



12 Myths about Legal Holds

A Look at Common Misconceptions about
Litigation Holds in Light of Recent Case Law

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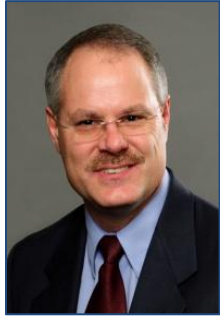
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ABOUT ZAPPROVED INC.

Zapproved is a Software-as-a-Service (SaaS) provider based in Portland, Ore., with a platform that adds accountability to business communications. Zapproved's first products focus on targeted compliance workflows that reduce liability risk in legal and regulatory compliance. The company is expanding its product line to create a suite of applications that address additional compliance issues and workplace collaboration.



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Two thousand nine was a watershed year for legal holds. The number of decisions that pivoted on litigation hold implementation – or rather lack thereof – was remarkable. In previous years, cases have trickled in but 2009 has brought a torrent of opinions that have clarified the critical role legal holds are playing in today’s courtrooms.

Unfortunately, the pace of decisions has meant that it is a challenge to stay on top of the current requirements for legal holds because they continue to evolve so rapidly. The fallout is that there are misconceptions about holds that cut across the legal industry.

Not only are legal holds obligatory, they are a critical step in demonstrating reasonable and good faith efforts when responding to a preservation obligation. Outcomes of many decisions reinforce this importance. This white paper aims to show why a defensible litigation hold methodology is absolutely essential by dispelling many of the common myths surrounding legal holds.

Myth 1: “A robust legal hold notification is a ‘nice-to-have,’ not a requirement.”

While this may be true because it is not part of a statute, the risks of not having a robust process can be extreme, including creating undue leverage for the opposition, increased settlement costs, greater risk of sanctions and losing cases. Notifying custodians in writing of their duty to preserve data is now a requirement of reasonableness and good faith, and the courts are continuing to affirm this practice by sanctioning those who fail to do so. Additionally, the courts are looking for detailed audit trails about the hold implementation and affirmative custodial responses of compliance.

The Sedona Conference® Commentary provides the basic framework for proper legal hold implementation. Guidelines 6-11 pertain to the execution of a legal hold with some broad guidelines. Clearly articulated in Guideline 8 is that a hold is most effective in written form “in a manner that ensures the recipients will receive actual, comprehensible and effective notice of the requirement to preserve information.” Furthermore, organizations are advised to “consider requiring confirmations of compliance

with legal hold notices as a means of verifying that recipients understand their preservation duties and obligations.”¹

An employment discrimination case in March 2009 out of the U.S. District Court for the Eastern District of New York serves as a cautionary tale. In *Acorn v. County of Nassau*², the County Attorney’s office claimed to issue a “verbal” litigation hold. Furthermore, the County could not provide documentation of “any follow-up to ensure that her instructions were being followed.” A formal litigation hold was issued 15 months after the event that triggered the preservation obligation.

The judge was not impressed, writing in the opinion that the “court finds the County’s failure to implement a proper litigation hold amounts to gross negligence.”³ A harsh criticism, and altogether avoidable decision. The court held

¹ P.4, *The Sedona Conference® Commentary on Legal Holds*, The Sedona Conference, 2007.

² *Acorn v. Co. of Nassau*, 2009 WL 605859, (EDNY 3/9/09)

³ P.6, *Acorn v. Co. of Nassau*

that the failure to implement a litigation hold required a monetary sanction to punish the defendant's conduct and thus awarded the costs of the motion and attorneys fees, although the plaintiff was unable to obtain an adverse inference instruction.

The lesson is that the courts will not tolerate litigation holds that are not well documented. *Acorn v. County of Nassau* is but one of many cases that illustrate that every litigant must embrace a legal hold policy that will hold up in court. Otherwise, they will risk losing even relatively minor cases based on this one component of the discovery response process. A poorly designed and/or executed preservation process signals to the judge a party's inability to observe even the most basic tenets of what is needed in the modern courtroom.

Myth 2: "Asking for custodian acknowledgements puts me at greater risk."

As discussed previously, a robust legal hold notification process should include affirmative custodial responses in order to assure awareness of and compliance with the preservation notice. Obtaining an affirmative response is a key component in the legal hold notification process going back to the *Zubulake*⁴ decision. In her opinion, Judge Scheindlin articulated the following expectation: "The party must see that the litigation hold is complied with, 'monitoring the party's efforts to retain and produce the relevant documents.'"

Relying solely on an assumption that upon receipt of a notice the custodian will comply (rather than asking for an affirmative response) creates an opportunity for challenge, and unquestionably weakens a defense of reasonable and good faith effort on the part of the legal team. Are you certain the notification was received? Did the recipients understand what was being asked of them? Did anyone

⁴ *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 432 (S.D.N.Y. 2004)



11 Guidelines from The Sedona Conference® Commentary on Legal Holds

Guideline 1

Reasonable anticipation of litigation arises when an organization is on notice of a credible threat it will become involved in litigation or anticipates taking action to initiate litigation.

Guideline 2

The adoption and consistent implementation of a policy defining a document retention decision-making process is one factor that demonstrates reasonableness and good faith in meeting preservation obligations.

Guideline 3

The use of established procedures for the reporting of information relating to a potential threat of litigation to a responsible decision maker is a factor that demonstrates reasonableness and good faith in meeting preservation obligations.

Guideline 4

The determination of whether litigation is reasonably anticipated should be based on good faith, reasonableness, a reasonable investigation and an evaluation of the relevant facts and circumstances.

Guideline 5

Judicial evaluation of a legal hold decision should be based on the good faith and reasonableness of the decision (including whether a legal hold is necessary and how the legal hold should be executed) at the time it was made.

Guideline 6

When a duty to preserve arises, reasonable steps should be taken to identify and preserve relevant information as soon as is practicable. Depending on the circumstances, a written legal hold (including a preservation notice to persons likely to have relevant information) should be issued.

11 Guidelines from The Sedona Conference® Commentary on Legal Holds (continued)

Guideline 7

In determining the scope of information that should be preserved, the nature of the issues raised in the matter, experience in similar circumstances and the amount in controversy are factors that may be considered.

Guideline 8

A legal hold is most effective when it:

- (a) Identifies the persons who are likely to have relevant information and communicates a preservation notice to those persons;
- (b) Communicates the preservation notice in a manner that ensures the recipients will receive actual, comprehensible and effective notice of the requirement to preserve information;
- (c) Is in written form;
- (d) Clearly defines what information is to be preserved and how the preservation is to be undertaken;
- (e) Is periodically reviewed and, when necessary, reissued in either its original or an amended form.

Guideline 9

The legal hold policy and process of implementing the legal hold in a specific case should be documented considering that both the policy and the process may be subject to scrutiny by the opposing party and review by the court.

Guideline 10

The implementation of a legal hold should be regularly monitored to ensure compliance.

Guideline 11

The legal hold process should include provisions for the release of the hold upon the termination of the matter at issue.

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have questions about the instructions they were being given? Such queries reaffirm the importance of best practice as outlined in *The Sedona Conference Commentary* from 2007 that includes “ongoing certifications from custodians” as a key component (Guideline 10).

Is there additional risk if some of the custodians fail to affirmatively acknowledge a litigation hold, and later auditing reveals such gaps? Perhaps, but of more importance is your ability to clearly demonstrate that the process was implemented with good faith through appropriate reminders and documented attempts to follow up. Clearly, expecting to obtain an affirmative response and failing to do so can pose a risk; but the greater concern should be the risks inherent to not attempting to do so – risks ranging from inadvertent spoliation to a court challenging the integrity of your entire legal hold process due to a lack of what is certainly becoming expected reasonable effort.

Issues surrounding the challenge of custodian responsiveness can be addressed by implementing a litigation readiness program that includes a training component for employees. An overwhelming majority of legal holds are routine communications to key employees with very straightforward, easy-to-follow instructions. They are not threatening or even ominous. A litigation hold policy and procedure should be a smooth process which employees are not alarmed by.

Addressing this concern proactively with a minimal amount of training can improve custodial response. Include such training in employee handbooks and guidelines for new hires. Make mention of it in periodic compliance orientations. And look for ways that lower the barrier to replying affirmatively in order to improve responsiveness (such as an automated legal hold management process). Legal holds are a clear necessity and taking steps to ensure employees fully understand and are able to fully comply will bolster defensibility when the process is challenged.

Myth 3: "Putting an organization on notice of a need to preserve data is good enough to protect a safe harbor."

While perfect preservation is the ideal, the reality is that no system or organization is foolproof and spoliation is all but unavoidable. In today's world of technology, it is simply not possible to know whether every crumb of data has been swept up and saved. Thankfully the drafters of the *Federal Rules of Civil Procedure* (FRCP) understood this concept when they amended the rules in December 2006 by offering a safe harbor from sanctions for companies that took reasonable steps to preserve evidence, but inadvertently destroyed electronically-stored information (ESI).⁵

Safe harbor requires reasonable and good-faith efforts, which means an effective and well constructed legal hold notification process is absolutely essential. Rule 37(e) of the FRCP states:

"Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system."

The safe harbor defines "good faith" relatively narrowly and is designed to recognize that organizations have the right to destroy information but that IT systems are complex to control. It only applies to information lost from routine operations as scoped in Rule 37(e)8:

"Good faith in the routine operation of an information system may involve a party's intervention to modify or suspend certain features of that routine operation to prevent the loss of information, if that information is subject to a preservation obligation."

This is only true in limited cases though. The narrowness of the definition in the FRCP is fair

⁵ P.11, Isaza and Jablonski, *7 Steps for Legal Holds of ESI and Other Documents*, ARMA International, 2009

warning that organizations must have a well thought out document retention program and should consider a proactive litigation preparation plan so they aren't caught unaware when the next trigger event occurs.

The Sedona Conference® Commentary on Legal Holds references Rule 37 in the FRCP when it wrote Guideline 10 about monitoring a hold on an ongoing basis, remarking that:

"[t]his provision places a premium on the legal hold process... Without a defined process, the safe harbor will be difficult to invoke and may offer little safety at all."⁶

Observing the following best practices encompass some of the principles needed to meet the threshold, including:

1. Send hold notices in writing to each recipient rather than relying on others to spread the word.
2. Take steps to ensure compliance by recipients, including ensuring that they received, understood and agreed to comply with the notice.
3. Periodically remind recipients of their on-going obligation in order to keep it fresh.

Myth 4: "The only way to ensure good faith preservation is to collect everything so a hold is no longer necessary."

The idea that it is possible to go out and collect or preserve every piece of ESI, and that doing so is the lowest risk and only way to truly preserve, is completely erroneous. The reality is this:

1. It is virtually impossible to collect everything;
2. It is very expensive; and
3. It actually creates more risk and exposure for future preservation obligations, since data in an organization's possession is subject to being preserved for future matters that arise.

⁶ P.16, *The Sedona Conference® Commentary*

Conversely, courts have demonstrated that providing timely, comprehensive and well understood notification to custodians is generally considered reasonable and good faith practice for civil litigation.

The corollary that a seemingly thorough collect-to-preserve process abrogates the obligation to issue a legal hold is misguided. The fact is that no organization has total control of the information its employees create. The courts recognize this and insist on an effective notification system. In this case, the risk of **not** issuing a hold far outweighs the effort associated with implementing a hold process, especially when a standardized workflow is already in place.

Custodians that create, store or maintain data that may be subject to a legal hold obligation may be retaining it "in the wild" – i.e., in unauthorized places or areas beyond the organization's control. Can a legal team really be certain that all potentially responsive data types and repositories are being preserved? The best practice is to notify custodians and data stewards even if the prevailing culture in an organization is to never delete ESI.

Myth 5: "Legal hold notices are privileged documents and do not need to be produced in court."

In general, it is common practice that legal hold notifications are not discoverable. This emerged because hold notices are typically sent by attorneys, raising concerns about privilege, and according to *Gibson v. Ford Motor Co.* this "could dissuade other businesses from such instructions in the event of litigation."⁷

Circumstances do exist when they are fair game as a case showed in August 2009. In *Major Tours v. Colorel*⁸, a poorly implemented legal

hold by the defendant caused the court to look into the process and its affect on the case. After a "trigger event" in September 2003 and a complaint in June 2005, a formal litigation hold letter was not issued until March 2007.

Because of the amount of time between the time when litigation could be reasonably anticipated and the notification to custodians, the judge felt that it was reasonable to deduce that there was spoliation. For that reason, he admitted the hold letters as discoverable after a "preliminary showing of spoliation."

Although it is not clear whether the courts will now skew toward producing legal hold notices, it is prudent to consider this possibility when drafting and distributing legal notices.

Myth 6: "One must collect data and evidence each time a legal hold notice is sent."

This is a common misconception which can inhibit proper document preservation by creating the perception that it is a large and seemingly insurmountable task. The fact of the matter is that there is not a 1:1 ratio of legal holds to collection of relevant ESI.

The obligation of issuing a legal hold once litigation can be "reasonably anticipated" as described in *The Sedona Conference® Commentary on Legal Holds*:

"This duty [to preserve relevant information] arises at the point in time when litigation is reasonably anticipated whether the organization is the initiator or the target of litigation."

The implication is, as the old adage goes, that it is better to be safe than sorry. A potential litigant would be wise to issue a legal hold notice sooner rather than later. The goal is to ensure that steps are taken to retain data, especially where it is at risk of automatic destruction through routine IT operations.

Whether or not that ESI is ever collected is another matter altogether. The case could be

⁷ *Gibson v. Ford Motor Co.*, 510 F.Supp.2d 1116, 1123 (N.D. Ga. 2007), August 7, 2009

⁸ *Major Tours v. Colorel* (LEXIS 68128, U.S. Dist., Aug. 4, 2009)

found to not have merit, settle, or any number of potential outcomes. In those situations, the data may never need to be collected at all. However, it is necessary to take the first step because the case may proceed and the risk of not having issued a hold is far greater than the potential cost of initiating a hold.

Myth 7: "Legal holds are for defendants only."

Often overlooked by plaintiffs, document preservation is just as important for them as it is for their counterparts. Not properly saving and protecting information that is relevant to the case can significantly undermine a claim when it comes to trial. Careful reading of the FRCP and *The Sedona Conference Commentary* reveal that there is no differentiation between the obligation to preserve for plaintiff and defendant. Defense attorneys are becoming increasingly aware of this weakness and are using it as a point of attack in challenging the veracity of claims made against their clients.

In June 2009, an entire regulatory investigation was put into doubt due to potential spoliation by the U.S. Department of Justice (DOJ). Abbott Labs, which was being investigated along with other pharmaceutical companies for alleged price fixing to Medicare, asserted that Medicare "did nothing to preserve evidence....Not a single litigation hold order was issued."

As stated in the memorandum filed by Abbott Labs, the DOJ "waited twelve years to direct anyone to preserve evidence relevant to this litigation" resulting in spoliation on a "massive scale" with the following assertion:

"DOJ kept the lawsuit under seal for more than *eleven years*, conducting one-sided discovery against Abbott, but did nothing to preserve evidence in its own possession or control. Not a single litigation hold order was issued. Not a single agency was told to preserve evidence. Even when manufacturers wrote to DOJ in 2000, specifically reminding

it of its obligation to preserve relevant evidence, the DOJ did not lift a pen to stop the destruction of relevant evidence."⁹

The response to this claim is still under consideration by the court, but Abbott is seeking the elimination of claims where there is no data which, if upheld, would negate more than a decade of investigation by the Federal government.

Similarly, in *Synventive v. Husky*¹⁰ out of the U.S. District Court of Vermont, Judge Conroy took a firm stance that illustrated the importance of plaintiff-issued litigation holds in the patent infringement case. When Husky's defense team realized that the plaintiff was not adequately preserving evidence, they sought a legal hold. The court noted that Synventive "never instituted a litigation hold to insure (sic) the preservation of documents relevant to this litigation."

In response, Judge Conroy raised the bar with his response: He ordered a litigation hold for personnel likely to possess discoverable information. He compelled the plaintiff to file a sworn declaration describing the "nature and extent" of the litigation hold and to provide the court with a list of the affected personnel.

As *Zubulake* and the FRCP note, the duty to preserve arises when one "reasonably anticipates litigation" on either side of the case. When an organization sets out to sue someone, the trigger may occur when the action is first contemplated and well before the actual filing event.

With *Synventive*, the courts are further eliminating the shades of gray that currently exist for legal holds. The direction is clear: If you are involved on either side of litigation, you need to have a defensible hold in place, or the court may do it for you.

⁹ P. 11, *In re Pharmaceutical Industry*, Abbott Laboratories Spoliation Motion (D.Ma. June 2009).

¹⁰ *Synventive Molding Solutions v. Husky Injection Molding Systems*, 2009 U.S. Dist. LEXIS 105306 (D. Vt. Mar. 13, 2009)

Myth 8: "Sending the legal hold notice a single time is sufficient."

Starting with U.S. District Court Judge Scheindlin in the Zubulake case, the recommendation of regular reminders to custodians has been a recognized component of a sound legal hold notification process. She wrote that custodians "should be periodically reminded that the preservation duty is still in place" in her opinion. The importance of routine follow up to maintain the efficacy of a legal hold is well established and that sending a single notice will increasingly be unaccepted as a reasonable effort by the courts.

The Sedona Conference® Commentary carried this idea through when it wrote clearly in Guideline 8(e) that a legal hold is most effective when it "is periodically reviewed and, when necessary, reissued in either its original or an amended form."¹¹ A lackadaisical approach to issuing legal holds, either by outside or in-house counsel, is risky behavior that can invite sanctions from the court.

In re NTL, Inc. Securities Litigation was a class action alleging securities fraud. In a January 2007 opinion, United States Magistrate Judge Peck based part of his findings against NTL on the lack of reminders sent to custodians. He ruled that NTL had not fulfilled its obligations for data preservation by not sufficiently reminding employees of their ongoing obligation to retain relevant ESI and documents.

"[T]here was no evidence that employees at [NTL] were ever reminded to preserve relevant documents and e-mail," the opinion said. The court granted plaintiffs' motion for sanctions, including adverse inference instruction, costs and attorneys' fees incurred with the motion, and additional discovery costs.

The following year, in *Keithley v. The Home*

¹¹ P.4, *The Sedona Conference Commentary*

"Zubulake V" Establishes the Underpinnings of the Legal Hold

The Zubulake case (*Zubulake v. UBS Warburg, LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004) ("Zubulake V") is the seminal case that established the legal principle of a legal hold. Following is an excerpt from Judge Scheindlin's opinion:

There are thus a number of steps that counsel should take to ensure compliance with the preservation obligation. While these precautions may not be enough (or may be too much) in some cases, they are designed to promote the continued preservation of potentially relevant information in the typical case.

First, counsel must issue a "litigation hold" at the outset of litigation or whenever litigation is reasonably anticipated. The litigation hold should be periodically re-issued so that new employees are aware of it, and so that it is fresh in the minds of all employees.

Second, 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.

Store.com,¹² Judge LaPorte in the U.S. District Court for the North District of California cited the lack of "timely reminders" prominently in her opinion. The judge cited *In re NTL* when deciding the intellectual property infringement cases in the plaintiff's favor, noting the prior opinion's "finding that the failure to have an adequate litigation hold in place and the failure to issue reminders to employees regarding the duty to preserve evidence was at least grossly negligent." The result was the plaintiff was

¹² *Keithley v. The Home Store.com, Inc.*, 2008 U.S. Dist. LEXIS 61741, 2008 WL 3833384 (August 12, 2008)



The Two Faces of Legal Holds: Notification and Execution

If you have searched the term “legal hold” or read any marketing materials, you will see that phrase is ubiquitous. It can be confusing because “legal hold” has taken on several meanings within the legal software industry.

Generically, a “legal hold” is the obligation by an organization to preserve data and records that could be used as evidence in litigation. In practice, this takes on two complementary tasks: legal hold notification and legal hold execution.

Notification: The task of communicating to custodians of relevant data of their obligation to preserve and not alter relevant information. Proper notification should be done in writing as soon as possible once litigation or investigation is “reasonably anticipated.” Organizations can best show good faith by rapidly executing a defensible, repeatable process that tracks compliance with a detailed audit trail. The objective is to avoid risk of spoliation by telling affected people to not destroy or alter potentially-relevant files, including discontinuing any automatic settings or procedures that could unwittingly delete information (e.g., automatic email deletion based on date, or suspending routine backup tape rotation).

Execution: The process of collecting and/or preserving in-place data that is potentially relevant to a matter. Executing a preservation protocol to preserve ESI “in-place” typically requires either an intelligent data repository that can suspend routine alteration or destruction of data (such as an email archive or content management system), or an external tool that can identify and “lock” files (such as modifying a file’s access permission to be read-only). Executing a legal hold in this manner typically requires capability to access and index files across a network, identify files using search attributes (e.g., owner, creation date or keyword content), and override local file permissions to prevent modification.

A robust preservation protocol often relies on both.

awarded \$1.4 million in present sanctions, along with an adverse inference jury instruction and future cost sanctions.

Without firmly establishing the frequency of reminders that are recommended, the clear direction is that reissuing reminders is a requirement. Attorneys will need to interpret a prudent approach that will not risk sanctions in the event of a trial. As one article wrote in the wake of *In re NTL*, “The more active the role taken by outside and in-house company counsel in this process, the less likely the company is to find itself facing potentially severe sanctions.”¹³

Myth 9: “Legal holds aren’t formally part of the Federal Rules of Civil Procedure and are not needed in state courts.”

Technically this may be true. The concept of how a legal hold is communicated and implemented was not formalized when the Federal Rules were revised in December 2006 to include the concept of electronic discovery following *Zubulake v. UBS Warburg*. Actually, the *Zubulake* case inaugurated the concept in this citation from the opinion: “counsel must issue a ‘litigation hold’ at the outset of litigation or whenever litigation is reasonably anticipated.” (See sidebar on p.6.) The underlying principle of “the common law duty to preserve relevant information in anticipation of litigation”¹⁴ has long been held, so the procedure of a legal hold is a practical extension of this fundamental idea. The most important concept is that the most defensible process is one that can be applied consistently regardless of venue.

As the introduction of *The Sedona Conference® Commentary on Legal Holds* states:

The duty to preserve information includes an obligation to identify, locate, and maintain, information that is relevant to specific,

¹³ Frackman, Longo, et. al., “Recent Decision Highlights That Failure To Execute Adequate Litigation Hold And Produce Accessible Documents Can Lead To Severe Sanctions,” February 14, 2007

¹⁴ P.1, *The Sedona Conference Commentary*

predictable, and identifiable litigation. When preservation of electronically stored information ("ESI") is required, the duty to preserve supersedes records management policies that would otherwise result in the destruction of ESI. A "legal hold" program defines the processes by which information is identified, preserved, and maintained when it has been determined that a duty to preserve has arisen.

The Sedona Conference®, which convenes leading legal experts in order to help the legal system adapt to new developments, effectively formalized the parameters for legal hold implementation with the publication of its *Commentary* in 2007.

Since that time, case law has continued to build that has firmly entrenched legal holds into the American legal lexicon. As described earlier, the recent case of *Synventive v. Husky* helped clarify this continuing trend after Husky's defense team realized that the plaintiff was not adequately preserving evidence.

In response, a Synventive executive argued during his deposition that a litigation hold is not obligatory. U.S. Magistrate Judge Conroy firmly wrote that "Synventive's argument that the Federal Rules do not require litigants to adopt a "litigation hold," though technically accurate, is ultimately not persuasive." He cited *Fujitsu v. Federal Express*, *Jacob v. City of New York*, *Treppel v. Biovail Corp.* among other cases, as key precedents.

From *Synventive* forward, however small the door might have been left ajar for litigants to make that argument, it is now effectively closed.

The common law concept of evidentiary preservation in civil litigation is generally applicable in state courts as well as on the Federal level. The Federal courts have pioneered formalizing legal holds, and state courts are now following that lead. As the practice of using legal holds for preservation is more widespread, it is logical that state courts would hold litigants to the same standards.

On June 29, 2009, the California Electronic Discovery Act was signed into law. This marks a

formal adoption of the procedure as part of a state's Rules of Court. California's e-discovery rules will closely mimic the FRCP which will further cement the procedures as expected.

Recent case law is bearing this out. In November 2009, New York Superior Court in *Einstein v. 357 LLC*¹⁵ weighed in on the failure to implement a legal hold¹⁶ as indicated by this excerpt from the court's opinion:

"[T]he failure to implement any litigation hold, not only after the commencement of litigation, but also after this court's repeated warnings that counsel should 'read [their] client the riot act', was grossly negligent and rises to the level of 'culpable conduct' required for a finding of spoliation."

In July 2009, a North Carolina Business Court also called out a poor implementation of legal holds in *Clark v. Alan Vester Auto Group*¹⁷ where spoliation occurred even after the case was underway due to improper destruction of key documents. The judge concluded that sanctions were in order, including "appropriate spoliation jury instruction with regard to inferences raised by the absence of [key documents]." In addition to the adverse inference instruction, the court awarded plaintiffs their attorneys' fees relative to the spoliation issue.

Myth 10: "The FRCP rules requiring attorneys to 'meet and confer' result in greater certainty regarding what actions are required to preserve data for discovery."

Cooperation and negotiation is the idea and what the courts aspire to, but it is often much more difficult in practice. In reality, civil litigation and discovery is a complex and evolving process that can greatly impact the legal hold process.

¹⁵ *Einstein v. 357 LLC*, N.Y. Sup. Ct. Manhattan Co., No. 604199/07, November 4, 2009

¹⁶ *Ibid.*

¹⁷ *Clark v. Alan Vester Auto Group, Inc.*, 2009 NCBC 18 (N.C. Super. Ct. July 17, 2009)

Understanding and articulating a preservation obligation can be challenging early in a case because the duty to preserve begins as soon as litigation is “reasonably anticipated.” Having a legal hold notification process in place that is flexible and can adapt to the process as it evolves is critical. Such flexibility is critical – as the process gets underway, custodians will change. Data repositories will change. Even preservation instructions will change.

Do not be lulled into complacency and be sure to constantly reassess the content and scope (both in terms of data and custodians) to be certain the scope is effective and implemented in good faith. Further, past actions can help inform what actions should be taken in the future when similar preservation obligations arise.

Myth 11: “The courts are lenient toward spoliation as long as one is acting in good faith.”

The courts are clamping down on spoliation as a result of poor hold implementations regardless of the circumstances leading to the loss of data. It may be possible to reduce sanctions with extraordinary efforts, but the prevailing direction is that the courts are less tolerant of spoliation now that the revised FRCP has been in force for more than three years.

The *Pinstripe v. Manpower*¹⁸ case in July 2009 out of the Northern District of Oklahoma shows what it takes to earn a reduction in sanctions. The dispute centered around two staffing companies who were providing temporary workers for a major client. Following the trigger event, the defendant’s outside counsel drafted a legal hold notification that was never communicated to custodians. The in-house counsel realized her mistake and admitted to the error and then set out to attempt to rectify the situation. Key emails were destroyed which the

defendant spent more than \$30,000 in an effort to recover the data using computer forensic techniques and reconstruction of communications.

The court ruled that in spite of “good faith” efforts that sanctions were still in order. The court-imposed sanctions on Manpower including additional future expenses related to depositions on spoliation, and ordered the company to contribute \$2,500 to Tulsa County Bar for a Continuing Legal Education program on legal holds. The exceptional efforts would not have been needed if Manpower had followed procedures. They were able to avoid an adverse inference instruction by managing to sufficiently reconstruct key communications that were available during the discovery process.

Myth 12: “Legal holds are expensive and time consuming to manage.”

Properly implementing a legal hold can be a daunting undertaking. The pressure is on to execute preservation well because, as has been well established in this document, taking a thoughtful approach is critical. The power of a well documented legal hold gives confidence when presenting to the court and can head off any speculative probing that can be a distraction in solving the matter at hand.

By far, the most common approach to legal hold management is using a manual approach, most often involving tracking numerous email interactions on a spreadsheet. However, in order to have a manual workflow process meet the minimal acceptable threshold of notification and compliance tracking, it often requires both discipline and an investment of hours.

Unfortunately, too many organizations fail to put sufficient resources toward the legal hold process, and as a result are taking tremendous risks in their litigation. When done right, manual approaches can certainly be “reasonable,” but more commonly manual approaches lack the necessary resources to ensure all the steps get completed, lack the discipline to keep track of all the actions being taken, and are simply not scalable.

¹⁸ *Pinstripe, Inc. d/b/a Acctknowledge v. Manpower, Inc.*, 2009 U.S. Dist. LEXIS 66422 (ND Okla. Jul. 28, 2009)

Some organizations have invested in enterprise software solutions, either from commercial software providers or by building one in-house. However, the investment, time, equipment and training needed have been beyond the reach of most organizations. Luckily, new options have emerged.

New lower-cost tools such as Legal Hold Pro are entering the market that ensure a defensible, repeatable process for managing legal hold notification and compliance, tools that are affordable and easy to implement. Such tools can dramatically reduce both the personnel-hours required to manage holds and the errors that inevitably creep into a manual process and erode confidence when challenged in proceedings. Such tools also automate compliance tracking and documentation while achieving higher response rates from custodians.

As a SaaS-based solution, Zapproved's Legal Hold Pro is extremely fast to implement and

easy to use. Its innovative email-based reminder and acknowledgment process assures custodian tracking and fosters greater compliance. Its detailed documentation (who/what/when) fosters defensibility and repeatability. And its ability to automate routine legal hold activities significantly reduces cost while mitigating risk.

Will an automated legal hold management system solve all your problems? Not necessarily, but today's solutions certainly will help. Yet technology is only part of the total solution. An organization must also account for the people and process aspects of a complete solution. It remains critical to also assess:

- Is the technology easy to learn and use?
- Is it accessible when it is needed?
- Does it enable a good process, or constrain it?
- Is it affordable and does it save money?



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"The failure to implement a litigation hold at the outset of litigation amounts to gross negligence."

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