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The Who, What, When, Where And How of Litigation Holds

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Since Judge Shira Scheindlin's landmark decisions in the seminal *Zubulake* cases, the use of litigation holds to identify and preserve relevant evidence has become an integral part of litigation practice. See *Zubulake v. UBS Warburg,* 220 F.R.D. 212 (S.D.N.Y. 2003). Last year, while revisiting *Zubulake* in *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of America Sec.*, 685 F. Supp. 2d 456, 465 (S.D.N.Y. 2010), Judge Scheindlin reiterated the now well-accepted rule that litigation holds must be implemented when the duty to preserve evidence arises. Significantly, she also found that the failure to implement a *written* litigation hold when the duty to preserve arises constitutes gross negligence.

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The duty to preserve evidence arises when litigation is reasonably anticipated, threatened or commenced. The duty to preserve applies to plaintiffs and defendants alike. For a plaintiff, the duty will likely arise long before litigation actually commences. Once the duty arises, the party must take reasonable steps to identify, locate and preserve relevant evidence. The duty to preserve is a continuing one. Affirmative steps must be taken to ensure that key players (both current and former employees) are identified, their documents preserved and that routine document destruction policies are suspended.

To satisfy the duty to preserve, the process of issuing a written litigation hold is commonly used, and based on the *Pension Committee* decision, now required. Any litigation hold should: (1) direct custodians to preserve relevant evidence and suspend automatic or routine document destruction policies; (2) inform the recipients of the nature of the underlying dispute and identify the types and categories of information that may be relevant and that need to be preserved; (3) explain the form of materials that need to be preserved by, for example, defining what is meant by the terms *document* and *electronically stored information* (ESI); (4) list the key players likely to have relevant information and require the recipients to identify other current or former employees or third parties who also may have relevant information; and (5) provide for regular monitoring and follow up. Through the use of a written litigation hold, counsel will be able to document the good-faith efforts used to preserve relevant evidence should the process ever be called into question.

1. To whom should the litigation hold be sent?

Counsel should work with the client to identify "key players" most likely to have relevant information and direct those individuals to preserve documents and ESI. The key players may come from one department or be sprinkled throughout the organization. While the key players should be at the top of the list, counsel cannot stop there. The litigation hold notice should require each of the key players to identify other current and former employees and even third parties who also may have potentially relevant information. Establish a procedure and a timeline for the key players to identify new custodians and ensure that the litigation hold notice is distributed to them as well. While the distribution list often evolves over time, proper documentation is essential so that counsel and the client can retrace their footsteps if necessary.

2. You want me to preserve what?

The litigation hold notice should explain the nature of the underlying dispute and the categories of information to be preserved. While the scope of the materials will depend on the facts and circumstances of the particular case, the guiding principle should be reasonableness. Absent extraordinary circumstances, a party need not preserve *all* of its documents and ESI. Rather, it is information that is potentially relevant to the claims and defenses that must be protected. The costs and burdens of preserving large quantities of data should be part of the analysis. The concept of proportionality is key; "[w]hether preservation or discovery conduct is acceptable in a case depends on what is reasonable, and that in turn depends on whether what was done — or not done — was proportional to that case and consistent with clearly established standards." *Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010). When in doubt, however, counsel should cast a wide net when it comes to preservation and narrow the scope when it comes to collection and production.

3. Become friends with the IT department.

In addition to identifying the key players, counsel must also work with the client's IT personnel. Too often the IT personnel are the last to know about the need to suspend routine document destruction policies or automatic deletion programs. Early communication often avoids an inadvertent loss of relevant information. An added benefit of early communication with IT is that counsel begins to learn the IT infrastructure of the client at the earliest possible stage of the case. All parties are better served when their counsel has an accurate and complete understanding of the relevant document retention policies, including the storage and retrieval of ESI.

4. Let them know that you mean business.

Notice of the litigation hold should come from a person with authority, who commands respect. That person may be in-house counsel, an officer or a member of top management. Communicating to employees the importance of the duty to preserve evidence cannot be overstated. The notice should be clear, direct and to the point. Require employees to acknowledge in writing that they have received the litigation hold and will take the requested steps to preserve evidence. Briefly explain the consequences of a party's failure to preserve evidence, including monetary penalties and other court-imposed sanctions.

Typically, the recipients of a litigation hold are nonlawyers who have little or no familiarity with litigation generally, let alone a litigation hold. It is therefore prudent to designate a contact person to address any questions or concerns.

5. Do I have to preserve all ESI?

The litigation hold should define the term *ESI*. The sources of ESI seem to grow daily. While no definition of ESI is likely to cover everything, the litigation hold notice should identify as many potential sources of ESI as possible, including network drives, remote servers, local or external hard drives, home computers, flash drives, smartphones and other electronic storage locations.

Remember to consider back-up tapes. Under both *Zubulake* and *Pension Committee*, back-up tapes need not be preserved *unless* they are the sole source of relevant information for a key player. While the general rule can be stated simply, it is often difficult to apply in practice.

6. Once the notice has been distributed, counsel can sit back and relax, right? Wrong!

After the written litigation hold has been distributed and preservation procedures have been put into place, counsel has several additional obligations relating to the duty to preserve.

Counsel should continue to work with the client's IT department to understand the IT infrastructure and how to best collect relevant ESI. Counsel will need to know where the information is located — whether on local computers, servers or back-up tapes — and how it can best be retrieved. In addition, counsel needs to understand whether there are any unreasonable burdens and expenses associated with preservation and/or collection so that these issues can be addressed early with the adverse party and the court if necessary. As noted above, the rules regarding back-up tapes can be complex and it behooves counsel to determine whether, in fact, back-up tapes are the only source of information for particular employees.

Interview key players and follow up with newly identified custodians to determine whether they have information that needs to be preserved. Use a written questionnaire for each custodian interview to document efforts to identify the potential sources of documents and ESI. Maintain copies of the questionnaires during the life of the litigation.

Develop a written ESI collection protocol. The collection techniques protocol should protect the integrity and metadata of files that are preserved. Chain of custody should also be documented.

Ensure that hold reminders are issued during regular intervals. Among other things, monitoring compliance increases the likelihood that counsel will learn about and have an opportunity to preserve newly created information.

Finally, develop a protocol to deal with new and departing employees.

7. When can the hold be lifted?

The litigation hold can and should be lifted at the conclusion of the litigation. But before pressing the "delete" button, both counsel and the client should do their due diligence to ensure that the information to be destroyed is not subject to another litigation hold.

Written litigation holds are now an essential part of any party's litigation practice. It is the starting point from which document preservation and collection takes place. Getting it right from the outset allows a party to focus on the merits of the claim rather than alleged deficiencies in preservation and collection. Given the recent sanctions levied for e-discovery violations, being proactive and prepared has never been more important. ■