



Alert

Commercial Litigation

To: Our Clients and Friends

April 16, 2013

“Inadequate” Litigation Holds Can Result in Spoliation Sanctions

In the wake of recent court decisions imposing spoliation sanctions even where written litigation holds were timely issued, we want our clients and friends to be aware of the need for immediate concern and provide some suggested action steps for consideration.

For many in-house legal departments, and outside law firms, litigation holds have become routine. A letter threatening litigation (or creating at least the anticipation of litigation) is received, and someone starts with the standard litigation hold memorandum and tailors it to select custodians of identified categories of documents that may potentially be responsive. For some, that is it -- job done. While it is certainly true that many companies and law firms do more, and even much more than this, it is also true that too many do only this and believe it is adequate. Sending out a written litigation hold, alone, is not enough. The correct implementation of the hold is key.

What then should be done with litigation holds and how should they be implemented?

First, we urge you to evaluate what you are presently doing to reasonably ensure retention of potentially responsive documents in anticipation of litigation. To be clear, this is not an examination of policy; it is instead an assessment of actual practice from top to bottom.

Second, we suggest that you update your policies and actual procedures to reasonably ensure that, at a minimum, litigation holds are in writing and clear English (not legalese), targeted to the right people and to the right subject matters of potentially responsive documents, hard and electronic, and fully explain the scope and nature of the duty to retain documents, including the possible need for suspension of automatic document purges or deletions (which should be done on a case by case evaluation), but we must emphasize that you should not stop there. As more is learned about the dispute, from time to time, you should re-check the list of recipients and include additional people as appropriate, and re-check the list of subject matters and include additional subject matters as appropriate, and then resend the updated litigation hold drawing attention to the changes. This is

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definitely not a situation where less is more; indeed, too often what seems like “more” in the beginning becomes “less” over time.

Third, when a litigation hold is issued, we urge you to follow-up immediately to audit and make certain that each of the targeted recipients received the written litigation hold, understands his or her responsibilities and has taken and is continuing to take all appropriate steps to retain the appropriate documents. This last effort *must* include evaluating on a case by case basis whether suspension of any form of automatic document purges or deletions is appropriate. We suggest that you involve your IT department in this step, as appropriate, to determine whether the suspension is needed, is feasible and, if so, how to make sure it is done correctly. Whatever is decided in this regard should be recorded.

Fourth, as a constant reminder that the litigation hold remains fully operative, we encourage you to follow-up on a regular basis (perhaps quarterly or semi-annually) to audit and make certain that all targeted recipients are in fact carrying out their responsibilities to retain the appropriate documents, and take any needed corrective action.

Fifth, we suggest that you document all of these efforts in form and substance that meets the requirements for the imposition of the attorney-client privilege. Merely having the policy in place, without being able to demonstrate that the policy was actually observed, will likely not suffice. You should assume that you will be required to establish by *in camera* submission (or redacted submission removing any privileged content) what was done and when, including establishing the date that litigation was reasonably anticipated, the date, form and content of the initial litigation hold and any subsequent modifications, the initial list of targeted recipients and any subsequent modifications, the initial list of subject matters of potentially responsive documents and any subsequent modifications, the suspension of any automatic document purges or deletions, the follow-up efforts and audits and the results of audits and corrective measures taken.

Lastly, as an alternative approach, we suggest that you consider negotiating the scope and implementation of the litigation hold in a reciprocal fashion with opposing counsel in each new matter where litigation is anticipated. There may well be mutual interest in reducing expenses and focusing any discovery that may follow.

The purpose of this Alert is to make sure our clients and friends have heard the sounding of the alarm, that you have a brief summary of some suggested action steps for your consideration, and that you have our recommendation that you work with your counsel to tailor a specific approach that fully meets both the legal requirements and your unique needs and circumstances. No list of suggested action steps in this area can be deemed adequate for all time, including those provided. As issues arise, and courts render decisions in this area, you should endeavor to stay abreast of those developments and adjust your policies and procedures whenever needed to stay current.

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