A Guide
To Electronically Stored Information Preservation Responsibilities
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A Guide To Electronically Stored Information Preservation Responsibilities

by Thomas W. Tobin & Daniel M. Braude

Wilson Elser
www.wilsonelser.com

ABSTRACT

A guide for clients, lawyers, information technology staff and others interested in the litigation-related obligation to preserve electronically stored information (ESI) in United States litigation.

THE IMPORTANCE OF PRESERVING ESI

The litigation-related duty to preserve relevant evidence is well established and widely known in the legal community and the business world. Despite broad familiarity with this obligation, many corporate litigants have recently been subjected to severe sanctions due to an increasing judicial intolerance for the failure to preserve electronically stored information. While some such sanctions involve the imposition of legal fees, in many instances courts have issued severe adverse jury instructions, effectively destroying a litigant’s chance of prevailing or waging an effective defense.

In contrast to the stereotypical Enron-style destruction of evidence (i.e. deliberate document shredding!), courts have made it clear that the destruction of evidence, including ESI, need not be willful for a court to impose sanctions. Rather, a litigant’s “lackadaisical attitude” toward its discovery and preservation obligations, including the passive acts of failing to issue a written legal hold, collect ESI from key players, or cease routine destruction of ESI, may result in the imposition of potentially severe sanctions.

In today’s legal climate, even a company’s seemingly innocent delay in implementing an appropriate method to preserve ESI may be catastrophic. As a result, the duty to preserve relevant evidence, including ESI, is too important to ignore, not only for those individuals engaged in litigation on a daily basis, but also for company management seeking to control costs and expenses.

1 This guide represents the views, thoughts and ideas of the authors and not necessarily Wilson Elser. It is not intended to be specific legal advice and should not be relied upon for that purpose.

2 While Tom and Dan (the authors) primarily work out of Wilson Elser’s New York Metro Offices, they consult nationally on document preservation and ESI issues. They are most conveniently reached by e-mail: thomas.tobin@wilsonelser.com and daniel.braude@wilsonelser.com.

3 For a more thorough discussion of this topic, see The Sedona Conference® Commentary On Legal Holds - The Trigger & The Process. www.thesedonaconference.com

4 Any use of the terms “evidence”, “document”, or ESI in the context of a Company’s preservation obligations includes hard-copy documents and all materials in electronic formats, referred to as electronically stored information or ESI.

5 A review of federal judicial opinions involving sanctions related to ESI preservation issues from the December 1, 2006 ESI amendments to the Federal Rules of Civil Procedure through February of 2009 revealed that adverse inference sanctions were imposed in 44% of the cases while the sanctions of default judgment or dismissal were imposed in another 20% of cases! Note should also be made that in some circumstances the intentional destruction of potentially relevant evidence can lead to criminal prosecution. See, e.g., 18 U.S.C. §§1512(c) and 1519.

6 Any use of the terms “evidence”, “document”, or ESI in the context of a Company’s preservation obligations includes hard-copy documents and all materials in electronic formats, referred to as electronically stored information or ESI.

7 See Pension Committee v. Banc of America Securities, 2010 U.S. Dist. LEXIS 4546, 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010) (Adverse inference instruction imposed as a sanction for parties that were grossly negligent in performing their discovery obligations for:
– Failing to issue a written legal hold;
– Failing to collect ESI from key players; and,
– Permitting the destruction of backup tapes after the duty to preserve has been triggered.

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THE PRESERVATION MANTRA

► Act swiftly to manage risks and control costs.
► The duty to identify and preserve is extensive and may be urgent.8
► Failure to produce can almost always be cured, but failure to preserve may be fatal.
► Implement a company-wide legal hold policy with associated legal hold procedures, and then follow-up and audit to ensure compliance9

THE PRESERVATION TRIGGER

The duty to preserve relevant evidence and to follow appropriate legal hold procedures is triggered once an organization can reasonably anticipate litigation or a government investigation.10 This occurs as soon as there is a “credible threat” that the organization will become involved in litigation or will be the target of an investigation.11

In some circumstances, the preservation trigger is easy to identify. An obvious example is when a lawsuit has actually been initiated either by or against a company. At the same time, the trigger for the preservation obligation may look entirely different depending upon the side of the obligation on which you sit! Potential events that may indicate a reasonable anticipation of litigation, and thereby trigger the preservation obligation, include:

► Receipt of a claim letter demanding payment of damages;
► Announcement of a threatened lawsuit, either by or against a company;
► Consideration of filing a lawsuit, including retaining outside counsel;
► Knowledge of similar litigation within the company’s industry;
► Substantive management or supervisor discussions of a potential lawsuit;
► Knowledge of a contractual dispute with another company;
► Notice of a claim filed with an administrative agency;
► Receipt of a letter questioning a hiring decision;
► Occurrence of an incident causing significant property damage;
► Occurrence of an incident causing significant injury;
► Providing notice to a company’s insurance carrier of a potential claim;
► Receipt of a letter demanding a company’s preservation of documents;
► Notice of a governmental investigation or inquiry.12

The above list is not intended to be an exhaustive list of potential triggers. Due to the severe ramifications that may result from noncompliance with the preservation obligation, management and in-house counsel may prefer to take a conservative approach and deem a trigger to have occurred even when in doubt.

TIMING & SCOPE OF THE PRESERVATION OBLIGATION

The obligation to preserve relevant materials is broad in scope and requires swift action to prevent possible loss of evidence. Immediate action may be needed to issue a legal hold to all potential document custodians in order to avoid sanctions for spoliation of evidence, particularly when litigation is already pending.

8 Particularly via hindsight!
9 Wilson Elser has prepared a set of template Legal Hold Policy & Procedure Materials, along with numerous associated template documents, designed to assist companies with implementing a company-wide Legal Hold Policy and to provide guidance to management and in-house counsel with the execution of defensible legal hold procedures. Please ask us about these.
11 For a plaintiff, this duty may arise when documents are being assembled to evaluate the prospects of litigation, when litigation counsel is hired or when failed negotiations lead to the conclusion that litigation is the only option to preserve or protect one’s rights.
Determining the scope of the duty to preserve when drafting a legal hold requires a close examination of the triggering event, likely with a timeline focusing on who, what, where, when and why.

Once a preservation obligation has been triggered, reasonable good-faith efforts must be taken to preserve potentially relevant hard-copy documents and ESI. This relatively broad obligation frequently requires suspending the routine destruction of electronic documents, such as e-mail subject to automatic deletion. As a general rule, courts will not impose sanctions for the destruction of ESI pursuant to a document retention policy, provided that the policy was implemented for good faith business purposes. However, once the preservation obligation is triggered, it is necessary for an organization to immediately suspend routine ESI destruction, such as by communicating this obligation within a formal legal hold to key players, including those with access to their documents, and information technology (IT) staff.

When in doubt, be conservative and take reasonable steps to quickly and broadly preserve evidence relevant to the claims and defenses in the litigation or investigation. This will assist in building credibility with any court later asked to review your preservation efforts.

**LEGAL HOLD IMPLEMENTATION**

Upon a company becoming aware of litigation, anticipated litigation, or a governmental investigation, a manager or in-house counsel should be designated as the Legal Hold Manager to implement the legal hold process and oversee subsequent monitoring and auditing of the process. This duty includes confirmation that all “key players” are identified and notified of the hold.

The Legal Hold Manager will issue one or more legal holds instructing recipients to preserve relevant documents. The legal hold, and any subsequent holds, should be distributed to all potential document custodians plus appropriate IT personnel and management. The following information should be included:

- A description of the event or issues involved in the litigation or investigation;
- A discussion of the definition of “relevant” and the scope of the preservation obligation;
- Instructions to preserve all potentially relevant evidence including ESI;
- Instructions to halt policies of routine document deletion or destruction;
- A description of categories of documents and other items to be preserved;
- A list of all potential document custodians and recipients of the hold, when feasible;
- A request for identification of additional potential document custodians;
- A request for identification of additional potential locations of relevant evidence;
- A copy of the company’s legal hold policy as an attached appendix;
- Instructions to return a signed copy of the legal hold certifying that the recipient understands the hold and pledges to comply with its requirements; and,
- Any additional information the Legal Hold Manager deems appropriate to include.

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13 Types of ESI and locations of ESI storage are numerous. They include, but most certainly are not limited to:

<table>
<thead>
<tr>
<th>Sample Types of ESI</th>
<th>Sample Locations of ESI</th>
</tr>
</thead>
<tbody>
<tr>
<td>E-Mail</td>
<td>Servers</td>
</tr>
<tr>
<td>Word Proc. Files</td>
<td>Desktop &amp; Home PCs</td>
</tr>
<tr>
<td>Spreadsheets</td>
<td>Laptops</td>
</tr>
<tr>
<td>Databases</td>
<td>CD-ROMs</td>
</tr>
<tr>
<td>Web Pages</td>
<td>Flash Drives</td>
</tr>
<tr>
<td>CAD Drawings</td>
<td>Cell Phones, PDAs, iPods</td>
</tr>
<tr>
<td>Instant Messages</td>
<td>Web-Based E-Mail Systems</td>
</tr>
<tr>
<td>Videos</td>
<td>Archive Systems</td>
</tr>
<tr>
<td>Voice Mail &amp; VOIP</td>
<td>External Hard Drives</td>
</tr>
<tr>
<td>PDFs</td>
<td>Back-Up Tapes</td>
</tr>
<tr>
<td>Image Files</td>
<td>Hidden or Deleted Data</td>
</tr>
<tr>
<td>System Files</td>
<td>Social Networking Sites</td>
</tr>
</tbody>
</table>
At the outset of the preservation obligation, important information such as the storage location of relevant documents, the identification of key players, and even the scope of the preservation obligation itself are often unclear. As a result, an amended legal hold may need to be issued subsequent to the initial hold.

When implementing the legal hold process, companies should consider whether a third-party may be in possession of relevant documents such that a legal hold should be issued to that third-party as well. Special attention needs to be paid to information in locations outside the U.S. Some countries have laws that limit the retention of certain types of information and the transportation of some information to the U.S. for discovery purposes.14 In addition, remember that the legal hold notice may itself be discoverable!

**DOCUMENT CUSTODIAN & IT PERSONNEL INTERVIEWS**

The Legal Hold Manager should conduct and/or coordinate interviews of identified document custodians and IT personnel to assure compliance with the legal hold policy. This is an important step in the monitoring and auditing of a legal hold. Interviews can be utilized to confirm that custodians and locations have been fully identified and that routine deletion practices have been halted. Special attention should be given to custodians who are considered to be “key players” in the litigation. Information gathered during such interviews will often assist with determining the appropriate scope of preservation and will apprise the Legal Hold Manager of necessary information to include in an amended legal hold. Custodian and IT personnel interviews will assist the Legal Hold Manager in determining:

► Relevant time frames and whether ESI creation is ongoing;
► Whether there are any additional unidentified key players;
► Whether to create “forensic copies” of network or local storage media;
► Whether to utilize a legal hold server while the hold remains in effect;
► Whether any ESI is located off-site or is in possession of third-parties;
► Whether metadata is an issue in the subject litigation;
► Whether ESI should be immediately harvested;
► Whether the IT department has the requisite skill, software and equipment to appropriately preserve ESI, such as when forensic imaging is required;
► Whether any ESI has already been deleted and remains available only on backup media; and,
► Whether the company’s system architecture, cycling of backup media, electronic document metrics, and relevant document types pose any specific concerns.

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14 See, for instance, the *European Directive 95/46/EC*. Under this *Directive* personal data shall not be kept for longer than is necessary for the purposes for which it is processed and shall not be transferred to a country or territory outside the EU, unless that country or territory ensures an “adequate” level of protection for the rights and freedom of data subjects in relation to the processing of personal data. One exception to the *Directive* that may apply in certain cases is when the transfer is required for the exercise or defense of legal claims.

15 *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 432 (S.D.N.Y. 2004) ("Zubulake I") ("It is not sufficient to notify all employees of a litigation hold and expect that the party will then retain and produce all relevant information. Counsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched.")
DOCUMENTING THE PRESERVATION PROCESS

Perfection in the preservation of documents is not required. However, courts require that a party must make at least reasonable good-faith efforts to identify, preserve, and collect relevant documents. Every step of the process, including the Legal Hold Manager’s decisions and rationale, should be memorialized with an eye toward illustrating reasonable decisions made in good faith. You should always be thinking about how best to explain and defend these decisions (“defense of process”).

PROPORTIONALITY PRINCIPLES APPLY

Although the obligation to preserve discoverable materials is broad, the scope of the duty to preserve is tempered by general principles of reasonableness and proportionality:

“Must a corporation, upon recognizing the threat of litigation, preserve every shred of paper, every e-mail or electronic document, and every backup tape? The answer is clearly, ‘no.’ Such a rule would cripple large corporations.”

In certain instances it may be permissible for an organization to determine that preservation is not required or is necessary only on a small scale. This is true where there is either a low likelihood of the materials containing relevant information, or where the preservation cost or burden is excessive and unreasonable compared to the potential relevance or value of the information.

In contrast to disputes over proportionality at the document review and production stages of discovery, decisions at the preservation stage are frequently made unilaterally by the preserving party. Therefore, to reduce the possibility of later being sanctioned for failure to preserve materials, an organization should be conservative in its interpretation of the scope of the duty to preserve until a detailed preservation agreement can be negotiated with potential adversaries.

OUTSIDE ESI TECHNICAL CONSULTANTS

Many companies, often including those with large and sophisticated IT departments, do not have the necessary resources to preserve ESI. Examples are where preservation requires retention of metadata or forensic imaging. Even where in-house staff is capable of appropriately preserving ESI, in many instances ESI and related issues are so extensive that an outside consultant can be effectively utilized to assist in developing and implementing a data identification and preservation plan.

Roles of outside consultants may range from the creation of forensic copies of ESI in order to maintain chain of custody, to the use of data sampling to identify data sources reasonably likely to contain relevant information. Importantly, the use of an outside technical consultant may eliminate the need for in-house IT personnel to testify as to a company’s document retention and preservation efforts. If you expect a need to involve ESI technical consultants, doing so early will likely yield significant cost savings and other efficiencies in your efforts to identify, preserve, collect, process, review and produce.

MEET & CONFER WITH OPPOSING COUNSEL

In December, 2006, the Federal Rules of Civil Procedure were amended to address issues related to the discovery of ESI. Most notably, the Rules now require counsel to discuss the discovery of ESI at the Rule 26 “meet & confer” conference held at the outset of litigation. More and more states have since followed suit and now also require, or may soon require, that counsel “meet & confer” on ESI and other issues possibly within 100 days of service of process.

Although the requirement to “meet & confer” regarding ESI creates a new obligation at the outset of litigation, early discussion of ESI issues may allow an organization to narrow the scope of their preservation obligations. Contrary to popular belief, the sooner a litigant can openly and cooperatively come to an agreement with opposing counsel on preservation obligations, the better!
Prior to reaching such an agreement, it is typically wise to make very conservative decisions. Once an agreement is reached, preservation obligations may well diminish. If an agreement cannot be reached, a motion for protective order should be considered.

**SPECIAL TYPES OF ESI**

A legal hold should account for “not reasonably accessible” media which most often includes backup tapes used for disaster recovery purposes rather than for ordinary business purposes. As a general rule, a party is not obligated to preserve all backup tapes even after the preservation obligation is triggered. However, a party may be required to preserve at least some backup tapes by withdrawing them from weekly or monthly tape rotation cycles in order to comply with the obligation to preserve relevant documents.

When it comes time to search and produce documents, you may need to affirmatively advise your adversary of what media will not be searched on the basis of it being “not reasonably accessible.” However, because the scope of preservation is much broader than that of production, it is likely that at least some backup tapes should be preserved. In contrast to backup tapes, absent a showing of special need and relevance, litigants are typically not required to preserve, review or produce deleted, shadowed, fragmented, or residual ESI.

**SEEK ADVICE FROM YOUR LAWYERS EARLY & OFTEN!**

When the preservation trigger has been pulled you need to move quickly. Ultimately ESI responsibilities will include a wide range of issues including keyword searching, document review, and production. Although a failure in one of these areas can typically be cured, the failure to preserve may be fatal.

Assessment of preservation obligations is always fact-dependent. In furtherance of your duty to make reasonable, good-faith preservation decisions, you should preserve the rationale for the decisions made. Seek your adversary’s understanding and approval of your decisions! Absent that, consider obtaining judicial approval. The ultimate goals are risk management and cost control while maintaining a defensible preservation procedure. The way to get there is cooperation, accuracy and consistency, memorializing your decisions every step of the way.

Lawyers familiar with ESI issues can be of great assistance. Expect them to have and routinely use:

- Legal Hold Policies & Procedures Templates
- Preservation Notice Templates
- Template Objections & Responses to Requests for ESI
- 30(b)(6) ESI Witness Preparation Outlines
- Motions to Compel / Responses to Motions to Compel Templates
- “Meet & Confer” Outlines
- Employee Document Search Certification Templates

Don’t be shy. We would be pleased to assist you with preservation and other ESI issues!

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17 See The Sedona Conference® Commentary on Preservation, Management and Identification of Sources of Information that are Not Reasonably Accessible. www.thesedonaconference.com

18 See Zubulake V.

19 This may be because of the cost of searching, the cost of searching balanced against other factors, such as the availability of similar ESI in other locations, or the technical IT burdens on the business. Such positions are often met with challenges and requests for sampling. Your adversary may take the position that the benefit exceeds the burdens. See generally: The Sedona Conference Commentary on Preservation, Management and Identification of Sources of Information that are Not Reasonably Accessible. www.thesedonaconference.com

20 See Endnote No. 5.
Our Firm

Wilson Elser is a large, full-service firm with clients in the United States, Latin America, Europe, and Asia. Domestically, we are ranked among the top law firms identified by *The American Lawyer* and listed in the top 50 of *The National Law Journal 250*.

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