Litigation Holds: Ten Tips in Ten Minutes

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Introduction

A **litigation hold** is a written directive advising custodians of certain documents and electronically-stored information ("ESI") to preserve potentially relevant evidence in anticipation of future litigation. Also called "preservation letters" or "stop destruction requests," these communications basically advise of the possibility of future litigation and identify relevant documents and ESI which should be preserved. The terms "Litigation Hold Letter" and "Litigation Hold Notice" are used interchangeably to describe written requests from adversaries designed to trigger the duty to preserve relevant evidence, and the same terms are used to describe the written notice lawyers send their own clients advising them to suspend routine document retention/destruction policies and implement a legal hold on all evidence which may be relevant to future litigation.

In the past several years spoliation of relevant evidence—and particularly of ESI spoliation—has assumed a level of importance in civil litigation which warrants very careful attention. Claims of spoliation and motions seeking discovery sanctions for failure to preserve relevant ESI cause litigants and courts to take costly and time-consuming detours from the litigation, and are occurring with greater regularity in all sorts of cases. As Magistrate Judge Piester observed in 2007:

> "When the prospect of litigation is present, parties are required to preserve documents that may be relevant to the issues to be raised, and their failure to do so may result in a finding of spoliation of evidence. The obligation to preserve evidence begins when a party knows or should have known that the evidence is relevant to future or current litigation. *See Stevenson v. Union Pac. R.R. Co.*, 354 F.3d 739, 746 (8th Cir. 1993)(Sanctions not abuse of discretion in pre-litigation destruction of evidence without showing of bad faith); *see also Zubulake v. UBS Warbrg LLC*, 220 F.R.D. 212, 216-18 (S.D.N.Y 2003)("Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure preservation of relevant documents." *Id.* at 218)(citing *Fujitsu Ltd. v. Federal Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001); *Kronish v. United States*, 150 F.3d 112, 126 (2d Cir. 1998)). At a minimum, that means counsel must direct the client to ensure that documents are preserved, not deleted from an electronically stored information system or otherwise destroyed or made unavailable. Failure to do so has been found to be 'grossly negligent.' *Zubulake*, 220 F.R.D. at 221."

Board of Regents of the Univ. of Nebraska v. BASF Corp., Case No. 4:04CV3356, 2007 WL 3342423 at 4-5 (D. Neb., Nov. 5, 2007).

Discovery sanctions for failing to preserve relevant evidence can be game-changers for lawyers and litigants, and include orders which direct that certain facts be taken as established; prohibit the

disobedient party from supporting or opposing certain claims or from introducing certain matters into evidence; strike pleadings in whole or in part; dismiss the action in whole or in part; render a default judgment against the disobedient party; impose monetary fines on the lawyers and/or clients; give adverse jury instructions; or exclude evidence if the court later concludes relevant evidence was destroyed in bad faith. *See, e.g., Meccatech, Inc. v. Kiser et al.,* Case No. 8:05CV570, 2008 WL 6010937 (D. Neb. April 2, 2008)(Recommending sanctions including striking the disobedient party's answer and entering default judgment against it; holding admissible ESI which eventually was recovered from a hard drive; finding certain facts contained in deleted documents were established for purposes of the action; and precluding disobedient parties from defending against certain of the plaintiff's claims); *Board of Regents of the University of Nebraska v. BASF Corp.,* Case No. 4:04CV3356, 2007 WL 3342423 (D. Neb., Nov. 5, 2007)(Recommending Plaintiff's counsel be required to produce affidavits showing efforts to preserve electronic information going forward; pay defendant's attorney fees regarding sanctions motion; immediately impose a litigation hold on all electronic information of clients to prevent further destruction of evidence; and halt further progress in the case until these sanctions had been met, among other sanctions).

Ten Tips for Responding to Litigation Hold Letters

1. **Watch for Triggers:** Sometimes the event which triggers an organization's duty to preserve relevant documents and ESI is obvious—a letter threatening litigation and demanding that certain evidence be preserved leaves little doubt the duty has been triggered. Other times the triggering event may be more subtle, like a group of supervisors talking about reported harassment, *see, e.g., Doe v. Norwalk Community College*, 248 F.R.D. 372 (D. Conn. 2007), or an SEC investigation into a client's financial irregularities, *see, e.g., Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005). Be aware that events which provide notice of pending, potential or threatened litigation can take many forms, and even when the threat of future litigation is clumsy or obscure, it may trigger the duty to preserve.

2. **Don't Procrastinate:** Responding to and managing preservation issues can be daunting for busy lawyers, but delaying action for even a few days can result in the destruction of relevant evidence which exposes the lawyer and the client to costly discovery sanctions. Place a high priority on responding to preservation issues—this is one area where a day really can make a difference.

3. **Reply to All:** If you receive a Litigation Hold Letter from an adversary, respond in writing stating the measures you and your client are taking to identify and preserve relevant evidence. If you disagree with the parameters or scope of the preservation request as articulated by the adverse party, say so, and offer to consider taking additional measures if the adverse party can show the measures are legitimately warranted under the circumstances. A response letter provides you the opportunity to establish the parameters of what you consider relevant to the issues involved in the future litigation, and places the burden on your adversary to articulate why those parameters should be broader. *See Maddex, Stephen J., "Responding To A Litigation Hold Letter," www.lexology.com (Feb. 19, 2009).*

4. Identify What is Relevant: The scope of a litigation hold will be driven by the documents and ESI which are relevant to the facts and circumstances likely to be at issue in the future litigation. The type of evidence which will be deemed relevant will, of course, depend on the specific facts. Rule 401 of the Federal Rules of Evidence defines relevance as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The touchstone of discovery in civil cases is whether the information sought is "reasonably calculated to lead to the discovery of admissible evidence" and, in considering the reasonable scope of a litigation hold, one should be guided by the same legal principles. Fortunately, the courts have recognized the duty to preserve is not unlimited and does not require litigants to "preserve every shred of paper, every e-mail or electronic document, and every backup tape," *see Zubulake IV*, 220 F.R.D. at 217, yet determining what information may be relevant is not always easy. Despite the difficulty of determining what sort of information is likely to be relevant to future litigation, lawyers should avoid the temptation of issuing a Litigation Hold Notice which simply asks members of an organization to preserve "relevant" evidence without providing any practical guidance on what that means in the context of the particular claim. *See Samsung Electronics Co., Ltd. v. Rambus, Inc.*, 439 F. Supp.#2d 524, 565 (E.D.Va. 2006)(instructing employees to "look for things to keep" and telling them not to destroy "relevant documents" were insufficient for implementing a legal hold and were found to be the sort of token effort which will "hardly ever suffice.")

5. Put Your Client's Hold Notice in Writing, and Be Specific:

A good Litigation Hold Notice should clearly identify the reason for the hold, should prohibit the destruction of relevant documents, and should identify what sort of information is considered relevant. Don't leave a voice-mail or send an e-mail communicating the litigation hold, and don't walk down the hallway and instruct the custodian to "save everything." Put the Litigation Hold Notice in writing, with clear instructions to suspend automatic deletion and clear instructions on what should be preserved. Make sure the Litigation Hold Notice is disseminated to all key players in the organization, and not merely to the official record custodian. Remind your client of the consequences of disregarding the litigation hold, and advise the client that if questions arise about whether something may be relevant, they should check with you before deleting it. Open communication with the client will help ensure all relevant data sources are discovered and relevant information is retained on a continuing basis.

6. Think Outside the E-Mail Box: Talk with your client about what sort of ESI they have, where and how it is stored, and who has access. Consider all your client's sources of data, and look beyond just e-mail, calendar entries, contacts and task lists. What about employee cell phones and Blackberrys®? What about text messages? Voice-mail messages? Backup tapes? Hard drives? Thumb drives? Office lap tops? Social networking sites? Home computers that access the office network? Work closely with your client's IT Manager (or hire a consultant or vendor if appropriate) to get an accurate data map of all your client's ESI so you consider all data sources and can clearly articulate and monitor the preservation obligation.

7. **Follow Up to Ensure Compliance:** Litigation holds, when done correctly, involve more than sending an initial hold notice to your client. It is critical that counsel follow up on the litigation hold to ensure it was implemented properly and is being followed. Counsel should docket and send periodic written reminders about the litigation hold to keep it top-of-mind among the key players, and counsel should refine the scope of the hold if the legal issues evolve or change. *See, e.g., Eng, Michael J., "Counsel Must Not Only Implement Litigation Hold But Must Also Oversee Its Compliance. Electronic Discovery Navigator," www.ediscoverynavigator.com (Mar. 7, 2007).*

8. **Don't be Afraid to Bring In Help:** There may be times when the sheer amount of ESI, the complexity of the data sources, or the level of sophistication required to implement a litigation hold or identify discoverable documents are too much for you and your client to manage effectively or efficiently. In those situations, hiring a qualified ESI consultant may be wise. Particularly when the litigation involves sensitive issues such as alleged fraud, certain employment-related matters, or internal investigations, an impartial third party consultant can assist in implementing and monitoring the litigation hold, as well as do the heavy lifting of sifting through ESI when the time comes to respond to discovery requests, as well as offering independently defensible testimony concerning the reasonableness of the steps taken to preserve and collect evidence.

9. **Plan Ahead:** Work with your clients now to develop a litigation readiness plan so that, if necessary in the future, a litigation hold can be effectively enacted, including the sequestering of back-up tapes, suspension of data destruction policies, and implementation of ESI collection procedures. Identify in advance where data is stored in active systems, backups, archival systems, and other locations so the client's data map is well-developed. Put in place methods to identify those who should be contacted for timely preservation of data. Develop exit checklists for when employees leave the client's company to ensure their documents are easy to locate and properly deleted or stored. *See, e.g., Graham, Jeffrey R., "Litigation Holds: Best Practices for Protecting Your Company's Email Data From Inadvertent Loss and Spoliation," www.abatoday.com (Aug. 2007); Beard, Jeffrey J., "White Paper: Best Practices for Legal Hold Processes," www.legalholds.typepad.com (June 23, 2009).*

10. **Stay Current in this Rapidly-Evolving Area of Law, and Attend the Fall CLE on E-Discovery.** The law concerning litigation holds is evolving rapidly, with important opinions coming out every month that impact the way in which litigation holds are managed. To be sure you comply with the discovery rules, avoid sanctions, and protect yourself and your clients from allegations of spoliation, you should closely monitor changes in this area of law, and consider attending the seminar on E-discovery which the Federal Practice Committee is planning for later this fall.

ADDITIONAL RESOURCES

For informative blogs and additional information on managing litigation holds consider:

- *www.bowtielaw.wordpress.com* – "The Knotty Issues of e-Discovery"
- *www.ediscoverynavigator.com* – "Electronic Discovery Navigator: Predictability and Consistency in eDiscovery"
- *www.lexology.com* – "Practical Know-How and Market Intelligence for Business Lawyers"
- *Maddex, Stephen J., "Responding To A Litigation Hold Letter," www.lexology.com (Feb. 19, 2009)*
- *www.legalholds.typepad.com* – "Legal Holds and Trigger Events: A blog dedicated to cases, insights, developments and best practices relating to the development and implementation of legal holds"
- *www.abanet.org* – "ABA Law Practice Today"
- *www.businessmanagementdaily.com* – "Business Management Daily"
- *www.ediscoveryjournal.com* – "Unique Perspective. Independent Insight. Pragmatic Advice."

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