- Document and monitor
- International holds



Policies and Procedures

- Adopting and consistently following a policy governing an organization's preservation obligations are factors that may demonstrate reasonableness and good faith.
 - Example: Anonymous threat of litigation investigated and dismissed.
- Adopting a procedure for reporting information relating to a possible litigation to a responsible decision maker may assist in demonstrating reasonableness and good faith.
 - Example: Set up website to report threats and possible litigation, and train employees to use it.

Actual or Anticipated Litigation

- Actual Litigation
- Anticipated Litigation
 - Very fact based
 - Based on good faith and reasonable evaluation of relevant facts and circumstances
 - Evaluate in light of the facts and circumstances reasonably known at the time of decision; not hindsight
 - Reasonable and good faith efforts, taken as soon as is practicable and applied proportionately
 - Factors include: the nature of the issues raised in the matter, the accessibility of the information, and the relative burdens and costs of the preservation effort.

What Does the Legal Hold Do?

- Provides info on how preservation should be undertaken and offers help with questions
- Communicates in a manner that in good faith is meant to be effective
- Includes a mechanism to acknowledge the hold
- Is periodically reviewed and modified as necessary
- Is followed by periodic reminder notices

Must a Legal Hold be in Writing

- Know Your Jurisdiction
 - The failure to institute a written litigation hold does not automatically constitute gross negligence for sanctions purposes...But developing and implementing a formal litigation hold will aid parties in avoiding allegations of spoliation and related consequences.
 - *Kinnally v. Rogers Corporation*, 2008 WL 4850116, at 7 (D. Ariz. Nov. 2008)
 - “The failure to issue a written litigation hold constitutes gross negligence.”
 - *Pension Committee v. Bank of America Securities, LLC* 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010)

Content of Legal Hold

- Should be written in clear and concise language and include the following:
 - Purpose of notice, including overview of issues and logistics of preservation
 - Locations of possible data, and requested to identify additional data locations
 - Possible data types of relevant data
 - List key custodians, and request to identify additional custodians
 - List of things not to do (upgrading, migrating, deleting, overweighting, modifying, otherwise altering)
 - Contact person for questions
 - Require and track recipient acknowledgements
- Considerations relating to automatically generated legal holds

Document and Monitor

- Defensibility of legal hold is key
 - Document hold procedures and actions taken
 - Monitor compliance with the holds over time
 - Include provisions to release the hold

International Holds

- An organization should be mindful of local data protection laws when initiating a legal hold outside of the U.S.





Practical Advice for Implementing, Managing, and Lifting Legal Holds



Where Do You Start, and Where Do You End?

- Planning for a legal hold
- Identification of information to preserve
- Custodian-based collections
- Legal hold modifications
- Termination of legal hold

Practical Advice – Life Cycle of Legal Hold

- Initial legal holds should be issued as soon as possible
- Consistently evaluate legal holds (modify accordingly)
- Data map custodians and assess risk for potential data loss
- Implement process to secure information in the event an employee leaves or transfers
- Know when to terminate legal holds

Where Do You Start?

- Educate internally/client
 - Explain to the client what a legal hold is and its purpose
 - Step in the litigation process
 - Effectively implementing a legal hold requires:
 - Teamwork
 - Communication
 - Implementation plan

Initial Assessment



- Initial assessment
 - Internal/client interviews
 - IT interviews
 - Nature of case
 - Date range at issue
 - Potential custodians
 - Potential data sources
 - Evidence mapping of data sources
 - Deletion/destruction practices in place
 - Is imaging necessary

High Level Planning for a Legal Hold



Initial assessment completed

Outlined internal/client responsibilities
Custodians identified



IT interview completed

Data sources identified
Resources to track custodian acknowledgments



Identify international data



Document decisions regarding implementation of legal hold

Identification of Information to Preserve

- Possession, custody, and control (know your jurisdiction)
- If a responding party has possession, custody, or control of relevant documents (including ESI), it has a duty to preserve and produce them in discovery
 - Legal Right Standard
 - Legal Right Plus Standard
 - Practical Ability Standard
 - *The Sedona Conference Commentary of Tule 34 and Rule 35 “Possession, Custody or Control.”*
- Reminder: rooted in law: FRCP 37(e) – Failure to Preserve ESI
 - A party can only be sanctioned for destroying evidence they had a duty to preserve

Custodian Based Collections

A consistent policy demonstrates reasonableness and good faith

- **DO...**
 - Involve and guide custodians/IT through the identification process.
 - Create an open and safe environment for exchange of information.
 - Use the appropriate tools and methods to preserve identified data.
- **DON'T...**
 - Let custodians fend for themselves regarding what and how to preserve.
 - Let custodians alter or destroy data in response to preservation efforts.
 - Just take everything.

Modification of Legal Hold Notices

- Update legal hold notice as appropriate
 - Add/delete custodians
 - Add delete content
 - Track compliance
- Send reminders
- Terminate when appropriate

Inflection Points for Modification of Legal Holds

- Evaluation of information obtained through custodian interviews
- Change in scope of parties
- Change in scope of claims or defenses
- Change in counsel
- Finalization of ESI Protocol
- Close of fact discovery
- Rulings on dispositive motions
- Litigation no longer anticipated
- Dismissal or modification of claims or defenses
- Settlement

Termination of Legal Hold Notice

- Notification of the end of a legal hold
- Should be in writing
 - Reference previous legal hold notices
 - Identify any ending obligations
 - Identify contact persons for questions

Engagement With Opposing Counsel

- Not a lot of case law regarding defensibility of modifying or lifting a legal hold
- Modification or lifting of a legal hold
 - While not required, if concerned about modification or lifting of a hold, you can engage with opposing counsel regarding this issue
 - Could bolster defensibility
 - If you engage with opposing counsel regarding modification/lifting of a legal hold and they do not object, it would be difficult to contest modification/lifting at a later date

Competency

- Know your state ethics/professional responsibility obligations with respect to eDiscovery
- If you are not competent in eDiscovery, you will be unable to preserve relevant information contained on your client's electronic devices/systems/networks/applications/etc.
- Know the difference and/or interaction between federal and state laws.
- State Law Example: The State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Opinion No. 2015-193
 - If you are not competent in eDiscovery, you must:
 - Acquire sufficient learning and skill before performance is required
 - Associate with or consult technical consultants or competent counsel; or
 - Decline the representation



Impact of Deficient Legal Holds on Litigation



Factors for Disaster

- Different legal systems or discovery obligations (international)
- Can't preserve what you don't know about
- Personal criminal liability
- Departing employees
- Legacy systems
- Verbal discussions
- Unresponsive custodians or inability to secure data
- Failure to suspend automatic deletion

Data Loss Happens

- Areas of data loss include:
 - Change in global policies set with automation for behind the firewall and cloud systems
 - Decommissioning of systems of record for a new system
 - Updates to software or applications that purge temp files or data held in repositories
 - User deletion for a legal hold in place
 - Employee sensitive separations or nefarious actions
 - Lack of understanding of life cycle of your data

Underlying Causes for Data Loss

- Negligence
- Gross negligence
- Deliberate ignorance
- Willful misconduct
 - *The distinction between “negligence” and “gross negligence” is one of degree, with “gross negligence” described as “a failure to use even that care which a careless person would use.” In contrast, “willfulness” involves intentional conduct in “disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow...”*
 - *Pension Committee of the Univ. of Montreal Pension Plan, et al. v. Banc of America Securities, LLC, et al., 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010)*

Penalties

- Inherent power of the court to correct misconduct
 - Adverse inferences
 - Directed verdict or finding
 - Attorneys' fees
 - Other penalties including contempt
 - Pleadings or case dismissal
 - Sanctions on counsel or client

Questions????



Thank You!



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