Whose Hold Is It Anyway? Potential New Roles for Law Firms in Litigation Holds

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The revision of the Federal Rules of Civil Procedure (FRCP) in December 2006 focused on the rapidly evolving practice of electronic discovery and attempted to deal head-on with the complex issues arising from the production of electronically stored information (ESI) for cases being litigated in the federal courts. While the rules should present an opportunity for real partnership between law firms and their clients, they are potentially creating more tension in this delicate relationship—corporate legal departments are looking to make the minimal investments possible to minimize risk while law firms recognize any new partnership that translates into an emerging business opportunity.

With recent precedents in case law related to holds management that includes severe penalties for non-compliance, many in-house legal executives face a dilemma. They are uncertain whether to outsource all or part of their holds management activities to their law firms or maintain ownership for what they view as a corporate responsibility. The benefits of outsourcing are clear—in addition to reducing their already burdened workloads, engaging outside counsel effectively transitions associated risk from their company to the firm. In other words, if the hold is not administered properly, the responsibility could fall on the law firm, thereby shielding in-house counsel from sanctions.

As a result, law firms increasingly recognize holds management as a critical opportunity. The current economic downturn has negatively impacted the legal industry causing law firms to seek additional markets and services to bolster declining revenues. From the outside counsel perspective there are several short-and long-term business development reasons why proactive law firms are seizing the opportunity to implement litigation holds on behalf of their clients including deepening client relationships, lengthening their involvement in client's litigation, and establishing differentiation of products and services relative to other firms.

This white paper details current practices as relates to the management and implementation of litigation holds, analyzes the forces driving the litigation holds tension between in-house counsel and their outside law firms, and suggests important lessons learned that foreshadow where we may be headed as an industry.

The Rise of Litigation Holds

By creating a "duty to preserve" ESI in the discovery phase of a legal matter, the new FRCP rules forced us to rethink how document retention policies are applied to electronic files such as e-mails and word-processing documents. At the heart of these suddenly ubiquitous discussions is the crucial execution of litigation holds. Much has been written about the burgeoning universe of case law impacting litigation holds, but far less attention has been given to the latest trends in how successful organizations are managing the litigation holds process.

For purposes of this discussion, a litigation hold is generally regarded as a suspension of an organization's document retention and destruction policies for documents that may be relevant to a lawsuit that has been filed or for litigation that may be reasonably anticipated. The purpose of a hold is to ensure that relevant data is not destroyed and to alert employees about the risk to both the company and the employee if they fail to honor the litigation hold request.

Companies have issued an increasing number of litigation holds in every year since 2006, due in part to the fact that the volume of electronically stored information continues to grow exponentially. Moreover, most organizations are issuing holds across a broader spectrum of litigation.

Further increasing the confusion around litigation holds has been a great deal of misunderstanding around the discrete elements of a hold. The reality is that a litigation hold comprises two separate areas of undertaking:

1. *The Holds Notice*—This refers to all of the activities that must be done to identify and notify custodians of their obligation to preserve data in conjunction with a litigation hold. It also includes the various requirements around reminding custodians of their continued obligation to comply during the life of the hold. Failure to comply with the notification requirements alone can lead down the slippery slope toward sanctions.

2. *Perfecting the Hold*—This process is very similar to the Electronic Discovery Reference Model (EDRM) requirements. Once notification is complete, the hard task of identifying, preserving and collecting potentially responsive documents must begin. From a task-based perspective, this is a different activity from the requirements to notify potential custodians, yet both must be done properly to meet the requirements set forth in a burgeoning body of law.

The impact for non-compliance with a hold is quite severe, both financially and, potentially, legally. A company's failure to properly and promptly impose a litigation hold can result in court-ordered sanctions, in the form of both monetary fines and perhaps even spoliation charges if information is found to be destroyed because a litigation hold was not effectively carried out. The landmark case for litigation holds was the *Zubulake v. UBS Warburg* case that was tried in New York in 2003 and 2004. In *Zubulake*, the court imposed dramatic sanctions because of UBS's obvious failure to notify all employees of the hold and monitor their ongoing compliance. Judge Shira Scheindlin's rulings in *Zubulake* clearly outlined the responsibilities for the lawyers with respect to preserving electronic information, establishing a widely held standard.

A recent important decision takes *Zubulake* even further. In *Victor Stanley, Inc. v. Creative Pipe, Inc.*, No. MJG-06-2662 (D. Md. Sept. 9, 2010), the judge entered a 101-page-sanctioning and jailing the president of the defendant company for not complying with litigation hold and discovery obligations. Corporations now are not only at risk for sanctions for failure to issue and honor a litigation hold or ESI request, but they could even face a prison sentence (the president in this case faces up to 2 years).

There is an obvious legal trend emerging—the courts are placing an unprecedented level of scrutiny on litigation hold procedures and are not afraid to issue serious sanctions when litigation holds are not ordered, executed and managed properly. This also underscores the risk for the corporate legal executive—be compliant or face both monetary and criminal sanctions—and creates a dilemma about how to manage holds.

The Legal Executive Dilemma: In-Source or Out-Source?

In the past several years, corporate legal executives have learned that implementing litigation holds throughout an organization is a costly and error-prone process. Managers know that creating a "fail-safe" litigation holds process can be very burdensome, but the potential costs of inefficient holds can be far more serious to the company if they are not conducted as part of a well-organized, technologically robust program. A common question is, "What can our corporate legal department do to reduce risk by establishing a strong litigation hold management process without spending too much money or causing unnecessary disruption to the company's operations?"

In most companies, the e-mail system is the largest repository of records from which they will be called upon to "hold" electronic files because e-mail messages can include crucial evidence in corporate litigation—such as business instructions, legal contracts, financial data, presentations and various opinions about business ventures under consideration. Typically, paralegals or even specifically designated litigation holds coordinators draft the initial notice and follow a predetermined approval process prior to publishing the hold notice.

Given the significant increase in holds issued and the number of custodians involved, a growing number of companies are evaluating additional avenues for overseeing how the actual notices are served—beyond the obvious routine of sending out e-mail blasts to appropriate parties. For example, a notable management trend for issuing litigation hold notices includes making all current notices available to each employee on an intranet or other internal employee Web portal. Other companies are now targeting notices to the recipient's role and his/her specific responsibilities for file preservation responsibilities, an idea based on the premise that notice language customized to an individual will result in improved compliance with the notice. With this in mind, another growing management trend with litigation holds is the movement toward the deployment of automated systems that improve the consistency of turnaround times with issuing notices. Automated systems are increasingly helping companies manage the process—from the triggering event to the execution of the litigation holds notice to the monitoring of compliance with the notice—and providing a crucial record trail that may be needed down the road if the matter escalates to trial.

The administration of a single litigation hold is therefore time consuming, cumbersome and expensive. It can require the augmentation of staff and technology expenses that can quickly exceed hundreds of thousands of dollars. Even with these investments, corporate legal executives are learning that litigation holds management is a tyranny of the middle; they are not rewarded for overachievment, but severely penalized for underperformance. The incentive is to execute the minimal level of compliance without incurring unnecessary expenses in the process. In-house legal counsel is therefore presented with the dilemma of maintaining the burden of the holds ownership or transferring the risk at some point in the hold lifecycle to an outside firm and incurring the cost. In the later case, many are learning this is not an all-or-nothing proposition and there are multiple ways to structure the relationship.

An Uneasy Collaboration

One of the unpleasant and unwelcome consequences of the post-*Zubulake* world with respect to litigation holds is the highlighting of the seemingly inherent tension between inside and outside counsel. Specifically, the scope and depth of a litigant's discovery compliance efforts have a tendency to challenge even the most committed, long-term relationship between client and law firm.

The debate is how to divide the responsibilities associated with the execution of litigation holds and the oversight of the litigation holds process in an organization. The simplest answer is that both sides have skin in the game, so each must be involved in the process at some point. The more complicated answer involves the assignment of specific roles in that relationship.

Increasingly law firms are taking ownership of hold at the initiation of the litigation holds process. Many organizations are finding it prudent for client and law firm to structure a formal electronic discovery process at the very beginning of a case. The theory is that if in-house and outside counsel structure the relationship properly at that point, they will develop an efficient process with absolute clarity of who is responsible for performing each function along the way.

Another emerging structure is to assign an e-discovery team and identify key contact people in the group. These professionals agree on the methods that outside counsel will use to monitor and "approve" how the client maintains, stores and retrieves documents. The team also agrees on how to distribute litigation hold notices and how to conduct the necessary follow-up work that will ensure compliance.

The ultimate goal here is to put in place a defensible audit trail as relates to litigation holds; one that will hold up in court if the matter goes to trial. There are several possible frameworks for how to accomplish that goal, but it seems certain that the common thread will be a dedication to collaboration between in-house and outside counsel.

A Moment of Opportunity

One would be hard-pressed to find a corporate legal executive or a law firm partner who welcomed litigation holds as a new frontier in electronic discovery management. But at this time, we're observing the early stages of what could be a real moment of opportunity for law firms: outside counsel has a unique chance right now to engage with their clients as real business partners and not just lawyers.

There are at least three fundamental ways in which we're seeing the most progressive outside counsel step into the spotlight and play this crucial role:

- Closely monitor developments with litigation holds affecting other companies in the client's industry and track what errors to avoid, best practices to put in place, etc.;
- Have the client's best interests in mind as if it were in fact the firm's own best interests—because often it is; and
- Explore the strategy of managing the overall litigation holds process for the client by creating infrastructure inside the law firm that would allow the management of litigation holds to be outsourced by the client to the firm.

This last option is clearly the one that will have the most profound impact in the legal services marketplace over the coming months and will strike more traditional firms as an overly ambitious undertaking. But with the assistance of leading-edge technology solutions and experienced discovery management professionals, outside counsel can expand the services they provide to their clients and assert more control over the increasingly serious process of managing litigation holds.

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