

Ten Things to Consider When Establishing a Legal Hold Policy

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With sanctions for spoliation of evidence increasing 271% since 2005, it's more important than ever for your company to implement a defensible legal hold process. As the Honorable Shira A. Scheindlin, the jurist behind the *Zubulake* and *Pension Committee* decisions, suggests, there is no reason to avoid issuing written litigation holds. Your company will know what they need to do and will shield itself from potential spoliation claims. In Judge Scheindlin's words, "Just do it. Just do it." Below you will find some helpful tips on how to "just do it".

To be most effective, a legal hold policy must assure that your hold notifications will stand up under scrutiny if challenged by a spoliation claim. As such, the policy should:

- Reduce risk and increase defensibility
- Guarantee that holds are issued in a timely fashion and contain all necessary information
- Create an efficient method for ascertaining and notifying both custodians and other key players
- Outline a standard set of data/content types (both print and electronic) to be preserved; this list should be reviewed and updated periodically as new types of data (e.g. social media) emerge

In light of these goals, here are ten things to think about when establishing your corporation's legal hold process.

1. Consider your risk/exposure.

Courts require that you initiate a legal hold when litigation is reasonably anticipated, which may occur many years before any actual litigation commences. Should you fail to issue a legal hold early enough in the process, your organization runs the risk of severe penalties for spoliation of evidence, including, but not limited to: adverse jury instructions, preclusion

of evidence, or default judgment/dismissal. When deciding how your company will handle legal holds, ask yourself whether any delay in issuing notifications is worth the risk.

2. Outline the specific criteria required for a defensible hold notification.

The content of the legal hold notification is crucial to its defensibility. Your notices, and any subsequent reissues, at a minimum, should:

- a. offer an overview of the matter
- b. provide specific examples of the types of information to be retained
- c. identify possible sources of data
- d. include applicable date ranges
- e. inform recipients of their ongoing legal obligation to preserve the potential evidence
- f. provide contact information for the legal department

3. Determine who in the company needs access to the hold information.

At first glance, you might think the legal department is the only group that needs access to the information involved in any particular legal hold (e.g. notification details, custodian list, hold history, etc). Upon deeper reflection, however, you may determine that others within the organization also require the data. Make sure the information is readily available to additional teams, such as information technology, human resources, and outside counsel, as needed.

4. Identify your custodians.

Custodians are those people who may possess information potentially relevant to the litigation. Companies employ a variety of methods for identifying custodians. Some conduct telephone or in-person interviews and then send notices to only the small group of individuals flagged as most likely to have data pertinent to the matter. Others cast a wider net and send the hold notification to an entire department or, in fewer instances, the entire company, in an effort to be overly cautious. Whichever direction your company takes, make sure your policy for locating these custodians is documented and followed. This will increase the defensibility of your process.

5. Create notification templates.

Chances are you already have a form letter or email that you're using for creating hold notifications. Take that letter and use it as the basis for creating hold notification templates (perhaps one per matter type) to be shared with anyone in your legal department responsible for issuing holds. Whether you issue just a few holds each year or multiple holds every week, creating hold notification templates saves your company time and money. More importantly, it ensures that each person in the department is initiating holds in a consistently defensible manner.

6. Gather additional information from the custodians.

Use the legal hold process to gain additional knowledge about the data from your custodians, in addition to notifying them of their obligation to retain potential evidence. Asking the custodians a series of simple questions, such as, "what evidence do you have in your possession," "where is it maintained," "in what format is it being stored," and "who else has data relevant to this matter," can elicit a wealth of information and further protect your company against a spoliation claim.

7. Communicate regularly.

Any legal holds associated with litigation must remain in place for the life of the litigation, whether it lasts months or years. Reissuing legal hold notifications on a regular basis (for instance, every 6 months) will keep the custodians'

obligation fresh in their minds while increasing the defensibility of your process. One guide for determining the frequency of reissues might be your current document retention policy timeframe. If your company deletes emails every 120 days, consider reissuing your hold notifications every 90 days, for example. Also, let your custodians know when the matter has ended and the hold is released so that they may resume compliance with the company's normal document retention policy.

8. Document your activities.

With the growing number of spoliation claims, courts are increasingly requiring that companies document the steps taken to prevent negligent or intentional destruction of evidence. The ability to prove to the court that you have an established process and that it was followed with regard to a particular matter is essential. Keep track of all activity relating the hold, such as: when notifications, reminders, and reissues are sent; the custodians who received the notifications; which custodians acknowledged receipt of the notice; any correspondence with the custodians about the hold; and the custodians' responses to any survey questions.

9. Consider technology solutions.

Take a careful look at the tools you're currently using to implement your legal holds. Many companies simply use e-mails to send - and spreadsheets to track - their hold notifications and the custodian acknowledgements. Tools like this are not designed for legal hold management so they can make the process overly burdensome. Imagine attempting to reconstruct a defensible trail, after several years of litigation, based solely on email "read" receipts, notes from telephone conversations, and a spreadsheet hidden somewhere on your paralegal's hard drive. Instead, consider implementing a technology solution using a product that was specifically designed for managing the legal hold process.

10. Next steps - preserving the data.

Once you've informed all the custodians that they are subject to a legal hold, you need to consider collecting and preserving the potentially relevant data. Get your IT team involved to ensure that all information is properly identified, stored, and maintained.

Following these simple steps can help you take a process that can be painful, tedious, and risky and turn it into one that is repeatable, automated, and defensible. So, what are you waiting for? Just do it!

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