Guide

THE DEFINITIVE GUIDE TO LEGAL HOLD BEST PRACTICES

A step-by-step approach to creating an effective preservation plan

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Evidence is indispensable.

Without evidence, there can be no proof, and thus, no litigation. Preservation of evidence, therefore, is the precursor to ediscovery and all ensuing negotiations and court proceedings.

Notably, the duty to preserve evidence applies equally to both plaintiff and defendant. It does not call for perfection. Rather, it demands that litigants take reasonable steps to ensure that relevant information is not lost or modified.

Court cases reinforcing and interpreting the importance of reasonable preservation abound, from Judge Scheindlin's seminal *Zubulake* opinions through the 15 years of subsequent case law illustrating the costs of failure to comply.

Yet, many organizations lack an effective plan for mitigating these risks and often pay the price — and not just in sanctions for spoliation. Failing to preserve may make it impossible to offer evidence in support of their own cases, leaving them powerless to enforce their rights, and in a weakened position when negotiating.

This guide aims to remedy that. It offers a comprehensive approach to creating a detailed preservation plan and will answer the following questions:

- Why do you need a preservation plan?
- What essential elements should be included in an effective plan?
- How should you implement the plan to improve compliance?
- What should you do next?

Why create a preservation plan?

The Origins of the Duty to Preserve

Preservation of evidence is critical to fact-based determinations of proof, and thus to litigation itself. The general preservation obligation therefore arises from the common-law duty to avoid spoliation (loss or destruction) of relevant evidence so that it is available for use at trial.

This duty is not explicitly defined in the Federal Rules of Civil Procedure (FRCP). But that's not to say that the rules don't address the parties' duty to preserve. Rule 26(f)(2), which establishes the parameters for the initial "meet and confer" between litigants, requires that the parties meet and "discuss any issues about preserving discoverable

The key is to ensure that your preservation efforts satisfy the core tenants of defensibility, namely "reasonableness and good faith" — standards that are grounded in timeliness, consistency, and transparency. An established preservation plan aids in achieving all three of these goals.

information," prior to their Rule 16(b) scheduling conference. And Rule 26(f)(3)(C), as amended in 2015, now requires that the parties include their "views and proposals" on "any issues about [the] disclosure, discovery, or preservation of electronically stored information" in their discovery plan.

More importantly, the Rule establishes penalties for litigants' failure to preserve information for discovery. Rule 37(e) provides a definition for spoliation, which occurs when four distinct elements are met:

- there must be electronically stored information that a party should have preserved in the anticipation or conduct of litigation,
- that information must be lost (either through deletion or modification),
- the loss must be due to a party's failure to take reasonable steps to preserve the information, and
- the information must not be able to be restored or replaced through additional discovery.

The Rule also provides penalties for spoliation. If the court finds "prejudice to another party from loss of the information," Rule 37(e)(1) authorizes the imposition of "measures no greater than necessary to cure [that] prejudice." Should the court find that a party destroyed evidence "with the intent to deprive another party of the information's use in the litigation," on the other hand, it may impose more severe sanctions under Rule 37(e)(2). These include a presumption that the information was unfavorable to the spoliating party, an instruction to the jury to that effect, or even dismissal or default judgment.

Additionally, a few states recognize spoliation of evidence as an independent tort claim, under which a party may recover monetary damages for an opponent's loss of evidence.

The Importance of Defensibility

The duty to preserve doesn't necessarily call for a defined preservation plan, so why develop one? Why not just respond to each preservation obligation in an appropriate, matter-specific way as the duty arises?

The key is to ensure that your preservation efforts satisfy the core tenants of defensibility, namely "reasonableness and good faith" — standards that are grounded in timeliness, consistency, and transparency. An established preservation plan aids in achieving all three of these goals.

First, a preservation plan facilitates a timely response by identifying, in advance, how decisions will be made and what processes will be employed when a preservation obligation arises. Timely action not only demonstrates good faith but also reduces the risk of inadvertent destruction of discoverable information.

Second, following a defined process promotes greater consistency and repeatability, ensuring everyone in the organization will use the same approach in every matter.

And third, documenting the actions taken and the decisions made in accordance with an established plan ensures that you can demonstrate compliance with the process — and defend your responses should they later be called into question.

A defensible process accounts for every step of the process, from initial awareness of a trigger event through the release of legal holds at the close of a matter. Let's turn next to those individual components.

An effective preservation plan should take into consideration the decision process that the organization will use and should ensure that the decision-maker clearly documents the rationale and outcomes of these evaluations.

What are the essential elements of an effective plan?

Your preservation plan must include guidance for:

1. Recognizing the Trigger Event
2. Defining the Scope of Preservation
3. Taking Action to Preserve (Implementation)
4. Monitoring the Hold
5. Releasing the Hold

Recognizing the Trigger Event

A preservation obligation arises "when an organization is on notice of a credible probability that it will become involved in litigation, seriously contemplates initiating litigation, or when it takes specific actions to commence litigation."[1] Evaluating a trigger event is therefore a fact-based inquiry, based on what is known at the time.

This first element of your plan should articulate how you will identify and evaluate trigger events, including who is responsible for making the decision and how that person will be informed of potential trigger events. For example, who will respond if:

- A disgruntled employee threatens to sue the organization?
- A business dealing goes south?
- The organization discovers a competitor is infringing on its intellectual property?

In each case, it is often a business manager — someone in the line of duty — who first becomes aware of the potential for litigation. The employees who encounter these situations must be trained to recognize and report events that may trigger the duty to preserve so that the legal department can make a final determination.

When does a situation rise to the level of triggering a duty to preserve evidence? At times, there may be a clearly recognized event: the receipt of a complaint or demand letter, notice of a lawsuit, or initiation of a regulatory action (e.g., an EEOC claim). Or it may be something less black-and-white, such as an ongoing contract dispute, an employee complaint, or a customer concern. The instigating event may be related to other actions, like a third-party subpoena request where the organization has the potential to become a party to the litigation or a regulatory inquiry that suggests potential litigation. To deal with all of these possibilities, the organization should identify the general types of events that may trigger a duty to preserve and then map how each such event will be brought to the attention of legal counsel in a timely manner.

Once the organization has identified potential trigger events, it must evaluate each individual incident to determine if and when a duty to preserve has attached. An effective preservation plan should take into consideration the decision process that the organization will use and should ensure that the decision-maker clearly documents the rationale and outcomes of these evaluations.

What factors create the potential for litigation or investigation? These considerations may include the nature and specificity of the claim, the person or entity making the claim, the likelihood that that person or entity will indeed file a claim, or the existence of similar claims that the organization has knowledge or information about (through industry press coverage or regulatory actions, for example). Vague threats lacking in detail or recurring threats that have never given rise to litigation may not represent the type of situations that lead to a "reasonable anticipation of litigation" and thus may not create a duty to preserve.

[1] The Sedona Conference, *Commentary on Legal Holds, Second Edition: The Trigger & The Process.*

Once the organization has determined that it's subject to a duty to preserve, it must determine a reasonable scope for those preservation efforts.

Remember that the duty to preserve evidence attaches equally to the plaintiff. When the organization itself reasonably anticipates that it may initiate litigation, or when it is actively contemplating legal action, its preservation obligation is triggered.

Here's a quick rule of thumb for determining when a preservation duty has attached: when an attorney would seek "work product" protection, the client at least anticipates that litigation is possible.

Recognizing the Trigger Event: Case Law Examples

Zubulake v. UBS Warburg LLC, 220 F.R.D. 212 (S.D.N.Y. 2003). In the fourth Zubulake opinion, the court observed that "It goes without saying that a party can only be sanctioned for destroying evidence if it had a duty to preserve it." Here, the court held that the trigger event occurred no later than August 2001, when Zubulake filed her EEOC complaint. But the duty to preserve may have attached four months earlier: Zubulake pointed to emails about her from April 2001 that UBS employees had titled "UBS Attorney Client Privilege." Since "almost everyone associated with Zubulake recognized the possibility that she might sue," UBS was obligated to preserve relevant evidence.

Apple Inc. v. Samsung Elecs. Co., 888 F. Supp. 2d 976 (N.D. Cal. 2012). In this patent litigation, the court reminded the parties that "there is no question that the duty to preserve relevant evidence may arise even before litigation is formally commenced." This specific litigation could have been reasonably foreseen long before Apple filed suit in April 2011, since "Apple alerted Samsung to Apple's patents and infringement positions" as early as August 2010.

Siras Partners LLC v. Activity Kuafu Hudson Yards LLC, No. 650868/2015, 2018 NY Slip Op 32484(U) (N.Y. Sup. Ct. Sept. 28, 2018). In this breach of contract case involving the dissolution of a partnership, the defendants argued that the plaintiffs had been under a duty to preserve relevant evidence since a 2014 meeting ended with a plaintiff stating that they could "deal with it, or…sue him." The court disagreed that this type of vague threat sufficed to trigger an obligation to preserve evidence. Rather, the duty to preserve arose when the petition for dissolution was filed months later.

Defining the Scope of Preservation

Once the organization has determined that it's subject to a duty to preserve, it must determine a reasonable scope for those preservation efforts. What information may be relevant to establishing the claims of the anticipated litigation? What information may be needed to defend against those claims or issues? What supports or undermines the allegations in the case?

Rule 26(b)(1) defines the scope of discovery. It states that "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." The determination of proportionality turns on six factors:

- the importance of the issues at stake in the action,
- the amount in controversy,
- the parties' relative access to relevant information,
- the parties' resources,
- the importance of the discovery in resolving the issues, and
- whether the burden or expense of the proposed discovery outweighs its likely benefit.

At a minimum, data mapping helps to capture institutional knowledge concerning where certain types of data exist and who should be informed when preservation actions are required.

The rule further notes that "Information within this scope of discovery need not be admissible in evidence to be discoverable."

Therefore, scoping the extent of potentially discoverable information that is subject to a preservation obligation starts with evaluating the claims or defenses that could be asserted in the lawsuit. Many organizations convene a "claims and defense" meeting at the outset of a matter to determine what issues may reasonably be raised and identify relevant data sources to preserve and personnel to interview. Ultimately, scoping efforts determine what information is considered relevant, where such information resides, and who is likely to possess or have knowledge regarding that information (as data custodians or stewards).

A thorough preservation plan should define who will be engaged in the initial scoping process. Is the legal department equipped to identify where potentially relevant information may be retained within the organization? Are there others within the organization — perhaps in information technology (IT), information security, human resources (HR), records management, data privacy or other departments — who can assist? Many organizations create a standing "discovery response team" with members from these different departments. This allows them to quickly pull in knowledgeable people who are experienced in translating the various types of information that the legal department needs to preserve, given the myriad potential data sources that may be involved.

An organization may also choose to invest in some type of data mapping effort. At a minimum, data mapping helps to capture institutional knowledge concerning where certain types of data exist and who should be informed when preservation actions are required. These content maps may simply record where the organization stores commonly sought information, who controls that data, and how they can preserve it when required. When a new preservation obligation arises, this knowledge can be invaluable to making efficient, well-informed, and repeatable decisions. Having a data map for common data types also allows the team to focus only on the smaller subset of new information types or sources involved in a matter. Finally, the institutional knowledge from a data map can inform proportionality and burden arguments, helping counsel decide how far the organization should go when preserving data. Remember, perfection isn't the standard when it comes to preservation.[2]

Once an organization has identified the types and sources of data involved in a matter, including any attributes such as subject matter, date range, geography, and the like that may help to limit the scope of preservation, it must determine what steps it will take to preserve that data. Which data custodians or stewards need to be informed of the need to act, and what do they need to do? It's useful to draw a distinction between data that is under the custody and control of individual custodians, such as information on employees' computers and mobile devices, as opposed to data that is managed by data stewards who have a broad responsibility for maintaining a company system or data repository. Still other data may be in the custody and control of third parties that will need to be informed of the duty to preserve that data on the organization's behalf.

Again, documentation is critical to defensibility. A preservation plan should include steps for documenting how the organization has made decisions to include or exclude certain custodians or data types and what factors informed those decisions at the time. If proportionality or the burden of accessing and saving data are factors in deciding not to preserve it, it is critical to capture those reasons.

One last point about scope: the duty to preserve can, and likely will, evolve over the life of a matter. New information may alter the scope of the duty for anticipated or pending litigation. In the same vein, new information may lead an organization to conclude that it should no longer reasonably anticipate a particular litigation matter and that it is, consequently, no longer subject to that preservation obligation.

[2] As Judge Scheindlin recognized in Zubulake IV, litigants would be "cripple[d]" if they had to preserve "every shred of paper, every email or electronic document, and every backup tape." *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003).

First and foremost, the recipient of a legal hold notification must clearly understand both the importance of complying with the notice and the steps they should take to properly preserve information.

Defining the Scope of Preservation: Case Law Examples

In re Pradaxa Prods. Liab. Litig., MDL No. 2385 (S.D. Ill. Dec. 9, 2013). In this product liability case, the court sanctioned the defendants for the "gross inadequacy" of their legal hold, which failed to account for the full scope of the developing multidistrict litigation. The court noted that it was "frankly amazed" that the defendants "did not fully understand the broad scope of this litigation or the need to expand their litigation hold" to preserve all of the relevant evidence. The court also rejected any suggestion that it had deemed "such a tailored litigation hold [] acceptable" in this case. The court concluded that this assertion "smacks of a post-debacle argument in desperation to salvage a failed strategy regarding production evasion."

Gordon v. T.G.R. Logistics, Inc., No. 16-CV-00238-NDF (D. Wyo. May 10, 2017). In this personal injury case, the court struck a balance when ordering discovery of social media posts, considering both the risk of chilling legitimate cases and the need to detect exaggerated claims. The defendant sought discovery of Gordon's entire Facebook account history, both before and after the accident in question. The court agreed that "almost any post" could provide relevant information, but held that the full account history was not proportional, as it would burden Gordon by intruding on her privacy. The court therefore concluded that Gordon must provide all relevant posts, but not a full account history.

Nece v. Quicken Loans, Inc., No. 8:16-cv-2605-T-23CPT (M.D. Fla. Feb. 27, 2018). In this proposed class action about unwanted phone solicitations, Nece moved to compel a production that would require Quicken Loans to review at least 3 million emails. The court denied the motion, citing the importance of proportionality in determining scope and noting that each alleged violation of the Telephone Consumer Protection Act was worth just $500. The court further observed that requesting "a reasonable sample" could have avoided the dispute.

Taking Action to Preserve (Implementation)

Once the organization has determined the scope of the preservation obligation, it must take action to preserve the content within that scope. This typically involves notifying personnel about their need to preserve information and affording them adequate instructions to do so. An organization issuing this type of legal hold notice must do so in a timely manner, provide clear instructions on what actions need to be taken, and include mechanisms to ensure that data custodians and stewards receive the notice and indicate their willingness to comply with its instructions.

First and foremost, the recipient of a legal hold notification must clearly understand both the importance of complying with the notice and the steps they should take to properly preserve information. To make the notice process clear, consistent, and repeatable, organizations should evaluate these additional considerations:

- Who sends the notice? Will the recipient recognize the notification as an important communication?
- Can templates be used to improve the consistency of the notice and therefore enhance its clarity? If every notification is novel, will recipients take the time to review them thoroughly?
- Does the notice process provide a means for recipients to assist with identifying additional data sources or custodians?

Second, the notification process should include measures to ensure that the recipients received the notice, read it, understood the actions expected, and agreed to comply with

Organizations should also check for less-routine records information initiatives and protocols. How does the organization enforce or encourage periodic disposition of redundant or obsolete information?

those expectations. Organizations that simply send an email in hopes that recipients will "get the point" will find that practice extremely hard to defend should it be called into question later. Instead, organizations should adopt best practices such as automated tracking of custodian acknowledgments, escalating communications for delinquent responses, and affirmatively following up with custodians to ensure their understanding and compliance. Custodian acknowledgments may also come into play should the scope of the hold evolve and the notification consequently change over time (as most do).

Third, an effective hold notification process accounts for the ongoing nature of most preservation obligations. Most legal holds persist for a considerable period of time, during which they may overlap with other legal hold obligations. Therefore, employees who are called on to preserve information should be supported with regular reminders. Automating these routine notifications can save time for legal counsel while ensuring that custodians continue to comply with their various preservation obligations.

Fourth, a thorough preservation plan must account for data sources that are subject to routine purging cycles, such as emails that are automatically deleted after a certain number of days. These automatic deletion protocols should be suspended for the duration of the legal hold. Organizations should also check for less-routine records information initiatives and protocols. How does the organization enforce or encourage periodic disposition of redundant or obsolete information? For example, are there annual "spring cleaning days" when custodians should be proactively reminded about their current hold obligations?

Finally, the notification process should account for potential points of failure, those times when information may be at greatest risk of spoliation. These include:

Employee transitions. Organizations rely on employees to protect information in their possession — which means it's critical to think about what will happen if one of those employees leaves the company, transfers to a new department, or receives a new computer. How is the legal team advised of personnel changes? Integrating HR data with legal hold notification tools can aid timely reporting of changes and maintain preservation obligations. Including legal hold status in other systems and processes can also help trigger appropriate actions. For example, a flag in the organization's HR system can ensure that HR asks appropriate questions during an exit interview, while a flag in the IT help system could trigger IT to ask questions during computer repairs or upgrades.

Addition of new applications or data repositories. New software and hardware may be added as part of a scheduled upgrade or infrastructure modernization or on an ad hoc basis to replace failed equipment. When an individual or the entire organization adopts new applications or data repositories, relevant information will inevitably be migrated to the new system. All of these changes may affect ongoing preservation obligations. Including flags in the IT system can keep preservation top-of-mind during these changes.

Non-custodial data storage. Organizations are often responsible for preserving data that is not in their direct custody. Preservation of non-custodial systems data requires alerting data stewards of the need to preserve content retained in organization databases, document repositories, and other enterprise systems. The organization is also obligated to inform third parties that are retaining data on behalf of the organization when that data is under the "custody, ownership, or control" of the organization. This may include data within cloud-based applications being delivered on a software-as-a-service basis. Organizations should consider how they will retain or obtain data from these systems should their service contracts be amended or terminated.

Organizations should not assume that custodians will automatically grasp the importance of preservation. That's why organizations widely consider it a best practice to provide a mechanism for recipients of legal hold notifications to acknowledge that they have read, understood, and agreed to comply with their preservation obligations.

While this is a standard list of legal hold considerations, others may apply in an organization's unique circumstances, especially in light of increasing data privacy regulations and expectations. For preservation obligations that involve information about or data repositories in different jurisdictions (e.g., the European Union), organizations should take special care to minimize conflicts with local privacy regulations such as the General Data Protection Regulation (GDPR).

Taking Action to Preserve: Case Law Examples

Franklin v. Howard Brown Health Ctr., No. 17 C 8376, 2018 WL 4784668 (N.D. Ill. Oct. 4, 2018). In this employment discrimination case, the defendant "bollixed its litigation hold … to a staggering degree and at every turn." Franklin explicitly threatened litigation on July 24, 2015, but for whatever reason, the defendant waited over a month to initiate a legal hold. Nor did the defendant's counsel take any action to preserve instant messages, the standard means by which employees communicated; in fact, counsel entirely lost the plaintiff's computer. The court imposed evidentiary sanctions for the spoliation caused by the deficient legal hold.

Apple, Inc. v. Samsung Elecs. Co. Ltd., No. C 11-1846 LHK (PSG) (N.D. Cal. July 25, 2012). In this long-running intellectual property dispute, the court imposed an adverse inference jury instruction due to Samsung's spoliation of evidence, caused by poor management of its legal hold. Samsung issued its legal hold only to a small group of key employees, and took no action to suspend the biweekly automatic deletion of emails. It also waited seven months to verify whether employees were complying with the legal hold instructions. Even when Samsung expanded its hold to 2,700 employees, it still did not suspend the automatic purging of its email system.

The Importance of Custodian Acknowledgments

Most data custodians — despite being integral to the preservation process — are not lawyers or ediscovery professionals. Organizations should not assume that custodians will automatically grasp the importance of preservation. That's why organizations widely consider it a best practice to provide a mechanism for recipients of legal hold notifications to acknowledge that they have read, understood, and agreed to comply with their preservation obligations. This acknowledgment should be accompanied by a mechanism for custodians to ask questions or raise concerns about their legal hold obligations. It may conclude with a short survey that the custodian must complete to memorialize their understanding of the hold. A robust preservation process also includes follow-up procedures with custodians, including more in-depth custodian interviews and periodic reminders about their hold obligations.

Tracking custodian acknowledgments improves the legal team's confidence that the recipient has indeed received the notice and reinforces the perceived importance of compliance. Should a custodian fail to acknowledge the hold, the legal team can more rapidly detect that failure and follow up on it. Tracking acknowledgments also reduces the risk of inadvertent spoliation by a custodian or data steward, thereby enhancing the organization's ability to defend its hold notification process by demonstrating its "reasonable and good faith" design.

Despite the widespread use of legal hold acknowledgments, some attorneys continue to express concerns.

First, attorneys may be concerned that mandatory acknowledgment creates an undue burden for the legal team. Following up on noncompliance, especially with larger holds or diverse recipient populations that are unaccustomed to receiving legal directives, may indeed take time. But it is critical for an organization to demonstrate that it is taking

Another key component of hold enforcement involves following up with custodians for additional information. Both questionnaires and interviews can help counsel to confirm that the custodian is following the hold instructions and reinforce the importance of complying with the hold.

reasonable steps to communicate and routinely remind custodians of their preservation obligations. Actions such as documenting policies and procedures, remaining consistent with expectations, and diligently aligning actions to stated processes are common tactics to further reduce risk without excessively burdening legal staff.

Second, some attorneys worry that the lack of an acknowledgment from any custodian (i.e., "anything less than 100 percent compliance") creates exposure should the organization later be called on to defend its preservation efforts. This fear is misplaced. When spoliation allegations arise, a poor (or exceptional) acknowledgment rate has no bearing on the Rule 37(e) calculus. A spoliation claim is based on three elements: whether a preservation obligation had attached at the time data was lost, whether electronically stored information (ESI) is indeed lost and cannot be replaced by other means, and whether the requesting party is prejudiced by that loss. Further, an organization should never consider it a legal obligation to share its acknowledgment response rates or legal hold audit records with a requesting party; the organization should always protect these details as privileged communications that do not influence the spoliation analysis.

Organizations should therefore view the practice of tracking acknowledgments as a means for risk mitigation and a valuable component of an efficient and effective response to preservation obligations.

Monitoring the Hold

The work doesn't end after the legal team has issued a legal hold notice. Legal counsel has a duty to monitor custodians' compliance with the hold instructions.[3] Reasonable actions to satisfy this duty typically include seeking affirmative acknowledgments from recipients, sending past-due notices to nonresponsive custodians, issuing periodic reminders over the life of the hold, and modifying the scope of the hold as new information comes to light.

Another key component of hold enforcement involves following up with custodians for additional information. Both questionnaires and interviews can help counsel to confirm that the custodian is following the hold instructions and reinforce the importance of complying with the hold. Additionally, questionnaires and interviews allow counsel to gain a greater understanding of what additional relevant information may exist, where information is actually stored, and what other custodians should be added to the hold. They also afford an opportunity to assess whether the scope of the hold should be expanded or contracted.

With questionnaires, it is generally advisable to keep questions somewhat simple and straightforward to lessen the burden on custodians and encourage prompt response. This can depend to some extent on the organization's culture regarding available time and willingness to participate. Additionally, avoid questions that may cause confusion. Questionnaires can also be an effective way to reinforce desired behavior.

Exploring Preservation Problems: Case Law Examples

Inadequate attorney oversight: Zubulake v. UBS Warburg, LLC, 229 F.R.D. 422 (S.D.N.Y. 2004). In the fifth Zubulake opinion, the court granted Zubulake's motion for sanctions, imposing an adverse inference jury instruction after finding that UBS had not taken appropriate steps to preserve and produce information for litigation. The court laid out, in detail, the role of counsel in identifying, preserving, and producing information for discovery, noting that "counsel must oversee compliance with the litigation hold, monitoring the party's efforts to retain and produce the relevant documents." In large

[3] The *Zubulake V* opinion clarified this obligation, noting that "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." *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 432 (S.D.N.Y. 2004) (emphasis in original).

Organizations should establish a process to determine when legal holds have expired, perhaps by calculating statute-of-limitation expiration dates when the hold is first issued or regularly reviewing all pending holds to determine which are no longer required.

cases, this may demand that "counsel … be more creative," perhaps by using technology to aid in searches. While a "lawyer cannot be obliged to monitor her client like a parent watching a child," counsel must do more than trust that a client will "fully comply with [a legal hold] without the active supervision of counsel."

Intentional acts: GN Netcom, Inc. v. Plantronics, Inc., No. 12-1318-LPS, 2016 WL 3792833 (D. Del. July 12, 2016). In this antitrust suit, the court imposed $3 million in punitive fees and evidentiary sanctions against Plantronics after a senior executive not only deleted over 40 percent of his own emails, but also directed employees, three separate times, to delete their emails "due to the ongoing legal issues." Other Plantronics executives also instructed employees to use code words "to evade discovery of documents." The court found this spoliation willful and in bad faith.

Bad faith failure to preserve: Klipsch Grp., Inc. v. ePRO E-Commerce Ltd., Nos. 16-3637-cv, 16-3726-cv (2d Cir. Jan. 25, 2018). In this interlocutory appeal, the Second Circuit upheld the imposition of a $2.7-million discovery sanction in a case with an estimated $25,000 value. The court concluded that ePRO consistently, systematically, and willfully flaunted its discovery obligations by failing to issue adequate legal holds, manually deleting thousands of files and emails, and failing to disclose tens of thousands of relevant documents. The court further held that the imposed monetary sanction was "plainly proportionate—indeed, it was exactly equivalent—to the costs ePRO inflicted on Klipsch in its reasonable efforts to remedy ePRO's misconduct."

Boilerplate notices: EPAC Techs., Inc. v. HarperCollins Christian Publ'g, Inc., No. 3:12-cv-00463, 2018 WL 1542040 (M.D. Tenn. Mar. 29, 2018). In this contract dispute, the court imposed spoliation sanctions including adverse inference jury instructions, evidentiary preclusion, and partial attorneys' fees. It excoriated the defendant's preservation efforts, finding that it issued a boilerplate legal hold notice without providing any guidance or follow up. Everyone at the company reportedly ignored that notice. The court concluded that the "pitiable lack of legal leadership" caused widespread, if unintentional, spoliation.

Releasing the Hold

There's a common — yet costly — syndrome among some organizations: an urge to avoid any potential of spoliation by "preserving information forever." To avoid this expensive accumulation of data, an effective preservation plan shouldn't end with preserving data, but rather with releasing holds and resuming normal operations, including scheduled data destruction. This demands that organizations plan for the release of legal holds.

Just as the preservation plan described how to recognize a trigger event, it should also describe how the organization will release holds. Who makes the decision to release a hold, and under what circumstances? For example, if the duty to preserve was triggered in response to "anticipated litigation" that never materialized, what will trigger a review of that hold decision once litigation is no longer reasonably expected? Organizations should establish a process to determine when legal holds have expired, perhaps by calculating statute-of-limitation expiration dates when the hold is first issued or regularly reviewing all pending holds to determine which are no longer required.

Once a hold is released, the legal team must notify the custodians subject to that hold. This should involve providing written notice to custodians of the hold's release, checking other pending holds for those custodians to differentiate the scope of the continuing holds from that of the released hold, and clarifying with each custodian what information they should still be preserving.

To build an organization-wide culture of compliance that will improve the effectiveness and efficiency of each custodian's execution on preservation obligations, the organization should also incorporate regular training on data preservation.

The organization must also consider the implications of releasing a hold and resuming "normal retention and disposition practices." For example, most organizations rely on automated disposition of emails based on age. When a hold is in place, this automatic deletion is suspended, which may lead custodians to rely on their seemingly endless quota of email storage. When the hold is lifted, older emails can suddenly disappear because there is no longer any obligation to retain them, which may inconvenience or surprise custodians.

Finally, corporations should reach out to any third parties that have possession of any preserved data, such as law firms, consulting experts, ediscovery vendors, and requesting parties. This data should either be destroyed according to the terms of an agreement or case management order — indicated by a certificate of destruction — or returned to the corporation for destruction in accordance with written policy. Organizations should not allow third parties to retain case data after the legal hold is released.

What comes next?

Having an effective preservation plan is critical for an organization's efficient, timely, and defensible response to a preservation obligation. But to fully realize the benefits of that plan, the organization must put it into practice in every matter. That starts with taking steps to ensure that the entire organization, especially senior management and IT, buys in. Nor is this a one-time process: the organization should periodically review and update its preservation plan as its litigation profile evolves, new players engage, and new data sources emerge. This keeps the preservation plan evergreen, ensuring that it reflects changes in the organization's IT landscape and information management policies as well as the ways that employees create, transmit, and retain electronically stored information.

To build an organization-wide culture of compliance that will improve the effectiveness and efficiency of each custodian's execution on preservation obligations, the organization should also incorporate regular training on data preservation. In the development of a preservation-ready organization, ask:

1. Are employees that may be subject to a legal hold educated about their obligations and trained on how to implement a hold?
2. Are HR and IT policies routinely updated to incorporate evolving legal hold policies?
3. Do managers reinforce the importance of compliance, and are there consequences when the plan fails to generate the desired results?

By investing in the development of a good preservation plan, corporations will limit their risk and be better equipped to respond to litigation and regulatory inquiries.

Checklist for an Effective Legal Hold Notice

- ☐ **Form:** Is the form of the communication effective? Does it create a record, such as an email, to establish when it was sent?
- ☐ **Clout:** Is the notice sent from a person of authority, such as legal counsel?
- ☐ **Timeliness:** Is the notice sent and received promptly enough to ensure the immediate suspension of routine business operations that may otherwise destroy or alter the information that needs to be preserved?
- ☐ **Notice:** Does the notification clearly identify what it is and explain why the recipient is receiving the notice?
- ☐ **Clear instructions:** Does the notice clearly articulate the actions that the recipient should take? Does it identify what information the recipient should preserve and how the recipient should undertake that preservation? Does it explain how long the hold will apply? Organizations should suit their notices to their audience: use plain language that all employees can understand, avoid legalese or jargon, and clearly state the importance of ongoing compliance with the hold.
- ☐ **Comprehensiveness:** Do the preservation instructions address all potentially relevant data and data sources? This may need to include any information that may be within BYOD ("bring your own device") and BYOA ("bring your own application") sources.
- ☐ **Affirmative Response:** Is there a mechanism to document custodians' receipt of the notice? Custodians should be required to affirmatively indicate that they have read the notice and are willing to comply with its terms. The notice should include a clear call to action and plainly state the consequences of inaction.
- ☐ **Point of Contact:** Does the notice indicate an accessible point of contact should the recipient have questions or wish to provide feedback?
- ☐ **Confidentiality:** Does the notice maintain all applicable confidentiality and attorney-client privilege protections?
- ☐ **Cultural Norms:** Does the notice take into consideration any organizational or geographic norms, such as data privacy concerns and regulations?

Releasing Holds, Step by Step

- ☐ To ensure a smooth release process, organizations should take these steps:
- ☐ Determine who has the authority to release legal holds. Identify the individuals within the organization who can determine when a duty to preserve no longer applies and how they will make that determination.
- ☐ Establish a process to determine when triggers expire. The organization should regularly review all pending holds and determine which are no longer required.
- ☐ Notify custodians, in writing, when holds are formally released. As with the initial legal hold, this notification must be in writing to create an audit trail.
- ☐ Check for other active holds. Determine whether any affected custodians are currently preserving data for other cases. Take this opportunity to remind them of their other obligations and distinguish what data must be retained and what can be deleted.
- ☐ Inform custodians of the implications of returning to regular retention practices. If the organization's regular retention policy requires the deletion of emails after 90 days, make sure that employees understand that they'll be resuming that schedule so they aren't surprised at their sudden loss of historical emails.
- ☐ Consider data stored with third parties. Don't forget data stored outside the organization with a third party, such as a law firm, expert witness, or ediscovery vendor. Any data in the custody of third parties should either be destroyed or returned to the organization for destruction.

About ZDiscovery

Designed specifically for corporate legal teams, ZDiscovery is an intuitive and powerful ediscovery platform for managing litigation response from legals holds through processing and review.

ZDiscovery is backed by ironclad security and unrivaled customer support, giving the in-house team confidence and control to operate defensibly and efficiently while reducing legal costs.

Legal Hold Pro®

Preservations & Legal Holds

Legal Hold Pro provides a complete system to effortlessly initiate legal holds, manage custodian communications and compliance, and confidently oversee a defensible preservation process.

- Quickly send, track, and report on legal holds
- Defensibly preserve and collect data
- Streamline litigation response

Digital Discovery Pro®

Processing & Document Review

Digital Discovery Pro gives corporate legal teams the power to significantly reduce ediscovery costs and resolve matters faster.

- Process and cull data in-house to reduce costs
- Get rapid insights into matters
- Easily review documents with intuitive filters and search tools

Scalable & Secure

Software architecture that puts customers first

- Flexible platform adapts to unpredictable litigation volumes
- Usage-based pricing ensures you only pay for what you use
- SOC 2 Type 2 certification provides third-party validation of our data security protection

Outstanding Support

Elevate your ediscovery expertise

- Get a lifetime of support
- Grow your career with top-notch education and hands-on training
- Connect with a community of 350+ corporate customers

ABOUT ZAPPROVED®

Zapproved's ZDiscovery platform is designed specifically for corporate legal teams to take control of ediscovery from the moment litigation is anticipated until the matter is resolved. Our powerful yet intuitive system equips teams to confidently reduce reliance on outside providers, dramatically lower costs, and simply build a better process. Backed by ironclad security and unrivaled customer support, our enterprise-class software is trusted by more corporate legal teams than any other.

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