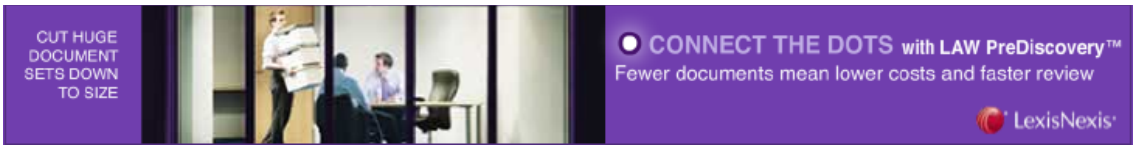

Step 7 for Legal Holds: Monitor and Remove

This is the seventh article of a series aimed at helping organizations discharge their duty to preserve ESI

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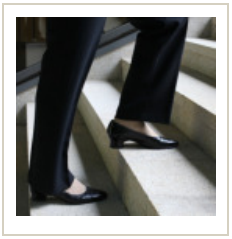

This is the seventh installment in a series of articles aimed at helping organizations implement an effective written litigation hold. This article covers monitoring and removing the legal hold.

This step involves what to do with a litigation hold once it has been implemented, enforced, examined, and modified (if necessary). Each step in developing and implementing a legal hold is an important part of a defensible litigation hold process. Despite the importance of monitoring and releasing a litigation hold, it is often the step that is overlooked by many organizations. At this point in the process the hard part of setting up the litigation hold is over and perhaps the team is moving on to the next litigation-hold fire or caught up in an e-discovery project. Perhaps there is a sigh of relief that the litigation hold is in place and defensible. Now is not the time, however, to rest on prior accomplishments. The process is not over.

Below are common tasks facing an organization during this final step, which includes monitoring, reminders, tracking, new employees, departing employees, and releasing a hold.

MONITORING

For an organization that has more than one litigation hold in place it is important to set up some tool to monitor the status of the hold, including a system of periodic reminders. The reminders will help the organization re-evaluate existing litigation holds for accuracy, scope, custodians, and the need for modification on a predetermined schedule, such as quarterly. The most common form of tracking is a spreadsheet containing basic information about the hold. Some organizations have purchased specialized software designed to track litigation holds or use readily available project management software to monitor legal holds. Whatever system is in place, the goal is to have the person or team charged with management of litigation holds periodically look at the adequacy of existing litigation holds. Further, if the trigger event has resolved, the litigation hold should be released (for example, if a lawsuit settled or the threat of anticipated litigation has abated).

REMINDERS

A number of court decisions have suggested that organizations send periodic reminders to custodians, reminding them of their duty to preserve ESI and other documents. Anyone familiar with litigation in the United States is acutely aware that years can pass between a trigger event and an actual lawsuit and between the initiation of a lawsuit and its final resolution. The purpose is to influence custodians at the moment in time when they are about to delete an old file relating to a previous trigger. In organizations using periodic reminders, the custodian should be aware that the old file that she is about to delete must be preserved. It is reasonable for a custodian to think that it may be OK to delete a file when she has not heard from the litigation hold team for years.

TRACKING

Organizations are fluid. People move around. People come and people go. The custodian list for a litigation hold should reflect the up-to-date status of custodians. Do you have the current contact information for the custodian? Have custodians left or moved to other parts of the organization since the last quarter? What has happened to the

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ESI of the moving or departing employee if it was being preserved in place?

It is also important to track the status of the litigation hold. Has a new demand for ESI come into the organization requiring issuance of a modified litigation hold? Has the trigger event or subsequent lawsuit resolved? Can the litigation hold be released?

NEW EMPLOYEES

As new employees start at the organization it is important to add them to any litigation holds that affect their job responsibilities. Are they inheriting ESI and other documents that are subject to an existing litigation hold? Do their job responsibilities bring them under the rubric of a trigger event or lawsuit that has an ongoing preservation requirement? If the answer to these questions is yes, the litigation hold needs to be modified to add the new employee, and a written litigation hold notice needs to be given to the new employee.

DEPARTING EMPLOYEES

At the other end of the spectrum are departing employees. What would happen if a custodian list is provided to a court or an opponent and several key players are listed, but no longer with the organization? Are these departed custodians holding ESI or other documents as indicated in your litigation hold notice or custodian list? Likely not, so be sure that the litigation hold is updated to reflect the accurate status of custodians and their ESI and other documents. If ESI and other documents are inherited from a departing employee, the new custodian should be added to the litigation hold.

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There are more specific steps that should be taken to protect litigation holds applicable to departing employees. These steps were discussed in **Legal Holds: Watch the Door** (*Law Technology News*, Apr. 13, 2009), by John Jablonski.

RELEASING HOLDS

Ending a legal hold (sometimes known as releasing, lifting, or removing the legal hold) is a valuable and necessary last step in a defensible litigation hold process. Guideline 11 to the "Sedona Conference's Commentary on Legal Holds" (2007) states: "The legal hold process should include provisions for release of the hold upon the termination of the matter at issue." There are important benefits associated with bringing a legal hold to an effective and timely end.

Releasing the hold allows the corporation to return to its normal record retention practices relating to the held ESI and other documents. Expired ESI and other documents not subject to any other existing preservation duty can be destroyed pursuant to the corporation's retention schedule. As the Supreme Court held in *Arthur Andersen*, "'Document retention policies,' which are created in part to keep certain information from getting into the hands of others, including the Government, are common in business. It is, of course, not wrongful for a manager to instruct [her] employees to comply with a valid document retention policy under ordinary circumstances." ***Arthur Andersen v. United States***, 544 U.S. 696, 704 (2005).

Another important benefit: the litigation hold can come off the compliance radar. Periodic reminders, modification, tracking, and monitoring can stop; storage costs can stop. Closing down a large hosted data set can reap significant savings.

Many organizations have a pool of ESI that is perpetually trapped by succeeding litigation holds. This cascading or overlapping of legal holds happens when all or a portion of ESI held in one matter is also relevant to a subsequent litigation hold. Expired ESI and documents that linger for years (in the hands of a corporation, its outside law firm, or an e-discovery vendor) are just another pool of potentially relevant ESI available to discovery in future, unforeseen litigation.

Timely release of legal holds can help organizations escape from the litigation hold purgatory. Although untested by a reported case, the timely release of a litigation hold is an essential part of an organization's retention policy. It demonstrates that the organization returns to its routine practice after its legal duty to preserve has been discharged. If litigation is not threatened or anticipated, there is no duty to keep the released ESI.

Releasing the hold and proper destruction of expired ESI may also bring some relief under the "Safe Harbor" of the Federal Rules of Civil Procedure's Rule 37(e). In ***Adams v. Dell***, 621 F.Supp.2d 1173 (D. Utah 2009), the court held that knowledge of industrywide litigation triggered the duty to preserve. See ***United States v. Koch Industries Inc.***, 197 F.R.D. 463 (N.D. Okl. 1998) (deposition testimony from other cases and Congressional inquiry triggered a duty to preserve). According to the court, defendant ASUSTek and other manufacturers were "sensitized" to potential litigation between 1999 and 2000, specifically citing to a multibillion dollar settlement paid by Toshiba in 1999. As a result, the court held ASUSTek should have been preserving evidence back in 1999 -- eight years prior to the initiation of the lawsuit.

What if ASUSTek implements a legal hold in 1999 in response to the industrywide litigation? It rides out the storm thankful that it was not dragged into litigation. ASUSTek releases its legal hold between 1999 and 2004, a period of five years with no lawsuit, and destroys expired ESI pursuant to standard policy. Fast-forward to a 2005 threat to

sue letter and the corporation issues a new litigation hold. This time, however, most of the ESI is long gone pursuant to routine destruction. Arguably, ASUSTek's actions were reasonable. Its routine destruction took place when there was no reason to anticipate litigation and no duty to preserve. Under this scenario the corporation should be safe. Destruction took place years prior to the new trigger event.

Releasing holds is an important and necessary last step in a defensible legal hold business process. Do not forget it.

*John Isaza, partner at **Howett Isaza Law Group**, and John Jablonski, partner at **Goldberg Segalla**, are authors of "Seven Steps for Legal Holds of ESI and Other Documents" (ARMA International 2009).*

::::RESOURCES::::

Step 1 for Legal Holds: Trigger Events

Step 2 for Legal Holds: Analyze the Trigger Event

Step 3 for Legal Holds: Define the Scope.

Step 4 for Legal Holds: Implementation.

Step 5 for Legal Holds: Enforcement.

Step 6 for Legal Holds: Modification.

Legal Holds and Trigger Events blog by John Jablonski, and contributor John Isaza, is devoted to tracking cases, articles, commentary, and trends involving legal holds and trigger events

Book Review: '7 Steps for Legal Holds'

The book "**7 Steps for Legal Holds of ESI and Other Documents**" (ARMA International 2009) contains an interview checklist for key players, as well as a checklist for IT considerations to help organizations enforce the effectiveness of their litigation holds. It also contains key areas to search for ESI and sample legal hold procedures. The book can be purchased from ARMA Internation for special price of $67.00 until March 15; regular price for non-members is $100.00.

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