



Litigation Hold Compliance – Separating Fact from Fiction

Today, the implementation of a litigation hold after litigation is “reasonably anticipated” is one of the most essential, if not the most essential first step of your litigation and electronic discovery requirements. This, however, is not without impediments. Issuing, implementing, and supervising even one litigation hold is an administrative challenge; tracking multiple, often overlapping holds increases the complexity of complying with anti-spoliation legal duties.

These complications have contributed to some organizations adopting a mindset of “we will wait to see if discovery obligations happen first” before taking a proactive readiness measures. Reactive approaches tend to be predicated on a variety of misunderstandings and fictions, the most popular of which include:

- ✘ **Fiction #1:** We don’t have enough litigation to justify a formal approach.
- ✘ **Fiction #2:** We can delegate the responsibility to preserve any important documentation.
- ✘ **Fiction #3:** We won’t get sanctioned for not meeting the standard.

The benefits, however, of an effective, yet practical litigation-hold policy can be critical -- and the costs of an ineffective policy can be steep. Organizations are encouraged to understand the facts before taking the risk of assuming immunity or that they “have got covered.”

Litigation Holds Facts

Fact #1: Organizations have a duty to issue a litigation hold

Commonly, attorneys are under the impression that the duty to preserve arises only after they receive a preservation letter from the opposing party, a preservation order from the court or a discovery request from the opposing party. This is simply inaccurate. As noted in Fed.R.Civ.P. 37 and common law “[a] preservation obligation may arise from many sources, including common law, statutes, regulations or a court order in the case.” *Keithley v. Homestore.com, Inc.*, 2008 WL 3833384, at *5 (N.D.Cal. Aug. 12, 2008).

Based on the jurisdiction, the obligation to preserve evidence can arise in a variety of ways prior to the onset of actual litigation:

“Reasonably anticipated” – *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003) (“Zubulake IV”) (duty attaches “at the time that litigation was reasonably anticipated.” In that case, meaning when the plaintiff’s former supervisors became reasonably aware of possible litigation).

“Pending or anticipated” – *Silvestri v. General Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001) (duty attaches when the party knows or reasonably should know that the evidence may be relevant to pending or anticipated future litigation).

“Should have known” – *Fujitsu Ltd. v. Federal Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001) (duty attaches “when the party has notice that the evidence is relevant to litigation or when a party should have known that evidence may be relevant to future litigation”).

“Sensitized to the issue” – *Phillip M. Adams & Assoc., LLC v. Dell, Inc.*, 2009 WL 910801 (D. Utah Mar. 30, 2009) (duty arose not when company received the notification of potential infringement, but when the company became “sensitized” to the issue 5 – 6 years earlier).

Fact #2: Organizations have a duty to actively manage their litigation holds

In several cases, courts have chastised organizations that “may have instructed” or “announced” litigation holds but did not do enough to enforce them fully because management trusted that employees would administer the hold order.

You cannot rely on custodians to self-manage. In *Hawaiian Airlines, Inc. v. Mesa Air Group, Inc.*, 2007 WL 3172642 (Bankr. D. Hawaii 2007), the court refused to allow a firm to expect that a “valued, trusted, high level employee of the company” would not act contrary to the e-discovery rules. Instead, the company “could and should have taken reasonable steps” to manage custodians and prevent such actions affirmatively. Another court scolded a firm’s “cursory compliance efforts, including the misplaced reliance on custodian administration and self collection.” *Samsung Electronics v. Rambus*, 439 F.Supp. 3d 524 (E.D. Va. 2006).

You must keep the hold fresh in the minds of custodians. Counsel should communicate directly with the “key players” in the litigation, i.e., the people identified in a party’s initial disclosure and any subsequent supplementation thereto. Because these “key players” are the “employees likely to have relevant information,” it is particularly important that the preservation duty be communicated clearly to them. As with the litigation hold, the key players should be periodically reminded that the preservation duty is still in place. *Zubulake v. UBS Warburg, LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004).

United Medical Supply Co., Inc. vs. U.S., 2007 WL 1952680 (Fed. Cl. June 27, 2007) (sanctioned government for failure to follow up on litigation hold emails sent).

Litigation Holds Facts (continued)

Fact #3: Organizations failing to meet the standard are routinely sanctioned

Some organizations defer tacking action to manage their custodians and electronically stored information based on their interpretation of safe harbor provisions under Fed.R.Civ.P. 37(f). Pursuant to Rule 37(f), absent exceptional circumstances, a court may not impose sanctions for loss of electronically stored information resulting from the routine, good-faith operation of an electronic information system.

Rule 37(f) applies only to information lost due to the routine operation of an information system only if the operation was in good faith. From "Committee Note to Federal Rule of Civil Procedure 37(f)."

Once litigation is "pending or reasonably anticipated," the rules, however, change: "good faith" means that a party is not permitted to exploit the routine operation of an information system to thwart discovery obligations.

As organizations have the affirmative obligation of issuing a litigation hold, the effect of Rule 37(f) is limited. ("[t]he Court further advises the parties that they should be very cautious in relying on upon any "safe harbor" doctrine as described in new rule 37(f)").

The consequences for not taking affirmative and anticipatory action are severe:

1. *Acorn v. County of Nassau*, 2009 WL 605859, at *4 (E.D.N.Y. Mar. 9, 2009) (awarding motion costs and attorneys fees for failure to implement a litigation hold; holding that "the failure to implement a litigation hold at the outset of litigation amounts to gross negligence.").

2. *Keitley v. Homestore.com, Inc.*, 2008 WL 383384 (N.D.Cal. Aug. 12, 2008) (\$320,000 monetary sanctions and adverse inference instructions)

3. *In re NTL, Inc. Sec. Lit.*, 2007 WL 241344 (S.D.N.Y. Jan. 30, 2007) (sanctions included adverse inference instruction)

4. *Conner v. Sun Trust Bank*, 546 F. Supp. 2d 1360 (N.D. Ga. 2008) (adverse inference instruction)

5. *In re September 11th Liability Ins. Coverage Cases*, 243 F.R.D. 114 (S.D.N.Y. 2007) (sanction of \$1.25 million)

6. *Wachtel v. Health Net, Inc.*, 239 F.R.D. 81 (D.N.J. 2006) (deeming facts admitted, precluding evidence, striking privilege claims, striking trial witnesses, and fine)

7. *Paramount Pictures Corp. v. Davis*, 234 F.R.D. 102 (E.D. Pa. 2005) (spoliation inference)

8. *Ingoglia v. Barnes & Noble College Booksellers*, 852 N.Y.S.2d 337 (N.Y. A.D. 2008) (dismissal)

9. *QZO, Inc. v. Moyer*, 594 S.E.2d 541 (S.C. App. 2004) (answer stricken)

10. *United States v. Philip Morris, USA, Inc.*, 327 F.Supp.2d 21 (D.D.C. 2004) (\$2,750,000 fine and barring witness testimony)

What to Do?

Businesses cannot afford to take the requirement that they issue litigation holds lightly. Embracing a process- and resource-intensive litigation holds response may, however, not be appropriate. Practitioner advice on addressing litigation hold requirements share common themes:

1. Select a technology partner

Repeated judicial criticism of "self-help holds," putting aside intentional obstruction and the need to continue to conduct ordinary business, makes it clear that organizations should put in place a clear, yet simple technology solution for litigation holds requirements.

2. Get the fundamentals right

- Determine if a triggering event has occurred to trigger a litigation hold
- Investigate to determine likely custodians of key electronically stored information
- Issue a litigation hold at the outset of litigation or whenever litigation is reasonably anticipated
- Ensure notification of all management regarding the preservation order
- Ensure that employees and/or third parties who are in "possession, custody, or control" of key data are notified about the litigation hold.
- Ensure that the litigation hold is "periodically, reissued to that new employees are aware of it, and so that it is fresh in the minds of all employees."
- Ensure that litigation hold notices are acknowledged by employees
- Collaborate with IT, HR, outside counsel on the management of custodians and data
- Gather and preserve case essential electronic files

3. Be proactive

Neither litigation nor electronic discovery is likely to go away, but rather will only become more complex and difficult with the spread of new technologies. The earlier and more thoughtfully organizations begin to address these issues, the better off they will be.

Legal Disclaimer

The information contained herein is not intended to provide legal or other professional advice. CaseGuard encourages you to conduct thorough research on the subject of electronic discovery and confer with experience legal counsel.

Our Litigation Hold Technology Benefits

Economical

Scalable costs match litigation volume.

CaseGuard users access services, on-demand, tailored to their litigation volume. Legal teams can choose to allocate the costs of compliance internally in a way that is defensible and transparent.

Unprecedented time-to-value.

Our applications deploy immediately – much faster than installation-required litigation holds offerings – with a total cost of ownership five to ten times less than with installed software.

Less expensive initially – and in the long-run.

CaseGuard solutions are provided pay-as-you-go. There are no heavy up-front costs or hidden expenses of maintenance and updates. With no software to install, you will always have the latest version.

Convenient

Accessible wherever you are.

Device and location independence enable users to access our solutions using a web browser regardless of their location or what device they are using. As infrastructure is off-site and accessed via the Internet, users can securely connect from anywhere.

Easy on administrators.

CaseGuard users can tailor notifications and access reports with the ease of navigating their favorite websites.

Compatible with your environment.

We work in concert with your document management systems, leaving content within your corporate environment and security protocols. We leverage the ongoing investment of your IT security and avoid the need to review and recertify controls.

Dependable

Available. Our environments take advantage of server redundancy providing you with 99.9% uptime and disaster recovery.

Rigorously tested. Our products receive hundreds of hours of on-going testing with improvements delivered real-time and seamlessly to our customers.

Secure and confidential. Your information is protected by 128-bit SSL security. Data maintained and backed up in access-controlled, monitored Tier 1 data center.

About CaseGuard

CaseGuard specializes in providing intuitive, secure, and affordable litigation software solutions that allow customers to achieve efficiency and compliance from day one.

Each of our solutions is designed to address different needs, be flexible to match your actual litigation volume, and structured to allow legal teams to allocate cost of compliance across budgets, matters, departments or divisions.

Our mission at CaseGuard is not simply to deliver software, but to deliver real value – giving us the ability to offer our customers a true edge in eDiscovery compliance and litigation management with solutions that are accessible anytime and anywhere.

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