

Braking for Legal Holds: How to Read the Signals

Seven scenarios offer examples of events that signal the need to stop disposition of records in anticipation of litigation.

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Editor's Note: This article is based on the author's recent research project for the ARMA International Educational Foundation. The complete study, *Legal Holds for Anticipated Litigation: New Case Developments to Determine Triggering Events and Scope of Production* may be downloaded at www.armaedfoundation.org. The scope of legal holds will be the topic of a second *IMJ* article later in the year.

Since the revised Federal Rules of Civil Procedure (FRCP) took effect on December 1, 2006, companies have been struggling to understand litigation, or legal, holds. As evidenced by the extensive downloading of ARMA International Educational Foundation's online research reports related to legal holds, most organizations don't know how to read the signals and slam the brakes on their information disposition.

Under the revised FRCP, organizations recognize that they

must hold from destruction all relevant electronically stored information (ESI). Case law has shown that the consequences for untimely destruction of ESI can be dire for any organization, irrespective of size. Add to this already daunting task the responsibility to determine what is considered foreseeable, potential, or anticipated litigation, and it is no wonder that organizations are searching for clarification.

When does the duty to preserve attach for potential or anticipated litigation? The following scenarios provide salient examples of events that should inform the decision on when to pull the litigation hold trigger. From these scenarios, a company's own retention decisions can be derived on a case-by-case basis.

Triggering Events for Pending Litigation

With respect to pending litigation, legal holds come into play when the lawsuit has been served or discovery demands have

begun. Specifically, this duty to preserve evidence is triggered by summonses, court orders, and discovery. Each of these events should be represented by a formal document, which is tangible and discernible. Thus, the triggering events for a pending litigation hold are, in general, more clear-cut than in cases of potential or anticipated litigation. The edict is clear: Once the lawsuit, discovery, or some court order or agency demand has been served, an organization must place a legal hold on relevant information, including ESI, that is related to the lawsuit.

According to *Tulip Computers International B.V. v. Dell Computer Corp.*, "... once Dell had knowledge of the case, it had an affirmative obligation to preserve potentially responsive documents....". *Trigon Ins. Co. v. United States* states that a party has a duty to preserve documents once the party "has notice (by a discovery request, by the provisions of a rule requiring disclosure or otherwise) that evidence is necessary to the opposing party's claim.

Triggering Events for Anticipated Litigation

Pre-litigation legal hold decisions are more complicated than those made when the lawsuit is already pending or in cases where counsel has sent a notice letter prior to filing the lawsuit. Where there is no such letter or notice, companies must make a judgment call for when the duty to preserve attaches. Although case law has not revealed a discernible pattern regarding when to issue litigation holds for potential or anticipated litigation, some general guidelines are apparent. An analysis of pre-litigation or anticipated litigation trigger issues includes several scenarios.

Scenario No. 1: Creation of List of Potential Opponents Before Filing Lawsuit

One instructive example on how unpredictable the doctrine of spoliation can be, especially in the pre-litigation scenario, arose in an intellectual property case. Courts in Virginia and California reached dramatically different conclusions about whether a technology development company had engaged in actionable destruction of documents under the same set of underlying facts.

In *Hynix v. Rambus*, as well as in *Rambus v. Infineon* and *Samsung v. Rambus*, Rambus had created and implemented a retention policy in conjunction with its intellectual property defense strategy. The defense strategy included the creation of a list of prospective opponents. Once the policy and defense strategy were in place, Rambus employees participated in office "shred days" for at least two years before filing its patent infringement claims. The goal of the exercise was to make the company "battle ready."

Two Virginia court decisions found that Rambus committed various acts of litigation misconduct, including the intentional destruction of documents. Both of the Virginia court decisions

At the Core

This article

- ▶ Provides an overview of pending litigation as a triggering event for legal holds
- ▶ Presents scenarios that illustrate triggering events for anticipated litigation
- ▶ Offers a checklist of sample events to help identify anticipated litigation

essentially viewed the shred days as pretext for destroying relevant documents. Also, the courts were suspect of the simultaneous timing of the records management program's development and the creation of a litigation strategy.

In an interesting twist, the California court did not find spoliation (defined by *Black's Law Dictionary* as "the intentional destruction of evidence"), though its decision was based on the same basic set of facts. The California court deemed that the evidence did not demonstrate how Rambus targeted any specific document or category of relevant documents with the intent of preventing production in a particular

lawsuit.

All three intellectual property decisions were based on essentially the same acts, yet the decisions were not unanimous. Even so, a few lessons are evident:

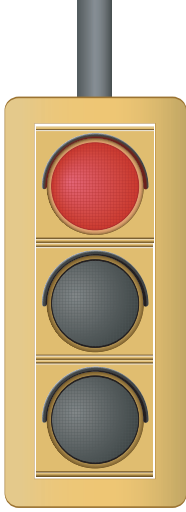
1. Avoid calling implementations "shred days" or alluding to the records management program as a tool for "battle readiness."
2. Do not associate the retention policy with the creation of a prospective opponents' list.
3. Be mindful of creating and implementing a records management program simultaneously with an intellectual property protection strategy or other major litigation.
4. Apply legal holds in anticipation of a lawsuit that the organization may initiate
5. Apply retention policy systematically, without targeted documents or categories of documents in mind. This may convince the court that the records' disposition was legitimate, as the California court found in its Rambus decision.

Scenario No. 2: Notice to Insurance Carrier

Phoenix Four sued Strategic Resources Corporation (SRC), its investment adviser, for breach of fiduciary duty, negligent misrepresentation, and fraud. Phoenix, the plaintiff, filed the complaint on May 19, 2005, but there had been much activity prior to the case.

On April 21, 2004, SRC had given notice to its insurance carrier that a dispute existed with Phoenix. In February 2005, SRC was evicted from its corporate offices. When SRC vacated in March 2005, it left behind some of Phoenix's marketing documents, old prospectuses, trade publications, and 10 computer work stations (which the landlord promptly destroyed).

The court granted an adverse inference instruction (allowing the jury to infer that the evidence would have been adverse to SRC) for abandoning the hard copy documents and computer workstations. The court found that SRC had an obligation to preserve these abandoned items because it should have known that the evidence might be relevant to litigation that



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ensued, about which SRC had notified its insurance carrier more than one year before Phoenix filed the complaint. The court noted that:

It is a pity that we do not have copies of the actual notices [to the insurance carrier], but these references to future litigation, while thin, are adequate to support a finding that the SRC Defendants were obligated to preserve the abandoned evidence... Their indifference constituted an act of gross negligence that is not excused by the disarray of their business affairs... counsel's obligation is not confined to a request for documents; the duty is to search for sources of information.

Thus, under Phoenix Four, the act of giving notice to the company's insurance carrier was considered a triggering event for litigation holds.

Scenario No. 3: Filing Claims with Administrative Agencies

The *Zubulake v. UBS Warburg* case illustrates one of the most discernible pre-litigation events that would trigger a litigation hold. In *Zubulake IV*, the plaintiff, Zubulake, filed a discrimination claim against her employer, UBS Warburg. Prior to filing the lawsuit, Zubulake filed a claim with the Equal Employment Opportunity Commission (EEOC), of which the defendant was aware.

When it surfaced at trial that her employer had destroyed e-mails pertaining to Zubulake, the court noted:

In this case, the duty to preserve evidence arose, at the latest, on August 16, 2001, when Zubulake filed her EEOC charge...But the duty to preserve may have arisen even before the EEOC complaint was filed.

The court states clearly that, at minimum, the triggering event occurred when the EEOC claim was filed. However, the facts in *Zubulake* revealed other circumstances to trigger the duty to preserve.

Scenario No. 4: Substantive Conversations with Supervisors and Others

In *Zubulake IV*, the duty to preserve existed even before the EEOC claim. The court concluded:

Merely because one or two employees contemplate the possibility that a fellow employee might sue

does not generally impose a firm-wide duty to preserve. But in this case, it appears that almost everyone associated with *Zubulake* recognized the possibility that she might sue.

Similarly, in *Broccoli v. EchoStar*, a sexual harassment and employment discrimination case, plaintiff *Broccoli* informed two of his supervisors at *EchoStar*, verbally and via e-mail, of the sexually harassing behavior. *Broccoli* made numerous complaints to them about the inappropriate behavior throughout 2001. His supervisors subsequently relayed, verbally and via e-mail, the complaints to their own superiors at *EchoStar*. In addition, *EchoStar*'s management went to extreme measures to purge e-mails and other potential evidence as soon as possible after creation.

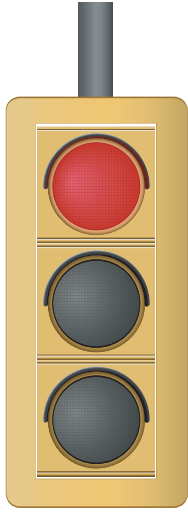
The court granted *Broccoli*'s motion for sanctions and included an adverse spoliation of evidence instruction in the jury instructions. The evidence of a regular policy at *EchoStar* of "deep-sixing" nettlesome documents and records (and of management's efforts to avoid their creation in the first instance) was found to be "overwhelming" evidence of intent to spoliolate.

Both *Zubulake IV* and *Broccoli v. EchoStar* illustrate the critical junction where threats to sue rise to the level of anticipated litigation. The threats by one or two employees may not give rise to such anticipation. However, when several others begin to chat about it and e-mails are channeled to supervisors for comments, the threat rises to a new level.

Scenario No. 5: Letter Requesting Explanation for Non-Hiring

In *Irion v. County of Contra Costa*, plaintiff *Irion* brought an action for reverse discrimination and various other claims against *Contra Costa* after the county declined to hire him as a firefighter. *Irion* was notified of the decision not to hire on June 19, 2002.

Following receipt of his rejection letter, *Irion* wrote a letter to the fire chief, dated June 24, 2002, requesting an explanation of the county's decision. On July 18, 2002, plaintiff also filed a detailed Freedom of Information Act (FOIA) request seeking information as to the scores of other candidates, to which the county responded on August 5, 2002. Sometime later in August, *Irion*'s own score sheet was provided to him by the county. Further, a fire district employee testified at deposition that score sheets would "certainly" have been kept until the end of the rel-



The plaintiffs claimed that defendant NTL's directors, officers, and managers made poor decisions that resulted in NTL entering bankruptcy. They alleged that NTL falsely reported to the public that it was financially healthy up to that time.

evant hiring period, which in this case was July 31, 2002.

Based on the foregoing facts, the Irion court determined that the county had notice of the likelihood of potential litigation by July 2002. It is unclear, however, whether the court concluded that plaintiff's letter of June 24, 2002, or his July 18, 2002, FOIA request triggered the duty to preserve. At the very latest, once the FOIA request had been made, defendant had an obligation to preserve relevant information regarding its employment decisions. Additionally, the court found that defendant had a statutory duty to retain these documents for two years pursuant to California Code. The defendant had violated its statutory duty to preserve.

Scenario No. 6: Circulation of Internal 'Document Hold' Memoranda

The case of *In Re NTL, Inc. Securities Litigation; Gordon Partners, et al. v. Blumenthal, et al.*, involved a class action alleging violations of federal securities laws. The plaintiffs claimed that defendant NTL's directors, officers, and managers made poor decisions that resulted in NTL entering bankruptcy. They alleged that NTL falsely reported to the public that it was financially healthy up to that time. The plaintiffs sought and were granted discovery sanctions against NTL for hindrance of discovery and destruction of evidence including e-mails of approximately 44 of NTL's "key players."

NTL sent out its own internal "document hold" memoranda on March 12 and March 13, 2002, including a description of the types of documents to be preserved. The class action lawsuit was subsequently filed on April 18, 2002. NTL entered bankruptcy on May 8, 2002, and the Gordon plaintiffs filed their complaint on September 13, 2002. In this case, the court determined, and the defendant conceded, that the preservation duty arose in March 2002 when defendant circulated its internal "hold" memoranda. From that point forward, defendant was on notice as to the potential for litigation.

Scenario No. 7: Severity of Injuries Combined with Totality of Circumstances

In *Pace v. Amtrak*, plaintiff Pace was a railroad conductor who brought a claim for personal injury when he tripped on a track buffer and severely injured his back. Pace sued his employer, Amtrak, and the jury returned a verdict in Pace's

favor. Thereafter, Amtrak moved for a new trial on various grounds including that the trial court erred in charging the jury on spoliation of evidence. The motion for a new trial was denied and the jury's decision was upheld on appeal.

The data at issue were several maintenance and inspection reports, which Pace argued would provide relevant information as to the condition of the buffer plates on which he tripped.

Amtrak first learned of Pace's injury in July 1999. Amtrak destroyed the reports pursuant to its standard two-year retention policy in approximately late August 2001. The court determined that it was reasonably foreseeable to Amtrak that litigation would result from Pace's injury before the two-year period ended and, therefore, it had a duty to preserve the reports.

Although the court did not cite one specific triggering event, it considered several factors which, taken as a whole, led to the conclusion that Amtrak was on notice of potential litigation prior to August 2001 when the documents were destroyed. Specifically, the court considered the following:

1. The extent and severity of Pace's injuries, especially the fact that Pace underwent surgery in May 2000
2. Amtrak's retention in May 2001 of an expert to report on the extent of Pace's injuries and conduct an independent medical examination
3. There was a claims person working on the case.
4. Amtrak conducted video surveillance on Pace from May 2000 through August 2000.

Taken together, these facts created a duty on defendant to preserve the maintenance and inspection reports at some point prior to the date of destruction in August 2001.

Checklist for Preservation Decisions

From the scenarios, it is possible to develop a checklist of considerations for determining whether a potential, anticipated, or threatened litigation or investigation should trigger a legal hold.

- Pre-litigation correspondence, such as a letter from a party threatening legal action or a letter from a party's attorney
- Creation of a list of potential opponents

- Notice to an insurance carrier
- Filing of a claim with an administrative agency, e.g., EEOC
- Substantive conversations with supervisors and/or others
- Retainer of counsel and/or experts
- Imminent lawsuit is apparent or other red flags
- Partial settlement of claims
- Letter requesting information regarding hiring/firing decision
- Circulation of internal “document hold” memorandum
- Severe injuries combined with the totality of circumstances

Any one or a combination of the events listed should prompt an organization to initiate a legal hold and communicate that hold effectively to its employees. Here, a sound legal hold policy and procedure is critical to ensuring that notice of the pending or potential litigation is transmitted to the persons with the authority to initiate the legal hold and ascertain that it is carried out properly. ■

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References

- Broccoli v. EchoStar* (D. MD 2005) 229 FRD 506, 516-17
- Hynix v. Rambus* (N.D. Cal. 2006) 2006 U.S. Dist. LEXIS 30690
- In Re NTL, Inc. Securities Litigation; Gordon Partners, et al. v. Blumenthal, et al.* (S.D. NY 2007) 2007 U.S. Dist. LEXIS 6198
- Irion v. County of Contra Costa* (N.D. Cal. 2005) 2005 U.S. Dist. LEXIS 4293
- Pace v. Amtrak* (D. Conn. 2003) 291 F. Supp. 2d 93,
- Phoenix Four v. Strategic Resources Corporation* (SD NY 2006) 2006 WL 1409413,
- Rambus v. Infineon* (E.D. Va. 2004) 220 F.R.D. 264, reviewed on other grounds 318 F.3d 1081
- Rambus, Inc. v. Infineon Techs. AG*, (E.D. Va. 2001) 155 F.Supp.2d 668, 680-83, rev'd on other grounds 318 F.3d 1081.
- Rambus, Inc. v. Infineon Techs. AG*, (E.D. Va. 2004) 222 F.R.D. 280, 286
- Samsung v. Rambus* (E.D. Va. 2006) 2006 U.S. Dist. LEXIS 50007.
- Samsung v. Rambus* (E.D. Va. 2006) 439 F.Supp. 2d 524
- Tulip Computers International B.V. v. Dell Computer Corporations* (D.Del.2002) 2002 WL
- Trigon Ins. Co. v. United States* (E.D. Va. 2001) 204 F.R.D. 277, 287
- Zubulake v. UBS Warburg* (SDNY 2003) 220 F.R.D. 212.