

Litigate the Merits – Avoid Spoliation Claims

Work with your client to understand who the relevant custodians are, what computer systems can reasonably be expected to contain relevant information, and what the costs and burdens are of preserving relevant information.

By Rodney A. Holaday

Fair Warning

Developing case law indicates that attorney who fails to implement a careful written legal hold does so at substantial risk to their client.

Judge Scheindlin, the author of the seminal Zubulake decisions regarding electronic discovery, recently authored a separate decision styled *Pension Committee v. Bank of America Securities*. In *Pension Committee*, the Court identified certain minimum actions that should be taken upon becoming aware of litigation or the reasonable likelihood of litigation, and, indeed found that failure to take such actions likely constitutes gross negligence. Those actions include the:

Issuance of a written legal hold notice;

Identification of all the key players and ensuring that their electronic and paper records are preserved;

Cessation of the deletion of e-mail or preserving the records of former employees that are in a party's possession, custody or control; and

Preservation of backup tapes when they are the sole source of relevant information.¹

Pension Committee has been cited within the Southern District of Ohio for the standard of spoliation based on the alleged failure to properly preserve information.² Because a client may be sued in a multitude of different jurisdictions, as a practical matter it may be a best practice to conform with the most stringent minimum acceptable standard for a proper legal hold.

Duty to Preserve

The duty to preserve information requires a party to take reasonable steps to identify, locate and maintain relevant evidence under its possession, custody, or control "when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation."³

The duty to preserve is owed to the court, not the adverse party, and may arise from statutes, regulations, ethical rules, court order or the common law.⁴ The duty exists independent of whether the court declared such a duty or the adverse party requested a legal hold.⁵

Legal Hold

Once the duty to preserve has arisen, a party should implement a legal hold. A

legal hold is the suspension of routine document destruction or other ordinary course of business practices that may result in the destruction of potentially relevant information.⁶

Legal Hold Best Practices?

The Sedona Conference, a not-for-profit organization composed of leading jurists, lawyers, experts, academics and others that is frequently cited by courts, including the Sixth Circuit,⁷ recently issued helpful guidelines for legal holds.⁸

Guideline 8 states that:⁹

In circumstances where issuing a legal hold notice is appropriate, such a notice is most effective when the organization identifies the custodians and data stewards most likely to have relevant information, and when the notice:

Communicates in a manner that assists persons in taking actions that are, in good faith, intended to be effective.

Is in an appropriate form, which may be written.

Provides information on who preservation may be undertaken.

Is periodically reviewed and, when necessary, reissued in either its original or an amended form.

Addresses features of relevant information systems that may prevent retention of potentially discoverable information.

Have you received a multi-page preservation letter from adverse counsel demanding that your client immediately preserve all existing electronically stored information for a range of general subjects on any media over a wide timeframe, without reference to specific custodians or computer systems? Strict compliance with that kind of overbroad demand would literally require pulling the plug on every electrical device and closing the doors of a client's business. Clients understandably react negatively if their counsel send similarly overbroad preservation letters.

Instead, work with your client to understand who the relevant custodians are, what computer systems can reasonably be expected to contain relevant information, and what the costs and burdens are of preserving relevant information. You can then work with your client to formulate a legal hold that takes reasonable steps to preserve relevant information without undue burden. As one court recently recognized, the legal hold process "requires nuance, because the duty 'cannot be defined with precision.'"¹⁰ While there may never be a "perfect" legal

hold, courts should assess your effort for “reasonableness and proportionality.”¹¹

Consider transparent disclosure to adverse counsel up front to explain what your client intends to preserve, and, more important, what information or data storage systems your client does not intend to preserve. Early resolution of preservation disputes reduces the likelihood of sanctions down the road.

While there presently is no Sixth Circuit decision requiring that a legal hold be in writing, your client could be hailed into a jurisdiction that has adopted the Pension Committee standard; put your legal hold in writing. Consider drafting a legal hold with the advance intent of producing it without claim of privilege to demonstrate the overall legal hold effort.

Disclose the custodians in your legal hold and actively solicit those custodians to add names to the list, if appropriate.

A legal hold is not a static, one-time obligation. It exists throughout the litigation and should be revisited as pleadings are amended, disputed issues shift or identified key players change.¹²

An attorney cannot simply ask a client, or a client’s in-house counsel, to preserve, identify and collect relevant documents. Trial counsel must exercise oversight to ensure that the client’s employees are acting competently, diligently and ethically in order to fulfill counsel’s responsibility to the Court.¹³ Applied to electronically stored information, counsel must affirmatively act to communicate with the client to identify all sources of information and to “become fully familiar with [the] client’s document retention policies . . . and data retention architecture.”¹⁴

Presently, there is no specific civil rule with best practices on how to meet the

obligation of the duty to preserve information for anticipated or pending litigation. Developing case law indicates that a proper legal hold is an essential tool to avoid spoliation claims and, in turn, to litigate your client’s case on the merits.

1. *Pension Committee v. Bank of America Securities*, 685 F.Supp.2d 456, 482 (S.D.N.Y. Jan. 15, 2010, as amended May 28, 2010)(Scheidlin, J.).
2. See In re: Global Technovations, Inc., 431 B.R. 739, 459, 2010 Bankr. LEXIS 1948 (Bankr.E.D. Mich. 2010).
3. *Kemper Mortgage, Inc. v. Jeffrey P. Russell*, No. 3:06-CV-042, 2006 U.S. Dist. LEXIS 20729, *3 (S.D. Ohio Apr. 18, 2006)(Merz, M.J.), quoting *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003)(commonly referred to as “Zubulake IV”)(Scheidlin, J.); see also *John B. v. Goetz*, 531 F.3d 448, 459 (6th Cir. 2008).
4. *Victor Stanley, Inc. v. Creative Pipe, Inc.*, No. MJG-06-2662, 2010 U.S. Dist. LEXIS 93644, **84-5 (D.Md. Sept. 9, 2010)(Grimm, J.).
5. *Ferron v. Search Cactus, L.L.C.*, No. 2:06-cv-327, 2008 U.S. Dist. LEXIS 34599, **9-10 (S.D. Ohio, Apr. 28, 2008)(Frost, J.).
6. *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 432 (S.D.N.Y. 2004)(Scheidlin, J.)(commonly referred to as “Zubulake V”).
7. See *John B. v. Goetz*, 531 F.3d at 459.
8. See Commentary On Legal Holds: The Trigger & The Process, The Sedona Conference, Working Group 1, 11 The Sedona Conf. J. 265-287 (Fall 2010).

9. Id. at pps. 282-283.
10. *Victor Stanley, Inc.*, 2010 U.S. Dist. LEXIS 93644, *88.
11. Id. at 88-9.
12. *Zubulake V*, 229 F.R.D. at 433 & n. 79 (internal citation omitted).
13. *Bratka v. AnheuserBusch Co., Inc.*, 164 F.R.D. 448, 460-461 (S.D. Ohio 1995).
14. *Zubulake V*, 229 F.R.D. at 432; see also In re A&M Florida Properties II, LLC v. GFI Acquisition LLC, 2010 WL 141881, **12-4 (S.D. N.Y., Apr. 7, 2010)(Gonzalez, J.)(Monetary sanctions imposed against counsel and client for counsel’s failure to properly gain nuanced understanding of client’s electronically stored information or data storage systems or to pose appropriately detailed questions on the subject to employees of the client in searching for responsive records).



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