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PRESERVATION DUTIES

Because the duty to preserve electronically stored information and impose a litigation hold is easily triggered, and because it may be expensive to continue to maintain a litigation hold, it is also important to identify the circumstances under which the duty ends. Michael D. Berman explores some aspects of this poorly understood aspect of e-discovery.

When Does a Litigation Hold End?

BY MICHAEL D. BERMAN

Quite understandably, much has been written about when the duty to preserve is triggered and a litigation hold must be initiated. ''The duty to preserve attaches at the time that litigation is reasonably anticipated. . . . Although this commonly occurs at the time a complaint is filed, . . . it can also arise earlier, for instance where relevant individuals anticipate becoming parties in imminent litigation.'' *Green v. McClendon*, 2009 WL 2496275 (S.D.N.Y. 2009) (citations omitted).

Decisions such as *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216 (S.D.N.Y.2003) (''Zubulake IV''), brought the issue to the forefront, especially in connection with electronically stored information (''ESI''). The fragility, persistence, and volume of ESI increased the importance of early recognition of the duty to preserve, and proper and prompt imposition of a litigation hold that is proportional to the needs of dispute.

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There is, of course, nothing new about the basic concept of the duty to preserve. E.g., *Board of Justices v. Fennimore*, 1 N.J.L., 1794 WL 507 (N.J. 1794) (''The excuse is futile; unless the book is produced, every presumption must be made against the defendant.'').

When the Terminus is Clear. Much less attention has been paid to the mirror-image issue of when the duty to preserve ends and the litigation hold may be lifted. In some circumstances, that termination date may be clear. Issuance of a final mandate, with expiration of the date for further appellate review, would generally be the final date for preservation that commenced because litigation was reasonably anticipated.

A plaintiff, whose duty to preserve was triggered because he or she anticipated filing suit, should no longer retain that duty when a firm decision not to file suit is made, absent other circumstances triggering the duty.

A defendant, whose duty was triggered because litigation was threatened, should no longer undergo the burden of that duty when all applicable statutes of litigation and repose have run, without the commencement of litigation.

Similarly, settlement agreements may expressly provide for termination of the duty to preserve and all litigation holds. See generally S. Olson, ''The Fine Art of Safely Lifting Litigation Holds,'' LJN's Prod. Liabil. & Law and Strategy (Apr. 2009); I. Mahony, ''Corporate Compliance Answer Book,'' (PLI 2009), 232; A. Anderson, ''Issuing and Managing Litigation-Hold Notices,'' 64 Bench & Bar Minn. 20 (2007); S. Gibson, ''Litigation Holds: Turning On—and Off—The Switch to Avoid Sanctions and Costly E-Discovery Blunders,'' (PLI 2007), 151, 160-61.

Some Hypotheticals

As the following examples illustrate, however, there are many situations that are not as clear, or where an earlier termination of the duty should be recognized:

Business Contracts. Assume that XYZ Corp. receives a letter from ABC Corp., threatening suit for breach of a contract allegedly under seal, in a jurisdiction with a six-year statute of limitations for contract actions, and a 12-year statute for documents under seal. The letter unequivocally makes litigation over the assertedly-sealed contract reasonably anticipated. Assume further that no lawsuit is filed for seven years, and there are no further communications or transactions between ABC and XYZ.

Must XYZ continue to preserve ESI and documents related to the contract for the full 12 years? Does litigation remain reasonably anticipated, because it is legally possible?

Domestic Relations. Alternatively, assume that John tells his wife, Mary, that he intends to sue for divorce based on adultery. Because litigation is reasonably anticipated, that statement triggers the duty to preserve.

Assume the couple separates for three months, reconciles, and resumes the marriage in a state where that resumption is a defense to adultery under the applicable substantive law. Assume further that the couple lives together for several years and then separates and commences divorce proceedings.

Did the duty to preserve, triggered by the earlier threat of a divorce proceeding, continue in effect after resumption of the marriage? If, after resumption of marital relations, John destroys all of the preserved information, can Mary assert spoliation years later in the divorce proceeding?

Third Party Production. Imagine that Company DEF is served with a subpoena for ESI under Fed.R.Civ.P. 45. It produces the requested information. Is it under an obligation to preserve that information through trial and appeal of litigation to which it is not a party?

Multiple Claims. Finally, assume that GHI Corp. receives notice of intent to sue from A, institutes a proper preservation regime and litigation hold, and, a week before it settles with A and obtains a general release of all obligations (expressly including the duty to preserve information), the corporation receives a claim letter from B, asserting related claims. Does the settlement with A release the duty to preserve imposed as a result of A's claim, notwithstanding the related claims of B?

Issuance of a final mandate, with expiration of the date for further appellate review, would generally be the final date for preservation that commenced because litigation was reasonably anticipated.

Why is This Important? First, if preserved data is prematurely destroyed, and then litigation commences, a strong argument may be presented that intentional destruction occurred after litigation was anticipated, and therefore the destruction was presumptively prejudicial and sanctionable.

Second, the more data that is available, the more data there is that must be potentially preserved, processed, searched, and produced, in connection with other claims or issues. And, because information that has been preserved in anticipation of litigation must be securely stored and a litigation hold must be periodically monitored, unnecessary preservation imposes substantial costs.

Governmental Wrinkle. Additionally, the question of when a litigation hold terminates may be particularly acute in the government context, or where regulations or statutes prohibit retention beyond a date certain. A public agency might have conflicting duties to preserve information pursuant to a litigation hold, and to delete, for example, expunged data, or confidential financial disclosure reports after a date specified by law. In short, an improperly lengthy litigation hold might conflict with citizens' rights that government not maintain information longer than authorized by law.

In Search of a Standard

In light of these factors, there must be a way to define a time that a litigation hold can be safely brought to an end. In *Cache La Poudre Foods Inc. v. Land O'Lakes Inc.*, 244 F.R.D. 614, 623 (D. Col. 2007), the court wrote that a potential dispute did ''not crystalize into litigation for nearly two years.'' This, combined with other factors, was too long:

> ''Any other conclusion would confront a putative litigant with an intractable dilemma: either preserve voluminous records for a indefinite period at potentially great expense, or continue routine document management practices and risk a spoliation claim at some point in the future.''

Guidance from Sedona. The Sedona Conference® has provided guidelines explaining when a hold may be terminated. See The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age (September 2005) (''Sedona Best Practices''); The Sedona Conference Commentary on Legal Holds: The Trigger & The Process (August 2007 Public Comment Version) (''Sedona Litigation Hold''); The Sedona Conference Commentary on Non-Party Production and Rule 45 Subpoenas (April 2008) (''Sedona Non-Party Production'').

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THE SEDONA CONFERENCE COMMENTARY ON LEGAL HOLDS: THE TRIGGER & THE PROCESS, GUIDELINE 11

The SEDONA BEST PRACTICES suggest that: "When the circumstances that gave rise to the hold cease to exist, the organization should determine whether the hold can be lifted in whole or in part, in order to alleviate further costs of preservation." Id. at 45.

In short: "Legal holds are exceptions to ordinary retention practices and when the exigency underlying the hold no longer exists (i.e., there is no continuing duty to preserve the information), organizations are free to lift the legal hold." Id. at 12.

Comment 5.i provides: "An organization's policy and procedures can explain not only who in the organization has authority for determining that the need for a legal hold no longer exists, but also what factors or information should be considered, and what procedures should be followed, to remove the legal hold. Considerations may include:

- The form and content of notice that the legal hold has been lifted;
- Whether there is a post-case obligation to maintain some records or other information pursuant to normal retention schedules or otherwise;
- Whether the records or other information that can now be destroyed are subject to another legal hold, or may be needed for another special purpose (e.g., needed in whole or in part for other litigation);
- Whether the underlying litigation that has been resolved gives rise to the reasonable anticipation of other similar litigation;
- Whether records or information in third-party custody can be destroyed; and
- Whether the records or other information can be disposed of as soon as the legal hold is lifted, or whether the organization should wait until the next scheduled disposition."

Guideline 11 to the SEDONA LITIGATION HOLD analysis provides: "The legal hold process should include provisions for the release of the hold upon the termination of the matter at issue." The Commentary to that Guideline states:

> "An organization creating a legal hold process should include procedures for the release of the information subject to the holds once that organization is no longer obligated to preserve that information. These release procedures should include a process for conducting a custodian and data cross check to allow the organization to determine whether the information to be released is subject to any other ongoing preservation obligations. Organizations may wish to consider the use of legal holds automation software that can perform custodian, system, and data cross checking and provide for efficient legal holds management. When the organization is satisfied that the information is not subject to other preservation obligations, notice that the legal hold has been terminated should be provided to all recipients of the original legal hold notice (and any modifications or updated notices), and to records management, IT, and other relevant personnel. Organizations may wish to conduct periodic audits to ensure that information no longer subject to preservation obligations is not unnecessarily retained."

Similarly, the SEDONA NON-PARTY PRODUCTION analysis addresses the issue vis-à-vis third parties served with subpoenas. It suggests that litigants discuss the end of the duty to preserve, noting that 70 percent of those surveyed reported difficulty in determining when a matter is resolved so that Rule 45 obligations are at an end. Id. at 8, 10. The Sedona Conference® suggests that a third-party's duty should end with the termination of the review period under a subpoena.

Perhaps the simplest technique to determine whether it is permissible to destroy information subject to a litigation hold is to negotiate with the opposing litigant, see The Sedona Conference® COOPERATION PROCLAMATION, and seek a stipulated court order or a provision in a settlement agreement lifting the hold.

Absent such agreement, the comprehensive Sedona analysis may be summarized to provide that a litigation hold and the coextensive duty to preserve terminates when, even though litigation once was reasonably anticipated, due to intervening events (such as the passage of time, judicial resolution, or acts or inaction inconsistent with reasonable anticipation of litigation), it is no longer reasonable to anticipate litigation.

Perhaps the simplest technique to determine whether it is permissible to destroy information subject to a litigation hold is to negotiate with the opposing litigant.

Other Considerations

Organization knowledge management plans should designate an individual to be tasked with performing that analysis in a consistent manner. Once the decision has been supportably made, prior to any destruction, there must also be an analysis of all other threatened or reasonably anticipated claims, litigation holds, and statutory, regulatory, and contractual obligations to ascertain whether they impose a separate preservation obligation.

Additionally, standard organizational retention policies should be consulted prior to destruction, both for consistency and because the information may still be necessary for ordinary business purposes, separate and apart from litigation holds.

Finally, there must be an established mechanism for giving notice that the hold has been lifted, consistent application of destruction policies, guidance regarding the mechanism of destruction, and audit of the destruction process. It does little good, for example, to inadequately destroy the information that is no longer subject to a litigation hold, only to find out months or years later that it remains preserved on disaster recovery or other media.

Hypotheticals Resolved

Application of these principles provides the following results:

Business Contracts. XYZ, having received a demand and preservation letter from ABC seven years earlier may engage in a reasoned analysis and conclude that litigation is no longer reasonably foreseeable, even though under the applicable statute of limitations, ABC's claim may not be time-barred. The test for continuation of the duty to preserve should be one of reasonableness, not whether it remains legally possible to assert a claim under the statute of limitations.

Domestic Relations. Similarly, John should be permitted to destroy the preserved information, after the grounds for divorce have been eliminated under substantive law of domestic relations, by resumption of marital relations and/or by the passage of several years during which the marriage was resumed.

Third Party Production. DEF, having produced information subject to the subpoena, should no longer be under any duty to preserve the ''original'' information through any trial and appeal; that duty has now been shifted to the discovering party that has obtained whatever information it was legally entitled to under Fed.R-.Civ.P. 45, and there is no valid reason to impose continuing costs on a non-party.

Multiple Claims. GHI, however, is in a different posture. Although the claims of A triggered the duty and have been settled, B has asserted related claims. While GHI's duty to preserve as to A has been terminated, B's claim imposes a new duty.

Of course, the scope all such duties is subject to the limits of proportionality or court orders. P. Grimm, et al., ''Proportionality in the Post-Hoc Analysis of Pre-Litigation Preservation Decisions,'' 37 U.Balt.L.Rev. 381, 392-97 (2008).

Back to Basics

Because the duty to preserve ESI and impose a litigation hold is easily triggered, and because it may be expensive to continue to maintain a litigation hold, it is important to also identify the circumstances under which the duty ends. In some instances, such as issuance of a final mandate or settlement of all claims, that time is clear. In others, it is both necessary and appropriate to analyze what is reasonably anticipated, an endeavor that, while hardly risk-free, is supported by The Sedona Conference® and the intent of Fed.R.Civ.P. 1: ''[The Rules] should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.''

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