You've Really Got a Hold on Me

(aka Litigation Hold Considerations)

No area of discovery requires such immediate attention as the necessity of preserving relevant data and documents. And no area results in more sanctions than a failure to do so and to institute and monitor reasonable legal holds. The significant risk of sanctions for both clients and counsel should get our attention because reasonable, proportionate processes can probably avoid the sanction minefields.

Large companies and large law firms solve many of these problems through sophisticated software methodology. However, the ABA reports that the great majority of U.S. attorneys work in offices with ten or fewer attorneys. The obligation to preserve appropriately is common to all cases and all parties, therefore individuals, small companies, and their lawyers are those most in need of guidelines to avoid future troubles.

By now, most of us know that the obligation to preserve electronically-stored information (ESI) and paper documents arises when litigation can reasonably be expected. But the follow-up question should be: "What next?"

We lawyers should promptly instruct any new client to institute a legal hold and explain to them what that means, what they should do about it, and to what information and documents the obligation applies.

We cannot achieve that with a boilerplate letter and let it go with that. No letter will be appropriate for every client, so careful thought should go into the composition of the instructions to the client. Good lawyering also requires working with the client to identify sources of information, likely custodians of that information, and appropriate methods for its preservation and collection.

Lawyers and their clients can avoid most problems by taking immediate, reasonable steps to design and implement the litigation hold. Case law is evolving toward validating litigation holds that focus on particular time periods, particular custodians, particular categories of documents, and documents that contain particular language. Recent amendments to the federal rules now provide that the preservation obligation covers information that is relevant to a claim or a defense. Those amendments now clearly state that the litigation hold must be proportional to the issues, the amount in controversy, and the relative abilities of the parties to effect an appropriate hold.

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Each client will have electronic information in various, but not all, of the likely locations: hard drives, servers, mobile devices, storage media, social media such as Facebook or Twitter, or information in a Google account. Each client must preserve the information that falls into any of those categories that is relevant to the issues. If a lawyer or a client is not conversant enough with these issues, there are consultants and vendors who can advise and assist with the design and implementation of an appropriate hold and the required preservation.

Ensuring a legal hold as defensible is not a final accomplishment after we complete the initial tasks. Data changes daily, new data is created daily, and some processes erase or migrate data daily.

After our initial advice, warnings, and planning, we must regularly monitor the hold processes and remind our clients of their ongoing obligations. As counsel, we can always negotiate with our opponents to refine or relax the breadth of the preservation, especially as we learn more about the claims and defenses and refine the issues in our cases.

There is no perfect script for instituting appropriate preservation and collection in litigation. There are multiple available checklists and forms we can refer to and adapt to particular circumstances and cases. All that should be required are reasonable efforts. Most courts have concluded that perfect results are unnecessary, and would rather appropriate, good-faith and reasonable efforts.

Bill Kammer (wkammer@swsslaw.com) is a partner with Solomon Ward Seidenwurm & Smith, LLP.