

Designing a Litigation Hold Process

by Robert L. Kardell



The cost of litigation over the last several years has increased significantly due to the costs associated with e-discovery. Lexis/Nexis conducted a survey of corporate counsel and reported that 73% had seen a rise in e-discovery costs since the new Federal Rules of Civil Procedure became effective in December of 2006.¹

The e-discovery costs associated with email and electronic storage of documents will continue to rise as the rates of emails

and documents increase. Computer use for document review has helped bring down the average cost for each document to be reviewed, but the gains are offset by the sheer volume of information to be reviewed. A paper review is \$.70 versus an electronic review of \$.23.² One study showed the average email user receives 133 emails a day and this is expected to increase to 160 per day in 2009.³ The study also estimated there are 541 million email users worldwide. At 160 emails a day, roughly 86 billion emails are sent and received everyday. By contrast, The United States Postal Service delivered just over 212 billion pieces of mail for the entire year of 2007.⁴

Robert L. Kardell



Robert L. Kardell, JD, MBA, CFE is a managing consultant and member of the Forensics & Dispute Consulting division of BKD, LLP, one of the 10 largest CPA and advisory firms in the U.S. Based in BKD's Omaha office, he provides fraud investigation services, litigation support and expert testimony for a variety of business clients. Bob is a 1987 graduate of Benedictine College,

Atchison, Kansas, with a B.S. degree in accounting, and a 1991 graduate of the University of Nebraska, Lincoln, with both MBA and Juris Doctor degrees. He is a member of the American Bar Association, Nebraska State Bar Association, Nebraska State Board of Public Accountancy and Association of Certified Fraud Examiners. Before joining BKD, Kardell spent 13 years with the Federal Bureau of Investigation in Chicago and Omaha. Contact the author at rkardell@bkd.com.

The good news: these costs can be managed and reduced by taking a proactive approach before a company is subject to an electronic data preservation order. In such an approach, it is imperative attorneys and companies discuss with their clients a litigation hold strategy and an e-discovery processing plan because of the court imposed obligations on attorneys to gather information on their client's e-discovery process.

Attorneys should be aware of possible actions against them for failing to understand or manage the e-discovery process. In the well-known *Zubulake V*⁵ decision, the court held the attorneys did not fully perform their duties when U.S. District Court Judge Shira A. Scheindlin concluded "counsel must become fully familiar with her client's document retention policies, as well as the client's data retention architecture. This will invariably involve speaking with information technology personnel, who can explain systemwide backup procedures and the actual (as opposed to theoretical) implementation of the firm's recycling policy."⁶



DESIGNING A LITIGATION HOLD PROCESS

In a second case, the court held that counsel did not fully perform their duties when the client's server contained a hidden partition on the hard drive and the hidden partition was not unveiled during the e-discovery process. In *Phoenix Four, Inc. v. Strategic Resources Corp.*,⁷ counsel was sanctioned for failure to find these partitions and understand their client's computer systems better.

The Review Process

The review process will be different for each organization, but a general outline of steps should include an organizational review, personnel review, systems review and an industry review.

1. Organizational Review - Some reasons for the large sanctions in spoliation or failure to properly implement a litigation hold process are due to poor communication or miscommunication because of the personnel's segregation of duties. The normal business operation includes people with specialized expertise, who often are separated in distinct areas such as accounting, marketing, sales, IT, etc. These areas may have good communication within employee groups, but not among the groups. Therefore, the organization must conduct a review to understand its internal structure, and identify key personnel who can be the point people for each group.

A review also can help an organization identify its computer systems or programs. For instance, it is not unusual to have a separate customer service database and/or system for the customer relationship managers (CRM). Different areas may use different files or email servers.

Companies should have a business record retention policy in place. Depending on the industry or organization, companies must retain their records for five, seven or 10 years. This built-in retention should be reviewed and made part of the litigation hold plan. It might be possible to more efficiently store the documents, such as in a digital format. A better, more efficient manner in which to store files will mean search and retrieval can be conducted with less cost.

2. Personnel Review - The goal of the personnel review should be to identify the key individuals who must be included in an e-discovery process. Including the right people in a litigation hold process is an essential part of preserving data. Failure to include the key people can result in disaster as seen by the *Zubulake V* decision. In that case, the counsel met and conferred with most, but not all, key personnel who needed to be notified of the litigation hold. Since counsel did not communicate with every key person, the court concluded the counsel did not fully perform its duties.

The case of *Wiginton v. Ellis*⁸ also demonstrates the need to identify and notify key people. In this case, counsel forwarded a letter to the company that was the defendant in a sexual

harassment suit. The company, however, did not inform its director of network services about the litigation hold, and he continued to recycle backup tapes and overwrite data. In this case, the court concluded sanctions were not yet warranted against the defendant for failure to preserve the documents, as there was no proof any relevant documents had been deleted.

After identifying the key personnel in each area of the organization, the next step is to determine the personnel involved with the creation and retention of the documents that would be the subject of litigation. To be conservative, a firm may wish to assume all documents of the company could be the subject of litigation, but this is not a reasonable assumption in larger organizations. The larger the company, the more expensive the litigation hold process will become to manage all documents. The court in *Wiginton* stated, "[i]t [the company] does not have to preserve every single scrap of paper in its business. *Danis v. USN Communications, Inc.*, No. 98 C 7482, 2000 WL 1694325, at *32 (N.D. Ill. Oct 20, 2000). But a party must preserve evidence that it has notice is reasonably likely to be the subject of a discovery request even before a request is actually received. *Cohn v. Taco Bell Corp.*, No. 92 C 5852, 1995 WL 519968, at *5 (N.D. Ill. Aug. 30, 1995)."⁹

3. Systems Review - The systems review might be the most crucial part of the review process. As the quotes from the courts in *Zubulake V*, *Phoenix Four, Inc.* and *Hopson* in the introduction to this article demonstrate, courts are requiring counsel to become familiar with their clients' computer systems.

The system review can include everything about the company's computer systems from the operating systems to storage. Generally, a tape backup system is cost effective for companies to implement, but is expensive to restore and process for discovery purposes. The burden of access archived data on a backup has led to the adoption of the two-tiered approach in the Federal Rules of Evidence. Rule 26(b)(2)(B) states that "[a] party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost." Types of inaccessible data storage media cited by the Committee on Rules of Practice and Procedure in its report to the Judicial Conference "include backup tapes intended for disaster recovery purposes that are often not indexed, organized or susceptible to electronic searching; legacy data that remains from obsolete systems and is unintelligible on the successor systems; data that was "deleted" but remains in fragmented form, requiring a modem version of forensics to restore and retrieve; and databases that were designed to create certain information in certain ways and that cannot readily create very different kinds or forms of information."¹⁰ Thus, it is important to know what method and types of systems your client may use for backup purposes as its method and system may render the data inaccessible or unduly burdensome for purposes of this rule.

Review Process for Litigation Hold Strategy

Organizational Review

1. Internal structure
2. Identify key personnel
3. Identify areas
4. Business record retention policy

Personnel Review

1. Identify key individuals to include in an e-discovery process
2. Personnel involved with company document creation & retention
3. Information preservation plan

Systems Review

1. Crucial part of review process
2. Familiarity with company computer systems, data storage
3. Email system, backup, restoration & retention policies
4. Policies on access, devices, software & privacy
5. Subcontractors

Industry Review

1. Review case law involving similar companies
2. Find out what other companies have asked for in litigation
3. Judges' demands on record-keeping & e-discovery
4. Other processes to identify & preserve data

Implementation

1. Draft a litigation hold strategy
2. Implement litigation hold policy
3. Review process annually

DESIGNING A LITIGATION HOLD PROCESS

Companies also implement backup in a variety of schemes, which can be full, partial or incremental, and the back-up tapes can be rotated based on schemes called Grandfather/Father/Son. It is important to understand these schemes and terms to decide where the relevant information may be and thus what may be subject to a litigation hold order.

The type of server, backup system and restoration protocol of the email system also should be reviewed. The most commonly used email servers, such as Microsoft Exchange Server or Lotus Notes Server, are generally easier to process because there are more tools available to search and retrieve the relevant documents from their electronic files.

The type of case being brought against a company can dictate the process of e-discovery and the limits of the process. For instance, some companies will separate business emails from personal emails at the user level. These emails may have different retention policies applied to them, e.g., 90 days for

personal emails versus five years for business-related emails. In cases in which emails are part of discovery in a sexual harassment suit, personal email may be the most relevant to the case. A litigation hold plan must therefore take into account different retention policies.

It is also necessary to assess the company's current policies regarding computer access, peripheral devices, third-party software and personal privacy. Part of this review may fall under a Personnel Review or an Organizational Review. The company should have a clear policy, signed by employees, which specifically address issues such as the types of software to be used, whether peripheral devices such as USB thumb drives or iPods are allowed, whether the computer or the email system can be used for personal use and other relevant computer use issues. Consider the difference between the e-discovery process for a company which allows employees to use personal storage devices such as USB thumb drives versus a company which bans all such devices and actively attempts to limit their use. A well-reasoned argument by an opposing counsel may lead to the first company having to endure the expense and trouble of imaging, processing, searching, reviewing and producing relevant documents from its employee's personal storage devices, while the second company may not have to worry about such devices.

Companies also have started outsourcing critical aspects of their business, such as email and server storage. Subcontractors such as these are in charge of an essential portion of documents, which must be included in the company's e-discovery process and should be addressed in any e-discovery plan. A subcontractor who has been through the process already may have a plan in place which has passed judicial scrutiny.

4. Industry Review - In finalizing your audit, an attempt should be made to review the case law from all jurisdictions for cases involving companies similar to your clients. The review might provide you with some insight as to what other companies are being asked for in litigation, what judges are demanding as far as record keeping and e-discovery and the processes which other companies may perform to identify and preserve relevant data.

Implementation

After the review process, the drafting and implementation of a litigation hold policy can be a challenging process. Based on the outcomes of the reviews above, a litigation hold strategy can be developed and customized for the company, but there are a few basic ideas which should be included in every plan: establishing a clear chain of command, drafting company policy on computer usage, drafting a litigation hold budget and dealing with other technical issues, such as a plan to re-initiate the company's data deletion policy.

What Should Counsel Discuss?

One of the most comprehensive lists of information which counsel should discuss with their clients was offered by the court in *Hopson v. Mayor of Baltimore*¹:


"At a minimum, they [counsel] should discuss: the type of information technology systems in use and the persons most knowledgeable in their operation; preservation of electronically stored information that may be relevant to the litigation; the scope of the electronic records sought (i.e. e-mail, voice mail, archived data, back-up or disaster recovery data, laptops, personal computers, PDA's, deleted data) the format in which production will occur (will records be produced in "native" or searchable format, or image only; is metadata sought); whether the requesting party seeks to conduct any testing or sampling of the producing party's IT system; the burdens and expenses that the producing party will face based on the Rule 26(b)(2) factors, and how they may be reduced (i.e. limiting the time period for which discovery is sought, limiting the amount of hours the producing party must spend searching, compiling and reviewing electronic records, using sampling to search, rather than searching all records, shifting to the producing party some of the production costs); the amount of preproduction privilege review that is reasonable for the producing party to undertake, and measures to preserve post-production assertion of privilege within a reasonable time; and any protective orders or confidentiality orders that should be in place regarding who may have access to information that is produced."

¹ *Hopson v. Mayor of Baltimore*, 232 F.R.D. 228, 245 (D. Md. 2006), p. 31.

DESIGNING A LITIGATION HOLD PROCESS

Summary

It is essential for attorneys to take the initiative and discuss litigation hold policies with their clients for both the client's and the attorney's benefit. Judges have begun to hold attorneys responsible for their knowledge of the process and their client's litigation hold process and knowledge of computer systems.

Clients also are being held to high standards of preservation and production while trying to efficiently manage the process without extreme expense. If your client has a litigation hold process already, a short review of the process on a yearly basis should be performed. A review of a process should ensure all new technology has been incorporated into the plan and that new employees have read and signed all agreements and acknowledgements regarding company computer policies. 

Endnotes

¹ Lexis/Nexis, accessible at <http://www.lexisnexis.com/about/releases/1022.asp>

² Teshima, Daryl, 7 Deadly Sins of Electronic Discovery, LAW OFFICE COMPUTING, p.84, June/July 2003, accessible at http://www.lawofficecomputing.com/EDC/issue_archive/table_of_contents/2003/jun-jul.php

³ The Radicati Group, Inc., Taming the Growth of Email - An ROI Analysis White Paper, March 2005, accessible at <http://www.radicati.com/registry.asp?pub=440>

⁴ United States Postal Service 2007 Annual Report, accessible at http://www.usps.com/financials/_pdf/AR2007_final.pdf

⁵ *Zubulake v. UBS Warburg*, 2004 WL 1620866 (S.D.N.Y. July 20, 2004)

⁶ *Ibid.* at 25.

⁷ *Phoenix Four, Inc. v. Strategic Resources Corp.*, No. 05-CIV-4837, 2006 WL 1409413; 2006 U.S. Dist. LEXIS 32211 (S.D.N.Y. May 22, 2006)

⁸ 2003 WL 22439865 (ND Ill. Oct. 27, 2003).

⁹ *Ibid.* at 7.

¹⁰ *Summary Of The Report Of The Judicial Conference Committee On Rules Of Practice And Procedure*, September 2005, www.uscourts.gov/rules/Reports/ST09-2005.pdf, Appendix C p. 42.

2008 Fair Housing Conference & Celebration of the 40th Anniversary Fair Housing Act Signing

Tuesday, March 25th & Wednesday, March 26th

Embassy Suites Conference Center • 1040 P Street, Lincoln, Nebraska

Sponsored by the City of Lincoln Commission on Human Rights

March 25th, 1:00 PM-5:00 PM

Scott P. Moore, attorney at the Baird Holm Law Firm, will facilitate a session for attorneys dealing with the Fair Housing Law. From 1998-2002, Mr. Moore, served as the Senior Trial Attorney in the Housing and Civil Enforcement Section of the Civil Rights Division of the U.S. Department of Justice. He served as the lead counsel on some of the largest pattern of practice cases brought by the Justice Department under the design and construction provisions of the Fair Housing Act. He is well known and respected throughout the country.

March 26th, 8:00 AM-5:00PM

A variety of concurrent sessions offered including: Mobile Homes, Substandard Housing, The Foreclosure Crisis, Avoiding Landlord Liability, Fair Housing 101 for Elected Officials & more.

****There is NO cost to attend the conference, however everyone MUST register.****

Registration and informational brochures available at:

http://www.lincoln.ne.gov/city/mayor/human/pdf/fair_housing_brochure.pdf

**For more information contact our conference coordinator,
Margie Kniep at 402-441-7625 or mkniep@lincoln.ne.gov**

“Designing A Litigation Hold Process,” by Robert L. Kardell. This article, published on pages 5-9 in the March 2008 issue of **The Nebraska Lawyer**, appears here with the permission of the Nebraska State Bar Association.