E-DISCOVERY

Urgent Need for Legal Hold Policies and Procedures

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, corporate litigants continue to be subjected to severe spoliation sanctions due to an increasing judicial intolerance for the failure to preserve electronically stored information (ESI). In many instances courts have not only imposed legal fees, but have issued severe adverse inference instructions, effectively destroying a litigant’s possibility of prevailing or waging an effective defense.

In contrast to the stereotypical Enron-style destruction of evidence (i.e., deliberate document shredding), a loss of evidence—including ESI—needs not be willful for a court to impose sanctions. Rather, a litigant’s “lackadaisical attitude” toward preservation, exhibited by passive acts such as failing to issue a written legal hold, failing to collect ESI from key players, or permitting routine destruction of ESI to continue, may result in potentially severe sanctions.1

A seemingly innocent delay in implementing an appropriate method to preserve ESI may be catastrophic. As a result, the duty to preserve is simply too important to ignore, both for those engaged in litigation on a daily basis and for management seeking to control costs. An organization must seek to reduce litigation risk and e-discovery expenses by implementing an appropriate organization-wide legal hold policy and utilizing an organization-specific set of legal hold procedures. This will ensure, to the greatest extent possible, that a consistent, systematic and defensible approach to the preservation obligation is followed.

Legal Hold Policies

A legal hold policy sets forth an organization’s legal obligation to preserve evidence, including ESI, that is potentially relevant to litigation or a governmental investigation. This obligation arises from a triggering event that produces a reasonable anticipation of litigation or a governmental investigation involving the organization.2 Though this responsibility is likely obvious to in-house counsel and high-level management, it is quite possibly foreign to employees, including those who may become key players in litigation.

Employees must understand the basics of the duty to preserve and be aware that failure to comply with this obligation may result in severe legal ramifications for the organization. An effective legal hold policy, which may be viewed as an abbreviated white paper, will educate employees as to the preservation obligation by addressing (1) the legal obligation to preserve evidence, (2) the recognition of potential triggering events, (3) the internal notification of a potential triggering event, (4) possible types and locations of ESI, and (5) the legal hold process in general.

An organization’s ability to respond and react to its preservation obligations relies greatly on the education, training, and compliance of its employees. The longer an organization’s employees fail to understand the duty to preserve, the greater the risk of a failure to preserve ESI, potentially resulting in sanctions, even for inadvertent conduct. Certainly the possibility that an employee’s lack of knowledge regarding retention and preservation policies could result in a destruction of documents is a sufficient impetus to implement an appropriate organization-wide legal hold policy.3

Legal Hold Procedures

In-house counsel and management at organizations that are frequently involved in litigation likely have experience with determining when the preservation obligation has been triggered and with implementing legal holds. However, many organizations have historically limited their preservation efforts to the mere issuance of a hold, without any subsequent efforts. Although this has often worked in the past, courts today routinely find such minimal efforts woefully inadequate.4

Beyond the simple distribution of a legal hold, organizations must recognize the likely need to monitor, enforce, reissue, and amend each legal hold that is issued. Such individual steps and the management of each hold must not be approached ad hoc. An organization should instead adhere to a customary and standardized set of procedures while maintaining detailed documentation of its efforts. Not only can such a strategy be expected to minimize costs, but in the event preservation methods are attacked, the organization’s efforts are more likely to prove defensible before a court.5

An effective set of legal hold procedures should provide an organization with a consistent and systematic approach to preserving relevant evidence, with step-by-step guidance for an appointed legal hold manager on all aspects affecting legal holds. This is not a “one-size-fits-all” solution. A set of procedures should be tailored to an organization with consideration of the relevant industry and lines of business, information system architecture, document retention policies, and level of adherence to an enterprise structure. Regardless of an organization’s particulars, the standard legal hold procedures that follow are among those that should nearly always be followed and should nearly always be included in a set of legal hold procedures.

The Preservation Trigger and the Decision to Issue a Legal Hold.

Once alerted to a potential triggering event, in-house counsel or management must act quickly to determine whether the identified event gives rise to a reasonable anticipation of litigation or an investigation, and whether a legal hold must be issued. The fact-sensitive nature of many triggering events often dictates the need for a case-by-case analysis, perhaps by outside counsel on “close calls.” When a legal hold is not issued, counsel should monitor the decision in case subsequent information suggests litigation may in fact be reasonably anticipated.
Appointment of a Legal Hold Manager or Team. A legal hold manager (or possibly a legal hold team) designated immediately following the decision to issue a legal hold can direct all aspects of the hold, including its implementation, monitoring and enforcement. This role should be filled by an employee who has sufficient stature within the organization to command the attention and respect of employees, along with knowledge and understanding of both IT and general business operations. When desired, outside counsel may participate in managing the hold.

Defining the Initial Scope of a Legal Hold. Defining the scope of a legal hold requires (1) determining how to define “relevant,” (2) identifying custodians of potentially relevant evidence, (3) identifying locations of evidence, (4) determining whether metadata is relevant, and (5) determining appropriate time frames. This is a critical step in the preservation process: a narrow hold carries the risk that relevant evidence will be lost, while an overly broad hold may cause excessive and unnecessary expenses.

As a general policy, until such time that specific preservation rules are implemented, a preference exists for an over-inclusive scope due to potentially severe ramifications of a failure to preserve. Of course, the defined scope may consider issues of reasonableness and proportionality to the amount in controversy.

Implementing a Legal Hold. The most important steps related to implementing a legal hold are (1) distributing the hold and confirming its receipt, (2) conducting document custodian interviews, and (3) conducting IT and records management interviews. Over-inclusiveness is generally preferred when creating a legal hold distribution list, particularly for an initial legal hold.

Distribution of a hold can be either by hard copy or electronic means, such as e-mail or Intranet. Regardless of the method of distribution, the legal hold manager’s key responsibility at this stage is verifying receipt by potential custodians, possibly through obtaining signed confirmation indicating agreement to comply with the hold. An aggressive follow-up with non-responders may be necessary.

Amending Legal Holds. The process of implementing a legal hold, including conducting custodian interviews, frequently sheds light on the appropriate scope of the hold. Where the initial hold was, in hindsight, too narrow in scope, an expansion of the hold may be required. Events leading to an increase in a hold’s scope include receipt of preservation demands by an opposing party, receipt of supplemental discovery demands, revision to the definition of “relevance,” and identification of additional custodians or locations of relevant evidence.

Conversely, the scope may be narrowed when previously identified potential custodians are ruled out or the relevant issues become more focused. Reducing the scope remains appropriate pursuant to reasonableness and proportionality concepts, preferably upon consent of the adversary or the court.

Monitoring and Enforcing a Legal Hold. A legal hold manager retains a continuing duty to appropriately monitor and enforce the legal hold until the hold has been fully released. This may require reviewing the hold, reissuing the hold, distributing reminders, and conducting supplemental custodian, IT and records management interviews.

Following implementation of a legal hold, the manager should calendar the hold for periodic reviews of its contents and scope, the frequency of which is a case-specific determination. Legal holds may also be reviewed upon the occurrence of certain events, including the above-listed situations prompting the consideration of an amendment to the hold. With each review, the legal hold manager should consider whether to conduct supplemental interviews of particular custodians, specifically including key players, and of IT and records management personnel.

A litigant’s ‘lackadaisical attitude’ toward preservation, exhibited by passive acts such as failing to issue a written legal hold, failing to collect ESI from key players, or permitting routine destruction of ESI to continue, may result in potentially severe sanctions.

The extended periods during which matters in litigation often remain open raises the concern that a document custodian may mistakenly believe an open legal hold is no longer in effect. To reduce this possibility, the legal hold manager should periodically reissue outstanding legal holds and distribute legal hold reminders.

As with periodic reviews, the frequency for reissuance or reminders is a case-specific decision. A reissuance may also be appropriate following a reorganization or change in work force, especially among IT and records management staff. The reissued hold should be expanded to include newly hired employees, where the creation of relevant documents is ongoing, or when hardware is inherited from a departing employee.

Release of the Hold. The final step in the life of a legal hold is, of course, the release of the hold. Although straightforward on the surface, releasing a hold may be complicated by the existence of other outstanding holds. The legal hold manager must therefore confirm that the evidence to be released is not subject to a separate legal hold.

Conclusion

As increased emphasis has been placed on the preservation of ESI, many litigants have been sanctioned despite undertaking preservation efforts that seemed to be more than adequate in the past. In response, some forward-thinking organizations have implemented legal hold policies and procedures geared toward tackling ESI preservation issues. Although crafting an appropriate policy and set of procedures will inevitably require tailoring to an individual organization, the above steps provide a solid foundation.

The ad hoc preservation efforts of the past are not only inefficient, but are often not defensible in today’s culture of judicial intolerance for preservation errors. An appropriate policy and set of procedures, along with associated template legal hold materials and custodian questionnaires, must be utilized to enable organizations to consistently, economically and defensibly preserve evidence, including ESI. The possibility for organizations unprepared in this arena to incur substantial discovery costs and severe legal sanctions is simply not worth the risk.

2. Numerous opinions have addressed this standard, including those cited above plus, most notably, Zubulake v. UBS Warburg LLC, 229 F.R.D. 422 (SDNY 2004).
4. Although sanctions may differ slightly among the federal circuits and the states, there is agreement that the mere issuance of a legal hold is insufficient. See Pension Committee; Rimkus; Keithley; Zubulake.
6. A proposal for federal preservation rules was submitted and discussed at the 2010 Civil Litigation Conference held at Duke Law School. Although preservation rules could provide a degree of certainty to litigants, it remains unknown when or if such rules will be drafted or implemented. See Preservation Rulemaking After the 2010 Litigation Conference, Thomas Y. Allman, July 17, 2010.