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Step 5 for Legal Holds: Enforcement

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

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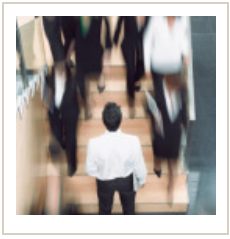

This is the fifth installment in a series of articles aimed at helping organizations implement an effective written litigation hold. This article covers enforcing the legal hold and examining its effectiveness in the organization.

We use the term "enforcement" for this step, because it more accurately describes the follow-up necessary to discharge an organization's preservation duty. To be clear, a duty of reasonableness has developed over the last few years requiring organizations to take affirmative steps to prevent the destruction of relevant ESI and other documents. A short list of affirmative steps can be gleaned by reviewing the laundry list of shortcomings of the plaintiffs' preservation efforts in ***The Pension Committee v. Banc of America***, 2010 U.S. Dist. LEXIS 1839 (S.D.N.Y. Jan. 11, 2010, as amended Jan. 15, 2010). Simply looking for the latest or greatest list of best practices for enforcing litigation holds misses the point. It is more helpful to understand just why enforcement of litigation holds has developed as a duty in U.S. federal courts.

DUTY IN FEDERAL COURT

It is incumbent upon litigants to understand that a litigation hold serves the purpose of facilitating discovery in litigation. In today's complex business environment ESI can be easily lost, destroyed, or misplaced. Employees leave organizations and, as a matter of routine business practices, their hard drives are often wiped so the drives can be reused by the organization. Network drives may also be deleted when an employee leaves an organization. Often, due to the complexity of an organization's computer system, custodians do not have an adequate understanding of just where in the organization their business documents are stored electronically. It is not too difficult to imagine a judiciary overwhelmed by the sheer volume of information exchanged in litigation, given the complexity of computer systems and the very real business practices surrounding the destruction of ESI (such as e-mail retention limits of 60 days). In response the judiciary has placed the burden of complex computer and storage systems squarely on the shoulders of litigants. It is not the court's job to interview the IT department and key players to: a) figure out where all relevant information may be stored; and b) make sure people are taking steps to preserve it.

The drafters of the 2006 amendments to the Federal Rules of Civil Procedure acknowledged the practical realities of large complex computer systems and the difficulty organizations face when preserving ESI. The drafters created a "safe harbor" exception from sanctions for organizations that took reasonable steps to preserve evidence, but inadvertently destroyed ESI.

The commentary to the "safe harbor" amendment stresses the importance of "good faith" in the operation of an organization's information system and that preservation requires the affirmative step of turning off automatic deletion features of a computer system:

> Rule 37[e] [safe harbor] applies to information lost due to the routine operation of an information system only if the operation was in good faith. *Good faith* in the routine operation of an information system *may involve a party's intervention to modify or suspend certain features of that routine operation to prevent the loss of information, if that information is subject to a preservation obligation.*

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If one takes the time to review a small handful of litigation hold cases, a common denominator is often the testimony of one or more witnesses that never received the litigation hold notice, never took affirmative steps to preserve the materials identified in the written litigation hold notice, or never developed a sufficient understanding of just where all the ESI was located. As a result of carelessness, practical shortcomings in IT knowledge, or an "it's not my problem" attitude toward preservation, some judges have come down very hard on organizations and their lawyers. In *The Pension Committee v. Banc of America*, the court even chided one company for entrusting preservation and collection to a low level employee who had no understanding of the company's computer system and never collected ESI before.

In response to growing pessimism on the part of courts, it is important for litigants to take the steps necessary to implement litigation holds in a timely manner with an eye toward how members of the organization will eventually testify about the organization's preservation efforts. In these terms, it may be easier to understand the enforcement requirements born in federal courts. Just think about how limited an opponent's ability to seek sanctions will be if faced with the following testimony:

> *Question:* Did you take any steps to prevent the destruction of ESI related to this case?
>
> *Answer:* Yes.
>
> *Question:* When did that take place?
>
> *Answer:* Well, within a few days of the event, a few of us met with our lawyer and discussed whether we anticipated this litigation. We answered in the affirmative. I was interviewed by counsel and we discussed the people involved, the documents and e-mail related to the event and where things related to the event are stored. We even talked about our retention schedule and what if any danger for destruction existed due to some of our IT policies.
>
> The next day I received a written litigation hold notice and was asked to acknowledge receipt, which I did. A few days after that, I received a call from counsel and she described in detail the company's duty to preserve evidence, asked me if I had deleted or destroyed anything -- and I told her no -- and then asked if I know of any other people or electronic storage areas involved in this event. I did recall two more key people.
>
> Within a few days, I received an amended written litigation hold notice that included the names of the additional people, and an expanded list of related documents. A few days later someone from data security within our IT department stopped by and collected all the file folders and their contents stored on my hard drive. We also found a few copies of files on my desktop that met the scope of the written litigation hold and copies of those files were collected also.

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While this scenario is fictional, it is an example of the end result that an organization is trying to achieve through effective litigation hold procedures. By developing evidence of the good faith discharge of an organization's preservation duty, it may be possible to reduce the risk of a sanctions motion. In other words, not only does a good legal hold process protect an organization against sanctions, it may actually deter the threat of sanctions.

The second part of step 5 is to examine the effectiveness of the hold. Is everything mentioned by the custodians being preserved? Are there other areas of follow-up needed? Is IT properly preserving ESI as requested? Do we need to save backup tapes? If so, are we doing this? In a practical sense, an organization is comparing the current scope of the hold against the list of key players, other custodians, and potential sources of ESI to make sure that the written litigation hold adequately describes the preservation that needs to take place. If the written litigation hold is lacking in one or more elements, then the effectiveness of the hold is falling short. If falling short, the litigation hold needs to be modified to cover the newly defined scope of the litigation hold as determined during the enforcement and examination step.

In our next article we will discuss how to modify a written litigation.

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::::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.

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 "Seven Steps for Legal Holds of ESI and Other Documents" (Lenexa, Kan.: 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 "**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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