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Using Legal Holds for Electronic Discovery

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USING LEGAL HOLDS FOR ELECTRONIC DISCOVERY

Minnesota E-Discovery Working Group 2[†]

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[†] The Minnesota E-Discovery Working Group is a grassroots organization that was founded in 2011 with the goal of writing five separate papers that address various aspects of e-discovery best practices from a Minnesota perspective and could be used as a resource by both judges and lawyers in Minnesota. Its members consist of members of the Minnesota judiciary, in-house attorneys, attorneys practicing with law firms across Minnesota, and e-discovery experts. The Working Group and the *William Mitchell Law Review* thank Briggs & Morgan, P.A. and Fredrikson & Byron, P.A. for their financial contribution to this joint project.

^{††} The views expressed herein do not necessarily reflect the view of the firms and companies listed, or of the Minnesota State Judicial Branch.

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OVERVIEW

Participating in electronic discovery requires, at the outset, a principled approach to the concept of document preservation—one tailored to the unique characteristics of the data and information environment, including a nuanced understanding of location and type of data, as well as how to preserve the data consistently and defensively.

This document addresses a number of electronic discovery legal hold issues: when to issue the hold, the scope and essential elements of the hold notice, implementation and monitoring of the hold, privilege issues related to the hold, as well as recent cases regarding electronic document preservation and legal holds. The document ends with a checklist of best practices for electronic discovery legal holds.

I. WHEN TO ISSUE A LEGAL HOLD

What Is a Legal Hold?

A legal hold is a communication issued as a result of current or reasonably anticipated litigation, audit, government investigation, or other such matter that suspends the normal disposition or processing of records. Legal holds may encompass procedures affecting data that are accessible as well as data that are not reasonably accessible. The specific communication to business or

IT organizations may also be called a “hold,” “preservation order,” “suspension order,” “freeze notice,” “hold order,” or “hold notice.”¹

When Should the Legal Hold Be Issued?

In articulating the standard that governs when the litigation hold should be issued, a federal district court in Minnesota held that “[t]he obligation to preserve evidence begins when a party knows or should have known that the evidence is relevant to future or current litigation.”²

The obligation to preserve evidence arises at least by the time litigation commences. The obligation, however, could arise before a lawsuit is filed. “Whether litigation can be reasonably anticipated should be based on a good faith and reasonable evaluation of the facts and circumstances as they are known at the time.”³ The mere threat of possible litigation, however, is not necessarily enough to trigger the obligation to issue a legal hold.⁴

1. The Sedona Conference, *The Sedona Conference Glossary: E-Discovery & Digital Information Management*, SEDONA CONF. 31 (3d ed. 2010), <https://thesedonaconference.org/download-pub/471>.

2. *E*Trade Sec. L.L.C. v. Deutsche Bank AG*, 230 F.R.D. 582, 588 (D. Minn. 2005) (Boylan, J.) (citing *Stevenson v. Union Pac. R.R.*, 354 F.3d 739, 746 (8th Cir. 2004)); *see also* *Zubulake v. UBS Warburg L.L.C.*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003) (“Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a ‘litigation hold’ to ensure the preservation of relevant documents.”).

3. The Sedona Conference, *The Sedona Conference Commentary on Legal Holds: The Trigger & the Process*, 11 SEDONA CONF. J. 265, 272 (2010); *see also* *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998) (“Th[e] obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation—most commonly when suit has already been filed, providing the party responsible for the destruction with express notice, but also on occasion in other circumstances, as for example when a party should have known that the evidence may be relevant to future litigation”). Thus, the triggering events for what constitutes reasonably anticipated litigation is fact specific. *See* *Goodman v. Praxair Serv.*, 632 F. Supp. 2d 494, 509 n.7 (D. Md. 2009) (refusing to require an unequivocal notice of impending litigation); *Phillip M. Adams & Assocs. v. Dell, Inc.*, 621 F. Supp. 2d 1173, 1191 (D. Utah 2009) (holding the duty to preserve was triggered many years before the suit was filed because of mere awareness of the dispute by others in the industry).

4. *See* *Cache La Poudre Feeds, L.L.C. v. Land O’Lakes, Inc.*, 244 F.R.D. 614, 623 (D. Colo. 2007) (stating a letter referencing potential “exposure” did not trigger the obligation to preserve since mere possibility of litigation does not

Factors that every litigant or potential litigant needs to consider include:

- The nature and specificity of the complaint or threat;
- The party making the claim;
- The position of the party making the claim;
- The business relationship between the accused and accusing parties;
- Whether the threat is direct, implied, or inferred;
- Whether the party making the claim is known to be aggressive or litigious;
- Whether a party who could assert the claim is aware of the claim;
- The strength, scope, or value of a potential claim;
- The likelihood that data relating to a claim will be lost or destroyed;
- The significance of the data to the known or reasonably anticipated issues;
- Whether the company has learned of similar claims;
- The experience in the industry;
- Whether the relevant records are being retained for some other reason; and
- Press and or industry coverage of the issue either directly pertaining to the client, or of complaints brought against someone similarly situated in the industry.⁵

Courts have identified a number of potential triggering events for defendants:

- Receipt of plaintiff's demand letter;⁶
- Meeting by defendant representatives before lawsuit is commenced to discuss allegations which later give rise to the lawsuit;⁷

necessarily make it likely and the letter referred to the possibility of amicable resolution).

5. *The Sedona Conference Commentary on Legal Holds: The Trigger & the Process*, SEDONA CONF. 9 (public comment version Aug. 2007), <https://thesedonaconference.org/download-pub/77>.

6. *See Oxford House, Inc. v. City of Topeka*, No. 06-4004-RDR, 2007 U.S. Dist. LEXIS 31731, at *11 (D. Kan. Apr. 27, 2007).

7. *See Doe v. Norwalk Cmty. Coll.*, 248 F.R.D. 372, 377 (D. Conn. 2007); *Peskoff v. Faber*, 244 F.R.D. 54, 57 (D.D.C. 2007).

- Search by corporate officer of his or her own e-mail for materials relevant to dispute;⁸
- Receipt of order from bankruptcy court of possible discovery regarding a “complex and far-reaching fraudulent scheme” involving securities lending;⁹
- Receipt of notice of the filing of an EEOC complaint;¹⁰ and
- Receipt of notice of a Securities and Exchange Commission investigation.¹¹

Plaintiffs and defendants both have a duty to issue legal holds. In fact, “[a] plaintiff’s duty is more often triggered before litigation commences, in large part because plaintiffs control the timing of litigation.”¹² The date that a plaintiff retains counsel could be a highly relevant factor. The retention of third-party experts has also been found to trigger the obligation to issue a legal hold.¹³ Sometimes one party will send a legal hold to an opposing party before litigation has commenced to ensure the opposing party will not destroy information while the parties negotiate.

Even nonparties may have a duty to issue legal holds. The obligation to preserve evidence may arise upon the nonparty’s receipt of a subpoena.¹⁴ It should also be noted that a mere delay in implementing a legal hold does not necessarily mean the hold is ineffective.¹⁵

8. See 3M Innovative Props. Co. v. Tomar Elecs., No. 05-756 MJD/AJB, 2006 U.S. Dist. LEXIS 80571, at *15–21 (D. Minn. July 21, 2006), *aff’d*, No. 05-756 (MJD/AJB), 2006 U.S. Dist. LEXIS 66840 (D. Minn. Sept. 18, 2006) (Davis, J.).

9. See E*Trade Sec., L.L.C. v. Deutsche Bank AG, 230 F.R.D. 582, 589 (D. Minn. 2005) (Boylan, J.).

10. See Escamilla v. SMS Holdings Corp., No. 09-2120 ADM/JSM, 2011 U.S. Dist. LEXIS 122165, at *28–29 (D. Minn. Oct. 21, 2011) (Montgomery, J.).

11. See OFFICE OF CHIEF COUNSEL, SEC. & EXCH. COMM’N DIV. OF ENFORCEMENT, ENFORCEMENT MANUAL § 3.2.6.4.1.3, at 67 (2013), available at <http://www.sec.gov/divisions/enforce/enforcementmanual.pdf>.

12. Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., L.L.C., 685 F. Supp. 2d 456, 466 (S.D.N.Y. 2010), *abrogated by* Chin v. Port Auth., 685 F.3d 135 (2d Cir. 2012).

13. See ADS Holdings, Inc. v. Fed. Ins. Co., No. 06-3715 (ADM/AJB), 2008 U.S. Dist. LEXIS 122758, at *14 (D. Minn. Mar. 28, 2008) (Boylan, J.).

14. *In re* Napster, Inc. Copyright Litig., 462 F. Supp. 2d 1060, 1068–69 (N.D. Cal. 2006) (holding that an organization had a legal obligation to preserve documents based on a third party subpoena).

15. See, e.g., Rahman v. Smith & Wollensky Rest. Grp., No. 06 Civ. 6198LAKJCF, 2009 WL 773344, at *6 (S.D.N.Y. Mar. 18, 2009) (“Even assuming

Finally, the failure to implement a timely legal hold may be deemed obstruction in some circumstances: 18 U.S.C. § 1519 prohibits the spoliation of documents in “contemplation” of an investigation, which can occur long before the government has actually begun its investigation.¹⁶ Likewise, the U.S. Department of Justice has set forth the “Principles of Federal Prosecution of Business Organizations,” and discussed how it measures and values a company’s level of cooperation.¹⁷ The Department of Justice will consider whether a company disclosed all relevant, non-privileged facts concerning misconduct¹⁸ and whether a company provided non-privileged documents and other evidence.¹⁹ The Department of Justice will also consider whether a company obstructed a government investigation by, for example, providing an “incomplete or delayed production of records.”²⁰ Thus, a failure to issue a timely legal hold could make it difficult for a company to satisfy the minimum standard of cooperation.

II. SCOPE, ELEMENTS, AND IMPLEMENTING THE HOLD NOTICE

A. *Scope and Elements of an Effective Legal Hold*

Once a determination has been made that a legal hold is required, appropriate steps must be taken to issue the hold. A legal hold is most effective if it:

- Is in writing;
- Informs recipients of the purpose and importance of a legal hold;

there was, in fact, no litigation hold until [the late stages of the case], the plaintiff has failed to establish any gap in [production] which is attributable to the failure to institute [a] litigation hold at an earlier date.”).

16. See *United States v. Russell*, 639 F. Supp. 2d 226, 240 (D. Conn. 2007) (“[I]n contemplation of . . . is commonly understood as meaning something that is envisioned or anticipated.”); see also *United States v. Fumo*, 628 F. Supp. 2d 573, 598 (E.D. Pa. 2007) (noting that defendant learned about government investigation through press coverage).

17. See U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL tit. 9, ch. 9-28.000 (2008), available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm (“Filip Memorandum”).

18. *Id.* ch. 9-28.720.

19. *Id.* ch. 9-28.720 n.2.

20. *Id.* ch. 9-28.730.

- Is sent to all custodians who are likely to possess documents related to the matter and instructs those custodians to send the hold on to others possessing relevant information who were not on the original distribution list;
- Requires recipients to confirm receipt of the hold;
- Clearly defines what information is to be preserved and how the preservation is to be undertaken;
- Specifies a point person, and his or her contact information, who can be consulted in the event recipients have questions about the hold; and
- Is periodically reviewed and, when necessary, reissued in either its original or an amended form.

Outside counsel, in-house counsel (if any), and the client or its employees play varying roles when it comes to implementing these elements. The division of responsibilities may vary from matter to matter depending on time and resources available to dedicate to full-time management of the legal hold. Attorneys and clients are well advised to discuss who will be primarily responsible for each element. As a practical matter, however, outside counsel—who ultimately is responsible to the court and to the client for compliance with discovery obligations—should ensure that each person responsible for any element is capable of competently performing his or her responsibilities.²¹ In cases where sanctions have been issued for failure to properly preserve information, it is often apparent that either: (a) there was a failure to clearly delineate who was responsible for each element; or (b) the person assigned to be responsible for a particular element was not capable of performing or misunderstood the expectations regarding that element.²²

21. *See, e.g.*, *Turner v. Hudson Transit Lines*, 142 F.R.D. 68, 73 (S.D.N.Y. 1991) (stating that the duty to preserve runs first to counsel, who has a duty to advise, with “corporate managers” having the responsibility to convey that information to the relevant employees).

22. *See generally* *Green v. Blitz U.S.A., Inc.*, No. 2:07-CV-372 (TJW), 2011 U.S. Dist. LEXIS 20353, at *21, *30 (E.D. Tex. Mar. 1, 2011) (finding that the defendant’s discovery efforts were unreasonable, as the defendant placed a single employee who was admittedly “as computer . . . illiterate as they get” in charge of collection and discovery efforts which resulted in monetary sanctions and the requirement that the defendant file a copy of the court’s order with its first pleading or filing in all new lawsuits for the next five years); *Pinstripe, Inc. v. Manpower, Inc.*, No. 07-CV-620-GKF-PJC, 2009 U.S. Dist. LEXIS 66422, at *4 (N.D.

B. Preparing the Hold

It is not a best practice to verbally communicate the instructions of a legal hold or to assume that individuals are inherently aware of their obligation to preserve data and documents with respect to a legal matter. The centerpiece of an effective legal hold is the written notice.²³

To be meaningful, the written notice must provide recipients with enough information so that they can understand what is being requested of them. The hold should include a clear statement about the purpose and the reason for the hold; provide background information, including a description of the lawsuit or investigation or reasonably anticipated lawsuit or investigation; and contain detailed instructions of what is required of the recipient.²⁴ The hold should also notify recipients that document preservation is a legal requirement and that failure to preserve relevant documents and data could result in civil and criminal penalties for both the recipient and the organization.²⁵

Okla. July 28, 2009) (highlighting the importance of communication when implementing a legal hold, which “necessarily involves communication with all of the ‘key players’ in the litigation”) (citation omitted); *In re NTL Sec. Litig.*, 244 F.R.D. 179, 198–99 (S.D.N.Y. 2007) (finding that the failure to have an adequate litigation hold in place and the failure to issue reminders to employees regarding the duty to preserve evidence was at least grossly negligent); *Zubulake v. UBS Warburg, L.L.C.*, 229 F.R.D. 422, 432 (S.D.N.Y. 2004) (explaining that a party’s issuance of a litigation hold does not end its responsibilities in discovery and stating that the party must see that the litigation hold is complied with, “monitoring the party’s efforts to retain and produce the relevant documents”); *see also* The Sedona Conference, *supra* note 3, at 282–84.

23. *See* *Scentsy, Inc. v. B.R. Chase, L.L.C.*, No. 1:11-CV-00249-BLW, 2012 WL 4523112, at *8–9 (D. Idaho Oct. 2, 2012) (finding oral litigation hold inadequate to comply with obligation to preserve evidence). However, not all courts require a written legal hold. *See* *Kinnally v. Rogers Corp.*, No. CV-06-2704-PHX-JAT, 2008 WL 4850116, at *6–7 (D. Ariz. Nov. 7, 2008) (holding that sanctions do not lie merely because of the “absence of a written litigation hold” when a party has taken “the appropriate actions to preserve evidence”).

24. The Sedona Conference, *supra* note 3, at 282–83.

25. *See e.g.*, *Philips Elecs. N. Am. Corp. v. BC Technical*, 773 F. Supp. 2d 1149, 1195–96, 1211–12, 1216 (D. Utah 2011) (issuing sanctions for failing to preserve relevant evidence, deleting relevant data, and subsequent cover-up, and referring matter to the Department of Justice for criminal prosecution); *Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 502–15, 538–41 (D. Md. 2010) (issuing sanctions for deleting, destroying, and failing to preserve the defendant’s

In terms of who prepares the hold document, in-house counsel may be in the best position to develop an overall legal hold policy and create specific legal hold notices. However, input from the affected business unit and outside counsel can be extremely valuable in crafting the hold, identifying custodians, and generating document and data types and source suggestions.²⁶

C. Who Should Receive the Legal Hold

Identifying potential custodians is an essential step in the legal hold process. Consider who is likely to possess documents related to the specific matter. For example, one may want to explore potential custodians based on job title and job function, or employees within a particular department, or individuals named in related documents. When developing the hold recipient list, it may be helpful to speak with the impacted business units to assist in identifying potential custodians.²⁷ Remember, it may be appropriate to include IT and Records Management in the hold distribution and to alert any third-party vendors who may maintain corporate data.²⁸

In order to facilitate understanding, the hold should also include a single contact or point person to whom the recipients can direct questions.

Original hold recipients may know of other potential custodians who have data or documents related to the matter. Consider including language within the hold instructing the original recipients to alert the hold point person or sender if they know of additional potential custodians. This way the point person or sender is aware of these additional potential custodians and can decide whether to include them in the hold.

electronically stored information, and ordering that the president of the corporate defendant “be imprisoned for a period not to exceed two years, unless and until he pays to Plaintiff the attorney’s fees and costs”).

26. See *Turner*, 142 F.R.D. at 73 (stating that the duty to preserve runs first to counsel, who has a duty to advise, and then to “corporate managers,” who have the obligation to communicate that information to the relevant employees).

27. The Sedona Conference, *supra* note 3, at 283.

28. *Id.*

D. What to Hold

Although being thorough when identifying potentially relevant data is important, a party implementing a legal hold does not need to freeze all data and electronically stored information.²⁹ Rather, the duty is to preserve all information that is reasonably believed to be relevant.³⁰ Good faith and reasonableness are the keys to determining the proper scope of a hold.³¹ With this in mind, an effective hold should provide custodians with guidance and examples of both general and specific types and sources of documents and data that should be preserved.³² These can include, but should not be limited to: e-mail, word-processing documents, spreadsheets, slideshows, voicemail or video recordings, PDFs, text messages, database or application records, paper originals and copies, faxes, social media entries, and handwritten notes. In addition, the hold should mention document or data types specific to the matter. For example, in an employment matter, the sender may want to specifically mention locating and preserving personnel records, performance evaluations, and job descriptions.

The hold should remind recipients that related information needs to be preserved regardless of where it is stored, including, but not limited to: desktops or laptops, personal or network drives, applications, databases, portable-media devices, phones, tablets, cloud-service providers, and offsite storage or storage with a third party.³³

When detailing what needs to be preserved, include a relevant date range so recipients know what they need to locate and retain. Consider the organization's retention policies and the impact on document preservation. Parties have an affirmative duty to take action to preserve rather than merely avoid overt destruction activity, which makes knowledge of retention schedules particularly important.³⁴ If necessary, reference the retention schedule of

29. See *Zubulake v. UBS Warburg*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003) (stating that litigants are not required to "preserve every shred of paper, every e-mail or electronic document, and every backup tape," because "[s]uch a rule would cripple large corporations").

30. *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998).

31. The Sedona Conference, *supra* note 3, at 279.

32. *Id.* at 283.

33. *Id.* at 279, 283.

34. See *Swofford v. Eslinger*, 671 F. Supp. 2d 1274, 1281 (M.D. Fla. 2009)

specific document sources or types and provide a remedy for any retention concerns.

Custodians frequently have questions about whether specific types of documents are subject to a legal hold that they have received. Sometimes those questions are easy to answer, particularly if the documents should be preserved. Deciding not to preserve documents can be more difficult because the consequences of making the wrong decision can be dramatic. That said, it is important to take a thoughtful and reasoned approach to preservation questions rather than erring on the side of keeping everything, which can be extremely burdensome for the client.

One way to relieve possible concerns about the decision *not* to preserve a particular category or type of document is to consult with or at least advise opposing counsel of your preservation plans. If opposing counsel objects to the decision not to preserve a particular type of document, informing counsel of the plan will vet the issue early on so that the parties can consult with the court to resolve disagreements. Often, however, parties can agree at the outset of litigation that certain types or categories of documents need not be preserved by either side due to limited relevance, easy availability of similar information from other sources, and excessive preservation costs.

E. Implementing and Monitoring the Legal Hold

Once a hold has gone out to the appropriate custodians, it is important to obtain affirmation that preservation steps have been

(“It is not sufficient to notify employees of a litigation hold and expect that the [employee] will then retain and produce all relevant information. Counsel must take *affirmative* steps to monitor compliance [to ensure preservation.]” (first alteration in original) (emphasis added) (quoting *Zubulake*, 220 F.R.D. at 432)); *Doe v. Norwalk Cmty. Coll.*, 248 F.R.D. 372, 378 (D. Conn. 2007) (holding that a party needs to take affirmative acts to prevent its system from routinely destroying information); *Zubulake*, 220 F.R.D. at 218 (holding that once the duty to preserve arises, a litigant is expected, at the very least, to “suspend its routine document retention/destruction policy and [to] put in place a ‘litigation hold’”); The Sedona Conference, *supra* note 3, at 271; *see also* *ACORN v. Cnty. of Nassau*, No. CV 05–2301 (JFB) (WDW), 2009 U.S. Dist. LEXIS 19459, at *9–10, *20 (E.D.N.Y. Mar. 9, 2009) (issuing sanctions against defendants who claimed that they issued a “verbal” legal hold and instructed key individuals to search for responsive documents despite lacking the technical resources to locate and access electronic documents).

taken by custodians. Sending written notices in a “fire and forget” fashion is not acceptable. Every effort should be made to gather and monitor individuals’ responses to written legal hold notices.³⁵ For some companies, automated legal hold applications can make reaching and tracking custodians easier and more efficient.

After custodians have reviewed and confirmed receipt of the hold, it can be very useful to follow up with custodian interviews to be sure the recipients understand their obligations and are preserving the right documents. This can be particularly important in cases involving data that would otherwise be subject to purge under ordinary retention schedules. It is crucial that custodians understand that relevant data will need to be shielded from normal purge cycles. Depending on the circumstances, this can be done by suspending ordinary retention policies, moving data onto platforms that are not subject to purges, or collecting data before the purge date arrives. When possible, consider leveraging technology and IT specialists to implement consistent processes. Documenting when steps were taken to preserve each data source will be helpful in demonstrating to the court that the legal hold was implemented defensibly.

Litigation and other matters can drag on for months and years. During this time, many things can take place that can erode the defensibility of a legal hold. First, as time passes individuals may forget they have an obligation to preserve data. It is critical that regular written reminder notices be sent to individuals to remind them of their obligation to preserve data.³⁶ Second, issues in a legal matter can broaden or narrow in scope. Therefore, it is important to update the legal hold notice such that it effectively communicates any new or changed preservation obligations.³⁷ Written notices should be revised and distributed in a timely manner.

Beyond the written notices, it is important to monitor new information systems and applications that come online in the organization. New systems may contain additional potentially

35. The Sedona Conference, *supra* note 3, at 286; *see, e.g.*, Phx. Four, Inc. v. Strategic Res. Corp., No. 05 Civ. 4837 (HB), 2006 U.S. Dist. LEXIS 32211, at *16–17 (S.D.N.Y. May 23, 2006) (holding that counsel had an obligation to actively supervise a party’s compliance with the duty to preserve).

36. The Sedona Conference, *supra* note 3, at 286.

37. *Id.*

relevant information or potentially relevant information migrated from older systems. Documentation is critical to being able to show that the new systems have policies that support a defensible hold. Among other things, this means ensuring data are not deleted or destroyed in the migration process. In the reverse scenario, it is critical to monitor systems being retired, destroyed, or archived, and to keep proper documentation in order to demonstrate that data subject to legal hold are properly preserved.

Finally, one of the most challenging tasks is monitoring individuals coming into and leaving an organization. Either scenario can prove challenging from a legal hold perspective. Individuals joining an organization may take on responsibilities of employees subject to the legal hold, thereby subjecting them to the legal hold as well. As individuals leave an organization, IT, as a regular practice, may purge an individual's data to prevent stockpiling of data. IT may also reuse or repurpose a former employee's hard drive or other equipment for incoming employees or other reasons. For these and many other reasons, it is important to monitor a legal hold to determine if new individuals should be added to the hold or if data are at risk due to individuals leaving an organization.

F. Sanctions for Failure to Preserve

If a party fails to adequately preserve relevant information, it may be subject to sanction by the court. Courts have wide latitude to issue sanctions, but will generally impose the minimum sanction necessary to restore balance to the parties. Three factors must be considered:

- (1) [T]he degree of fault of the party who altered or destroyed the evidence;
- (2) [T]he degree of prejudice suffered by the opposing party; and
- (3) [W]hether there is a lesser sanction that will avoid substantial unfairness to the opposing party and, where the offending party is seriously at fault, will serve to deter such conduct by others in the future.³⁸

38. Miller v. Lankow, 801 N.W.2d 120, 132 (Minn. 2011).

Sanctions can take a wide range of forms, including orders by the court that:

- Require the sanctioned party to retrieve and produce information that is less readily accessible than the destroyed information;
- Require the sanctioned party to submit to and/or pay the cost of computer forensics;
- Require the sanctioned party to pay the extra costs that will be incurred by the moving party to obtain the information from alternate sources;
- Require the sanctioned party to reimburse the moving party for excess discovery costs incurred as a result of the destruction of documents;
- Require the sanctioned party to pay the moving party's fees and expenses incurred in bringing the motion;
- Exclude expert testimony;
- Issue an adverse inference or spoliation jury instruction;
- Require designated facts be taken as established for purposes of the action;
- Exclude evidence supporting designated claims or defenses asserted by the sanctioned party;
- Exclude evidence opposing designated claims or defenses asserted by the moving party; and
- Dismiss certain claims or defenses asserted by the sanctioned party.³⁹

In the Eighth Circuit, a finding of more than mere negligence is required before a court issues an adverse inference instruction.⁴⁰

G. Releasing the Hold

Legal holds disrupt normal business processes, require considerable ongoing collection and maintenance efforts, and can be costly. They should therefore be released as soon as the obligation to preserve evidence ceases.

39. See *Richard Green (Fine Paintings) v. McClendon*, 262 F.R.D. 284, 290 (S.D.N.Y. 2009) (imposing monetary sanctions imposed on both counsel and client for failure to institute a timely legal hold). See generally FED. R. CIV. P. 37; MINN. R. CIV. P. 37.02(b), .03.

40. *Morris v. Union Pac. R.R.*, 373 F.3d 896, 900–02 (8th Cir. 2004).

In determining whether to release a legal hold, counsel should ensure that the information is no longer needed for the current dispute. In other words, the decision to release the hold should be based on a good faith and reasonable evaluation of the facts and circumstances known at the time.⁴¹ For example, if the matter has been dismissed with prejudice or a settlement has been reached, which includes a release of all claims, it would be reasonable to conclude that the preservation obligation has ended. If the matter has simply been dismissed without prejudice, however, counsel must carefully consider whether the litigation might recommence.

Counsel must also consider whether the information is needed for other matters. There may be parallel lawsuits, either ongoing or contemplated, that impose a continuing obligation upon the party to preserve evidence.

Once the legal hold is lifted, the party should direct custodians to return to normal retention schedules and ensure that data are not being retained unnecessarily.

H. Take-Away Best Practices

- (1) Legal holds can seem onerous. Provide recipients with enough information so that they can understand what is being requested of them and how they can satisfy the request, but communicate the requirements simply and efficiently. Invite recipients to ask questions.

41. No existing case law provides a convenient roadmap for determining when to release a legal hold, and courts will likely assess this issue on a case-specific basis using the same inquiry for determining when the duty to preserve is triggered. *See generally* Digital Vending Servs. Int'l, Inc. v. Univ. of Phx., Inc., No. 2:09CV555, 2013 U.S. Dist. LEXIS 145159, at *16–17 (E.D. Va. Oct. 3, 2013) (“The duty to preserve does not extend to every document the company possesses, only to ‘unique, relevant evidence.’ The duty to preserve is also defined by whether steps taken to preserve are proportional to the particular case and ‘consistent with clearly established applicable standards.’” (citations omitted)); *Consol. Aluminum Corp. v. Alcoa, Inc.*, 244 F.R.D. 335, 345 n.18 (M.D. La. 2006) (“The obligation to preserve electronic data and documents requires reasonable and good faith efforts to retain information that may be relevant to pending or threatened litigation. However, it is unreasonable to expect parties to take every conceivable step to preserve all potentially relevant data.” (citing THE SEDONA CONFERENCE, THE SEDONA PRINCIPLES ADDRESSING ELECTRONIC DOCUMENT PRODUCTION, at i (Jonathan M. Redgrave et al. eds., 1st ed. 2005))).

- (2) Be thoughtful in determining the proper recipients of a hold. Actually speaking with business unit partners or known custodians can be the best way to devise a comprehensive custodian list. Don't forget about custodians in IT and Records Management.
- (3) Good faith and reasonableness are the keys to determining the proper scope of the hold. The list of documents and information subject to a hold should be comprehensive, but resist the urge to "just keep everything." Communication with the client, custodians, and sometimes even opposing counsel is imperative.
- (4) Work as a team when devising a legal hold—input from in-house counsel as well as outside counsel can be crucial.
- (5) Monitor, review, and update your legal holds. Legal matters can go on for long periods of time—the scope of the hold can change and custodians need reminders.
- (6) Be thoughtful and active about releasing legal holds after the duty to preserve the information has expired so that data are not being retained unnecessarily.

III. LEGAL HOLD PRIVILEGE ISSUES

A. *Legal Holds Are Generally Protected by Privilege*

As a general matter, legal hold letters "are not discoverable, particularly when a party has made an adequate showing that the letters include material protected under attorney-client privilege or the work-product doctrine."⁴² However, when spoliation occurs, the letters are discoverable.⁴³

B. *Facts Regarding the Legal Hold Process Are Discoverable*

Although a legal hold itself may be privileged, many courts have found that the facts concerning what a party and its employees are doing to preserve and collect potential responsive

42. *Major Tours, Inc. v. Colorel*, No. 05-3091 (JBS/JS), 2009 U.S. Dist. LEXIS 68128, at *6 (D.N.J. Aug. 4, 2009).

43. *Id.* at *7; *see also* *Ingersoll v. Farmland Foods, Inc.*, No. 10-6046-CV-SJ-FJG, 2011 U.S. Dist. LEXIS 31872, at *48 (W.D. Mo. Mar. 28, 2011) (denying plaintiff's motion to compel discovery on litigation hold notices because there was no evidence of spoliation).

and/or relevant information generally are discoverable. For example, courts have found that the following facts are discoverable:

- The categories of electronic stored information or documents employees were instructed to preserve and collect;
- The specific actions employees were instructed to undertake to preserve and collect;
- When the legal hold was issued or given; and
- To whom the legal hold was issued or given.⁴⁴

IV. LEGAL HOLDS: FEDERAL AND MINNESOTA CASE LAW AND RESOURCES

A. *Triggering Events—Minnesota Federal Case Law*

*E*Trade Securities L.L.C. v. Deutsche Bank AG.*⁴⁵ The triggering event occurred when defendants received the order from the bankruptcy court of possible discovery regarding a “complex and far-reaching fraudulent scheme” involving securities lending.⁴⁶ The court held that sanctions were appropriate for defendants’ action/inaction after the triggering event—namely because of the permanent erasure of all the company’s hard drives and failure to alter the three-year retention policy on backup-tape destruction.⁴⁷

*3M Innovative Properties Co. v. Tomar Electronics.*⁴⁸ President of defendant company searched his own e-mail but failed to issue a company-wide legal hold and failed to examine whether any employees of the company would have documents relevant to the litigation.⁴⁹ The court found that the triggering event was being

44. See, e.g., *Cannata v. Wyndham Worldwide Corp.*, No. 2:10-cv-00068-PMP-LRL, 2011 U.S. Dist. LEXIS 88977, at *8 (D. Nev. Aug. 10, 2011) (stating that facts regarding the legal hold (i.e., to whom it was sent and categories of data to be preserved) are discoverable); *In re Ebay Seller Antitrust Litig.*, No. C 07-01882 JF (RS), 2007 U.S. Dist. LEXIS 75498, at *2 (N.D. Cal. Oct. 2, 2007) (holding that the list of employees that were served document retention notices was discoverable).

45. 230 F.R.D. 582 (D. Minn. 2005) (Boylan, J.).

46. *Id.* at 588.

47. *Id.* at 584, 590.

48. No. 05-756 MJD/AJB, 2006 U.S. Dist. LEXIS 80571 (D. Minn. July 21, 2006) (Boylan, J.), *aff’d*, 2006 U.S. Dist. LEXIS 66840 (D. Minn. Sept. 18, 2006) (Davis, J.).

49. *Id.* at *16.

“notified of this litigation”⁵⁰ and held that the jury instructions would include an adverse inference instruction with respect to the e-mail and other documents destroyed or withheld by defendant company.⁵¹

*Escamilla v. SMS Holdings Corp.*⁵² The court held that the obligation to preserve evidence begins when a party “knows or should have known that the evidence is relevant to future or current litigation.”⁵³ Further, the court noted that “[i]f a party creates its own burden or expense by ‘converting data it should have reasonably foreseen would be discoverable into an inaccessible format it should not be entitled to shift the costs of restoring and reviewing the data.’”⁵⁴ The triggering event in this EEOC case occurred when defendant company received notice of the filing of the claim.⁵⁵ The court issued sanctions for defendant’s failure to preserve evidence⁵⁶ and allowed plaintiff to use a computer forensic consultant to search defendant’s work and home computers.⁵⁷

*Nicollet Cattle Co. v. United Food Group, L.L.C.*⁵⁸ In this contract dispute, defendant sought a motion for summary judgment and claimed that plaintiff destroyed evidence by not preserving their “vessel books” used to track orders of meat.⁵⁹ Plaintiff claimed the destruction was in the ordinary course of business, and the judge agreed that there was no triggering event because there was no evidence that plaintiff “knew or should have known that litigation was imminent” at the time the vessel books were destroyed.⁶⁰ This case includes a citation to *E*Trade Securities L.L.C. v. Deutsche Bank AG*⁶¹ for the obligation to preserve evidence.⁶²

50. *Id.* at *23.

51. *Id.* at *2.

52. No. 09-2120 ADM/JSM, 2011 U.S. Dist. LEXIS 122165 (D. Minn. Oct. 21, 2011) (Montgomery, J.).

53. *Id.* at *24.

54. *Id.* at *28.

55. *Id.* at *29.

56. *Id.* at *33–34.

57. *Id.* at *23.

58. No. 08-5899 (JRT/FLN), 2010 U.S. Dist. LEXIS 92951 (D. Minn. Sept. 7, 2010) (Tunheim, J.).

59. *Id.* at *13.

60. *Id.*

61. 230 F.R.D. 582, 588 (D. Minn. 2005).

*ADS Holdings, Inc. v. Federal Insurance Co.*⁶³ In this insurance coverage dispute, the identified triggering event was the point when plaintiff had reason to believe that indemnification for the apparent loss would be disputed.⁶⁴ Plaintiff manufacturing company suffered a series of power outages that caused a circuit board to fail in a piece of equipment.⁶⁵ A third party was hired to examine the board and inadvertently destroyed the board during the examination.⁶⁶ Plaintiff failed to disclose this fact to defendant.⁶⁷ The court noted that plaintiff had a duty to preserve the circuit board,⁶⁸ but the court indicated there was not enough evidence to support a finding that it was destroyed with intent to suppress the truth.⁶⁹

B. Jury Instructions, Spoliation, and Evidence Preservation

1. Generally

*Frazier v. Burlington Northern Santa Fe Corp.*⁷⁰ This case arose out of a fatal September 2003 collision between a train and a car in Anoka.⁷¹ Plaintiffs sought sanctions against defendant for failure to preserve evidence; namely, defendant's failure to preserve the original computer hard drive onto which data from the crossing in question was downloaded on the night of the collision, failure to preserve the backup of the hard drive, destruction of electronic circuitry blueprints for the warning signals, and failure to preserve the tape from the event recorder in the trailing locomotive. Defendant's "bungled" and "sloppy evidentiary maintenance and preservation" provided clear and convincing evidence of

62. *Nicollet Cattle Co.*, 2010 U.S. Dist. LEXIS 92951, at *11.

63. No. 06-3715 (ADM/AJB), 2008 U.S. Dist. LEXIS 122758 (D. Minn. Mar. 28, 2008) (Boylan, J.).

64. *Id.* at *14.

65. *Id.* at *4.

66. *Id.* at *21.

67. *Id.* at *20.

68. *Id.* at *14 (citing *Stevenson v. Union Pac. R.R.*, 354 F.3d 739, 746 (8th Cir. 2003)) (finding that the duty to preserve evidence begins when a party knows or should know that the evidence is relevant to future or current litigation).

69. *Id.* at *27.

70. 811 N.W.2d 618 (Minn. 2012).

71. *Id.* at 622.

negligence on their part.⁷² Plaintiffs were awarded an adverse-inference jury instruction.⁷³

*Sherman v. Rinchem Co.*⁷⁴ According to the Eighth Circuit, in order to impose sanctions for spoliation of evidence, “there must be a finding of *intentional destruction* indicating a desire to suppress the truth.”⁷⁵ This contrasts with Minnesota law, which states “even when a breach of the duty to preserve evidence is not done in bad faith, the district court must attempt to remedy any prejudice that occurs as a result of the destruction of the evidence.”⁷⁶ Notably, the Eighth Circuit in *Sherman* held that federal law, as opposed to state law, applies to the imposition of sanctions for the spoliation of evidence in a diversity case.⁷⁷

*Chin v. Port Authority.*⁷⁸ In this employment-law case, plaintiffs alleged racial discrimination as the basis for being passed over for promotions.⁷⁹ An EEOC claim was filed in 2001, but the defendant did not implement a litigation hold.⁸⁰ Following this triggering event, the defendant destroyed employment files dated between 1999 and 2002 that were used by the defendant to track information related to promotion decisions.⁸¹ Plaintiffs unsuccessfully sought sanctions for spoliation and an adverse jury instruction in the district court because the destruction of documents was “negligent, but not grossly so.”⁸² The Second Circuit rejected the bright-line rule from *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, L.L.C.*,⁸³ which held that a failure to implement a litigation hold is gross negligence per se.⁸⁴ The court extolled a pragmatic, case-by-case

72. *Id.* at 629.

73. *Id.* at 622.

74. 687 F.3d 996 (8th Cir. 2012).

75. *Id.* at 1006 (citing *Stevenson v. Union Pac. R.R.*, 354 F.3d 739, 746 (8th Cir. 2004)).

76. *Miller v. Lankow*, 801 N.W.2d 120, 128 (Minn. 2011).

77. *Sherman*, 687 F.3d at 1006.

78. 685 F.3d 135 (2d Cir. 2012).

79. *Id.* at 140.

80. *Id.* at 142–43.

81. *Id.* at 143.

82. *Id.* (citing *Port Auth. Police Asian Jade Soc’y of N.Y. & N.J. Inc. v. Port Auth.*, 601 F. Supp. 2d 566, 570 (S.D.N.Y. 2009)).

83. 685 F. Supp. 2d 456 (S.D.N.Y. May 28, 2010).

84. *Chin*, 685 F.3d at 162 (citing *Pension Comm.*, 685 F. Supp. 2d at 464–65).

approach to sanctions for failure to implement a litigation hold by stating the better method is to examine how important the destroyed evidence is to the case.⁸⁵ The Second Circuit applied its own precedent from *Residential Funding Corp. v. DeGeorge Financial Corp.*,⁸⁶ where it had stated that a party seeking an adverse-inference instruction must establish:

- (1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed;
- (2) that the records were destroyed with a culpable state of mind; and
- (3) that the destroyed evidence was relevant to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.⁸⁷

Because employment evidence was available through alternate means, including direct testimony, the destruction did not rise to the level of an adverse inference jury instruction.⁸⁸

2. *Untimely Legal Hold/Sanctions*

*United States ex rel. Baker v. Community Health Systems, Inc.*⁸⁹ This case arose from a *qui tam* lawsuit under the False Claims Act where Medicare fraud was alleged against defendant hospitals.⁹⁰ Although the Government was investigating this claim for a number of years and sent a letter to the defendant in 2005 requesting defendant preserve its documents, the government did not implement its own litigation hold until February 2009—the same day it decided to intervene in the case.⁹¹ In September 2008, the defendant sent a letter to the Government rejecting a settlement offer.⁹² Per the district court, the receipt of the rejected settlement letter was the event that should have triggered the Government to issue a

85. *Id.*

86. 306 F.3d 99, 107 (2d Cir. 2002).

87. *Chin*, 685 F.3d at 162.

88. *Id.*

89. No. 05-279 WJ/ACT, 2012 U.S. Dist. LEXIS 144892 (D.N.M. Oct. 3, 2012).

90. *Id.* at *4.

91. *Id.* at *7–8.

92. *Id.* at *8.

litigation hold itself.⁹³ Failure to do so resulted in the destruction of exculpatory evidence that would have directly related to a strong defense theory.⁹⁴ The sanctions issued by the magistrate judge, which were “designed to prevent the Government to benefit from its apathetic conduct in preserving documents that were clearly meant to be preserved, when it had ample reason to believe the documents and ESI should have been preserved for some time prior to the litigation hold,” were upheld by the district court.⁹⁵

3. *Failure to Issue Legal Hold*

Strutton v. Meade.⁹⁶ A failure to issue a litigation hold does not mean that a party is necessarily subject to sanctions for spoliation of evidence.⁹⁷ The Eighth Circuit found the district court’s decision not to sanction state officials based on their failure to impose a litigation hold over agency e-mails was not an abuse of discretion in an action challenging treatment given to a civilly-committed sex offender.⁹⁸ Officials explained that there had been a consolidation of information technology systems of multiple state agencies and that e-mails were deleted in an effort to free up server space on the consolidated system.⁹⁹

93. *Id.*

94. *Id.* at *27.

95. *Id.* at *26.

96. 668 F.3d 549 (8th Cir. 2012).

97. *Id.* at 559.

98. *Id.*

99. *Id.*

V. LEGAL HOLDS IN ELECTRONIC DISCOVERY—TEN BEST PRACTICES

Issuing the Hold

- (1) Issue a legal hold once litigation is reasonably anticipated to ensure the preservation of relevant documents.
- (2) Because the timing of legal holds can be tricky, be aware of triggering events. For defendants, this may include a meeting by defendant's representatives to discuss allegations before a lawsuit was filed, or a corporate officer's search of his own e-mail for materials relevant to a dispute. For plaintiffs, this may include the date counsel or third-party experts are retained.

Initiating and Maintaining the Hold

- (3) Be thoughtful in determining the proper recipients of a hold. Instruct recipients to notify the sender of other potential legal hold custodians.
- (4) Legal hold recipients should be required to acknowledge receipt of a legal hold and provide affirmation that preservation steps have been taken.
- (5) An effective legal hold provides recipients with enough information to understand what is being requested of them, including clear instructions on how and what data should be preserved (such as examples of general and specific types and sources of documents and data that should be preserved).
- (6) Invite recipients to ask questions about the hold.
- (7) Send regular written reminder notices to remind custodians of their obligation to preserve data. These reminders may communicate changes in scope, including new preservation obligations.

Releasing the Hold

- (8) Legal holds should be released once it is determined that information is no longer needed for the current litigation. Use caution if a matter has been dismissed without prejudice, as litigation may recommence.

Additional Notes

- (9) Remember: legal holds do not require preserving all information—only that which is relevant.
- (10) Generally, legal holds are protected by privilege; however, facts regarding the legal hold process are discoverable.