By Alan Rutkin

Put on Hold

Insight: If a lawsuit may be coming, preserving evidence is rule No. 1.

Save what is necessary, but don't go into a paralyzing effort to save everything.

Litigation holds warn people to preserve evidence when litigation is anticipated.

I first wrote about holds in 2007. Then, it was a new concept, addressed by few courts. Now, it's established. This year we've seen more than 100 decisions mentioning holds, many involving sanctions. It's worth revisiting the issue.

Let's review the five most important things about holds.

First, courts have not adopted uniform rules on holds. Judge Shira Scheindlin, of the Southern District of New York, wrote the most frequently cited decisions on holds: several opinions in a wrongful termination suit, *Zubulake v. UBS Warburg*; and more recently about hedge funds, in *Pension Committee v. Banc of America Securities.*

Since there is no single controlling standard, companies should consider the decisions, as well as the company's specific circumstances, to develop hold protocols. Most importantly, consider the law that is likely to control your circumstances. Has your jurisdiction issued a rule or decided a case on this issue? If so, does your jurisdiction adopt Judge Scheindlin's approach or some different approach? If your jurisdiction hasn't addressed this yet and you must guess your controlling rule, it's reasonable to follow Judge Scheindlin's decisions. Her decisions seem to be the standard most likely to be applied.

Second, "reasonable anticipation" is the key. Holds are needed when litigation is reasonably anticipated. You may anticipate a suit before it's filed. So, you may need a hold before you're sued. And if you're part of an organization, that organization needs a mechanism to identify and act on reasonably anticipated cases.

Third, electronic evidence is tricky. It's difficult to identify, collect and preserve. Consider email: How many messages go through your office each day? Laptop computers and text messages are even more difficult problems because they generally run outside of corporate networks.

Electronic evidence is, ultimately, not simply a legal problem; it's a technical problem. Lawyers must coordinate with information technology professionals. In fact, some decisions have said that outside lawyers are obligated to develop understandings of their clients' computer systems.

Fourth, generally, litigation holds only apply to backup tapes if these tapes are "actively used for information retrieval." Also, backups must be held if there is a known problem with the primary source. You need to save what is necessary, but don't go beyond that into a paralyzing effort to save everything.

Fifth, absent a hold, companies can discard information under standard document management policies. You don't need to save everything.

In fact, many believe that companies over-preserve. Some estimate that nearly half of computer data is not needed. It's duplicative or unnecessary. It's trash.

Insurance companies should consider these five points in developing their discovery policies. Insurers should also note that the concerns here go beyond claims files. In fact, these disputes often arise in employment litigation.

It makes sense. Corporate litigants pause before imposing onerous discovery standards; they must live with the standards they impose.

But disgruntled employees are not worried about discovery standards. They are focused on only one case and their own discovery duties may be limited to their own laptops.

So consider these points and develop discovery policies before facing litigation. BR

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