Grasping Legal Holds What Organizations Need to Know

Several high-profile decisions make it clear that courts expect organizations to manage legal holds competently and will issue sanctions against those that do not. Taking the steps outlined in this article will ensure your organization is well-prepared.



he legal hold as a necessary preservation tool has moved from the understudy to star performer. This year will be forever remembered as the year legal holds transformed from best practice to a necessary practice. Why? Judges in U.S. federal courts and some state courts have grown weary of dealing with procedural issues related to whether a litigant took reasonable steps to properly identify and preserve information related to litigation. Cases are clogging the court system, stuck on ancillary issues that are entirely avoidable, and the courts are crying, "Enough!" That makes it imperative to understand why legal holds are so important, what their purpose is, and how to implement them effectively.

A *legal hold* is the term applied to the steps an organization takes to suspend its routine destruction of expired records, non-records, and electronic data. A legal hold notice is the oral or written communication provided to members of the organization informing them that the retention policy of the organization is being suspended for potentially relevant information.

In the United States, litigants are obliged by law to preserve evidence, regardless of how incriminating it may be. When an organization "reasonably anticipates" litigation or investigation, a duty to preserve responsive information – in electronic and physical formats – arises, and it must set out in good faith to preserve that information and prevent its alteration.

If information is destroyed or altered, whether intentionally or inadvertently, it is referred to as *spoliation of* evidence. Indeed, this is the very problem that has angered judges in the United States. As U.S. District Judge Lee Rosenthal expressed in her Rimkus Consulting Group Inc. v. Nickie G. Cammarata opinion issued in February 2010:

Spoliation of evidence – particularly of electronically stored information - has assumed a level of importance in litigation that raises grave concerns. Spoliation allegations and sanctions motions distract from the merits of a case, add costs to discovery, and delay resolution.

Records and information management (RIM) professionals play a critical role in ensuring that their organizations comply with their preservation obligations. They possess critical knowledge regarding:

- What information their organizations are retaining
- How long it is retained
- When it should be destroyed
- How and where it should be preserved, when required
- How to quickly and efficiently suspend routine destruction when their organizations come under a legal obligation to preserve such data

A Preponderance of Case Law

Since early 2010, noteworthy court opinions have been issued that prominently feature legal holds. The definitive conclusion is that courts (especially at the federal level) are focusing an unprecedented amount of scrutiny on litigants' legal hold procedures. They issue sanctions whenever existing procedures are not followed, are not adequate, or do not exist. The bottom line is: organizations that fail to grasp their legal hold obligations do so at their peril.

The first opinion to focus on legal holds this year was issued by prominent jurist U.S. District Judge Shira Scheindlin. She penned a series of seminal opinions that defined the concept of a legal hold in the Zubulake v. UBS Warburg case in 2004 and 2005. The Zubulake opinions have been widely cited throughout the United States. Needless to say, the legal community took notice when she issued an 89-page comprehensive legal holds opinion on January 11, 2010, in The Pension Committee v. Banc of America Securities.

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In her Pension Committee opinion, Scheindlin reiterated many of her concerns from the Zubulake case six years earlier. A tremendous amount of legal resources were devoted to arguments over the poor legal hold efforts of a group of plaintiffs. Plaintiffs' failure to issue timely legal hold notices and to properly enforce the legal holds now seriously jeopardize their case. In her findings, Scheindlin concluded that an organization's failure to issue written legal holds will inevitably result in the destruction of relevant evidence.

Shortly thereafter, Rosenthal also called into question legal hold practices in the *Rimkus* case. The opinion singled out the need for better preservation practices to maintain the integrity of the judicial process. Rosenthal, who chose not to impose sanctions based on the facts of the case, instead opted to instruct the jury about the defendants' willful destruction of evidence.

Two more recent cases reaffirm Scheindlin's position that the lack of written legal holds will inevitably lead to the wrongful destruction of relevant evidence. In Crown Castle v. Nudd Corp. from the Western District of New York, the plaintiff failed to issue a legal hold resulting in the "wholesale destruction" of responsive electronically stored information (ESI). The behavior was deemed grossly negligent, and the plaintiff was compelled to undertake extensive effort to recover the lost data to avoid even harsher monetary

In late April 2010, U.S. District Judge Richard Sullivan issued severe sanctions for a party's failure to issue a written legal hold in Merck Eprova v. Gnosis. Making frequent references to Scheindlin's Pension Committee opinion, Sullivan declared, "There is no doubt that Defendants failed to issue a legal hold" and deemed "this failure ... a clear case of gross negligence." In addition to requiring the defendants to pay the plaintiff's legal fees and costs, Sullivan fined the defendants \$25,000 "both to deter future misconduct ... and to instill ... some modicum of respect for the judicial process."

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A final example shines a bright light on RIM failures. In May 2010's Jones v. Bremen High School, an Illinois court was completely dismayed with the defendant's lackadaisical approach to records management. In this discrimination case, the defendant's actions included failing to:

- Issue a legal hold
- Adhere to a published document retention program
- Suspend automatic deletion of relevant electronic files

During the discovery phase, the IT manager at the suburban Chicago school district testified about certain recordkeeping practices that were counter to the organization's publicly available records management policy. This dichotomy did not sit well with the judge. Sanctions included special jury instructions and additional discovery costs.

As shown, courts are becoming less tolerant for failing to adequately preserve records. At best, poor preservation practices result in undue leverage for one's opponent in a lawsuit. When good faith is called into question, the ability to negotiate a fair and reasonable scope of discovery or offers to settle can become limited. As a result, litigation becomes more costly.

Furthermore, the courts are now increasingly imposing sanctions to deter poor practices and punish wrongdoing. Such sanctions can range from compelling further discovery actions, cost shifting to recover the expense of spoliation motions, monetary fines, special jury instructions, preclusion of evidence, and even default judgments.

Contemporary Standard for Legal Holds

Although the risk of shoddy legal hold practices is high, courts have provided explicit guidance about the steps necessary to avoid sanctions. As Scheindlin famously wrote in her *Pension Committee* opinion:

By now, it should be abundantly clear that the duty to preserve means what it says and that a failure to preserve records – paper or electronic – and to search in the right places for those records, will inevitably result in the spoliation of evidence.

Although not looking for perfection, courts and regulatory agencies do expect organizations to take reasonable and good faith steps to prevent spoliation. The necessary steps are best grasped as a seven-step business process:

1. Identify the trigger event.

A legal hold is necessary when an organization "reasonably anticipates" litigation or regulatory action. Once the duty to preserve is triggered, an organization must take steps to ensure potentially relevant data is being preserved. Examples of typical trigger events include the filing of a lawsuit, notices or threats of an intent to file a lawsuit, occurrence of events that typically result in legal action (i.e., significant monetary loss, a severe injury or death, breach of a contract, identified product defect), or employment claims filed with an agency. An often overlooked "trigger event" occurs when an organization first contemplates taking a legal action as a plaintiff.

2. Analyze the duty to preserve.

Once the duty to preserve has been identified, an organization must determine if a legal hold is necessary. This analysis is typically done by the general counsel, chief compliance executive, or outside counsel. It is important to keep in mind that an organization's knowledge is judged on a "knew or should have known" standard if spoliation occurs. If people are exchanging e-mails saying "we are going to be sued over this," it is reasonable to assume that a court will view the exchange as a trigger event. Any ambiguity or close calls should be resolved with the assistance of a lawyer.

3. Define the scope of the legal hold.

If a determination is made that ESI and/or physical documents must be preserved, an organization must define the scope of information to be preserved. Custodians (those individuals who have custody, ownership, or control over the information) must be given guidance about what information they are being asked to preserve. Merely asking someone to "look for things to keep" or to "preserve relevant information" is insufficient to meet preservation obligations.

Often defining the scope starts by identifying key play-

ers with direct knowledge of the specific matter. This will be a small group, while the number of recipients of hold instructions can be very large. For example, in an antitrust case a large multinational could compel thousands of employees to preserve relevant e-mails and business records.

4. Implement the legal hold.

The implementation phase has been garnering the most scrutiny by the courts in this year's court opinions. For this reason, the standards have become much more stringent, stemming directly from Scheindlin's landmark Pension Committee opinion. It is becoming clear that issuing a timely written legal hold whenever litigation is anticipated is likely the only way for litigants to demonstrate the proper discharge of their preservation obligations in federal court. The *Pension Committee* opinion says, "The failure to issue a written legal hold constitutes gross negligence."

The written hold should include instructions that clearly articulate what actions are expected by the recipients. Such instructions should include how potentially relevant information should be identified, how such data should be protected, and who to contact if any questions arise. Are files to be left unaltered or moved to a designated file location? The impact of such instructions must be considered as well – for example, valuable metadata may be inadvertently lost if files are moved or copied incorrectly.

It is also important to recognize that the operation of many IT systems routinely result in the deletion of aged or unneeded data (e.g., an e-mail disposition policy or processes that routinely overwrite back-up tapes meant for disaster recovery). The courts are expecting counsel to be actively engaged in procedures for identifying, preserving, and collecting relevant data – RIM professionals can be instrumental in helping guide that engagement.

5. Enforce and examine the effectiveness of the legal hold.

Ensuring the legal hold process is effective once it is under way requires diligence and follow up. As with any form of effective communication, steps must be taken to ensure and track the receipt, understanding, and acceptance by the custodians of their duty to preserve.

The records management team should be intimately involved in this phase since it knows better than anyone how information is created, managed, stored, and destroyed throughout the organization. RIM professionals can provide valuable information on standard retention schedules and practices, data disposition, and disaster recovery plans. They can also provide critical audit trails of actions taken to suspend routine destruction and collect relevant data, especially when such practices are challenged by opposing counsel or regulatory agency.

Legal Holds Checklist

\square Issue timely, written, legal holds.
\square Articulate preservation instructions clearly.
\square Suspend automatic deletion.
\square Preserve backup media (when it is the only source).
\square Provide supervision by counsel.
☐ Place priority on key players.
\square Ensure affirmative custodial responses.
☐ Conduct custodian interviews.
☐ Modify scope to match your court papers.
 Review legal holds periodically and issue routine hold reminders.
\square Ensure a defensible collection process.
\square Preserve data from departing employees.
\square Provide training/conduct auditing.
\square Assess and refine your process continually.

6. Modify the legal hold.

The legal hold is rarely a "one and done" deal. A duty to preserve evidence evolves as new facts come to light. At this stage, attorneys familiar with the case should interview the key players to ascertain their involvement. Initial evidence can be reviewed (often referred to as "early evidence assessment") to get an understanding of the types and quantity of data that may need to be collected. The scope of the hold or the instructions for preserving data often changes as more information is gathered. New custodians may be identified, while others can be released if no longer required.

7. Monitor and remove the legal hold.

It is also important to continue to monitor the hold over time. At a minimum, courts will expect organizations to send periodic and routine reminders to custodians to ensure their ongoing awareness of the need to preserve data. When continued diligence is expected on the part of custodians to preserve data, an occasional reminder is certainly warranted.

Once the duty to preserve no longer exists – the case settles, the regulators conclude an investigation, or the case is resolved in trial - the obligation to preserve relevant documents and data also goes away. At this point, it is important the legal hold be removed. A notice should be sent to custodians releasing them from the obligation to preserve information and stating that routine retention policies of the organization can be resumed. Further, any expired documents and records can now be destroyed, so long as they are not subject to any other continuing legal holds.

Four Steps to Undertake Prior to a Legal Hold

Given the increasing scrutiny of the courts over the past nine months, there should be no question that assessing and improving practices associated with data preservation should be first and foremost on the minds of RIM professionals. Scheindlin made it abundantly clear in January 2010 with her *Pension Committee* opinion where she said that failing to adequately recognize and fulfill a duty to preserve will undoubtedly be met with harsh criticism by the courts.

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Here are steps RIM professionals should be doing to protect their organizations in light of recent trends in case law.

1. Deploy a legal hold management process.

Ensure a consistent and defensible process is in place to reliably issue legal hold notifications and track custodial compliance with the hold instructions – and apply your processes consistently. As with information governance, RIM professionals can help reinforce that a transparent and repeatable process, consistently applied regardless of venue or type of legal matter, becomes far easier to defend than the actions of individuals. Having a reliable and consistent audit trail can also help.

2. Establish a legal hold oversight committee.

Responding to a preservation obligation is an inter-disciplinary exercise that should involve representatives from records management, legal, information technology, human resources, and compliance administrators. Needless to say, having these groups learn to collaborate in the midst of a high-stakes legal or regulatory response is not an optimal strategy for success. Rather, put these teams in place today, if you have not already done so, and establish a repeatable, documented process for invoking the team as needed.

3. Reassess and update information governance and records retention plan.

Knowing where data that may be relevant to a future

litigation or government investigation resides is critical to any data preservation effort. Responding in a timely manner requires proactively establishing a process for identifying what data needs to be preserved, where it resides, and who has responsibility for the data. Furthermore, such a data mapping process can help focus and prioritize information governance initiatives to reduce and eliminate obsolete or redundant data before a duty to preserve it arises. A valuable by-product of an effective legal hold management process is the ability to quickly identify data repositories and areas of the organization that are most frequently subject to data preservation and discovery actions.

4. Educate and train employees about legal holds.

An effective legal hold process depends on the actions of custodians and data stewards to suspend routine destruction or alteration of relevant data. A well-crafted legal hold notice's clear and concise instructions on what actions are required and a process to ensure receipt and understanding of the notice are critical elements of reasonable and good faith preservation. Organizations that also invest in education and training of employees will improve the efficiency and effectiveness of such efforts. Incorporate such training into new employee orientations or annual ethics and compliance training sessions. Introduce employees to sample legal holds and walk them through the organization's expectations of their response. Consider including a reference to legal holds in your employee policy and procedures handbook.

Prepare for Evolving Expectations

Since the Pension Committee opinion was issued in January 2010, this year has become "the year of the legal hold." In countless cases, courts have reaffirmed that poor preservation practices will no longer be tolerated and harsh penalties will be the likely outcome. Scheindlin concludes that failing to issue written legal holds and take other reasonable steps to preserve data will inevitably lead to spoliation and, as a result, to more findings of gross negligence. And, actions being taken today will be evaluated by the courts in years to come against these evolving standards.

The good news is that what the courts expect are reasonable and good faith standards. An organization that has affirmative procedures in place and supplements sound practices with cost-effective tools to improve its preservation process will be prepared for these evolving expectations. RIM professionals are keys to success and can be catalysts for positive changes that can measurably reduce litigation and regulatory risk at organizations of every scale. END

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