

CORPORATE COUNSEL

What's There to Hold On To? An Enlightened Approach to Data Preservation in the Era of the Legal Hold

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Data drives everything in today's business world, and it would be hard to name a more important concern for today's corporate arena than data preservation.

The growing urgency of this matter, until last year a novelty to most attorneys, touched off a flurry of rulings in the area of legal holds in 2010, with several major court decisions redrawing the map in what had been virtual terra incognita.

Beginning with the landmark *Pension Committee* decision by U.S. District Court Judge Shira Scheindlin in January 2010, the judiciary became hyper-focused on this area with opinion after opinion coming down for the rest of year. (*Rinkus v. Cammarata*, *Crown Castle v. Nudd Corp*, *Merck Eprova v. Gnosis*, *Jones v. Bremen High School*, and *Victor Stanley II*.)

Clearly corporate counsel can no longer function without developing the judgment to distinguish what must be preserved, the knowledge to negotiate and lucidly communicate the scope, and the skills and tools to select and instruct on reasonable and effective methods of preservation.

Implementing a reasonable, defensible legal hold need not be a complex or overwhelming task. The standard is not perfection, but reasonableness and good faith coupled with competency.

All too often, we see half-hearted attempts at data preservation undertaken with little understanding of an organization's information resources. A generic hold directive dispatched en masse to custodians carries high risks. Many will ignore it as incomprehensible or dismiss it as impractical. Worse, it may trigger absurd Herculean preservation efforts crippling productivity and budgets.

The 2010 decisions tip the scales toward:

- *Higher standards* — practices once thought acceptable or perhaps merely



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- negligent are now understood to be sufficient to touch off sanctions;
- *Higher stakes* — equating an ineffective legal hold to gross negligence puts litigants at risk of the most severe sanctions, even dispositive sanction; and
- *New vulnerabilities* — adversaries in litigation have greater incentive to challenge an opponent's preservation efforts when a flawed legal hold becomes a shortcut to victory.

Take a Fresh Look at Legal Holds

We propose several organizing principles that can serve as a guide to those preparing and implementing legal holds in cases of all sizes and types, from run-of-the-mill disputes implicating a handful of key players, to bet-the-company battles involving thousands of custodians and systems.

A well-documented, closely monitored and transparent process prompts those tasked with preserving information to more likely respond in a careful and timely

way. By applying such a process consistently (but not slavishly), costs and risks are mitigated, and the predictability of outcomes improved.

It is important to note what a legal hold is not. It is not just a letter, memo or e-mail. It is not a rote exercise. It is not a perfect process. There is no "one-size-fits-all" solution. A legal hold is an organic, bespoke process.

1. Know where you're going, then construct your legal hold to get there.

Every legal hold is as different as every case is, with its own unique complement of parties, witnesses, evidence, issues, intervals, and outcomes. There is no "cookie cutter" approach or "perfect hold directive" that, used every time, will ensure the proper preservation of information.

But, while the details change, the process — and particularly aspects that promote the integrity of process — should be consistent.

Begin the process by anticipating the evidence that your side will require and the other side will seek. Who are the most likely witnesses? What did they rely upon in decision-making? What are the issues before the court and the records that bear on them?

Anticipate as well the changes that are likely to occur between the times the preservation obligation attaches and the collection or processing of relevant data is performed. Employees leave or change positions. Systems are replaced and updated. Content is purged. Tapes are rotated. Hard drives fail.

2. Have a legal hold process — and execute it.

Legal holds can be complicated, but the reasons they fail are usually pretty simple. It's exceedingly rare for a party to be sanctioned for good faith, diligent efforts that have gone awry. Demonstrating that

you had routine policies, procedures, tools, personnel, and lines of communication in operation, ones that were likely to promote sound preservation, goes a long way to deflecting the evidence of bad faith at the heart of most sanctions.

To meet the threshold that courts expect, consider the following as key elements of a sound legal hold process:

1. Issue timely, written legal hold directives;
2. Ensure custodians understand what's required and how to comply;
3. Follow up (e.g., confirmation and clarity);
4. Provide for periodic updates and reminders;
5. Account for employee mobility and turnover;
6. Consider third-party custodians;
7. Thoroughly document actions and the bases for decisions;
8. Develop procedures, recordkeeping and training materials that leverage past preservation efforts; and
9. Remember that legal hold is a process, not simply a document.

Often, the process can be greatly aided using software tools designed to manage the legal hold. By automating routine preservation tasks, legal teams are less likely to overlook something and can better leverage past efforts by building a knowledge base detailing what has gone before.

3. Know that spoliation occurs even when you do your best.

In her *Pension Committee* opinion, Judge Scheindlin observes:

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.

Implementing a legal hold is not about scooping up all of the ESI and responsive data and locking it in a vault; it's taking reasonable steps to assure that data will be there when needed.

4. Don't over-preserve.

Over-preservation saddles litigants with a real, immediate cost that must be

weighed against the potential for responsive information being lost. A hold notice goes too far when it compels an organization to "preserve everything." That's gross negligence, too — except that the "sanction" is immediate and self-inflicted.

5. Create a detailed written record of legal hold efforts.

Document in detail the actions taken with respect to the hold. What was done and when? Who dictated the scope and why? Which custodians were notified, and what follow-up ensued? Cases often take years to resolve. Employees will forget, misremember, depart and die. Extensive, lucid documentation shows the court that you took your preservation duties seriously: absent, incomplete or confusing documentation proves you didn't.

Clear, thorough documentation doesn't just happen. It has to be someone's responsibility. Be sure that a person "in-the-loop" with the skills to do the job well is tasked to serve as your "Boswell," to document the effort.

6. Create targeted hold notifications for specific custodians.

When instructing employees, counsel must include clear and direct instructions to custodians to preserve records. Weak or improper instructions are an indication of an attorney not understanding the purpose of a legal hold. In *Samsung v. Rambus* the instructions were "to save all relevant documents." The court said that this was the "sort of token effort [that] will hardly ever suffice."

Consider different functional teams and tailor your hold notifications to their functions. A database administrator needs to know that he should archive back-up tapes for an enterprise resource planning software system, but if a sales manager received the same notice, it would only lead to confusion.

7. Understanding that "self-preservation" has two meanings.

Sometimes clients or employees lie. When preservation boils down to employees searching their own files for relevant material they become the sole arbiter of relevance — a task for which they are often ill-equipped or conflicted. Counsel cannot ignore the potential for custodians to act in their self-interest and "overlook," alter or delete information that

could compromise or embarrass them or the company.

The best hold notices fail if the persons charged to execute them won't do so fairly and honestly. When it's reasonable to anticipate a situation like this, consider alternatives that will minimize the potential for shenanigans, such as duplicating relevant data before the notice goes out or delegating the search and collection to someone not motivated to make information disappear.

Final Thoughts

The elements of a successful legal hold are straightforward and not difficult to execute; but they demand organization, diligence, thought, and care.

The *Pension Committee* opinion and subsequent opinions are a forceful reminder that the time to institute policies and procedures to meet legal hold obligations is now. In the time it will take you to identify key custodians, learn what data exist and where it resides, and then formulate a means to identification or collection, the data you're bound to protect may disappear.

A good lawyer, like a skilled firefighter or EMT, is ready to roll at a moment's notice. A good lawyer has a plan, and the process, people and tools to effectively execute it when needed. You can't put out a fire or save a life without doing everything possible to be prepared, and you can't put your data preservation on hold until an emergency rears its ugly head.

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