



Implementing an Effective and Defensible Legal Hold Workflow

BY DEAN GONSOWSKI

Ediscovery requires attention from multiple departments, the implementation of complex business processes, and often, it includes massive amounts of data. Any one of these elements is cause for potential worry, but the legal hold process is most often the crux of an ediscovery effort, since failure at this early stage often leads to sanctions.

Legal hold refers to the responsibility of an organization to notify key custodians (i.e., anyone potentially involved in the matter, including partners, employees, IT departments, subsidiaries, etc.) of their duty to preserve potentially relevant information when litigation is reasonably anticipated. It is often the first step in the ediscovery process, and is required in nearly every case regardless of the eventual outcome. While notifying custodians about their duty to preserve electronically stored information (ESI) is a fairly straightforward concept, the reality is that the process is often complicated and fraught with risk. This obligation is further complicated by the frequent need to go beyond the company's boundaries to notify third parties that may have relevant ESI, such as contractors, agents, subsidiaries, cloud storage providers and the like.

Therefore, it is critical for all organizations to conduct legal holds properly because of the ever-present risk of sanctions from the judiciary, which can include fines, witness and evidence preclusions, spoliation inferences, and in the most severe situations, terminating sanctions. Beyond the punitive measures that can be levied by the bench specifically in response to attendant spoliation sanctions, there is often collateral damage, which can be seen in the form of alienation of the judge/jury, loss of good will in the public marketplace, insurance coverage issues, etc.

Why does legal hold matter?

Improving the legal hold process is at the forefront of corporate to-do lists because of the growing risk of sanctions from the judiciary as a result of faulty legal hold processes. In 2003, US District Court Judge Shira Scheindlin issued a number of opinions in the case of *Zubulake v. UBS Warburg*. *Zubulake* is a landmark case in ediscovery because it was one of the first to rule on a number of key ediscovery issues including:

- the scope of a party's duty to preserve ESI when litigation is reasonably likely;
- a lawyer's duty to monitor their clients' compliance with ESI preservation; and
- the imposition of sanctions for the spoliation of electronic evidence.

During an employment discrimination matter between Laura Zubulake and UBS Warburg, a discovery dispute revealed that defendants had failed to appropriately preserve ESI, and were subsequently unable to produce several key emails relevant to the case. These failures led Judge Scheindlin to issue several groundbreaking opinions on a party's (and counsel's) responsibility to preserve ESI. She found that once the duty to preserve was triggered, counsel did not take affirmative steps to monitor compliance, and ensure all relevant sources were identified and searched.¹ She held that counsel had an obligation to guarantee that relevant information was preserved by placing the information under a litigation hold. These errors, amongst others, led to an adverse inference jury instruction and an eventual \$29.2 million verdict against UBS. Beyond the verdict's sticker shock, this case was paramount to the ediscovery industry because it articulated the definition of a legal hold, what a legal hold process includes, and the processes that the party must be prepared to defend. *Zubulake* also shed light on the duties of outside counsel, which included a previously undefined role in assuring compliance with the preservation process and securing ESI, not just sending over a hold memo and hoping for the best.

A more recent case (also from Judge Scheindlin) has further detailed the evolution of a defensible legal hold process, with an emphasis on clearly articulating the preservation instructions and monitoring custodian compliance. In *Pension Committee of the Univ. of Montreal Pension Plan, et al., v. Banc of America Securities, LLC*, Judge Scheindlin stated that "simply emailing a hold notice to a custodian and recording the hold on a spreadsheet" was not enough. According to the court,



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the email and spreadsheet approach did not adequately monitor compliance or clearly inform custodians about the criticality of the preservation process.² While simply issuing a written legal hold notice was previously regarded as an appropriate first step, more importance is now placed on the effectiveness of the notice.³ In *Pension Committee*, counsel failed to periodically remind custodians of their obligation to preserve ESI, track their acknowledgement of the preservation notice, and communicate with custodians to determine whether the preservation obligations were actually understood. In the end, all 13 plaintiffs were sanctioned for ediscovery failings given Judge Scheindlin's finding of gross negligence.

The legal hold process is not under the microscope of only one judge. Sanctions as a result of faulty legal hold processes are widespread and increasing. As published in the *Duke Law Journal*, ediscovery sanctions are up 271 percent since 2005, with the majority of sanctions resulting from an organization's "failure to preserve."⁴ Specific monetary awards attributed to ediscovery sanctions have increased over the same period as well, ranging from only \$250 to over \$8.8 million. Instances in which organizations disregarded their responsibility to enforce a reasonable and defensible legal hold strategy resulted in significant cost and exposure to legal risk. They also helped demonstrate why a proper legal hold process is instrumental to a defensible ediscovery process.

The typical legal hold process

In an attempt to escape sanctions and adverse jury instructions like those given in the *Zubulake* and *Pension Committee* cases, organizations have hastily implemented manual processes often deploying disparate tools to comply with the duty to preserve. However, these antiquated legal hold practices lack a holistic approach to safeguarding against sanctions, and are laden with inefficiencies that burden businesses with undue risk.

The email and spreadsheet solution

It is common practice for both legal and IT departments to regularly devote time and resources to the notification and preservation effort. This results in significant organizational costs, both in terms of manpower and lost productivity. In many cases, legal teams must identify the potential preservation requirements, and in parallel with the notification to custodians, must convey preservation instructions to the IT team (and any other third-party cus-

Transitioning from Preservation to Collection

Successfully navigating the legal hold challenge is a great first step, but in many instances, it doesn't actually ensure the physical collection of electronically stored information (ESI). To do this, many organizations have historically leveraged the actual custodians to harvest their own data. Recently, however, a number of cases have expressed skepticism over the self-collection of ESI in the electronic discovery process. In many of these cases, the reviewing judge or magistrate has looked at this process with an increasingly jaundiced eye, in some cases using the self-collection component as part of its rationale for sanctions.

Ability to discern relevancy

First, self-collection inherently requires key custodians to make legal decisions about relevancy for the matter at hand. In the recent case of *Northington v. H&M Int.* (N.D. Ill. Jan. 12, 2011), the plaintiff sued her former employer for sexual and racial discrimination, and retaliation in violation of Title VII. The court sanctioned the defendant by levying fines and recommending a spoliation inference to be issued at the time of trial, because the defendant's efforts to preserve evidence were deemed to be both "reckless and grossly negligent." One of the main factors rendering the defendant's behavior culpable was the use of a self-collection methodology, which the court found to be inherently unreasonable: "Most non-lawyer employees, whether marketing consultants or high school deans, do not have enough knowledge of the applicable law to correctly recognize which documents are relevant

to a lawsuit and which are not." Similarly, Judge Scheindlin in *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of America Sec. LLC*, (S.D.N.Y. Jan. 15, 2010) took exception with a self-collection process that unreasonably placed "total reliance on the employee to search and select what that employee believed to be responsive records without any supervision from Counsel."

Bias is hard to overcome

While adequate supervision from counsel can remedy some of the defects seen above, a thornier problem often occurs when there's a perception that biased employees may not accurately self-collect data. *Green v. Blitz U.S.A.* (E.D. Tex. Mar. 1, 2011) demonstrates another example of self-collections gone awry. In *Green*, the plaintiff sought to re-open her lawsuit despite a prior settlement, once she suspected that the defendant had failed to produce relevant ESI. Finding that defendant had committed numerous discovery abuses, the court issued unusually punitive sanctions where, in addition to a \$250,000 fine, the defendant also had to provide a copy of the court's sanctions order to plaintiffs "in every lawsuit proceeding against it" for the past two years, and also will have to file the court's order in every case that it is involved in for the next five years. Self-collection was again a culprit, since the main individual in charge of collections was also closely tied to the research and development of the "flame arresters" that were at issue in this exploding gas-can case.

custodians of ESI). The legal team often records notices on a spreadsheet, and attempts to track dozens of custodians across multiple (and overlapping) cases. This manual process is repeated every time there is a subsequent change or update in any given matter. Then, the IT team receives instructions and manually implements the holds, hopefully able to react to the same changes and modifications in scope as the case progresses. This methodology results in an error-prone legal hold process that wastes resources, increases risk and has compounding complexity as cases pile up over time.

Not surprisingly, this spreadsheet approach (historically used to document and track the legal hold notification process) is increasingly coming under fire. As highlighted in the opinion of the *Pension Committee* case, manual notification and tracking of all key pieces of information related to every legal hold via a spreadsheet is simply not defensible. Judge Scheindlin acknowledges, "parties need

to anticipate and undertake document preservation with the most serious and thorough care, if for no other reason than to avoid the detour of sanctions." In a 2007 matter with Intel, their general counsel stated that emails for 151 employees, who were to have been instructed to retain ESI as possible evidence in the AMD antitrust trial, were lost by virtue of a single IT manager misreading a spreadsheet. Apparently, a single manager didn't click on the tab where the 151 were listed. As a result, they never received backup instructions, where the employees' names were first distributed, thus demonstrating the risk of a manual spreadsheet preservation approach.

In addition to legal hold notification and acknowledgment, key pieces of information must be documented, such as dates, custodians, target data, initial scope of hold, subsequent changes in the scope, reminders and notes associated with each process step.⁵ In fact, The Sedona Conference Commentary on Legal Holds observed that without signifi-

The *Northington* court (cited earlier) also addressed this bias issue as rendering self-collections fatally flawed stating: "It is unreasonable to allow a party's interested employees to make the decision about the relevance of such documents, especially when those same employees have the ability to permanently delete unfavorable email from a party's system. ... Furthermore, employees are often reluctant to reveal their mistakes or misdeeds." A similar analysis occurred in *Orbit One Commc'ns, Inc. v. Numerex Corp.* (S.D.N.Y. 2010) (finding self-collection unreasonable since the party placed responsibility for preservation in the hands of the employee "with the greatest incentive to destroy evidence harmful to Orbit One and to his own interests").

Lack of automation

Finally, even where bias isn't an issue and the custodians are well supervised by counsel, there are still potential issues where custodians simply can't remember if they had responsive ESI or where such information might have been located. This problem can be particularly acute given the fact that litigation is almost always conducted in the rear view mirror, often years in the past.

Fortunately, technology solutions are rapidly able to play a role in automating the collection process. This IT-lead approach is being increasingly recommended by organizations like The Sedona Conference (in *Best Practices Commentary on the Use of Search and Information Retrieval Methods in Ediscovery*), which states: "reliance solely on a

manual search process for the purpose of finding responsive documents may be infeasible or unwarranted. In such cases, the use of automated search methods should be viewed as reasonable, valuable and even necessary."

Where to go from here?

The safer, contemporary practice is to utilize technology to conduct collections from key players and perhaps leverage the custodians (and technology) to point out where relevant ESI might exist. As such, a belt and suspenders approach is undoubtedly the safer way to proceed. As noted by prominent ediscovery commentator Ralph Losey, in this "dual protection" scenario, "key custodians still search, identify and self-collect what they think are relevant emails, but, as a fail safe, IT also collects *all* of the key custodians' emails." This approach "guards against the intentional and unintentional mistakes that can sometimes arise in self-collection."

The key to implementing this "dual protection" methodology is that proportionality must be calculated to evaluate the proper risk/reward balance. While it's not necessary to use IT tools to collect data immediately for all custodians who have received a litigation hold notice, it's probably unreasonable to not quickly collect ESI (via formal, IT-based methods) from at least some subset of key players. The main point is that this isn't an "all or nothing" calculation. Costs, risks and benefits should all be carefully evaluated and documented, in case there's a downstream challenge.

cant and detailed documentation of the legal hold process, organizations may be unable to demonstrate the effectiveness of the legal hold process to opposing parties. The legal hold process is always evaluated in hindsight, with litigants defending their decisions potentially years after the legal hold process is triggered. As such, it is a serious gamble to rely on those involved to manually track legal hold steps, remember the details of what steps were taken (after so much time has passed) and defend the decisions that were made.

The stand-alone solution

To reduce this manual effort, some serial litigants purchased third-party software applications to manage the legal hold process. In addition to the relatively high licensing costs of many of these applications, they typically only solve the management of legal hold notifications, and fail to assist in the actual preservation of ESI. By solving only half of the preservation problem, orga-

nizations are still at significant risk of spoliation from routine disposition of data based on records management policies, or modification and deletion of data through routine business processes. To completely solve the preservation duty, it is paramount that organizations utilize a solution that combines both the workflow and data aspects of the preservation process. Moreover, many of these tools are difficult to integrate with applications that support downstream ediscovery stages, such as collection, processing, analysis and review. This effort requires the investment of considerable time and money. Additionally, it can result in a risky workflow that requires moving data between solutions and makes it difficult to track chain of custody. To move data between ediscovery phases, IT resources and time are devoted to the exporting and importing of data from one application to another. Throughout this migration process, the information is exposed to potential spoliation, metadata changes,

Identification Is Intertwined

Once the preservation duty is triggered (when litigation is “reasonably likely”), the next task is defining the universe of potentially responsive data and then determining the scope of what will ultimately be responsive. The Sedona Conference is another very influential standards body, and they’ve issued a number of best practices for various areas within the electronic discovery space. They state that the “duty to preserve relevant information is certainly triggered when a complaint is served or a governmental proceeding is initiated or a subpoena is received. However, the duty to preserve could well arise before a complaint is served or a subpoena is received and regardless of whether the organization is bringing the action, is the target of the action or is a third party possessing relevant evidence. The touchstone is ‘reasonable anticipation.’”

The Sedona Working Group also discusses the scope of information that must be preserved once the duty is triggered:

“Once the duty to preserve information arises, an organization must decide what to preserve and how to accomplish that preservation. In some circumstances, the duty to preserve requires only that a limited number of known historical documents be located and preserved. In other circumstances, the scope of the information is larger and the sources of the information may not be known to counsel. The identification and preservation of potentially relevant information can be a complex undertaking that requires trained people, processes, and technology, particularly when electronically stored information is at issue.”

While this initial mission is complex and broad, it isn’t without boundaries. When implementing a legal hold, it is important to recognize that the duty to preserve extends only to “relevant” information. While relevance is broadly defined under the Federal Rules of Civil Procedure, it is not without limits. Rule 401 of the Federal Rules of Evidence defines the term as follows: “Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”

Counsel must first determine the scope of information that must be preserved. For many organizations, the best way to initially scope a matter is by defining “key custodians” that may be relevant to the subject litigation or investigation. Often, these key custodians can be derived from analysis of the complaint or by interviewing witnesses. Next, once the key custodians are determined, it’s important to link those employees with sites of potentially relevant information, such as hard drives, network shared drives, backup tapes, personal digital assistants and loose media. Now, with the advent of cloud data storage and the use of hosted applications, it’s critically important to figure out if a given custodian has any data relevant to the matter stored in a cloud environment.

To manage the linking of key custodians to data sources effectively, counsel must become familiar with their client’s IT infrastructure and all applicable document retention policies. Increasingly, counsel will look to applicable data maps, and if those aren’t in place, they’ll have to interview appropriate IT professionals and relevant business unit personnel that may have knowledge of the incident.

corruption and re-indexing problems.

It is generally accepted that the sooner relevant ESI is physically collected, the less risk there is of spoliation. In *Wilson v. Thorn Energy, LLC* (S.D.N.Y. 2010), Judge Frank Maas held that failure to preserve ESI from a portable USB flash drive constituted a violation of the duty to preserve. In this case, the defendant corporation identified a flash drive that contained relevant ESI, but rather than preserving that data safely to a centralized evidence repository, the defendant’s employee chose to hold on to the drive, putting it instead into a desk drawer. When the files were requested for review and production, the files could not be read from the drive. The defendant’s employee attempted to repair the drive and recover the ESI contained on it, but those efforts failed. This is a classic example of “better to be safe than sorry” with respect to data preservation.

Streamlining the legal hold process

Judges are the ultimate decision makers on determining whether a legal hold process is effective, and their opinions often provide a useful framework. Based on continually evolving opinions, it is critical that a legal hold solution:

- communicates the duty to preserve by providing instructions to all key custodians and IT professionals when litigation is “reasonable likely;”
- periodically reminds all key players regarding their duty to preserve; and
- continuously tracks and monitors compliance.

The duty to preserve, while extremely important, is only one step in the ediscovery process. After satisfying the duty to preserve, legal teams must also collect the relevant data, cull the data set down, review that data and eventually

Written Legal Holds — Optional or Mandatory?

In her recent *Pension Committee* opinion, Judge Scheindlin caused a big stir within the legal community when she honed in on the written dissemination of legal hold notices. Attempting to draw a definitive line where there previously was none, she stated: “Written notice of a litigation hold to key players is required. Custodians should be periodically reminded and their compliance monitored.”

While this sounds rather straightforward, for many smaller organizations, there’s a real question surrounding whether deploying a written (versus oral) communication protocol really is most effective. This nuance wasn’t missed by Judge Francis (also from the Southern District of New York) in his *Orbit One Commc’ns, Inc. v. Numerex Corp.*, 271 F.R.D. 429 (S.D.N.Y. 2010) opinion, where he stated:

“For instance, in a small enterprise, issuing a written litigation hold may not only be unnecessary, but it could be counter-productive, since such a hold would likely be more general and less tailored to individual records custodians than oral directives

could be. Indeed, under some circumstances, a formal litigation hold may not be necessary at all.”

Similarly, in *Steuben Foods, Inc. v. Country Gourmet Foods, LLC*, 2011 WL 1549450 (W.D.N.Y. Apr. 21, 2011), the court also refused to follow Judge Scheindlin’s written requirement:

“[T]his court is not obliged to follow the holding of *Pension Committee* as to its finding of a requirement of a written litigation hold, ... Accordingly, the court in this case declines to hold that implementation of a written litigation hold notice is required in order to avoid an inference that relevant evidence has been presumptively destroyed by the party failing to implement such written litigation hold.”

Nevertheless, for many conservative practitioners, issuing a written hold is the safe course of action, particularly for any organization of significant size. While the oral communication of the legal hold responsibilities may be sufficient, the written mode of conveyance will likely be much easier to prove if a challenge comes to fruition.

produce responsive documents to the opposition. Often during these other processes, counsel will identify potentially relevant data or custodians that have not initially been included in the purview of the original legal hold, and subsequently, require new notices to be issued. This coupled with other typical changes in case requirements make ediscovery an iterative, non-linear process. If an organization’s legal hold workflow is not tightly integrated with all other aspects of ediscovery to allow for this level of flexibility, the organization is likely to encounter higher costs than necessary because of inefficiencies.

Without a repeatable and defensible legal hold work-

flow, organizations are not only wasting money and resources, but they are hindering the defensibility of their ediscovery process. In the recent case of *Philips Elecs. N. Am. Corp. v. BC Tech.* (D. Utah Feb. 16, 2011), the court found that a proper litigation hold wasn’t issued until 19 months after the duty to preserve arose, and within that timeframe, thousands of files were deliberately deleted from key custodians’ machines. Because of the faulty legal hold process, the court concluded “that extreme sanctions are warranted in this case where discovery abuses of a serious magnitude [occurred].”⁶ As the threat of sanctions and costs grow, and compliance efforts continue to strain multiple departments, organizations need to re-evaluate their legal hold strategy and address legal hold as a critical business process. While initiated and governed by a judicially mandated duty to preserve, legal hold strategy must also weigh cost effectiveness and potential disruption to the continuity of business.

The benefits of an integrated legal hold solution

Organizations who adopt an integrated legal hold solution allow themselves to not only manage all of the workflow aspects of legal hold notice management, but also the actual preservation of ESI. An integrated software platform mitigates chain of custody risks, since all documents are tracked throughout the entire process and seamlessly moved through the ediscovery process virtually, not physically. Attorneys have the added benefit of managing the


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legal hold notification process from the same user interface employed in the collection, analysis, review and production phases of ediscovery. Legal and IT users can directly manage a case through all stages of the ediscovery process, providing for better collaboration and informed decisions. As a result, all stakeholders associated with a case have a secure, single ediscovery portal to access a holistic view of case progress and tracking.

Streamlining your process

Rapidly evolving case law continues to stress that a defensible legal hold process is necessary to avoid ediscovery sanctions. As case complexity continues to expand, organizations will need to turn to automated legal hold solutions that will cost effectively manage the preservation effort and mitigate their risk.

Choosing an integrated and intuitive solution will automate the legal hold notification process and simplify preservation efforts. Additionally, organizations can clearly articulate preservation instructions to custodians and IT, leverage innovative features (e.g., surveys) to easily gather case facts, and defensibly automate the monitoring and tracking of custodian compliance. Where historical legal hold methods were cumbersome, expensive and risky, new integrated legal hold solutions streamline the legal hold process to achieve both cost effectiveness and legal defensibility. 

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ACC Extras on... Legal Hold Workflow

ACC Docket

- *Effective Management of Litigation Holds and Ediscovery* (May 2009). www.acc.com/docket/litld&edis_may09

QuickCounsel

- *The Legal Hold Action Plan: Best Practices for Meeting the Preservation Obligation* (May 2011). www.acc.com/lhap_may11

Top Ten

- *Top Ten Issues in Meeting the Preservation Obligation* (May 2011). www.acc.com/topten/pres-obligation_may11

Presentations

- *Litigation Readiness for Companies Without a Lot of Litigation* (Oct. 2010). www.acc.com/lit-readiness_oct10
- *Document Preservation* (Sept. 2010). www.acc.com/doc-preservation_sep10
- *How to Excel at Litigation Holds* (Oct. 2008). www.acc.com/lit-holds_oct08

Form & Policy

- *Preservation Notice* (July 2009). www.acc.com/forms/preservation-notice_jul09

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NOTES

- 1 *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003).
- 2 *Pension Committee of the Univ. of Montreal Pension Plan, et al., v. Banc of America Securities, LLC*. 2010 WL 184312 (S.D.N.Y.).
- 3 In *Pension Committee* counsel telephoned, emailed and distributed memoranda instructing plaintiffs to be over, rather than under-inclusive. The court found this to be ineffective and said it did not meet the standard of a proper hold notice.
- 4 *Duke Law Journal*, "Sanctions for Ediscovery Violations: By the Numbers," 2010.
- 5 *Sedona Conference Journal*, "Commentary on Legal Holds," 2010.
- 6 *Philips Elecs. N. Am. Corp. v. BC Tech*, 2010 WL 5838993 (D.Utah).