Bench&Bar OF MINNESOTA

Vol. 64, No. 7 | August 2007

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Issuing and Managing Litigation-Hold Notices

Courts increasingly are interpreting the obligation to preserve evidence as one that attaches as soon as a party reasonably anticipates litigation or a government investigation. Corporations and their counsel must therefore exercise added care to ensure that relevant documents and other materials are preserved and managed in good faith.

By Alan M. Anderson

The law imposes on litigants and those subject to government investigation a duty to preserve evidence.1 The duty runs to all employees and agents, but particularly to senior management and to the lawyers representing an organization.2 There has been a growing trend among courts to interpret the obligation to preserve evidence as one that attaches as soon as a party reasonably anticipates litigation or a government investigation.3 The Sarbanes-Oxley Act, for example, explicitly addresses the destruction, alteration or falsification of materials with the intent to impede or influence an existing or contemplated investigation.4 Therefore, in some instances, the duty can attach even before a lawsuit is actually filed or before receipt of formal notice of a government investigation.5

What is the scope of the duty to preserve? In perhaps the leading case on the issue, the U.S. District Court for the Southern District of New York posed and answered the question as follows: "Must a corporation, upon recognizing the threat of litigation, preserve every shred of paper, every e-mail or electronic document, and every back-up tape? The answer is clearly 'no.' Such a rule would cripple large corporations … that are almost always involved in litigation."6 Another court has explained, "While a litigant is under no duty to keep or retain every document in its possession once a complaint is filed, it is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request."7

This article discusses the issues relevant to deciding when, how, to whom, and for how long an entity should issue a litigation-hold notice suspending its normal records retention and management policies. It also considers what a litigation-hold notice should contain and who should be responsible for ensuring compliance with the litigation hold. It is intended to provide guidance to inhouse counsel as well as outside counsel in navigating these waters, made even more treacherous by the recent amendments to the Federal Rules of Civil Procedure that pertain to electronic discovery.8

Litigation Response Plans

Preparation is essential. Before litigation or a government investigation is threatened or is reasonably anticipated, a company should consider implementing a litigation response plan that provides a road map for the company to identify quickly the types and location of

records, paper and electronic, in the company's possession, custody or control that are potentially relevant to the litigation or investigation.

The company's record-retention policy will intersect with its obligation to preserve relevant records once litigation or a regulatory investigation is pending or reasonably anticipated. As part of the litigation-response plan, the company should have a process under which it can quickly evaluate whether it needs to suspend, in whole or in part, the document-destruction component of its retention policy, and by which it can distribute a notice to all employees who are likely to have relevant records in their possession, custody or control.9

When to Issue the Hold

The duty to preserve materials arises when a party acquires notice or should know that the materials are relevant to an existing litigation or investigation, or to reasonably anticipated future litigation or investigation.10 "Reasonably anticipated" is the consensus standard that is emerging from the case law and commentary.

There is no bright-line rule indicating when a party should reasonably anticipate a lawsuit or investigation. Given the scarcity of guiding case law, it is important to look to other credible sources for guidance, such as the Sedona Principles.11 Sedona Principle 5 provides that: "[I]t is unreasonable to expect parties to take every conceivable step to preserve all potentially relevant data." Comment 5(a) further suggests that: "[a] reasonable balance must be struck between: (1) an organization's duty to preserve relevant evidence; and (2) an organization's need, in good faith, to continue operations." In making decisions concerning the scope of a litigation-hold notice, counsel should act reasonably, competently and in good faith to meet the legal obligations without incurring unnecessary expense by going beyond those obligations. Not every record, document and tangible object (such as a specimen or slide) needs to be retained in every case. To date, even when judges have disagreed with specific judgment calls made by persons acting reasonably, competently, and in good faith, they have not ordered harsh sanctions. Where the law does not provide sufficient guidance on the scope of the duty to preserve, companies should make reasonable decisions rather than simply ordering the preservation of all materials.

Thus, determining whether litigation is reasonably anticipated is a fact-intensive inquiry. It involves consideration of at least the following situations.

When litigation will likely arise. In some circumstances a litigation-hold notice should issue before the initiation of a formal proceeding. A prelitigation dispute where legal proceedings are reasonably anticipated will trigger the obligation to preserve materials.12 Specific or repeated inquires or complaints about an issue may also trigger the need to consider whether a litigation hold should be issued.13 In one contractual dispute, for example, the court held that the defendant was on notice after prelitigation meetings failed to resolve a dispute over a software-licensing agreement.14

When a plaintiff decides to file suit. Courts have held it to be improper for a plaintiff to destroy materials in the period after it makes the decision to file suit but before the complaint is actually filed.15 When determining whether to apply sanctions the courts evaluate whether the party in question "knew or should have known" at the time of destruction that litigation was a "distinct possibility."16

When a summons and complaint is received. In many instances, a summons and complaint is received with no warning whatsoever. In such cases, service of the summons and complaint will constitute the first notice to the company. The institution of a "proceeding" with any administrative or judicial body such as the Equal Employment Opportunity Commission or similar tribunals likewise triggers the requirement to issue a litigation-hold notice, although

the scope of the preservation requirement may be narrower than if the suit is ultimately filed.17

When a company is first on notice. The duty to preserve attaches immediately once the company is on notice and preservation efforts need to be undertaken as soon as possible.18 There are no cases that provide definitive guidance as to how quickly litigation-hold notices must be sent once the duty is triggered, but any such case will be evaluated in hindsight, *i.e.*, after relevant materials have been destroyed, and very little if any delay is likely to be tolerated by the courts.

When the possibility of a lawsuit is known. A company is generally deemed to know when its representatives know. Individuals within an organization may learn of the possibility of a lawsuit at different times. A company will be deemed to know that litigation is likely when more than one or two relevant individuals within the company know.19 When litigation is anticipated by individuals who eventually might be "key people" to that litigation, a litigation-hold notice may need to be issued.20 Regular communication between the business leaders and legal personnel should be encouraged, to determine whether in fact a notice needs to be issued and to ensure that relevant materials are preserved.

When a new lawsuit/investigation arises. A new litigation-hold notice should be issued for each complaint or incident giving rise to the duty to preserve. Generally, it will not suffice to rely on the fact that a previous notice was issued under which similar documents are simultaneously being preserved. Each instance giving rise to the duty to preserve should be treated separately except in special circumstances such as mass tort litigation.

Who Should Issue the Hold

While the job of issuing a litigation-hold notice has not been placed on the shoulders of any one person, courts place great responsibility and blame on a company's senior management. Courts have found companies at fault when senior management failed to communicate litigation-hold notices, or failed to take an "active role" in establishing the organization's records retention policy.21

For example, in one federal securities law class action, the complaint named as defendants the corporate issuer, its CEO, and its board of directors. On the day the complaint was filed, the board of directors met and discussed the necessity of preserving documents for the case. The CEO was ordered to promptly take steps to preserve documents. The CEO delegated all responsibility to an inhouse attorney with no litigation experience. The attorney did nothing to ensure that the directives were followed and some documents were destroyed in accordance with prelitigation practices. The court placed the blame for the failure on the corporate executive team, stating that "when senior management fails to establish and distribute a comprehensive document-retention policy, it cannot shield itself from responsibility because of field office actions."22

Moreover, counsel appear to have an affirmative duty to ensure that corporate senior management does its job. As noted by one court, "[a] party cannot reasonably be trusted to receive the 'litigation hold' instruction once and to fully comply with it without the active supervision of counsel."23 To ensure compliance, counsel should:

- Distribute written litigation-hold notices. Do not rely on oral notices.
- Issue litigation-hold notices in the name of a person recognized as having authority within the company. Correspondence from such a person will engage the attention of recipients and command compliance.

Senior management should stress the importance of complying with litigation-hold notices,

and encourage employees to share questions and concerns with the legal department. A process should be in place to provide timely and accurate responses.

Litigation-hold notices generally are not discoverable. "[T]hese instructions are often, if not always, drafted by counsel, involve their work product, are often overly inclusive, and the documents they list do not necessarily bear a reasonable relationship to the issues in litigation."24 Furthermore, the compelled production of such notices could dissuade other businesses from issuing similar directions aimed at insuring the availability of information during litigation.25

Who Should Receive the Hold

Companies are not required to send a litigation-hold notice to individuals with no connection to the relevant events, or no contact with the people or materials that may reasonably be at issue.26 Companies are charged with preserving materials reasonably calculated to lead to the discovery of admissible evidence, and persons with no connection to the dispute are not likely to possess such materials.

Counsel should make reasonable efforts to reach all individuals likely to have relevant materials. Sanctions have been imposed for failure to communicate the hold to the proper employees.27 At the outset, litigation-hold notices should be sent directly to all employees considered "key players" in the litigation or investigation.28 Careful consideration should be given to who these "key players" might be. Beyond that core group, reasonable investigation/research will help identify who else is likely to have relevant materials and should therefore receive the notice. It is also important to send litigation-hold notices to relevant IT personnel, so that they may assist in meeting the duty to preserve relevant electronic documents while continuing to allow the proper routine destruction of back-up tapes and emails.

Companies should also request that recipients who believe that relevant materials might be held by others (such as predecessors in the recipient's position) inform the designated contact person or "cascade" the litigation-hold notice to others in the company who may have relevant materials. The "cascade" approach is not the preferred method and should be used only when distribution by counsel is impractical and when there are effective mechanisms for tracking to whom the litigation-hold notice was cascaded. The original issuer of the notice must be copied on any notice forwarded to others.

Including Third Parties

Fed. R. Civ. P. 34 and relevant case law are both ambiguous and underdeveloped concerning the scope of a company's duty to issue litigation-hold notices to third parties. Parties are obviously responsible for preserving materials within their possession, custody, or control but some third parties (such as independent contractors, suppliers, vendors, litigants in a related lawsuit) and affiliates29 may also be deemed to be within the "control" of a company for purposes of preserving relevant materials.

Although the law interpreting Rule 34 "control" is conflicting, materials are generally considered to be within the "possession, custody, or control" of a party if the party has the legal right to obtain them on demand.30 Cases decided to date have not fully developed the principle that a "legal right to obtain materials" is the equivalent of Rule 34's "control." Courts have recognized, however, that when they evaluate a party's "control" of materials, that control "must be firmly placed in reality."31 The courts also have yet to decide clearly the additional issue of whether Rule 34 control carries with it an obligation, upon receipt of a subpoena or complaint, to notify third parties with potentially relevant materials to preserve those materials, although it appears that the courts are moving in that direction.32

What Should Be Included

A litigation hold must inform the receiving parties of the need to preserve relevant materials. It must include enough factual information to enable the recipients to determine whether or not they possess potentially relevant materials, and should briefly alert them to the possible negative ramifications (spoliation, sanctions, negative inferences, etc.) if the litigation hold is not followed.

A litigation-hold notice should:

1) include a clear and conspicuous statement of its purpose;

2) include a description of the lawsuit or investigation;

3) set forth the issues involved in it;

4) contain guidelines regarding what kinds of materials should be maintained.33 Unless a court order, government enforcement subpoena, or other unique circumstances mandate it, back-up tapes should not be preserved and recycling should continue;

5) set forth the importance of preserving materials, and the potential ramifications of not following the litigation-hold notice;34

6) describe the actual steps that a recipient must take to verify preservation of materials;35

7) contain the name and contact details of the person overseeing the litigation or investigation in connection with which the litigation-hold notice is being issued;36 and

8) request that the recipient inform the designated contact person if he or she is aware of any other person who may have materials covered by the litigation-hold notice.

Distributing the Hold Notice

In the event that any relevant materials are inadvertently destroyed, it will be difficult to prove to the court that a good-faith effort was made to retain all relevant materials unless written notices were distributed. Thus, while it may be useful to reinforce a litigation hold through oral communications, emails, or meetings, the litigation hold should not be issued in the first instance this way.

The litigation-hold notice should be disseminated using whatever means will most likely be effective. If email is used to disseminate the litigation-hold notice, then counsel must ensure that all of the intended recipients of the litigation-hold notice have email accounts. Recipients of hold notices via email should be advised to file the notice so that it is protected from automatic deletion in their inbox. Regardless of the method used to distribute the litigation-hold notice, it should be clearly and conspicuously labeled and dated.

Counsel must track receipt of the litigation-hold notice. If possible, counsel should implement a method to record that notices actually are read.37 It is also important to verify that the notice has been sent to all necessary individuals.38 The Sedona Principles discuss the advisability of documenting document collection:

In developing data-collection procedures for electronically stored information, organizations should consider the appropriate scope of the collection, the cost of the collection, the burden on and disruption of normal business activities, and the defensibility of the process itself. All

collection processes should be accompanied by documentation and validation appropriate to the needs of the particular case. Well-documented data collection and production procedures enable an organization to respond to challenges – even those made years later — to the collection process, to avoid overlooking electronically stored information that should be collected, and to avoid collecting electronically stored information that is neither relevant nor responsive to the matter at issue. The documentation of the collection process should describe what is being collected, the procedures employed, and steps taken to ensure the integrity of the information collected. Finally, this documentation should be revised as the organization introduces new or different technology.39

After litigation-hold notices have been distributed, reminder notices should be issued periodically to ensure that employees are continually mindful of their compliance obligations. A new notice should be distributed if the issues in an investigation or litigation change such that materials later determined to be relevant are not likely to have been covered under the original notice. Courts are requiring increased diligence in this effort and are becoming less forgiving of poorly conceived and implemented litigation-hold-notice policies.40

Terminating Litigation-Hold Notices

Litigation-hold notices should remain in effect until a matter is ultimately concluded. A matter is ultimately concluded when: 1) a final settlement agreement and release has been signed by all parties; 2) a dismissal with prejudice has been entered as to all parties; or 3) the deadline for any further appeals has run and the entered judgment has become final.

The termination notice will notify employees that they can resume routine document destruction in accordance with the company's normal record-retention schedules. Employees should be made aware of the critical responsibility of adhering to termination notices as well as litigation-hold notices. Disregarding a termination notice and retaining documents for indefinite amounts of time can expend unreasonable, unnecessary or even exorbitant resources.

Responsibility for Document Collection

While it may not be counsel's responsibility to physically sift through each employee's computer and files to locate responsive documents, one court has held that it is not enough for lawyers merely to instruct a client to preserve email and other relevant evidence once litigation is reasonably anticipated. The court found fault with counsel's failure to "request retained information from one key employee" and "safeguard back-up tapes that might have contained some of the deleted e-mails, and which would have mitigated the damage done by [the client's] destruction of those e-mails."41 The court further found that counsel's duty extended to supplementary responses under Federal Rule of Civil Procedure 26. Citing the advisory committee notes to Rule 26, the court held that "[a]lthough the Rule 26 duty to supplement is nominally the party's, it really falls on counsel … the lawyer … must periodically recheck all interrogatories and canvass all new information."42 While recognizing that "[a] lawyer cannot be obliged to monitor her client like a parent watching a child,"43 counsel must at least locate relevant information and preserve and timely produce that information.44

Conclusion

Until the lines are more clearly drawn by rule or precedent, there will continue to be uncertainty on the part of many organizations about issuing and managing litigation-hold notices. This uncertainty, the attendant fear of possible sanctions, and the compounding of such fears by Sarbanes-Oxley and recent criminal prosecutions, can deter some organizations from undertaking reasonable and good faith efforts to manage their electronic data

effectively. Such a reaction is entirely wrong. Companies and their counsel must proactively prepare for issuing and managing litigation-hold notices and must act reasonably and with the utmost good faith to ensure that relevant documents and other materials are preserved whenever litigation or an investigation is reasonably anticipated.

Notes

1 Generally, this duty stems from two sources, Fed. R. Civ. P. 37 (and analogous state rules), and a court's inherent power to manage its own affairs in order to achieve the orderly and expeditious disposition of cases. *Chambers v. NASCO, Inc*., 501 U.S. 32, 43 (1991); *see also* Corporate and Criminal Fraud Accountability Act of 2002 §802, 18 U.S.C. §1519 (2002).

2 *Danis v. USN Commc'ns, Inc*., No. 98 C 7482, 2000 WL 1694325 (N.D. Ill. 10/23/00).

3 *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003) ("Zubulake IV"); *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 431 (S.D.N.Y. 2004) ("Zubulake V"); *see also Rambus, Inc. v. Infineon Techs. AG*, 220 F.R.D. 264, 287 n.31 (E.D. Va. 2004).

4 *See* 18 U.S.C. §1519 (2002).

5 *See, e.g., Silvestri v. General Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001); *Kronisch v. United States*, 150 F. 3d 112, 126 (2d Cir. 1998).

6 *Zubulake IV*, 220 F.R.D. at 217.

7 *Wm. T. Thompson Co. v. Gen. Nutrition Corp*., 593 F. Supp. 1443, 1455 (C.D. Cal. 1984).

8 *See* Fed. R. Civ. P. 26(f)(3) and 34(a) and Advisory Committee Notes, 2006 Amendments.

9 Courts have not been clear about what actions must be taken to suspend recycling of disaster recovery back-up tapes, either on a temporary or ongoing basis, pending further litigation developments. *Compare Zubulake IV*, 220 F.R.D. at 218 with *Keir v. UnumProvident Corp*., No. 02 CIV. 8781 (DLC), 2003 U.S. Dist. Lexis 14522, at *7-8 (S.D.N.Y. 08/26/03).

10 *Fujitsu Ltd. v. Fed. Express Corp*., 247 F.3d 423, 436 (2d Cir. 2001). *See also Convolve, Inc. v. Compaq Computer Corp.*, 223 F.R.D. 162, 175 (S.D.N.Y. 2004).

11 The Sedona Conference, a nonprofit research and educational institute located in Sedona, Arizona, drafted and disseminated the Sedona Principles, which are intended to complement the Federal Rules of Civil Procedure. Although the Sedona Principles have been cited and recognized by some courts, they have not yet been widely accepted. A Second Edition was published in late June 2007. *See Zubulake V*, 229 F.R.D. at 440.

12 *Capellupo v. FMC Corp.*, 126 F.R.D. 545 (D. Minn. 1989). *See Metro. Opera Assoc. v. Local 100, Hotel Employees*, 212 F.R.D. 178, 230 (S.D.N.Y. 2003).

13 *Blinzler v. Marriott Int'l, Inc.*, 81 F.3d 1148, 1159 (1st Cir. 1996); *ABC Home Health Servs., Inc. v. IBM Corp.*, 158 F.R.D. 180, 183 (S.D. Ga. 1994); *Computer Assocs. Int'l, Inc. v. Am. Fundware, Inc.*, 133 F.R.D. 166, 168-69 (D. Colo. 1990).

14 *Computer Assocs. Int'l, supra* at 168.

15 *See Struthers Patent Corp. v. Nestle Co.*, 558 F. Supp. 747, 758-59, 765 (D.N.J. 1981).

16 *Id.* at 756.

17 *Byrnie v. Town of Cromwell Bd. of Educ.*, 243 F.3d 93, 108 (2d Cir. 2001); *Zubulake IV*, 220 F.R.D. at 216-17. *See MOSAID Tech. Inc. v. Samsung Elecs. Co.*, 348 F. Supp. 2d 332, 336 (D.N.J. 2004). But *cf. Computer Assocs. Int'l, Inc. v. Am. Fundware, Inc.*, 133 F.R.D. at 169.

18 *Computer Assocs. Int'l, supra* at 168-69.

19 Zubulake IV, 220 F.R.D. at 217.

20 *Id.*

21 *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 169 F.R.D. 598, 604, 612, 614 (D.N.J. 1997); *Zubulake V*, 229 F.R.D. at 432.

22 *Danis v. USN Commc'ns, Inc.*, 2000 WL 1694325, at *32.

23 *Zubulake V*, 229 F.R.D. at 433.

24 *Gibson v. Ford Motor Co.*, No. 1:06-cv-1237-WSD, 2007 WL 41954, at *6 (N.D. Ga. 01/04/07).

25 *Id.*

26 *Szymanska v. Abbott Labs.*, No. 93 C 3033, 1994 U.S. Dist. LEXIS 3830, at *32 (N.D. Ill. 03/26/94).

27 *In re Prudential*, *supra* at 604.

28 *Zubulake IV*, 220 F.R.D. at 220 n.47; *Zubulake V*, 229 F.R.D. at 427 n.32

29 *See Super Film of Am., Inc. v. UCB Films, Inc.*, 219 F.R.D. 649 (D. Kan. 2004).

30 *See, e.g., In re Bankers Trust Co.*, 61 F.3d 465, 469 (6th Cir. 1995); *Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420, 1426-27 (7th Cir. 1993); *Bank of N.Y. v. Meridien BIAO Bank Tanzania Ltd.*, 171 F.R.D. 135, 146-47 (S.D.N.Y. 1997). *See also In re NTL, Inc. Sec. Litig.*, Nos. 02 Civ. 3013(LAK)(AJP), 7377(LAK)(AJP), 2007 WL 241344, at *17 (S.D.N.Y. 01/30/07); *Tantivy Commc'ns, Inc. v. Lucent Techs., Inc.*, No. 2:04-CV-79 (TJW), 2005 U.S. LEXIS 29981, at *11 (E.D. Tex. 11/01/05); *Kamatani v. Benq Corp.*, No. Civ. A. 2:03-CV-437, 2005 WL 2455825, at *5 (E.D. Tex. 11/04/05); *In re ATM Fee Antitrust Litig.*, 233 F.R.D. 542, 545 (N.D. Cal. 2005).

31 *United States v. Int'l Union of Petroleum & Indus. Workers*, 870 F.2d 1450, 1453 (9th Cir. 1989).

32 *See E*Trade Sec. LLC v. Deutsche Bank AG*, 230 F.R.D. 582, 589 (D. Minn. 2005).

33 *See Wiginton v. CB Richard Ellis, Inc*., No. 02-C-6832, 2003 U.S. Dist. LEXIS 15722, at *5 (N.D. Ill. 10/27/03); *Telectron, Inc. v. Overhead Door Corp.*, 116 F.R.D. 107, 124 (S.D. Fla. 1987).

34 *See In re Prudential*, *supra* at 604.

35 *Id.* at 613.

36 *Id.* at 612.

37 *See, e.g., In re Prudential*, *supra* at 613, 617.

38 *Keir v. UnumProvident Corp.*, 2003 U.S. Dist. LEXIS 14522, at *16-17.

39 *The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Discovery, 2d Ed.* (The Sedona Conference® Working Group Series, June 2007), "Documentation and Validation of Collection Procedures for Electronically Stored Information," Comment 6.e.

40 *See, e.g., Zubulake IV*, 220 F.R.D. at 218-19, 222; *In re Prudential*, 169 F.R.D. at 616-17; *Telectron, Inc. v. Overhead Door Corp.*, 116 F.R.D. at 116.

41 *Zubulake V*, 229 F.R.D. at 424.

42 *Id.* at 433.

43 *Id.*

44 *Id.* at 435.

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