Litigation Support

Document Forensics and Legal Holds

ILTA White Paper **May 2009**

Best Practices for Legal Hold Processes

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In litigation, both organizations and individuals have legal obligations to identify, preserve, collect and ultimately produce information related to the matter under discovery. Unlike paper, electronically stored information (ESI) is more easily lost, modified, overwritten and deleted unless active steps are taken to manage this process throughout the life of the matter.

The source of many problems and sanctions encountered in litigation can often be traced back to some deficiency or oversight in the litigation hold process. What does or doesn't happen early in this process often has a greater impact on the costs of discovery and the eventual outcome than many people realize. Fortunately, many of these costs or adverse outcomes can be avoided by implementing and following best practices.

Despite all of the discussion and debate, the revised Federal Rules of Civil Procedure (FRCP), which were amended in December 2006 to explicitly address ESI-related issues, have not significantly changed the underlying nature of these legal obligations. While the revised FRCP have been a focal point for considering changes in discovery practices, the underlying obligations have been with us for quite some time.

Even beyond litigation, it's important to have appropriate processes in place for preserving information in such matters as internal and government investigations. Due to the massive shift to storing all kinds of information in electronic formats, many have recognized the need to create and implement best practices to meet these obligations appropriately and to reduce associated risks and costs. Some, however, have learned the hard way that these are not obligations and processes to lightly disregard.

Crafting, adopting and implementing legal hold best practices often raises the following questions:

- **When is our legal obligation to preserve information triggered?**
- **Where is all of our data relating to this matter?**
- **How should we notify people of the need to preserve their information?**
- **Who needs to be notified?**
- **How much or how little information do we need to preserve?**
- **How can we best preserve and collect the data to meet our legal obligation?**
- **When should we rely upon custodian self-selection of data to preserve, and when is it more appropriate to follow a different procedure?**
- **When can we dispose of the information preserved subject to the legal hold?**

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A CASE IN POINT

The recent court decision in *Keithley v. The Home Store.com, Inc.*, 2008 U.S. Dist. LEXIS 61741, 2008 WL 3833384 (N.D. Cal. August 12, 2008), is very instructive for establishing best practices on a number of levels. The underlying dispute involved an alleged intellectual property (IP) infringement of web site technology relating to the real estate market. Much of the discovery centered around the source code used. Unfortunately for the defendants, they made a number of mistakes leading to a costly set of monetary sanctions as well as an adverse inference jury instruction.

The duty to begin data preservation arose more than two years before the suit was even filed. The defendants had received a letter from the plaintiffs stating that "we assume that Homestore.com wishes to litigate this matter. Unless we hear otherwise by close of business Tuesday, August 7, 2001, we will advance this matter accordingly." The court found this was sufficiently clear to inform the defendants that litigation was reasonably anticipated. The lawsuit was later filed on October 1, 2003.

While reasonable minds might differ on whether the defendants should have issued a legal hold and begun data preservations efforts upon receipt of the letter, certainly all would agree that the duty would have been triggered at the commencement of the lawsuit at the very latest. The defendants not only failed to recognize this, but they also did not meet their legal obligations during the next 16 months after the suit commenced. The court stated, "As it turned out upon further investigation, however, the question of how far in advance of the filing of the lawsuit the duty arose is largely academic, because Defendants did not satisfy their duty to preserve even after this lawsuit was filed and recklessly allowed the destruction of some relevant source code as late as 2004."

The court explained why this case demonstrates the need for organizations to develop and follow a comprehensive litigation hold process: "The lack of a written document retention and litigation hold policy and procedures for its implementation, including timely reminders or even a single e-mail notice to relevant employees, exemplifies Defendants' lackadaisical attitude with respect to discovery of these important documents."

In the end, the court found that "[t]he discovery misconduct by Defendants in this case is among the most egregious this Court has seen," and awarded $320,000 in present sanctions, an adverse inference jury instruction impacting the scope and duration of the IP infringement, and also awarded future cost sanctions once Plaintiffs incurred and substantiated them.

While *Keithley* is an extreme example, it clearly underscores the need to establish and follow a well-thought-out legal hold process and supporting procedures.

Organizations looking to adopt best practices in their litigation readiness and response plans would be well advised to incorporate all of the following factors:

PLANNING

Understanding where and what types of data are involved, and taking the time well in advance to appropriately identify the resources needed to preserve and collect them, are key success elements in any legal hold plan. It will be far less costly and the process less error-prone if you address legal hold processes proactively. Conversely, mistakes and oversights are apt to occur when people are under the gun after a complaint or other triggering event crops up, especially while you and your preservation team are deep in the middle of other projects.

Also consider the level of expertise needed in your planning process. It's important to have the relevant stakeholders involved from legal, IT, records, HR, compliance and other business units as appropriate. Sometimes cooperation across these departments can be strained due to culture, economics, conflicting priorities and other factors. Having an experienced eDiscovery consultant or outside counsel involved is often a key value add. Not only are you bringing in a wider range of expertise than what may be available in-house, but you gain the advantage of having a neutral facilitator who can more easily bring these important stakeholders together to develop an effective process.

TIMELINESS AND PRIORITIZATION

An effective legal hold process should include procedures for identifying when the obligation to preserves arises, whether it's upon the commencement of a lawsuit or upon some other advance notice. Due to the transitory nature of some forms of ESI, it's important to act quickly to prevent the destruction, modification or other loss of data due to normal operations and the action or inaction of others. It's important to know where your data resides, the format or type of data, its retention cycle and the window of opportunity for collecting or preserving it within your acceptable levels of risk. It's also important to prioritize your preservation efforts by identifying early on which data is at risk for spoliation, such as data that is being overwritten or expired daily.

USE THE MEET AND CONFER WISELY

While the duty to preserve is typically triggered before the FRCP Rule 26(f) Meet and Confer occurs, this conference should not be overlooked as a critical point for further scoping your preservation, collection and production responsibilities for that matter. With savvy advance preparation, the Meet and Confer is a powerful opportunity to limit the scope of

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discovery to more reasonable and cost-justified parameters. Courts are increasingly looking to the parties to proactively and meaningfully agree to their relative discovery responsibilities at the outset of the case.

Consider the recent federal appellate decision, *In re Fannie Mae Securities Litigation*, _ F.3d _, 2009 WL 21528, 2009 U.S. App. LEXIS 9 (D.C. App. Jan. 6, 2009). The attorney for a non-party, the Office of Federal Housing Enterprise Oversight (OFHEO), had agreed to a stipulated order during a hearing regarding his client's objections to discovery-related subpoenas. This trial counsel agreed to the restoration of backup tapes, searches using terms provided by another party, and production of the resulting non-privileged e-mail and attachments.

However, the attorney apparently didn't realize that, due to the scope of this agreed-upon discovery, he was ultimately committing the client to spend over six million dollars to comply. This amount represented over nine percent of the agency's annual budget, which was even more of a bitter pill considering that it wasn't even a party to the litigation. Nonetheless, the court insisted on the agency's compliance with its agreement and ultimately sanctioned the agency for failing to do so. While this occurred in a hearing separate from the Meet and Confer, it serves as a strong warning for counsel to be fully advised and clearly understand all the ramifications of different approaches to eDiscovery before agreeing to them. Retaining eDiscovery experts and service providers early in the process to advise on such matters may well prevent commitments to uninformed and potentially disastrous timelines and search protocols.

COMMUNICATION, DOCUMENTATION AND AUDIT TRAIL

Effective data preservation is a team effort. Thus it's important to have clear lines of communication across the organization and with outside providers relating to roles, responsibilities, specific tasks, deadlines, and of course, the actual hold notifications. Unfortunately, it's not uncommon to hear "I didn't know," or "No one told me . . ." when problems arise. It's also not enough to simply issue the initial hold notices and hope that everyone will naturally comply. Courts are increasingly critical of passive or lackadaisical oversight of the legal hold process.

Many things need to be well documented so your organization is well prepared to withstand scrutiny. In the recent case of *Acorn v. Cty. Of Nassau*, 2009 WL 605859 (E.D.N.Y. Mar. 9, 2009), only a verbal hold was issued for a period of time. Along with other failures, this resulted in the court's finding that the defendant Nassau County was grossly negligent in failing to implement a litigation hold and the court consequently imposed sanctions.

The lesson here is to document a wide range of items during the hold process. These include the forms and timing of hold notifications, the follow-up steps taken, by whom, when, and just as importantly, why. When deliberate decisions are made to not preserve data (when it is clearly duplicative) or collect data (when ESI is not reasonably accessible), it's equally important to document the reasons and justifications. An audit trail is necessary to help your organization or client keep track of both completed and outstanding tasks and will help provide sufficient evidence to rebut allegations of spoliation, negligence and other discovery failures.

ACCOUNTABILITY

The legal hold process is only as strong as the weakest link in the chain. Therefore, it's advisable to clearly identify each person's or group's responsibilities and the procedures they should follow. It's also important to set up various checks and balances. For example, when there is an allegation of personal or corporate wrongdoing, it's usually not a sound idea to allow those involved to access or control the relevant data during preservation and collection activities. Your legal hold process should be able to withstand scrutiny from opposing parties and the court.

CONSISTENCY AND REPEATABILITY

An effective legal hold program is one that relies upon defined processes and policies, and appropriate training for all those involved. These defined policies and procedures must also be followed consistently and repeatedly to be effective, and ultimately, defensible. Both litigants and judges will hold you accountable for following your own rules, assuming that your practices are not held to be unreasonable. Therefore, your organization also needs to develop a feedback mechanism and continuous improvement program to understand how well your processes and policies are being followed, and to identify areas where additional improvement may be needed.

IDENTIFICATION

Due to the transitory nature of ESI, organizations need to quickly identify sources of relevant information upon a triggering event to prevent spoliation. While many organizations have already developed an enterprise data map, it's also important to identify locations and data types at the custodian level. Without this information, it can take precious time for counsel and IT to understand on which shared drives and servers a particular person has access and has stored data, as well as smartphones, hosted services including social networking sites, home computers and portable storage devices.

Also, a well-planned legal hold process includes the identification of potentially relevant departed

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employees and the correlation of their data against pending legal holds. Most organizations tend to quickly recycle a departed employee's computer, smartphone and portable storage devices; therefore, an exit checklist should be put in place that runs these data sources and their custodian's name against the list of employees subject to currently pending legal holds. It's fairly common to hear that custodians' hard drives were reformatted or re-imaged after they left the company, even though they may have been subject to a litigation hold. In the current economic environment of massive reductions in force and corporate restructuring, it is especially important that your process also incorporates methods for identifying and tracking the new custodians who "inherit" the data of their departed co-workers.

PLANNING FOR TRANSPARENCY

At some point, your internal processes and actions may be placed under scrutiny, and you may be asked to produce the records of your identification, preservation and collection processes and activities. Failure to do so may lead to a finding of negligence, monetary sanctions, adverse inference instructions and even terminating sanctions, such as dismissal or default judgment.

Transparency also needs to be anticipated in reference to tracked information. While this documentation needs to be accessible by your legal team, it's prudent to maintain it in a way that protects your various privileges, including attorney work product and attorney-client communication. Thus, while you may maintain lists of custodians, their ESI and the various statuses of each, be careful not to record or include potentially privileged information, such as attorney interview notes and legal impressions, in the same sources, lists or reports that may need to be produced to the court or opposing counsel. It may prove helpful to exercise control by segregating the factual from the privileged information. This way, you can produce information about the steps taken to meet your legal obligations without disclosing privileged legal strategies.

INFORMATION LIFECYCLE MANAGEMENT, INCLUDING EXPIRATION

With the paradigm shift to storing most information as ESI, many organizations have found it challenging to develop or simplify their records retention programs. In many instances, records management schedules designed for paper documents haven't transitioned well to managing electronic files, necessitating the need to radically simplify and reduce the number of relative retention and expiration categories. Also, depending on the hold strategies employed, everyday users are often being tasked to manage their own data both before and during legal holds, with greatly varying results. This presents increased risk in the legal hold process.

E-mail messages are typically of high interest in many types of litigation and investigatory matters. Absent a legal requirement to retain it, organizations need to balance the business value derived from retaining e-mail against the legal risk and costs of doing so. Having more e-mail, attachments and related data at hand can require additional work, time and cost to identify, collect, cull, search, review and produce, even with automated tools. In addition, over-retention can create serious implications for the efficient operation of electronic systems and the costs of increased data storage. It's important, therefore, to look beyond the legal hold in managing costs. Considering that document review is often the largest cost of discovery (comprising as much as 70 or 80 percent), the less data there is for review, the lower the resulting costs.

Some organizations have already turned to e-mail archiving as a part of the solution. However, some care is needed in determining what should be archived, and how. Some archiving vendors may recommend archiving everything into a central archive or vault, but that could have the unintended effect of "moving the landfill." Also, implementing an archive system that does not provide sufficient eDiscovery-related tools, such as robust searching, culling, reporting and exporting, could very well result in more time-consuming and costly efforts to get the relevant data back out of the e-mail repository.

Suffice it to say, when adopting best practices for legal holds, it's critical to assess the organization's overall information management policies, practices, and tools, as they can have a profound impact on the effectiveness, risks, and costs of eDiscovery and other business processes.

SUPPORTING TECHNOLOGY AND AUTOMATION

As seen in numerous eDiscovery cases, mistakes sometimes occur from miscommunication, disorganization and human error. With reductions in the workforce, there is often a loss of key organizational knowledge, sometimes referred to as "institutional memory." In many situations, there are simply fewer people with less time to devote to these tasks. However, when lapses in the process occur, the risk of spoliation and resulting sanctions can rise dramatically.

The proper application of supporting technology can often automate and increase consistency in the legal hold process while reducing risk and cost. Organizations commonly rely upon e-mail for distributing the initial and ongoing hold notifications and subsequent tracking with spreadsheets. People are already familiar with these tools, and they can easily be produced with technology that the organization already owns. But also consider the enhanced benefits of implementing dedicated legal hold tools. Rather than relying

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upon human intervention to manually review e-mail responses and spreadsheet entries, consider a system that automatically alerts you to nonresponders and automatically sets reminders for follow-up. This has the added benefit of providing constant "real-time" information, rather than having to wait for someone to update it manually.

Also consider that unless spreadsheet cells are protected, there is always the risk of a user inadvertently deleting or changing tracked information in a way that renders it inaccurate. Short of keeping prior file versions, spreadsheets do not contain an audit trail capability regarding cell content changes. Another common mistake, which increases risk, is when a person inadvertently overlooks custodians or data sources contained in other worksheet tabs or other off-screen content. By the time this overlooked information is discovered, if at all, extensive spoliation can have occurred.

Consider, too, that storing legal hold spreadsheets on a network or local drive makes it more difficult for multiple people to access or update the information. Local drives should definitely be avoided due to general lack of regular backups and risk of loss. In contrast, legal hold systems are typically database driven and may allow varying degrees of concurrent access depending on the user's security profile. By recording events as they are logged, legal hold systems also generate logs or audit trails, a critical element when the process comes under scrutiny.

THE GIFT THAT KEEPS ON GIVING

The legal hold process is a critical stage in eDiscovery. Implementing and executing a well-designed legal hold process can significantly reduce the risks and costs associated with eDiscovery. Implementing these best practices should be viewed as a critical investment. With discovery sanctions easily reaching into the millions of dollars and beyond, avoiding one or a handful of legal hold mistakes could help recoup this investment. Beyond this, creating and executing an effective legal hold process built upon best practices results in significant efficiency-driven cost savings year after year. **ILTA**

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TEN LEGAL HOLD BEST PRACTICE TIPS:

1. Take the steps to identify in advance where potentially relevant data is stored in active systems, backups, archival systems and other locations, such as portable devices and third-party hosted systems.

2. Put in place methods to identify, as early as possible, those who should be contacted for the timely preservation of data potentially related to the matter at hand (individual employee/custodians, enterprise and business unit data custodians, IT, third parties and collection service providers).

3. Confer with outside counsel and service providers early in the process and throughout to set clear goals and expectations to reduce risk.

4. Prioritize your hold efforts to address relevant evidence most at risk for spoliation if quick action is not taken to preserve it.

5. Develop written hold notice templates as appropriate, and retain copies of sent notices. They may be needed when your legal hold process is challenged.

6. Identify which temporal ranges (date ranges) will be needed for the legal hold, including ongoing preservation requirements.

7. Develop exit checklists and processes for reviewing departing employees' legal hold obligations. These should identify and inventory their data sources, such as laptop hard drives, portable storage devices and smartphones, and relate both the departing custodians' name and their data to existing hold matters. In addition, identify their successor data owners. Coordinate with HR as appropriate.

8. Incorporate personal follow-ups with individual and enterprise data custodians as part of your legal hold process. This is often a critical and effective step to learn more about the data, nature and merits of the case. Document and track each follow-up, keeping in mind the need to preserve privilege.

9. Differentiate between those matters where custodial self-selection is advisable and those that are not (*e.g.*, fraud, employment, and various types of investigations). Plan for implementing forensic and other collection methods to reduce the risk of spoliation and foul play in particularly sensitive matters.

10. Manage your data before it manages you and your budget.

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