Step 1 for Legal Holds: Trigger Events

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This series of articles provides an overview of the steps necessary to implement a legally defensible, written litigation hold and are based on the "Seven Steps for Legal Holds of ESI and Other Documents" (ARMA International 2009). The seven steps for legal holds are designed to help organizations tackle the seemingly daunting task of implementing written litigation holds. Although this series was conceived months ago, written litigation holds are now more important than ever in light of U.S. District Court Judge Shira Scheindlin's Opinion and Order in ***The Pension Committee v. Banc of America***, Case No. 05-cv-9016 (SDNY Jan. 11, 2010, as amended Jan. 15, 2010). Her introduction is a fitting opening to the series:

> In an era where vast amounts of electronic information is available for review, discovery in certain cases has become increasingly complex and expensive. Courts cannot and do not expect that any party can meet a standard of perfection. Nonetheless, the courts have a right to expect that litigants and counsel will take the necessary steps to ensure that relevant records are preserved when litigation is reasonably anticipated, and that such records are collected, reviewed, and produced to the opposing party. As discussed six years ago in the Zubulake opinions, when this does not happen, the integrity of the judicial process is harmed and the courts are required to fashion a remedy.

Our focus is on helping organizations discharge their duty to preserve electronically stored information and other documents. Absent an effective litigation hold process, an organization will be unable to meet its duty to preserve ESI and other documents. As articulated by various courts (including *The Pension Committee v. Banc of America*) the failure to implement a *written* litigation hold is gross negligence. A **finding of gross negligence** at the onset of a spoliation analysis is a surefire way to be sanctioned. The only question that follows is how much is the sanction.

A litigation hold is as an affirmative act by an organization to prevent the destruction of documents, including ESI and paper relevant to a lawsuit. In our book "Seven Steps" we refer to preservation efforts as a legal hold given its application beyond litigation. The names are interchangeable. A written litigation hold is the written notice distributed to the members of an organization that are custodians of relevant ESI and paper documents informing custodians that a litigation hold is being implemented. The notice must clearly identify the reason for the litigation hold and prohibit recipients from destroying relevant documents.

As we reported in "Seven Steps," the trend in the U.S. is toward a court mandated duty to distribute a written litigation hold notice to key players and other members of an organization that may possess relevant ESI and other documents. This latest federal court discovery duty was confirmed in *The Pension Committee v. Bank of America*.

Simply distributing a written litigation hold notice throughout the organization via e-mail, however, does not prevent sanctions. There are tasks surrounding the written litigation hold that are examined by courts to determine if a litigation hold was properly implemented. Proper implementation of a litigation hold is essential to avoid sanctions. Cases discussing litigation holds require more than merely distributing a notice. The definition of "more" is determined by courts on a case-by-case basis. The best way to understand "more" is to view it as a due diligence requirement. In other words, did a party act reasonably to identify custodians, repositories, search for and preserve ESI and other documents in response to actual litigation or a reasonable anticipation of litigation. Even the contents

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of the written litigation hold notice may come under judicial scrutiny.

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Why are courts placing so much emphasis on this ministerial step in preservation of issuing a written litigation hold? It appears that patience is running thin for lost ESI in federal court. More importantly, ignorance of litigation hold requirements is no excuse. Also, the days of he-said-she-said litigation hold arguments are numbered. Courts want to see a transparent and credible process by simply looking at a few documents (such as the written hold notice, distribution list, follow-up interview reports or logs, as examples).

As articulated by Judge Scheindlin in *Pension Committee v. Banc of America*, courts definitely do not want to wade through stacks of motions papers and days of hearings to determine if preservation efforts were sufficient to prevent the destruction of ESI and other documents. As a result, it is imperative for an organization to have in place a litigation hold policy and adequate procedures necessary to avoid going down the litigation "detour" of discovery sanctions motions.

The goal, on the other hand, is not perfection but rather development of a systematic approach to implementing litigation holds within your organization. Systematic, means repeatable and methodical. The idea is to build credibility. The purpose is to demonstrate reasonable efforts conducted in good faith, to search for ESI containing the truth and preserving it. While no system is foolproof, we developed the "Seven Steps" to help meet the litigation hold duties enumerated in recent litigation hold cases.

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The seven steps for preservation of ESI and other documents are:

- Step one: Identify Trigger Events.
- Step two: Analyze Preservation Duty -- Is a Legal Hold Required?
- Step three: Define the Scope of the Legal Hold.
- Step four: Implement the Legal Hold.
- Step five: Enforce and Examine the Effectiveness of the Legal Hold.
- Step six: Modify the Legal Hold (if Necessary).
- Step seven: Monitor and Remove the Legal Hold.

Below, we will discuss step one: trigger events. Future articles will cover the additional steps in the process. The series will culminate with an eighth and final article, discussing oversight and governance of an effective legal hold business process.

STEP ONE: IDENTIFY TRIGGER EVENTS

A "trigger event" is an event that triggers an organization's duty to preserve ESI and other documents. Sometimes the event that triggers the duty to preserve evidence is like a large neon sign flashing the words "we are going to sue" such as a letter from an attorney threatening a lawsuit. The letter may be a clear trigger event if it threatens litigation and demands preservation of all related documents. In other instances, there will be no notice or warning of a lawsuit. Even if the lawsuit is "blind" an organization has a duty to implement a litigation hold once it is served with the complaint.

Courts are in agreement that absent a trigger event, there is no duty to preserve documents. Sometimes the event is much more subtle, but visible nonetheless. For example, a group of supervisors talking about a harassment event may create the duty to preserve records. No lawsuit has been threatened or filed; no EEOC complaint has been made. At least one court has held that such a management discussion is, in fact, a trigger event, after which the organization had a duty to preserve related records, including e-mail: *Doe v. Norwalk Community College*, 248 F.R.D. 372 (D.Conn. 2007).

Most jurisdictions hold that a party has notice of anticipated litigation if a lawsuit is "reasonably foreseeable." For example, in *Blinzler v. Marriott International, Inc.*, the court held that an inference of spoliation (the legal term for the destruction of relevant documents for the purpose of preventing an adversary from obtaining copies of the documents) is proper only when the destroying party knows "of circumstances that are likely to give rise to future litigation." *Blinzler v. Marriott Intern., Inc.*, 81 F.3d 1148, 1159 (1st Cir. 1996).

In "Seven Steps," we analyze known trigger events, and include a listing of known trigger events along with trigger event case summaries as an appendix. Some known trigger events are:

1. Pre-litigation correspondence (aka preservation letter);
2. Pre-litigation discussions, demands, and agreements;
3. The creation of a list of potential opponents before filing a lawsuit;
4. Notice provided to an insurance carrier;
5. Claims filed with administrative agencies;
6. Substantive conversations with supervisors and others about a potential lawsuit;
7. Retention of counsel or experts;
8. Imminent appearance of a lawsuit or other red flags;
9. Partial settlement of claim;
10. Letter requesting an explanation for non-hiring;

11. Circulation of internal "document hold" memoranda; and
12. Severity of injuries combined with the totality of circumstances.

Recognizing trigger events (known or unknown) is the first difficult step in a legal hold process. An organization must develop a procedure for filtering facts that may equal trigger events to an individual or committee designated with the authority to implement legal holds. There are a number of approaches to recognizing trigger events and each organization will tackle this problem differently. In essence, an organization must develop some way to interpret events as they unfold and make a determination, on a case-by-case basis whether litigation could be deemed by a court as reasonably anticipated.

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::::RESOURCES::::

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.

"**Legal Holds for 'Anticipated Litigation': New Case Developments to Determine Triggering Events & Scope of Production**," by John J. Isaza, Esq.

"**Legal Holds & Spoliation: Identifying a Checklist of Considerations that Trigger the Duty to Preserve**," by John J. Isaza, Esq.

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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