



The Enlightened Legal Hold

A New Approach to Legal Preservation
Following the Pension Committee Opinion

By Brad Harris and Craig Ball

A Legal Hold **Pro**[™] Signature Paper

August 2010

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The Enlightened Legal Hold

A New Approach to Data Preservation Following the Pension Committee Opinion

By Brad Harris and Craig Ball

The landmark *Pension Committee*¹ decision by U.S. District Court Judge Shira Scheindlin in January 2010 underscores the impact and import of legal holds as never before. Just weeks after issuance, the 89-page opinion had already been cited extensively² owing to its clarity and scholarship. It may prove to be a turning point as decisive — and contentious — in the jurisprudence of electronic discovery as Judge Scheindlin's other e-discovery milestone, *Zubulake v. UBS Warburg*.³

The response of the legal community to the *Pension Committee* opinion has been pronounced and varied — some embrace it while others argue it goes too far, imposing a near-impossible burden on litigants and counsel. Of course, poor evidence handling and avoidable spoliation impose their own worrisome burdens on our system of justice, burdens which the opinion seeks to address.

Despite its epic length, *Pension Committee* offers little that is groundbreaking. In its tone and its novel subtitling by the Court — “*Zubulake Revisited: Six Years Later*” — Judge Scheindlin reminds us that she is applying established standards, not announcing new ones. She reflects and recounts a growing frustration among federal judges at being forced to police the preservation of electronically stored information (“ESI”) that is so much a part of modern litigation. She is bent on sending the clear message that judges don't want to waste time and squander resources on motion practice, depositions and reams of submissions growing out of inexcusable failures to properly preserve relevant ESI.

¹ *The Pension Committee of the University of Montreal Pension Plan, et al. v. Banc of America Securities LLC, et al.*, Amended Order, Case No. 05 Civ. 9016 WL 184312 (SDNY Jan. 15, 2010)

² See *Rimkus Consulting Group Inc. v. Nickie G. Cammarata, et al.*, 07-cv-00405 (SDTX Feb. 19, 2010)

³ *Zubulake v. UBS Warburg*, 220 F.R.D. 212 (S.D.N.Y. 2003) “*Zubulake IV*” and *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004) “*Zubulake V*”

The *Pension Committee* case and the numerous opinions that have followed (see sidebar, p.3) will surely serve as catalyst for changing the way organizations approach legal holds and in further polarizing attitudes about e-discovery between those who see e-discovery as an engine of truth and those who see it as a sideshow. The split is evident in the *Rimkus v. Cammarata* opinion from February 19, 2010. Judge Lee Rosenthal in the U.S. District Court for the Southern District of Texas wrote:

“Spoliation of evidence – particularly of electronically stored information – has assumed a level of importance in litigation that raises grave concerns. Spoliation allegations and sanctions motions distract from the merits of a case, add costs to discovery, and delay resolution. The frequency of spoliation allegations may lead to decisions about preservation based more on fear of potential future sanctions than on reasonable need for information.”⁴

It remains to be seen whether the courts’ frustration will diminish because litigants and counsel become more skilled at effectuating litigation holds, or because judges scale back discovery or choose not to treat preservation gaffes as spoliation.

If Judge Scheindlin is merely reiterating her 2004 *Zubulake*⁵ holding in the *Pension Committee* decision, why are we still seeing so many allegations and instances of improper legal holds? Managing legal holds is a complicated problem afflicted by simple mistakes. It appears that there’s less interest in understanding or perfecting the process than in getting “something” out that

can be claimed as evidence that a legal hold was put in place.

Now is the time for enlightened legal holds, an age when counsel have 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.

The process demands a reasoned approach focused on clear goals. Legal holds should be crafted to preserve potentially responsive evidence, not simply ward off sanctions. *Success in the former assures success in the latter.*

All too often, we see half-hearted attempts at data preservation undertaken with little understanding of a client’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.

It is said that “one only changes when the pain of staying the same is greater than the pain of change.” The *Pension Committee* decision tips the scales toward:

- *Higher standards* – practices once thought acceptable or perhaps merely negligent are concluded as sufficient to support sanctions.
- *Higher stakes* – equating an ineffective legal hold to gross negligence puts litigants at risk of the most severe sanctions, even dispositive sanction.

⁴*Rimkus*, p.1

⁵*Zubulake*

- *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.

Optimally, one's preservation process is so transparent as to be invisible; that is, it can freely be disclosed to an opponent to the point that objections will be flushed out

while it is relatively cheap and easy to cure them.

We propose several organizing principles serving 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.

2010 – The Year of the Legal Hold

On the Chinese calendar, 2010 is the Year of the Tiger. Based on the flood of court opinions, it is more like the Year of the Legal Hold! Following is a selected list of notable opinions relating to poor preservation practices.

- Jan. 11** *The Pension Committee of the University of Montreal Pension Plan, et al. v. Banc of America Securities, et al.*, 05 Civ. 9016 (SDNY Jan. 11, 2010) – The landmark opinion out of the Southern District of New York that strongly affirmed the expectations around the legal hold process by sanctioning plaintiffs as “grossly negligent” for failing to issue a written legal hold, among other preservation problems. Sanctions included special jury instructions and monetary sanctions, including costs and fees.
- Jan. 28** *John B. v. Goetz*, No. 3:98-0168, 2010 U.S. Dist. LEXIS 8821 (M.D. Tenn. Jan. 28, 2010) – In a class action against state agencies in Tennessee, another ruling cited shoddy preservation practices. The court ruled that state agencies were grossly negligent concluding that “even if the...litigation hold memorandum were distributed, there was not any implementation of its provisions” resulting in further extensive electronic discovery efforts.
- Feb. 17** *Kwon v. Costco Wholesale Corp.*, Civ. No. 08-00360, 2010 WL 571941, (D. Haw. Feb. 17, 2010) – A personal injury case in which the defendant failed to execute a legal hold resulting in destruction of a potentially relevant surveillance video. The court determined that the spoliation was not deliberate yet issued an adverse inference sanction which the court said would “deter defendant and others from allowing evidence to be destroyed.”
- Feb. 19** *Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598, 615-17 (S.D. Tex. Feb. 19, 2010) – Judge Rosenthal cited *Pension Committee* extensively. Even though there was willful destruction of evidence, a significant amount of the incriminating evidence was recovered by the plaintiff. The Court was unwilling to issue an adverse inference instruction and chose to present the facts as they are and allow the jury to determine the implications of the defendants’ misconduct.
- Mar. 15** *Wilson v. Thorn Energy, LLC*, No. 08 Civ. 9009 (FM), 2010 WL 1712236 (S.D.N.Y. Mar. 15, 2010) – Judge Maas determined that negligence resulting in spoliation was sufficient for sanctions, not just a “culpable state of mind.” The court issued an adverse inference instruction to the jury for “grossly negligent” actions that resulted in loss of relevant data.
- Mar. 31** *Crown Castle USA, Inc. v. Fred A. Nudd Corp.*, 2010 U.S. Dist. LEXIS 32982, (W.D.N.Y. Mar. 31, 2010) – Defendant acted grossly negligently resulting in spoliation, including failure to issue a legal hold, cease back-up destruction, and to act in a timely manner. Despite a ruling of “gross negligence,” the defendant avoided harsher sanctions because it was deemed to not have acted in bad faith and recovered most of the lost emails.
- April 20** *Merck Eprova AG v. Gnosis S.p.A. et al.*, 07 Civ. 5898 (S.D.N.Y. Apr. 20, 2010) – Judge Sullivan issued a \$25,000 fine and monetary sanctions for not issuing legal hold and other actions “to deter future misconduct...and to instill a modicum of respect for the judicial process” following the defendant’s weak efforts to preserve information.
- April 27** *Passlogix, Inc. v. 2FA Technology LLC, et al.*, 2010 WL 1702216 (S.D.N.Y., April 27, 2010) – The breach of contract case resulted in a \$10,000 fine. Bad behavior by the defendant resulted in spoliation due to a lack of a legal hold. The court said the “failure to preserve these written communications, in addition to [defendant’s] overall failure to issue a written litigation holds notice, constitutes gross negligence.”
- May 25** *Jones v. Bremen High School Dist. 228*, 2010 WL 2106640 (N.D. Ill. May 25, 2010) – Judge Cox made a ruling of gross negligence following a failure to issue a timely legal hold, lack of collections supervision and a failure to suspend routine destruction of backup media. The judge determined sanctions were necessary because “defendant’s attempts to preserve evidence were reckless and grossly negligent,” including special jury instructions and monetary sanctions.
- June 15** *Medcorp, Inc. v. Pinpoint Tech., Inc.*, 2010 WL 2500301 (D. Colo. June 15, 2010) – Plaintiff failed to prevent spoliation by implementing a legal hold leading to an adverse inference instruction and \$89,000 in monetary sanctions.

The Five Deadly Sins of Legal Holds

Despite the call to action sounded by Judge Scheindlin in *Zubulake* and by other courts in dozens of subsequent opinions, the bar has been slow to change. Slow to the point of obstinacy. When so many costly, embarrassing failures trace their origins to slipshod legal holds, one marvels that attorneys aren't bound and determined to get legal holds right. Yet, many lawyers still imagine that a legal hold notice is just a memo or message larded with synonyms for "data" and "computer." An effective legal hold notice is not a communiqué. It's a *process*.

We see five common mistakes when it comes to legal holds. Let's call them "the Five Deadly Sins of Legal Holds." See if any sound familiar:



Sin 1 – Complacency

Newton's First Law defines inertia as the tendency of an object at rest to remain at rest, unless acted upon by a force. It's not that organizations don't acknowledge the need to improve their preservation processes, such as by dispatching better notices earlier and with better follow-up. Instead, the excuse most often proffered in defense of poor preservation efforts is having been too busy to do it right.

An object (here, an organization) fails to change unless acted upon by a force. That force often comes in the form of court-imposed sanctions like those imposed in the

April 2010 opinion in *Passlogix, Inc. v. 2FA Tech* (S.D.N.Y. Apr. 27, 2010).⁶ The absence of a written hold and demonstrated spoliation on the part of the defendant resulted in imposition of a \$10,000 fine. Eschewing more severe sanctions, the Court nonetheless concluded that a fine was warranted to serve "the dual purposes of deterrence and punishment." An organization being acted upon by a force that will grow as irresistible as is required to compel change.

Sin 2 – Confusion

Ask an attorney about improving his or her legal hold processes, and you'll likely hear how hard it is to figure out who should be notified

and how daunting it is to identify all the possible sources of relevant ESI that must be preserved. The lawyer may add that he or she simply doesn't have the computer savvy or the support staff to craft defensible legal hold notices, get them in the right hands, follow-up appropriately and issue periodic revisions and reminders.

One CEO will surely make certain that counsel gets the job done right next time. In *Merck Eprova v. Gnosis* (SDNY, April 20, 2010), the Court issued severe sanctions with frequent references to the *Pension Committee* opinion, finding that "there is no doubt that Defendants failed to issue a legal

⁶ *Passlogix, Inc. v. 2FA Technology LLC, et al.*, 2010 WL 1702216 (S.D.N.Y., April 27, 2010)

hold” and deemed “this failure...a clear case of gross negligence.” The Court found unpersuasive the claim that Gnosis was a small company, deciding that was no excuse for the failure to issue a written legal hold and ensure proper compliance. The Court fined the defendants \$25,000 plus costs, “both to deter future misconduct... and to instill in Defendants some modicum of respect for the judicial process.”⁷

Sin 3 – Fear

Fear drives e-discovery in unproductive ways. Loathe to appear unskilled to clients or opponents, lawyers avoid delving into the unfamiliar so as not to risk revealing their confusion. Terrified of inadvertently producing privileged ESI, lawyers devote disproportionate resources to privilege review. Legal teams, too, are often paralyzed by fear of the unknown when implementing a legal hold. Fearful of omitting a key custodian or source of discoverable information, lawyers err on the side of too many and too much in framing legal hold efforts. Lawyers who over-preserve often seem more interested in protecting themselves than their clients; yet, over-preservation is its own, certain sanction because of the undue burden and costs that follow.

Overwhelmed by the volume and complexity of enterprise information systems, lawyers can forget that most cases are still about people. Counsel must identify, by name or role, the individuals whose communications and work product must be preserved. Certainly, it’s harder to identify the right people than it is to broadcast a hold to an

entire department or business unit, but the effort is always time well spent...and money saved. Moreover, a closely-targeted-and-tailored hold is a *personal* responsibility — one less easily dismissed as someone else’s problem.

Then, there is fear of the ostrich variety. Hesitant to discover that a problem exists, lawyers fail to audit or otherwise track compliance with legal holds. But, a problem you don’t know about is still a problem — just riskier and costlier to rectify over time. An effective legal hold isn’t just an artful notice cast into the void; it’s a notice proven effective by sound recordkeeping and diligent follow-up.

Sin 4 – Overconfidence

Where a surfeit of fear can paralyze a preservation effort, so, too, can overconfidence. Whether out of ignorance or an outsized trust of policies and systems, some lawyers fail to act based on a misplaced belief that a legal hold is unnecessary. The most common reasons cited are that there is nothing more that needs to be preserved because policy dictates they preserve everything, or there is nothing left to preserve because policy dictates it’s already gone. Where ESI is concerned, the gap between policy and practice rivals the Grand Canyon in every enterprise and for every custodian.

A “we-preserve-everything” assumption is precarious. To actually “preserve everything” that may be potentially relevant is incredibly expensive, and extends far beyond the trivial cost of more or larger hard drives. The greatest costs flow from the management and search of “everything,” whether in buying and maintaining active data storage devices (with their requisite power consumption,

⁷ Merck Eprova AG v. Gnosis S.p.A. et al., 07 Civ. 5898 (S.D.N.Y. Apr. 20, 2010)

maintenance and disaster recovery costs), paying to retain backup tapes (and systems and software to read them), or — most expensive of all — paying vendors and lawyers to process and review “everything.”

Even organizations that believe they preserve everything usually don't. Is business data on home computer systems preserved? Is data on local hard drives, external storage devices, cell phones, voice mail systems, web repositories locked down? Is data from new and emerging social communication mediums such as instant messaging, FaceBook, Twitter and LinkedIn being identified and captured?

Never confuse what people are supposed to do with what they really do — an effective hold deals with what's *really* out there.

Sin 5 – Over Complication

Technology can be seductive. And some get so caught up in the systems, data and metadata that they lose sight of the content. “The perfect,” Voltaire remarked, “is the enemy of the good.” Avoiding “paralysis by analysis” means striking a balance between getting lost in the details and failing to get on with it.

There is no optimum technical solution that obviates the need for custodial judgment and skill, just as there is no optimum preservation mechanism predicated on custodial action alone.

Ironically, obsessing over the perfect preservation notice or mechanism can lead to spoliation by delaying preservation. To paraphrase Woody Allen, “80 percent of success in ESI preservation is just getting it done.”

An Enlightened Approach to Legal Holds

Notifying an organization's data stewards of their need to preserve information is not all that difficult; but, it requires a thoughtful and reasoned approach. It definitely demands more than a form letter sent “to everyone in the Akron office telling them not to delete or change anything involving Consolidated Widgets.”

A well-documented, closely-monitored and transparent process prompts those tasked to preserve information to understand their obligations and be more likely to 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. Such transparency, consistency and predictability build trust and, ultimately, defensibility without undue burden.

It is important to note what a legal hold is *not*. It is *not* just a letter, memo or email. 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*.

Webster's defines “enlightenment” as “full comprehension of a situation.” Applied to legal holds, we can say that, “*a legal hold is a series of communications, actions and restraints grounded on comprehension of how information is created, used and retained, and designed to ensure that potentially responsive information will be available in response to discovery in a reasonably usable form.*”

The Principles of Legal Hold Enlightenment

Let the end guide your beginning.

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

Every legal hold is as different as every case, with a 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.

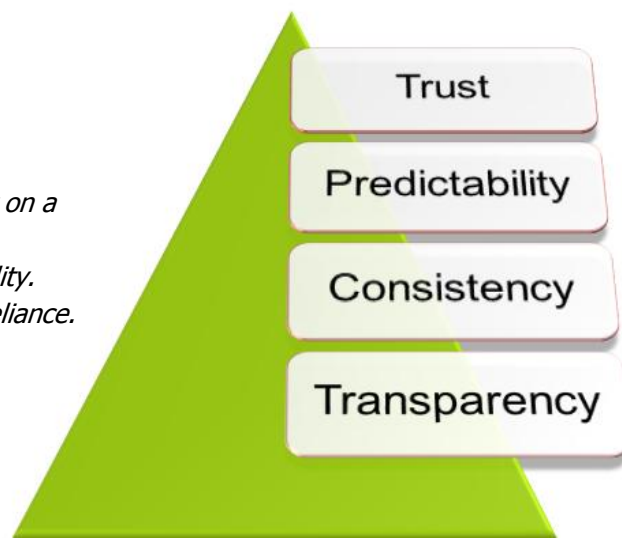
Begin the process by anticipating the evidence that your side will require and the other side will seek. Who are the most likely witnesses? What did they rely upon in decision making? What would they review to refresh their memories concerning key events and exchanges? What are the issues before the 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.

In the cases where parties were sanctioned for failing to preserve ESI, the missing material is rarely something that wouldn't have been deemed relevant and material, if someone had only taken a moment to think ahead and anticipate foreseeable consequences.

At the core of successful preservation efforts lies a routine workflow. If you lack a consistent preservation protocol that those charged to implement it understand well (including third-parties with custody or control of your data), then put one in place. Keep it simple (e.g., checklists and spreadsheets to track progress) while encouraging repeatability and consistency.

Process defensibility is built on a foundation of transparency, consistency, and predictability. Doing so builds trust and reliance.



Process Defensibility

Do the simple things well.

Have a 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. The courts work with litigants who can show that they employed a reasonable process and exercised the discipline to execute it consistently. Demonstrating that you had the policies, procedures, tools, personnel and lines of communication in operation 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:

1. Issue timely, written legal hold directives;
2. Ensure custodians understand what's required and how to comply;
3. Follow up, e.g. audit trails, one-on-one interviews, supervised collection;
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;

When **BIG** is Too Big: The Hazards of Over-Preservation

The implications for an overly-broad or overly-inclusive hold notice:

- Business interruption caused by responding to and complying with hold instruction.
- Added storage expense (particularly if hold affects the routine rotation of backup tapes, or retention policies of database and archive applications that routinely purge aged or obsolete data).
- IT infrastructure impacts (e.g., responsiveness of search queries across broader data sets, time required to perform a routine backup for disaster recovery).
- Subsequent discovery cost and risk associated with retaining information beyond its useful life that would otherwise not be preserved (once retained, it can become subject to future preservation obligations).
- Total cost of discovery to collect, cull and review data that is preserved for each case.
- Risk of unintended actions (e.g., "just preserve everything forever" or misinterpreting the true scope and preserving the wrong data).
- Risk of inaction by recipients (e.g., "it's so broad, I can't possibly comply" or "someone else will take care of this" response).

Some cost factors to consider:

- Typical knowledge worker sends and receives between 100 and 200 emails a day (conservatively).
- Over one year, that amounts to nearly 40,000 emails or roughly 2 gigabytes of stored data.
- If 100 employees placed on hold for one year, could result in 200 gigabytes for email alone if retaining every email.
- If you have to collect and review for discovery, even with good search criterion that can eliminate 95 percent of the data, still results in 10 gigabytes and 200,000 emails to be reviewed.
- A conservative estimate of total cost to process, cull, review and produce is \$1,500 per gigabyte collected resulting in \$300,000 in discovery cost alone (just for the email!).

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.

Perfection is unattainable.

Know that spoliation occurs even when you do your best.

In *The 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.”⁸

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.

Everything in moderation.

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 the “sanction” is immediate and self-inflicted.

*Memories are fleeting,
writings are not.*

Create a detailed written record of legal hold efforts.

Much has been said about Judge Scheindlin’s emphasis on issuing a *written* legal hold. Indeed, she characterizes written hold notices as essential, and the failure to furnish same as gross negligence. Whether a defensible legal hold absolutely requires a written directive to custodians or not may be debated, but certainly the absence of such directive is a red flag absent a compelling justification for not doing so.

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 Boswell to the effort.

⁸*Pension Committee*, p.2

Don't use a hammer to do the work of a saw.

Create targeted hold notifications for specific custodians.

When instructing employees, counsel must include clear and direct instructions to custodians to preserve records. Judge Scheindlin was critical of litigants that failed to do so, stating that their efforts did not “meet the standard for a litigation hold. It does not direct employees to preserve records – both paper and electronic.”⁹

Weak or improper instructions are an indication of an attorney not understanding the purpose of a legal hold. In *Samsung v. Rambus*¹⁰ the instructions were “to save all relevant documents.” The Court said that this was the “sort of token effort [that] will hardly ever suffice.”¹¹

Consider different functional teams and tailor your hold notifications to their functions. A database administrator needs to know to 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.

Trust everyone...but cut the cards.

Understanding that “self-preservation” has two meanings.

Sometimes clients or employees lie.

Judge Scheindlin pointed out that counsel must direct and supervise custodians in the preservation and collection process. Organizations, too, must actively supervise collections by employees and contractors. Judge Scheindlin called out a failure to do so in *Pension Committee* when an “ill-equipped” employee handled “discovery obligations without supervision.”¹² 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.

You don't post a fox to guard the henhouse. 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.

⁹*Pension Committee*, p.28

¹⁰*Samsung Electronics Co., Ltd. V. Rambus, Inc.*, 439 F.Supp.2d 524, 565 (E.D.Va. 2006)

¹¹Isaza, John and John Jablonski, *7 Steps for Legal Holds of ESI and Other Documents*, ARMA (2009), p.50

¹² *Pension Committee*, p.53

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 is 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, 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. A good lawyer has a plan, and the process, people and tools to effectively execute it when needed.



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“Spoliation of evidence – particularly of electronically stored information – has assumed a level of importance in litigation that raises grave concerns. Spoliation allegations and sanctions motions distract from the merits of a case, add costs to discovery, and delay resolution.”

Judge Lee Rosenthal
Rimkus v. Cammarata
(S.D. Tex. Feb. 19, 2010)

