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Litigation Holds: Creating Effective Notices, Implementing Efficient Collection Processes, Protecting Privilege

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Today's faculty features:

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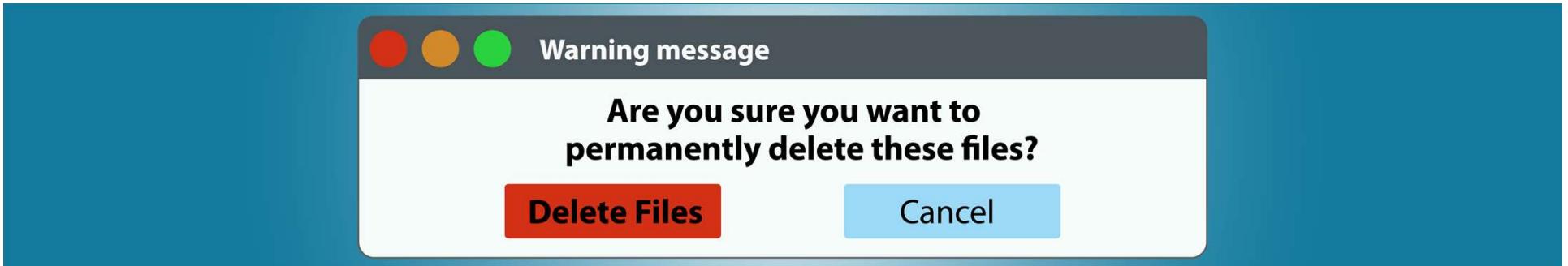
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Litigation Holds: Creating Effective Notices, Implementing Efficient Collection Processes, Protecting Privilege

Lionel Lavenue, Andrew Felser, and Chad Main

March 17, 2021

Agenda

- I. **Preservation Triggers and Retention Policies: Mitigating Risk Without Over-Preserving**
- II. Litigation Hold Notices: Creation, Implementation, and Oversight
 - I. What Should Be Included in a Litigation Hold Notice
 - II. Who Should Send It
 - III. Outside Counsel
 - IV. In-house Counsel
 - V. Company Managers
- III. Who Should Receive It
 - I. Related Parties
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- IV. Oversight and Ensuring Continued Employee Awareness After Implementation
- V. Beyond Email
- VI. Documenting the Process
 - I. Electronically
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- VII. Discoverability of Hold Processes and Notices
 - I. Attorney-Client Privilege
 - II. Work Product Doctrine
 - III. Loss of Protection

Preservation Triggers

- “Pending or reasonably foreseeable” litigation or investigation.
Micron Tech Inc v Rambus Inc, 645 F.3d 1311, 1321-22 (Fed Cir 2011)
 - “mere existence of a potential claim or the distant possibility of litigation” does not trigger. *Id.* at 1320.
 - Objective Standard: “asking not whether the party in fact reasonably foresaw litigation, but whether a reasonable party in the same factual circumstances would have reasonably foreseen litigation”. *Id.*
- Fact-specific
 - What’s the trigger?
 - Are non-parties obligated?
 - Any pre-existing agreements to preserve?

Preservation Triggers

Triggers:

- Staff exchanging emails about suit (*Bagley v. Yale University*, Civ. No. 3:13-CV-1890 (D. Conn. Dec. 22, 2016)).
- Planning for a related suit (*Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598, 612-613 n. 7 (S.D. Tex. 2010)).
- Receipt of government charges (*Jones v. Bremen High Sch. Dist.* 228, No. 08-CV-3548 (N.D. Ill. May 25, 2010)).
- Receipt of request for preservation for pending litigation action (*D'Onofrio v. SFZ Sports Group, Inc.*, No. 06-687 (D.D.C. Aug. 24, 2010)).
- Complaint served (*Mosaid Tech. Inc. v. Samsung Electronics Co.*, 348 F. Supp. 2d 332, 336 (D.N.J. 2004)).

Non-Triggers:

- Industry-wide event (*In re Abilify (Aripiprazole) Prods. Liab. Litig.*, No. 3:16-md-2734 (N.D. Fla. Oct. 5, 2018)).
- Equivocal letters (*Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc.*, 244 FRD 614 (D. Colo. 2007)).



Failure to Preserve

- Spoliation of evidence (See, e.g., *Dykes v BNSF Ry Co*, 2019 WL 1128521, at *7 (WD Wash 12 Mar 2019))
 - Exclusion of evidence
 - Giving adverse jury instructions
- What about non-party entities? Courts will consider:
 - Culpability of the aligned party in the breach (e.g. complicity or knowledge of the nonparty's breach).
 - Ability of the aligned party to control the non-party.
 - Steps taken by the aligned party to attempt to preserve the evidence destroyed by the non-party.
 - The extent that any negative judgment will be borne by the non-party (e.g. whether the non-party indemnifies the aligned party).
 - The degree of involvement between the non-party and aligned party; and
 - The importance of the evidence to the opposing party.



Related Corporate Entities

- Fed. R. Civ. P. 34: a party must produce documents in its possession, custody or control upon request.
- Control: “legal right, authority, or practical ability to obtain the information sought upon demand”¹
 - Commonality of ownership of the corporate entities.
 - Exchange or intermingling of directors, officers or employees of the corporations.
 - Any benefit or involvement by the non-party corporation in the transaction at issue.
 - Involvement of the non-party corporation in the litigation.
 - The corporate party’s marketing and/or servicing of the non-party company’s products; and
 - The financial relationship between the companies.²
- More common for a parent to exercise control and for a subsidiary to be required under a litigation hold, but it has also been found where a parent was required to hold information when the subsidiary is a party to the suit.³
 - Generally subsidiaries exercise no control, so a litigation hold is not typically necessary.⁴
 - Sibling entities will depend on the interrelationship of the entities.⁵



Retention Policies

- According to the Sedona Conference on Legal Holds, “Whether a party issued a legal hold notice and, if so, when, how, and to whom, are all important factors, although not dispositive, in determining the reasonableness of the party’s preservation efforts.”
 - This case-by-case, fact-specific analysis requires an organization to objectively look at the circumstances of the triggering event and tailoring its retention policy and legal hold scope to those circumstances. Courts will broadly use this determination in the light of the circumstances to establish “reasonableness.”⁶

Retention Policies



Moving the law forward
in a reasoned and just way.

- Sedona Conference Commentary on Legal Holds
 - “good faith” and “reasonableness”⁷
- In *Bagley v. Yale*,⁸ court judged “good faith” and “reasonableness” through multiple factors:
 - When did a party’s duty to preserve evidence begin?
 - Did the party issue a litigation hold notice in order to preserve evidence?
 - When did the party issue a litigation hold notice, in relation to the date its duty to preserve the evidence arose?
 - What did the litigation hold notice say?
 - What did recipients of the litigation hold notice do or say, in response to or as result of, the notice?
 - After receiving recipients’ responses to the litigation hold notice, what further action, if any, did the party giving the notice take to preserve the evidence?



General Data Protection Regulation (GDPR)

- Adopted in 2016 by the European Union
- Applies to three principal participants*:
 - Data Controllers: organizations that collect data of EU residents
 - Data Processors: an organization that processes data on behalf of a data controller (e.g. could service provider)
 - EU Residents
 - *Also applies to organizations who collect data on EU residents from outside the EU
- Collection of personal data for commercial or business activity must have a valid legal basis under Article 6

GDPR Article 6 Legal Bases

- (a) If the data subject has given consent to the processing of his or her personal data;
- (b) To fulfill contractual obligations with a data subject, or for tasks at the request of a data subject who is in the process of entering into a contract;
- (c) To comply with a data controller's legal obligations;
- (d) To protect the vital interests of a data subject or another individual;
- (e) To perform a task in the public interest or in official authority;
- (f) For the legitimate interests of a data controller or a third party, unless these interests are overridden by interests of the data subject or her or his rights according to the Charter of Fundamental Rights (especially in the case of children).

GDPR Controllers and Processors

- According to Article 30, organizations that meet the following must maintain a record of all processing activities.
 - employing more than 250 persons;
 - the processing it carries out is likely to result in a risk to the rights and freedoms of data subjects;
 - the processing is not occasional;
 - processing includes special categories of data as referred to in Article 9(1) or personal data relating to criminal convictions and offences referred to in Article 10.
- What does this mean for Litigation Hold notices?
 - Any organization located in the EU must have a highly tailored, specific litigation hold notice that adheres to these strict requirements for data collection
 - Penalties for violations of GDPR can be the higher of €20 million or 4 percent of total worldwide annual turnover (i.e., gross revenue) for the preceding year!



Guideline 12 and Local Data Collection Restrictions

- “An organization should be mindful of local data protection laws and regulations when initiating a legal hold and planning a legal hold policy outside of the United States.” The Sedona Conference, Commentary on Legal Holds, Second Edition: The Trigger & The Process, 20 SEDONA CONF. J. 341, 409 (2019).
 - GDPR restricts data collection as a fundamental human right.⁹ How does this affect preservation efforts?
 - Need reflexive legal hold policies based on where the company is located, where the data is maintained, and what the nature of the complaint is. Flexibility and compliance is key.
 - “Processing” personal data may be restricted, which may frustrate document collection efforts in discovery.¹⁰

Endnotes

- 1. See *Cacace v Meyer Mktg* (Macau Commer. Offshore) Co, 2011 US Dist LEXIS 50753, *10 (SDNY 2011); see also *Victor Stanley, Inc v Creative Pipe, Inc*, 269 FRD 497, 523 (D Md 2010); *Guillory v Skelly*, 2014 US Dist LEXIS 128178, 20-21 (WDNY 2014) (holding subsidiary had control over evidence held by parent).
- 2. *Meridian Labs, Inc v OncoGenerix USA, Inc*, 333 FRD 131, 135-36 (ND Ill 2019); *In re Subpoena to Huawei Techs Co, Ltd*, 720 F.Supp.2d 969, 977 (ND Ill. 2010) (citing cases); *Wachovia Sec, LLC v Loop Corp*, 2008 WL 2625907, at *2 (ND Ill 27 June 2008); *Super Film of Am, Inc v UCB Films, Inc*, 219 FRD 649, 655 (D Kan 2004); *Uniden Am Corp v Ericsson Inc*, 181 FRD 302, 306 (MDNC 1998); see also *Afros SPA v Krauss-Maffei Corp*, 113 FRD 127, 129 (D Del 1986); *Cormack v United States*, 117 Fed Cl 392, 403 (Fed Cl 2014); *Steele Software Sys, Corp v DataQuick Info Sys, Inc*, 237 FRD 561, 564 (D Md 2006) (holding that the specific form of the corporate relative involved does not matter when analysing control under Rule 34).
- 3. *Ferber v Sharp Electronics Corp*, 40 Fed R Serv 2d (LCP) 950 (SDNY 1984).
- 4. See eg, *In re Uranium Antitrust litig*, 480 F Supp 1138, 1153 (ND Ill 1979) (defining the test as whether the subsidiary “has, or once had, control over [the parent’s] directors, officers and employees who managed the uranium-related activities of [the subsidiary] alone or of both corporations”).
- 5. Compare *Perfect Form Mfg LLC v United States*, 142 Fed Cl 778, 788-789 (Fed Cl 2019) (finding control over evidence possessed by sister corporation) with *Klesch & Co v Liberty Media Corp*, 217 FRD
- 6. See, e.g., *Chin v. Port Auth. of N.Y. & N.J.*, 685 F.3d 135, 161-63 (2d Cir. 2012); *Snider v. Danfoss, LLC*, 15 CV 4748, 2017 WL 2973464 (N.D. Ill. July 12, 2017); *Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010) (“Whether preservation or discovery conduct is acceptable in a case depends on what is reasonable”); *Witt v. GC Servs. Ltd. P’ship*, 307 F.R.D. 554, 568 (D. Colo. 2014) (“The court does not expect perfection and will not ‘infer nefarious intent or bad faith’ from ‘ordinary discovery errors.’”) (citation omitted); *Fisher v. Ciba Specialty Chems. Corp.*, No. 03- 0566-WS-B, 2007 WL 987457, at *3 (S.D. Ala. Mar. 30, 2007) (“The rules of discovery do not demand perfection, clairvoyance, or miracle workings in the production of documents.”).



Endnotes

- 7. Reasonableness and good faith discussed in Guidelines 2-6. The Sedona Conference Commentary on Legal Holds, Second Edition: (June 2019).
- 8. Civ. No. 3:13-CV-1890 (D. Conn. Dec. 22, 2016)
- 9. See, e.g., GDPR, Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC, at Recital 1. Effective May 25, 2018, the GDPR replaced Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281), available at <https://eur-lex.europa.eu/legal-content/EN/ ALL/?uri=CELEX:31995L0046> [hereinafter EU Data Protection Directive].
- 10. “Processing” is defined as “any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction.” GDPR, supra note 9, at art. 4(2).
- [https://thesedonaconference.org/sites/default/files/publications/Commentary on Legal Holds_0.pdf](https://thesedonaconference.org/sites/default/files/publications/Commentary%20on%20Legal%20Holds_0.pdf)

Questions?

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Litigation Hold Notice

What Should Be Included?

- Good faith steps to preserve documents and data that may be relevant to the case.
- Must preserve what it knows and reasonably ought to know is relevant to possible litigation and is in its possession, custody, or control.
- Good faith and reasonableness, not perfection, is the standard.

DR Distrib., LLC v. 21 Century Smoking, Inc., No. 12 CV 50324, 2021 U.S. Dist. LEXIS 9513, at *185 (N.D. Ill. Jan. 19, 2021)

Issue a Written Litigation Hold

- Well settled that an **oral litigation hold** is insufficient to reasonably protect against the spoliation. *Borum v. Brentwood Vill., LLC*, 332 F.R.D. 38, 46 (D.D.C. 2019)
- Reliance on **oral litigation hold** caused loss of ESI. See *DR Distrib., LLC v. 21 Century Smoking, Inc.*, No. 12 CV 50324, 2021 U.S. Dist. LEXIS 9513, at *195 (N.D. Ill. Jan. 19, 2021).
- Litigation hold consisting of **conference call** informing clients to preserve relevant ESI is insufficient. After it occurred custodians took no affirmative steps to preserve text messages, resulting in their deletion. *Youngevity Int'l v. Smith*, No. 3:16-cv-704-BTM-JLB, 2020 U.S. Dist. LEXIS 227170, at *27-28 (S.D. Cal. July 27, 2020)

The Court has serious concerns with Scentsy's retention policy and litigation hold process. Generally not deleting documents, and orally requesting certain employees to preserve relevant documents concurrently with filing a lawsuit, is completely inadequate. It is very risky — to such an extent that it borders on recklessness.

Scentsy, Inc. v. B.R. Chase, L.L.C., No. 1:11-cv-00249-BLW, 2012 U.S. Dist. LEXIS 143633, at *20 (D. Idaho Oct. 2, 2012)

Sample Litigation Hold

Source: https://www.gcsu.edu/sites/files/page-assets/node/733/attachments/litigation_hold_letter.doc

Litigation Hold Letter

Dear¶

Georgia College ("GC") has reason to believe that litigation may result from the claim of [name of claimant] that [brief description of potential claim]. OR: The University System of Georgia has learned that [name of litigant] has filed a lawsuit for [brief description of claim]. This letter does not mean that you are necessarily involved in the dispute. However, GC is now under a legal duty to preserve all evidence, whether printed or electronic, that might become relevant to this matter. Some of this information may be in your possession or control, and as a GC employee, you have a legal duty to preserve that information. The purpose of this letter is to explain to you what that obligation means.¶

A team of [name members of team] has been charged to manage this situation, and has identified the following information as being potentially relevant to the dispute: [describe general subject matter of information]. That information may be located in: [identify likely source locations]. You are required to take the following steps immediately to protect and preserve any of that information that is in your possession or under your control until further notice. Specifically, you will need to do the following immediately:¶

1. → Suspend deletion, overwriting, or any other destruction of electronic information relevant to this dispute that is under your control. This includes electronic information wherever it is stored — at your GC work station, on a laptop, or at home. It includes all forms of electronic communication — e.g., e-mail, word processing, calendars, voice messages, videos, photographs, information in your PDA. This electronic information must be preserved so that it can be retrieved at a later time. You can be assured that nothing will be produced for the other side without first being appropriately reviewed and private or privileged information removed. The information must be preserved in its original electronic form, so that all information contained within it, whether visible or not, is also available for inspection — i.e., it is not sufficient to make a hard copy of electronic communication. The IT department will attend to the preservation of electronic information on the server and on back-up tapes, if that is called for. Your responsibility is for the information that is under your control.¶
2. → Similarly, preserve any new electronic information that is generated after you receive this letter that is relevant to this dispute.¶
3. → Preserve any hard copy under your control.¶

This is an important legal duty and failure to follow these instructions may subject you to discipline, as the failure to preserve this information has very serious consequences for the university.¶

The team that is managing this situation can be available to meet with you to further explain your obligations or respond to any questions you may have about this litigation hold.¶

Thank you for your cooperation.¶

Sample Litigation Hold

Source:

https://iaals.du.edu/sites/default/files/documents/resources/05_-_sample_letters_-_litigation_hold_and_electronic_data_preservation.pdf

[Sample Letter to Client to Ensure Preservation of Electronic Data -- Not Guaranteed Complete for a Given Case, but It's a Start]

Dear "Client":

ABC Corporation ("ABC") has filed a lawsuit in the United States District Court for the Eastern District of Virginia, Norfolk Division. ABC is seeking damages arising out of a contract entered into on January 7, 2010.

ABC's lawsuit will be governed by the Federal Rules of Civil Procedure, which apply to all suits filed in United States federal courts such as the one in the Eastern District of Virginia. Pursuant to the Federal Rules of Civil Procedure, every party to a lawsuit has a duty to preserve all evidence which could be relevant to the suit. This includes the duty to preserve all electronic evidence, such as emails discussing the incident or related to matters at issue in the suit.

This duty to preserve evidence is broad and extends to all documents, regardless of whether the document is stored electronically (such as email) or in hard-copy and regardless of the type of document. For example, reports, spreadsheets, photographs and videotapes are all considered documents that must be preserved. Furthermore, the duty to preserve this documentary evidence extends to all documents in existence as of the time you reasonably anticipated this litigation.

To ensure that all relevant documents are preserved, you should communicate directly with all employees who have possession or control of potentially relevant evidence, including but not limited to personnel who deal with email retention, deletion, and archiving. You should advise each of these employees to preserve any relevant documents in their custody. Furthermore, you should advise all such persons that any regularly scheduled and/or automatic deletion of email or other electronic documents must be discontinued with respect to any relevant data. In addition, any document destruction (such as shredding of documents) must cease with respect to any relevant documents. All relevant documents, both electronic and paper, must be preserved for the duration of this litigation.

If you have any questions about the details of these obligations, please contact me.

Sincerely yours,

Company-Wide Email

In house counsel assigned task to paralegal. Paralegal's company-wide email insufficient. *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456, 493 (S.D.N.Y. 2010)

Discoverability

The Court stated that Plaintiffs were "entitled to know 'what kinds and categories of ESI [the defendant's] employees were instructed to preserve and collect, and what specific actions they were instructed to undertake to that end.

Cohen v. Trump, No. 13-CV-2519-GPC (WVG), 2015 U.S. Dist. LEXIS 74542, at *20 (S.D. Cal. June 9, 2015)

Supervise and Monitor

- “[N]othing is to be gained and much is to be lost when counsel blindly rely on a client to self-collect after an inadequate litigation hold and inquiry into the adequacy of the client's search.” *DR Distrib., LLC v. 21 Century Smoking, Inc.*, No. 12 CV 50324, 2021 U.S. Dist. LEXIS 9513, at *206 (N.D. Ill. Jan. 19, 2021).
- Mere notification to employees is insufficient. Take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched. Talk to key employees in an effort to understand how evidence will be stored. *Martinez v. Salazar*, No. 14-534 KG/WPL, 2017 U.S. Dist. LEXIS 11715, at *8 (D.N.M. Jan. 26, 2017)
- Written hold insufficient unless accompanied by follow-up efforts to ensure that the hold is being followed. *Claredi Corp. v. SeeBeyond Tech. Corp.*, No. 4-04-CV-01304 RWS, 2010 U.S. Dist. LEXIS 153559, at *11 n.17 (E.D. Mo. Mar. 8, 2010)

Follow Up

Defendants' sole step of issuing a litigation hold, without more, was insufficient to satisfy Defendants' preservation duties. The magistrate judge observed that Defendants' litigation hold notices "were few and far between" and that Defendants failed to take even relatively inexpensive affirmative steps [*80] to ensure the preservation of text messages. Defendants did not, for example, "talk to individual custodians about ensuring messages were backed up" or "remind employees to either keep their old device when upgrading or otherwise ensure the data was preserved."

United States ex rel. Fesenmaier v. The Cameron-Ehlen Grp., Inc., No. 13-cv-3003 (WMW/DTS), 2021 U.S. Dist. LEXIS 5684, at *79-80 (D. Minn. Jan. 12, 2021)

Disable Auto-Deletion Settings

“Had reasonable steps—including a litigation hold communication stating to cease all autodelete functions—been taken when the duty to preserve arose, this ESI would more likely not have been deleted.”

DR Distrib., LLC v. 21 Century Smoking, Inc., No. 12 CV 50324, 2021 U.S. Dist. LEXIS 9513, at *195 (N.D. Ill. Jan. 19, 2021)

Late, inadequate distribution, and failure to confirm compliance

(1) Samsung's duty to preserve evidence arose on August 23, 2010; (2) Samsung's continued use of its biweekly email destruction policy, insufficient distribution of the litigation hold notice before April 2011, and failure to confirm compliance with the litigation hold notices constituted willful violation of this duty;

Apple Inc. v. Samsung Elecs. Co., 888 F. Supp. 2d 976, 983 (N.D. Cal. 2012)

Spoliation Instructions

While the Ninth Circuit has not set forth the standard for when an adverse inference instruction is appropriate, courts in this district have adopted the Second Circuit's three-part test, which provides that "a party seeking an adverse inference instruction based on the destruction of evidence must establish[:] (1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed 'with a culpable state of mind'; and (3) that the evidence was 'relevant' to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense."

Waters v. Kohl's Dep't Stores, Inc., No. 14-cv-00043-KAW, 2015 U.S. Dist. LEXIS 43941, at *4 (N.D. Cal. Apr. 2, 2015)

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III. Who Should Receive It?

General Concept

- Spoliation is “the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation.” *Zubulake v. UBS Warburg, LLC*, 229 F.R.D. 422, 430 (S.D.N.Y. 2004).
- Rule 34: “possession, custody or control”
- Affiliates – common ownership or control
- Third Party Custodians:
 - Third-party data backup providers
 - Third-party providers with document repositories
 - Subcontractors
 - Collaborating entities

Non-parties

- A party may only “lose” documents or ESI within that party’s possession, custody, or control.
- This includes documents that are not necessarily in the party's physical possession.
- Litigation hold may extend to third parties over which the primary litigant has control.
- “Control” means the legal right to obtain such documents on demand.

Eisenband v. Pine Belt Auto., Inc., Civil Action No. 17-8549 (FLW) (LHG), 2020 U.S. Dist. LEXIS 53369, at *20 (D.N.J. Mar. 27, 2020) (software in control of third party – sanctions denied)

Can a nonparty be sanctioned?

Rule 37 Spoliation Sanctions Are Not Available Against Nonparties. *Nida v. Allcom*, No. 8:17-cv-02162-JLS (JDEx), 2020 U.S. Dist. LEXIS 87401, at *10 (C.D. Cal. Mar. 11, 2020). However, Rule 45 thus allows a court to use its inherent powers to impose contempt sanctions on a party, or nonparty, for defying a subpoena by improperly destroying evidence.

Rule 37 can be read in its entirety here: https://www.law.cornell.edu/rules/frcp/rule_37

Sanctions may be imposed against a litigant based on a third party's spoliation of evidence if the third party acted as the litigant's agent in destroying or failing to preserve the evidence. *Bouve & Mohr, LLC v. Banks*, 274 Ga. App. 758, 762, 618 S.E.2d 650, 654 (2005). Query: Is third party custodian liable to litigant for indemnification?

Duty to Notify

If a party cannot fulfill this duty to preserve because he does not own or control the evidence, he still has an obligation to give the opposing party notice of access to the evidence or of the possible destruction of the evidence if the party anticipates litigation involving that evidence. *Silvestri v. GMC*, 271 F.3d 583, 591 (4th Cir. 2001) (product liability: airbag failure – vehicle inspected but not preserved – claim dismissed)



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Oral Notice Not Enough

- The obligation to preserve evidence “runs first to counsel”. As a result attorneys must explain to clients the need to preserve documents relevant to the legal matter.
- An attorney’s obligation regarding preservation of evidence includes both the implementation of a litigation hold as well as monitoring the client’s compliance with the legal hold and efforts to collect and produce relevant documents.

Industrial Quick Search, Inc. v. Meiresonne, et al., No. 13 Civ. 5589
(S.D.N.Y. January 2, 2018)

Management May Need to Help

- “[C]orporate managers are responsible for conveying [legal hold] information to the relevant employees.” *Cruz v. G Star, Inc.*, No. 17-CV-7685 (PGG) (OTW) (S.D.N.Y. June 19, 2019).

Obligation to Monitor Hold Continues After Sending

- “Oral litigation hold not enough. An attorney’s obligation regarding preservation of evidence includes both the implementation of a litigation hold as well as monitoring the client’s compliance. *Industrial Quick Search, Inc. v. Meiresonne, et al.*, No. 13 Civ. 5589 (S.D.N.Y. January 2, 2018).
- “[C]orporate managers are responsible for conveying [legal hold] information to the relevant employees.” *Cruz v. G Star, Inc.*, No. 17-CV-7685 (PGG) (OTW) (S.D.N.Y. June 19, 2019).

The Right Way to Communicate Hold

- Counsel issued a timely and detailed litigation hold to potential custodians of ESI, directing the preservation of any records and documents that might pertain to plaintiff's claims;
- Gave instructions to the ESI custodians regarding searches and specific search parameters;
- Explained the importance of a thorough search to the ESI custodians; and
- Provided guidance when questions arose during the search.

Mirmina v. Genpact, LLC, Civil No. 3:16CV00614 (D. Conn. July 27, 2017).

Agenda

- I. Preservation Triggers and Retention Policies: Mitigating Risk Without Over-Preserving
- II. Litigation Hold Notices: Creation, Implementation, and Oversight
 - I. What Should Be Included in a Litigation Hold Notice
 - II. Who Should Send It
 - III. Outside Counsel
 - IV. In-house Counsel
 - V. Company Managers
- III. Who Should Receive It
 - I. Related Parties
 - II. Third Parties
 - III. Interested Parties
- IV. Oversight and Ensuring Continued Employee Awareness After Implementation
- V. Beyond Email**
- VI. Documenting the Process
 - I. Electronically
 - II. Manually
- VII. Discoverability of Hold Processes and Notices
 - I. Attorney-Client Privilege
 - II. Work Product Doctrine
 - III. Loss of Protection

Beyond Email

Material alteration of promissory note merited denial of claim on note.
McMurtrey v. Sparks, 71 Mo. App. 126 (1897).

Safer v. Hudson Hotel, 2020 NY Slip Op 20276, 70 Misc. 3d 285, 134 N.Y.S.3d 161 (Civ. Ct.) (Facebook posts deleted – sanctions imposed)

Deleted Facebook Posts

Adverse inference instruction granted: The jury will be instructed as follows: Defendants have failed to preserve social media posts for Plaintiff's use in this litigation after Defendants' duty to preserve arose. You may, but are not obligated to, infer that the deleted social media posts were favorable to Plaintiff and unfavorable to Defendants.

Nutrition Distribution Ltd. Liab. Co. v. PEP Research, Ltd. Liab. Co.,
No. 16cv2328-WQH-BLM, 2018 U.S. Dist. LEXIS 205250, at *15 (S.D. Cal. Dec. 4, 2018)

Compare *Thurmond v. Bowman*, No. 14-CV-6465W, 2016 U.S. Dist. LEXIS 45296 (W.D.N.Y. Mar. 31, 2016) (inadvertent deletion – no proof of relevance)

GPS Data

Same principles apply as to any ESI: Was relevant data recorded?
Was it lost or destroyed? Was the destruction accidental or deliberate?

Mikhlyn v. Bove, No. 08-CV-03367 (ARR)(RER), 2011 U.S. Dist. LEXIS 172481 (E.D.N.Y. Feb. 3, 2011) (evidence of spoliation insufficient – motion for sanctions denied)

Questions?

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What to Document

- When was notice issued?
- How was it communicated?
- Who acknowledged
- What did it say and instruct recipients to do?
- Document recipients response to it (evidence tracker)
- Reminders

How to Document

- Software Logs
- Spreadsheets
- Custodian Acknowledgements

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VII. Discoverability of Hold Processes and Notices

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Attorney-Client Privilege

- Litigation hold letters are not discoverable in litigation if they include information protected by the attorney-client privilege. See, e.g., *Muro v. Target Corp.*, 250 FRD 350, 360 (N.D. Ill. 2007).
 - May include date of issue of litigation hold letter, recipients, and steps taken to preserve.³

Attorney-Client Privilege

- Just because something is believed to be privileged does not exempt it from being a required preserved document.¹
 - Even if a document is believed to fall under attorney-client privilege, there may still be advantages to including it in the scope of preservation.²
 - Documenting process of preservation to reinforce reasonableness of a hold.
 - Keep in the record to potentially use later to prove preservation efforts.

Work Product Doctrine

- Sedona Conference: “Attorneys and organizations should be cognizant of the possibility of arguments that the labeling of information as attorney work product (either at the time of creation or in later logs) is tantamount to admitting a preservation obligation existed at the time the information was created because both doctrines depend on a reasonable anticipation of litigation.”
 - Must balance the protection afforded by attorney work product doctrine with the risk of unreasonably not complying with scope of litigation hold.
 - Once something is categorized as work product, it must be preserved.
 - Leaves available (along with attorney-client privilege) the possibility for *in camera* review in order to prove privilege or protection **and** to prove preservation reasonable effort
 - “[u]nlike normal business activities such as paying taxes, record keeping, and calculating accounts receivable, litigation hold notices are prepared because of the prospect of litigation. They are, therefore, textbook work product.”⁴



Loss of Protection

- Remember: Protected unless spoliation is found!
 - *Major Tours Inc. v. Colorel*, Civil No. 05-3091 (D. N.J. Aug. 4, 2009) (finding that litigation was foreseeable in 2003, making the litigation hold letter issued in 2007 discoverable because of spoliation).
 - Similarly, if the litigation hold letters fail to maintain confidentiality of the notices, they do not enjoy privilege.⁵ Notices should be on a “need to know” basis to maintain confidentiality and privilege.
 - Producing physical copies of Electronically Stored Information (ESI) may lead to spoliation because ESI provides evidentiary support beyond the individual document or communication.⁶

Loss of Protection

- If a document is currently protected under either A-C privilege or work product doctrine, that implies the document needed to be preserved. If that protection is lost, the document then becomes potentially discoverable information.
- As a general rule, protected=preserved.
 - Avoids painful rulings or sanctions in court.
 - Helps to demonstrate good faith reasonableness in complying with a legal hold without disclosing anything that is rightfully protected under A-C privilege or work product doctrine.
 - Implementation is key, must maintain the protection in order to avoid spoliation and discoverability.

Endnotes

1. See, e.g., *EPAC Techs., Inc. v. Thomas Nelson, Inc.*, No. 3:12-CV-00463, 2016 WL 11339512, at *11, n.28 (M.D. Tenn. Jan. 29, 2016) (“[T]he duty to preserve applies to relevant, potentially-privileged material, even if such material is ultimately exempt from discovery.”).
2. See, e.g., *Gibson v. Ford Motor Co.*, 510 F. Supp. 2d 1116, 1123 (N.D. Ga. 2007).
3. *Cannata v. Wyndham Worldwide Corporation*, Case No. 2:10-cv-00068-PMP-VCF (D. Nev. Aug 16, 2012).
4. *In re. 3M Combat Arms Earplug Prods. Liab. Litig.*, Case No. 3:19-md-2885 (N.D. Fla. March 20, 2020).
5. *United States ex rel. Barko v. Halliburton Co.*, Case No. 1:05-CV-1276 (D.D.C. Nov. 20, 2014).
6. *Radiation Oncology Services of Central New York, P.C., v Our Lady of Lourdes Memorial Hospital, Inc.*, 2020 WL 3246747 (Sup Ct, Cortland County 2020) (“printing paper copies of the emails and permanently deleting the associated ESI potentially deprived the emails of significant evidentiary value.”).

Questions?

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