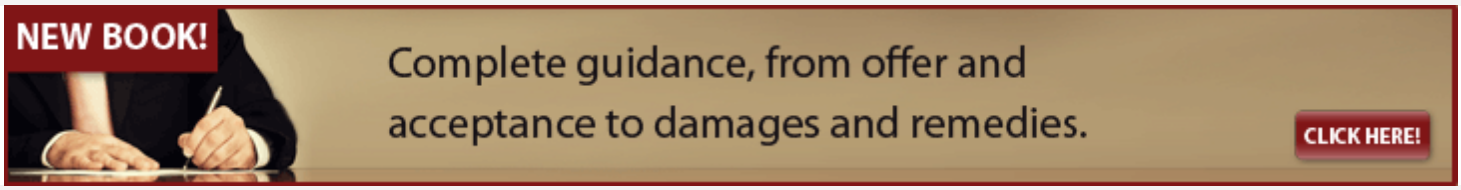

Step 3 for Legal Holds: Define the Scope

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

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This is the third installment in a series of articles aimed at helping organizations implement an effective written litigation hold. This article covers step 3: define the scope of the legal hold.

The universe of documents and records to preserve by a litigation hold is commonly referred to as the "scope" of a litigation hold. The scope of a litigation hold should include documents and records, including ESI, that are relevant to the facts and circumstances giving rise to the need for a legal hold. In other words, the scope of a litigation hold is directly related to the trigger event. For example, in a commercial landlord-tenant dispute the scope of a litigation hold may include the lease, written modification of the lease, rent bills, correspondence related to the lease, and e-mails about the lease. The scope of materials related to a trigger event is guided by past litigation involving similar trigger events or court cases on point with the trigger event that analyzed the scope of documents relevant to the trigger event. The scope can also be guided by the specific preservation demands of a potential claimant, if the preservation demands could be deemed reasonably related to the trigger event by a court.

An organization has a duty to preserve documents and records that it "knows, or reasonably should know, will likely be requested [by an opponent] in reasonably foreseeable litigation." *Mosaid v. Samsung*, 348 F.Supp.2d 332, 333 (D.N.J. 2004). The duty to preserve evidence "does not extend beyond evidence that is relevant and material to the claims at issue in the litigation." *Hynix Semiconductor Inc. v. Rambus Inc.*, 2006 WL 565893, *27 (N.D.Cal. Jan. 5, 2006).

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What is "relevant" is a legal term. A definition is contained in the Federal Rules of Evidence:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. "Federal Rules of Evidence," Rule 401.

The standard for discovery in civil litigation requires the parties to exchange information that is "reasonably calculated to lead to the discovery of admissible evidence." In other words, the parties are to exchange relevant information. Guided by these legal principles an organization implementing a litigation hold needs to determine what is relevant to the facts and circumstances that gave rise to the legal duty to preserve evidence. This topic was recently examined in *Goodman v. Praxair Services*, 2009 U.S. Dist. LEXIS 58263 (Jul. 7, 2009).

> "Relevant documents" include the following:
>
> [A]ny documents or tangible things (as defined by [Fed. R. Civ. P. 34(a)]) made by individuals "likely to have discoverable information that the disclosing party may use to support its claims or defenses." The duty also includes documents prepared for those individuals, to the extent those documents can be readily identified (e.g., from the "to" field in e-mails). The duty also extends to information that is relevant to the claims or defenses of any party, or which is "relevant to the subject matter involved in the action." Thus, the duty to preserve extends to those employees likely to have relevant information -- the "key players" in the case.
>
> *Goodman*, 2009 U.S. Dist. LEXIS 58263 (Jul. 7, 2009) *quoting Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 217 (S.D.N.Y. 2004) ("*Zubulake IV*") (footnotes omitted).

What is relevant has its limits. One court has held that "[c]learly [there is no duty to] preserve every shred of paper, every e-mail or electronic document, and every backup tape. Such a rule would cripple large corporations." *Zubulake IV*, 220 F.R.D. at 217. While it may be tempting to issue a litigation hold that asks members of the organization to simply preserve "relevant" information, this approach is a mistake. In *Samsung v. Rambus* the court held that instructing employees to "look for things to keep" or not to destroy "relevant documents" was insufficient for implementing a legal hold. The court stated "for a company merely to tell employees to 'save relevant documents' [was the] sort of token effort [that] will hardly ever suffice." *Samsung Electronics Co., Ltd. v. Rambus, Inc.*, 439 F.Supp.2d 524, 565 (E.D.Va. 2006).

Accordingly, it is advisable to define the scope of a legal hold by identifying specific categories of documents and records, including ESI, to be preserved by recipients of the written litigation hold notice.

Conceptually, thinking of the scope of a litigation hold as a road map for custodians may make the process of defining the scope easier to understand. If you draw a broad map with a few big buckets, you may be preserving too much. If you draw a narrow map with too few buckets, you may be preserving too little. Just where to draw a balance between too much and too little is a matter of individual choice for each organization. So long as careful thought has gone into the organization's attempt to define the scope, an organization has a good chance of demonstrating the reasonableness of its actions. The bottom line, however, is that based on a legal analysis of the trigger event and relevant materials, custodians need to be told the types of materials that they are prohibited from destroying.

Using legal acumen (from outside counsel or in-house counsel) an organization implementing a litigation hold needs to sketch the answers to who, what, where, and when for a trigger event. Interviews with key players should include specific questions about where ESI and other documents are stored, how they are created, how they are destroyed and whether others in the organization have knowledge about the trigger event.

The IT department should also be consulted to gain an understanding of the storage locations and destruction policies associated with relevant ESI, including the location and destruction policies associated with relevant backup tapes. Some organizations have created data maps listing all potential storage locations to help define the scope of litigation holds. No matter how you arrive at a list of relevant materials, the scope of a litigation hold is defined by using this sketch of sources of ESI and other documents.

The scope of the litigation hold will be communicated to custodians via a written litigation hold notice, so that they know exactly the types of ESI and other documents being preserved. The next article of this series will discuss issuing a written litigation hold.

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

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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