

A Compelling Need For Change in Legal Hold Practices

By Brad Harris
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Over 17 months ago, Judge Shira Scheindlin sounded the clarion call once again — organizations that fail to take reasonable steps in response to a preservation obligation do so at their peril. In January 2010, *The Pension Committee of the University of Montreal, et. al. v. Banc of America Securities, LLC* (685 F. Supp. 2d 456, SDNY Jan. 11, 2010) opinion reinforced principles that had been laid out as early as 2003. When litigation is rea-

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sonably foreseen, affirmative steps must be taken to prevent spoliation of potentially responsive information. Among other actions, failing to issue a written legal hold notice may constitute gross negligence, since the likely outcome of failing to notify those responsible for the custody, ownership or control of electronically stored information will be its modification or destruction.

Yet despite this call, many in-house counsel remain reluctant or unwilling to implement seemingly simple steps deemed reasonable by numerous jurists at the federal court level — Issue a written legal hold. Take steps to ensure understanding and agreement to comply with the hold instructions. Send periodic updates and reminders. And be actively engaged in deciding what and how information needs to be preserved and collected.

UNDERSTANDING THE NEED TO CHANGE

Throughout 2010, the legal profession saw a dramatic rise in the number of court opinions being issued in response to spoliation claims. As a result, organizations find themselves under increasing scrutiny by their adversaries and the courts to ensure that reasonable and good-faith efforts have been undertaken in response to a duty to preserve information for discovery.

The case that clearly articulated this need was issued in mid-January 2010 by Judge Shira Scheindlin out of the South-

ern District of New York. The *Pension Committee* opinion specifically dealt with motions for spoliation sanctions brought by the defendant in this case.

The opinion went to great lengths to articulate a framework for the court's review and analysis, including how it determined the level of culpability (negligent, grossly negligent or willful), the interplay between the duty to preserve and spoliation of evidence, which party should bear the burden of proof for both relevance and prejudice, and finally, the appropriate remedy for harm caused by the spoliation.

When meting out sanctions, Judge Scheindlin stated that defendants "demonstrated that most plaintiffs conducted discovery in an ignorant and indifferent fashion" (p.82). The court held that unknown documents were destroyed due to poor preservation and the lack of an effective litigation hold (p.40-1.) For the grossly negligent plaintiffs, the court ruled that relevance and prejudice may both be presumed, and described a detailed spoliation instruction to be given to the jury. For those found to be merely negligent, the court ruled that the defendants would need to demonstrate that any destroyed documents were relevant and the loss was prejudicial. Monetary sanctions were also awarded.

Numerous other cases followed throughout 2010 that reinforced Judge Scheindlin's findings that data preservation must be taken seriously. On the

heels of *Pension Committee*, Judge Lee H. Rosenthal in the Southern District of Texas ruled on *Rimkus Consulting Group Inc. v. Nickie G. Cammarata, et al.* (07-cv-00405, SDTX Feb. 19, 2010). The case involved intentional destruction of evidence that was later able to be recovered. Although *Rimkus* reached different conclusions based on the facts of the case regarding the level of culpability and issued reasonable sanctions based on the facts of the case and precedent in her court, Judge Rosenthal cited *Pension Committee* and affirmed the need for taking adequate steps to preserve evidence.

In March 2010, U.S. Magistrate Judge Marian Payson found the plaintiff to be grossly negligent in *Crown Castle USA, Inc. v. Fred A. Nudd Corp.* (2010 U.S. Dist. LEXIS 32982, WDNY Mar. 31, 2010) for not issuing a legal hold and awarded sanctions for cost of additional discovery. The next month, a case before Judge Richard Sullivan in the Southern District of New York, *Merck Eprova AG v. Gnosis S.p.A. et al.* (07 Civ. 5898, SDNY Apr. 20, 2010), cited a failure to issue a written legal hold — which was upheld as a reasonable and good faith response to a preservation obligation — in handing out sanctions, including a \$25,000 fine to “deter future misconduct.”

The year continued with Judge Paul Grimm's *Victor Stanley, Inc. v. Creative Pipe, Inc., et al.* (D.MD Sep. 9, 2010). The opinion, commonly referred to as *Victor Stanley II*, delved deeply into the standards set at the level of the U.S. Circuit Courts. The court had a case with a defendant who purposely destroyed documents and electronically stored information that were later recovered. This case did not address preservation issues, but rather the appropriate sanctions for an egregious spoliator, which included attorneys' fees and costs and a threat of up to two years in prison for contempt until the fees are paid.

Finally, in late October 2010, Magistrate Judge James Francis issued an opinion that continued the judicial debate. *Orbit One Communications, Inc. v. Numerex Corp.* (2010 WL 4615547, SDNY Oct. 26, 2010) involved a shareholder suit where spoliation was found to have taken place. In this case, Judge Francis denied the defendant's spoliation motion despite acknowledging the failure to “engage in model preservation” because there was insufficient evidence that any lost ESI was relevant to the case. Judge Francis takes the view that sanctions should be first weighed against the relevance of the lost data and prejudice suffered, rather than a *per se* conclusion based on preservation practices.

FEAR OF CHANGE

The risks and consequences of failing to take reasonable steps to preserve information continue to increase, driven by trends in information technology (the proliferation of data types, sources and storage repositories), the increasing likelihood of requests for electronic data, and the standards of care expected by the courts.

Sending and managing legal holds has traditionally utilized a manual process. Yet even for a small number of holds, manual processes can be very time-consuming — drafting the hold notice, sending it to appropriate recipients in a timely manner, and keeping track of who received it (let alone if they understood the instructions and agreed to comply). When the scope of the hold changes (*e.g.*, who needs to be informed or the actions required), the process starts anew. And the courts are now expecting periodic reminders (*e.g.*, every three to six months) to recipients if there is an ongoing duty to preserve. It's little wonder that many organizations tend to resist the idea of sending holds for every anticipated litigation or investigation.

Manual legal hold processes have other shortcomings as well. They tend to be ad

hoc, often leading to confusion and greater disruption on the business. Manual tracking is also prone to errors and omissions, and the lack of timely reporting can make management control and defensibility equally challenging. Additionally, manual processes are enormously difficult to scale, since adding personnel or outsourcing can be extremely costly.

So what are the alternatives to a manual legal hold process? One approach is going straight to collection, bypassing the need to notify custodians by copying or quarantining the information. In some cases, a “collect-to-preserve” strategy is very appropriate when the risk of spoliation is otherwise high — such as highly ephemeral data or when dealing with a bad actor — or if the relevant information can be precisely identified at the outset of a case. Evolving search and retrieval technologies can facilitate a collect-to-preserve strategy through automation and targeting.

There are, however, drawbacks and limitations to relying exclusively on collection. Automated collection technologies can be expensive to acquire and maintain. Performing broad collections at the outset of a preservation obligation inevitably leads to significant amounts of data being captured that needs to be stored properly and later sifted through should discovery proceed. Data being stored for one case becomes subject to future preservation obligations should new litigation arise. Last, with the proliferation of data types and the ubiquity of storage devices, attempting to collect from all the potentially relevant sources can be overwhelming and burdensome.

Another approach to responding to preservation obligations is to take advantage of intelligent data repositories that are capable of locking down information where stored in its normal course of business. E-mail archives and content management systems now routinely provide

the ability to search for relevant content and place a hold on the data-in-place to prevent it from being modified or deleted. When available, such intelligent repositories have the distinct advantage of avoiding the need to unnecessarily replicate data and enable better information governance by managing retention and routine disposition.

Where intelligent repositories are not in place, and a collect-to-preserve strategy deemed too costly or inadequate to address all potentially relevant data, automating the legal hold notification process can significantly lower cost and risk. So why not automate? In the past, automating the legal hold notification process meant a sizable investment in software, hardware and operating maintenance associated with an enterprise software implementation. An investment typically exceeding \$250K meant such automated systems were out of reach for most organizations. Home-grown solutions, if there were resources available to invest, also tended to be expensive and difficult to sustain.

Today, the picture is changing. New solutions for automating the legal hold notification process have been introduced that incorporate capabilities into existing discovery tools, or as best-in-class standalone solutions. The total cost of ownership for standalone solutions can also be dramatically lessened through emerging software approaches such as Software-as-a-Service (cloud-computing). Like many aspects of electronic discovery response, these automated solutions will significantly reduce the perceived burden on an organization for meeting new standards of reasonableness and good faith.

THE BENEFITS OF IMPROVED PRESERVATION PRACTICES

With judicial opinions like *Pension Committee*, *Rimkus*, *Victor Stanley II* and *Orbit One*, the awareness of the need to

improve legal hold and data preservation practices can hardly be argued. Taking affirmative, proportional and timely steps in response to a preservation obligation is the expectation.

Innovative software solutions for automating the legal hold notification and compliance process are affordable, cost-effective and easy-to-use, all but eliminating the argument of burden on those responsible for notifying and on the recipients. With automation, they also significantly mitigate risk while increasing defensibility. By taking proactive steps to improve an organization's response to a preservation duty, the risks and costs associated with discovery can be significantly reduced.

An automated system for issuing and tracking legal hold provides benefits to both the legal department personnel issuing the holds and the business unit employees who are subject to hold. Removing the subjectivity from the process of sending and tracking legal holds ensures each matter requiring preservation will be handled similarly. An automated system that provides notice to legal department employees about the status and need to reissue holds reduces the likelihood of failure to issue timely reminders.

CONCLUSION

Business employees subject to legal hold may be uninformed or inattentive to the process and requirements. By implementing a transparent, familiar and well-understood process, those responsible for implementing hold instructions are much more likely to take appropriate steps to avoid inadvertent spoliation. Following a defined process that includes keeping an adequate audit trail empowers an organization to defend those actions as "reasonable and in good faith."

Many business employees need guidance to understand what steps to take to preserve relevant materials. Being told to

preserve data is one thing — it's quite another for an employee to understand what to do to ensure relevant materials are not being deleted. Most users do not have a thorough understanding of the IT processes and procedures that impact the files and email they create and save everyday nor do they have an understanding of the ramifications of those processes and procedures on the preservation of those files.

Having a defensible data preservation process in place can also create strategic advantage for counsel. Knowing that reasonable and good-faith efforts can be defended affords much greater leverage when negotiating a fair and reasonable scope of discovery or considering settlement offers, and allows counsel to focus on the merits of the case, not the missteps of discovery.