

## SPECIAL REPORT

### MANAGING RISK & RESOLVING CRISIS



Effective litigation hold strategies

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## Effective litigation hold strategies

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Once litigation is pending, imminent, or reasonably foreseen, a duty to preserve potentially relevant evidence arises. After that point, the sanctions for destroying relevant evidence can be severe. To avoid such pitfalls, a party must execute an effective litigation hold strategy. In the last of her series of influential *Zubulake* opinions, United States District Judge Shira A. Scheindlin provides some helpful guidance on how to execute an effective litigation hold strategy. (*Zubulake v. UBS Warburg, LLC*, 229 F.R.D. 422, 433-34 (S.D.N.Y. 2004) (“*Zubulake V*”).)

*Counsel must issue a ‘litigation hold’ at the outset of litigation or whenever litigation is reasonably anticipated*

The first step in executing an effective litigation hold strategy is to issue a litigation hold notice. Considerations will include: (i) the substance of the notice, (ii) the manner in which the notice is distributed, and (iii) the parties to whom the notice should be distributed.

The actual substance of any litigation hold notice will depend on the facts and circumstances of each case. Nonetheless, the notice should include a clear description of the subject of the litigation and the types of information that may be relevant and should be preserved. The notice should also include a reminder that preserving ‘documents and materials’ should be understood in the broadest sense possible to include all manner of records, including paper documents, electronically stored information such as e-mail, and recordings such as voice mail. The notice should also include a reminder of the serious consequences that could result from the loss or destruction of potentially relevant material. Finally, the notice should include contact information for in-house or outside counsel to respond to any questions regarding how to comply with the notice.

Consideration must be given to how to distribute the notice. To avoid any misunderstanding, the litigation hold notice should typically be set forth in writing. Typically, the most effective and quickest means to disseminate the notice will be through email or an interoffice memorandum. Depending on

the size of the organisation and the scope of the dispute, a meeting or phone call with each individual likely to have relevant information may be appropriate.

Finally, consideration should be given to who within the organisation (or third parties within the organisation’s control) should receive the litigation hold notice. Again, the appropriate distribution list will typically depend on the facts and circumstances of each case. In *Zubulake IV*, Judge Scheindlin advises that “the duty to preserve extends to those employees likely to have relevant information – the ‘key players’ in the case.” (*Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003) (“*Zubulake IV*”).) Thus, although an organisation should err on the side of inclusiveness, the distribution list should at a minimum include all of the ‘key players’ in the dispute. Of course, it may not be appropriate to send a litigation hold notice to every member of an organisation in every case. In large organisations routinely involved in multiple litigations, the organisation runs the risk that individuals will become inundated with litigation hold notices unrelated to their work and will simply begin to ignore the messages.

*The litigation hold should be periodically reissued so that new employees are aware of it, and so that it is fresh in the minds of employees*

Litigation can often drag on for years, and during that time, employees will come and go. It is not sufficient to issue a litigation hold notice at the outset of litigation and never follow up with further notices. Thus, Judge Scheindlin advises that the litigation hold notice be periodically reissued. How many times each year the notice should be reissued will depend on the facts and circumstances of each case.

*Counsel must communicate directly and periodically with key players*

It may not be sufficient to rely solely on an e-mail or interoffice memorandum to notify certain individuals of their obligation to preserve documents and materials. Judge Scheindlin advises that “counsel should communicate directly with the ‘key players’ in the litigation.”

She notes that “[b]ecause these ‘key players’ are the ‘employees likely to have relevant information,’ it is particularly important that the preservation duty be communicated clearly to them.” To make sure that the key players actually receive the litigation hold notice and understand the message, it will typically be appropriate to follow up on the litigation hold notice with a meeting or phone call to discuss the document preservation obligation. Furthermore, “[a]s with the litigation hold, the key players should be periodically reminded that the preservation duty is still in place.”

*Counsel must take responsibility for ensuring preservation of electronically stored information, including relevant backup tapes*

Although the steps that must be taken to preserve electronically stored information (such as information stored on disaster mitigation systems) is outside the scope of this article, it should be noted that courts have held that “even valid purging programs need[] to be put on hold when litigation is ‘reasonably foreseeable.’” (*Rambus, Inc. v. Infineon Techs. AG*, 220 F.R.D. 264, 286 (E.D. Va. 2004).) Thus, an effective litigation hold strategy will in almost all cases involve an immediate meeting with information technology professionals and other individuals who may be responsible for the management of an organisation’s data that may be responsive, including data on backup tapes. The initial discussion with an organisation’s information technology professionals will typically involve addressing the need to suspend the overwriting of backup tapes or to pull specific tapes out of rotation, take an electronic ‘snapshot’ of certain parts of the company’s computer system, or other specific data preservation steps that should be taken immediately. ■

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