



**STEPS TO
OVERCOMING
COMMON
LEGAL HOLD**

MISTAKES

INTRODUCTION

IN THE SUMMER OF 2007, the Sedona Conference, a charitable research and educational institute dedicated to the advancement of law and policy in complex litigation, issued 11 key principles for managing a litigation hold. These principles contributed to a growing body of thought around the legal hold space, and its increasingly complex nature.

These principles – and the mounting need for a commonly accepted “best practices” approach to litigation holds – were given even more weight in the wake of several recent rulings, such as *Cache La Poudre Feeds, LLC v. Land O’Lakes, Inc.*, 244 F.R.D. 614 (D.Colo. 2007) and *In Re Seroquel Products Liability Litigation*, 2007 WL 2412946 (MD Fla. August 21, 2007). Both cases cited counsel’s failure to properly monitor the electronic discovery process, including deficiencies in their preservation and collection efforts. The hallmark of a defensible litigation hold strategy is developing a consistent and repeatable process that ensures the preservation (and ultimate availability) of all relevant paper and electronic information.

Recent events in the financial sector have had ripple effects throughout the national and world economies, making the situation even more tenuous for legal professionals. With a slew of new regulations expected in the aftermath of the financial crisis and with the ushering in of a new era of political leadership, the future of the legal industry couldn’t be more fraught with risks and opportunities.

Businesses must rethink their litigation hold strategies or face potentially dire consequences. Companies that immediately suspend their document destruction practices for all material that may be relevant to an existing lawsuit or one that they reasonably anticipate are operating cautiously. A strong hold process ensures that key data is not destroyed, and that the employees responsible for maintaining that data are properly notified. The technologists supporting the back-end operations must similarly be aware.

Before attempting to overhaul their approach to legal holds and e-discovery, it is essential that le-

gal teams take a long, hard look at the overarching principles driving their companies’ approach to these matters. After all, successful legal hold management begins before a legal hold notice is even received, in the nuts and bolts of daily operations. When legal teams and their corollary business units have comprehensive data management plans in place as a matter of course, legal hold and e-discovery costs will go down and efficiency will inevitably go up.

Corporate legal departments have become skilled in reactive governing, which is to say that when a legal hold notice or litigation can be reasonably expected, attorneys and high-level management spring into action. But what can a corporation do to prepare for and mitigate some of the organizational chaos that follows a legal hold or discovery action request? And further, what common mistakes should general counsel be aware of, and make preparations to avoid, to meet these requests?

MEETING TODAY’S STANDARDS FOR LEGAL GOVERNANCE, RISK AND COMPLIANCE

Coming up with actionable policies and processes is the first step to success in the realm of legal holds and e-discovery. Management teams often structure overall organizational leadership according to the principles of governance, risk management and compliance, and legal teams can apply these same general principles when it comes to crafting comprehensive, defensible methods, rules and processes for dealing with – and preparing for – legal hold and e-discovery requirements.

Legal governance, risk management and compliance, or Legal GRC, can be broken down into three subcategories: legal governance, legal risk management, and legal compliance. The processes, however, do not apply only to the legal department within a given corporation. Although the general counsel must take a leading role, it is essential that corporate departments work together to maximize efficiency in quickly, efficiently and effectively responding to e-discovery requests.

GOVERNANCE

As companies struggle to anticipate the reach of recent and future regulations regarding data retention and e-discovery, progressive general counsel and audit committees are taking no chances: potential improvements in corporate and legal governance are spotted and immediately pursued.

When it comes to Legal GRC, good governance is an essential first step. Mitigating risks of all types and preventing future compliance issues are both dependent on setting up defensible governance policies. General Counsel is responsible for determining and setting the internal controls essential to good corporate – and, by default, legal – governance.

Legal departments' involvement in crafting, implementing and monitoring policies, processes and rules is essential to ensure the success of any defensible governance plan. Each new initiative places greater demands on the general counsel and elevates the department's profile and voice in the board room and executive suite. The role of general counsel is likely to expand even further into departments outside the executive suite, as aspects of the daily operations of many corporations are re-routed through or reviewed by legal departments.

RISK MANAGEMENT

Risk and risk management have been pushed to the forefront by recent events within the financial world, namely the collapse of the subprime mortgage and financial markets. Poor risk management in the last few years, where good judgment and prudence gave way to greed, played a major role in the decisions that led to the current dire global straits in which we find ourselves. This is driving interest in both recovery from and prevention of future missteps within the realm of risk.

At its most basic, risk management can be broken down into three deceptively simple processes:

- **Risk Assessment**
 - Identification and evaluation of risks and their impacts, both good and bad
 - Recommendation of risk-reducing measures
- **Risk Mitigation**
 - Prioritization and implementation of recommended risk-reduction approaches
- **Evaluation and Assessment**
 - Continual evaluation process
 - Assessing opportunities for business growth against associated risks
 - Identifying keys for implementing successful risk management program

It is important to keep in mind that all business ventures, organizations and departments must deal with risk on at least some level. Without taking some risks, few businesses would be profitable. In fact, it could be argued that many a corporation, country and even society has been built on a few well-calculated risks. It is, however, in an organization's best interest to use the above steps to calculate its risk tolerance, and properly mitigate undesirable risks based upon that calculation. Indeed, throughout history, it is partly through successful – or unsuccessful – risk management that effective organizations have been separated from failed ones .

There are many and varied legal-hold specific risks that legal teams must deal with and prepare for. Whether a corporation has an internal e-discovery team or contracts without outside records experts, it's important to have sound data destruction and retention policies in place before the onset of litigation, or even the threat of litigation.

Additionally, proactive general risk management may be overlooked as legal teams field crises as they arise. Although handling likely and actual litigation as it comes is one of the most important functions of a corporate legal department, having protocols in place to manage the risk of potential future litigation can vastly reduce workload and overlap for in-house attorneys.

COMPLIANCE

Complying with regulations is one thing: Current processes and departmental codes handle regulatory and even ethical compliance – at least in theory – very well. However, anticipating future legislation and putting processes in place is something else entirely, and an area of practice in which many general counsel offices could use a primer.

With good governance policies and risk management practices in place, however, compliance should follow somewhat naturally, particularly for legal department members. For corporations as a whole, however, compliance may not be so easy. A lack of knowledge about complex legislation that may not even exist yet can make proactive compliance particularly troublesome to implement. Therefore, it's important for legal departments to maintain accessibility within their corporate environments, and to work both with the corporate C-suite and with the employees who handle the daily workload to cultivate a culture of compliance.

Corporate culture, or the set of values, beliefs, and relationships between individuals and functions that guide the decisions of the company in order to achieve its objectives, is an oft-overlooked but essential component of compliance, regulatory and otherwise. Corporate culture forms behaviour that has been learned within a group or transferred between individuals over time, and can make or break an institution's efficiency.

With the right governance tools, proper risk mitigation strategies in place, and a free, open corporate culture where employees have a real stake in furthering company goals, the challenges of regulatory compliance are greatly lessened throughout an organization's structure.

Not only can general counsel avoid some of the stumbling blocks inherent to electronic discovery by utilizing Legal GRC tools, he or she can also take steps to ensure meaningful compliance in his or her organization. A thorough understanding of the legal governance, risk management and compliance concept can serve to provide general counsel with

a framework for solving – and avoiding – common business process mistakes organizations face when approaching legal hold and e-discovery requests.

COMMON BUSINESS PROCESS MISTAKES IN THE REALM OF E-DISCOVERY

It is a straightforward concept, but balancing competing discovery priorities that are freighted with the number of people and departments involved, a large amount of data, and the ancillary information surrounding that data (i.e., its type and location), while allowing the daily business of the company to continue, is not always practically implemented. The global nature of modern business and the diversity of employee work environments (e.g., home, office, mobile, remote) pose significant challenges.

Some organizations believe that by simply maintaining a generic legal-hold policy that sets forth broad time frames and general best practices, such as identifying custodians and highlighting possibly document repositories, they can avoid any adverse litigation consequences. Unfortunately, in today's climate, unless the company has a narrowly tailored policy that specifies the correct protocols for notification, follow-up and tracking for employees to follow in sufficient detail, the courts may find that the company's policy is not of sufficient breadth to survive scrutiny. To minimize this potential, legal teams should establish clear directives and maintain strict records of their litigation hold and e-discovery processes and policies.

Some teams still believe in managing their efforts using Excel spreadsheets and manual processes. They identify individuals for follow-up from a staff list and record the dates on which communication is initiated and completed, as well as the information that is ultimately received. For some companies, this practice is completely appropriate given their size and litigation involvement. But for a company with hundreds or even thousands of cases pending simultaneously and hundreds or thousands of potential document custodians in their organizations, something more robust is required to enable them to adequately defend their practice before a court.

For those companies needing a comprehensive, defensible solution to meet today's compliance requirements, we recommend following these steps toward success:

FIVE STEPS TOWARD SUCCESS

The sheer number of people involved in litigation requires well-orchestrated coordination from notification of the hold through collection and review. It warrants a best management practice approach using an automatic, repeatable, consistent and defensible process throughout the entire process. By using the principles of legal governance, risk management and compliance (or Legal GRC), legal teams and their compatriots will be able to foresee and proactively prevent problems with legal holds.

STEP 1

Coordinate collaboration at the highest executive levels, including the general counsel, chief technology officer, chief administrative officer, and other relevant department heads. Achieving legal hold compliance, not to mention regulatory and ethical compliance, is driven by good governance. It must be borne out of thorough policies set at the top of organizations, and it is imperative to have complete buy-in from a diverse senior team that understands the company's technological infrastructure and can integrate the legal, IT and records management departments seamlessly. Records managers must monitor the flow of information, IT experts are tasked with processing that information and legal personnel determine relevance to the case at issue; none of this can be accomplished without executive support.

After setting forth clear and defensible policies and processes surrounding legal governance, risk management and compliance, it is time to put in place an actionable legal hold process that permits action and reaction in a collaborative environment in which all stakeholders have equal access to the necessary information. The first step to an effective legal hold is knowing where to find relevant information – even before you know which information is relevant.

STEP 1.5

Create a data map for your organization. Coordinate IT, legal and records managers to answer three questions:

1. What data do we have?
2. Where is our data stored?
3. What sort of data (record types and associated retention and destruction policies) is stored there?
4. What are the retention policies associated with the data?

Then, make sure that your organization's data map is constantly updated. You can do this using a data mapping program or manually; however, clear lines of communication and sound Legal GRC principles are essential to smooth implementation and efficient use of a data map.

STEP 2

Identify potentially relevant system data and preserve it at the time of the hold. Without a coordinated approach to find which systems or repositories contain relevant information, most corporations will default into "save everything" mode, which drowns them in a rising sea of unnecessary information.

The decisions of which systems to put on hold, what data to house and the time frames involved will be based on the division of the company involved, the nature of the matter and the potential employees who are implicated. Since these systems tend to be scattered throughout the corporate environment, detailed data maps and an ability to discuss document retention policies is key. This effort is critical downstream as well when the focus turns to review. This early strategic collection will minimize duplication and dramatically reduce the data set.

Having thorough governance processes in place, as well as open lines of communication between legal departments, IT professionals and records managers will go a long way toward streamlining what can often be a potential data disaster, particularly when an organization has paid no heed

to data retention policies or does not know them.

STEP 3

Issue an effective legal-hold notice. Part of defining governance processes and mitigating potential litigation-related risks involves issuing effective legal holds. Spamming custodians with legalese will not make your legal hold effective. Although a notice can be sent via email, your message must clearly convey to its recipients the potential effects on the company, stress the requirement for compliance, provide concrete instructions for compliance and contain contact information from key team members if there are questions.

In addition, you should carefully consider who the sender of the notice will be. Compliance is greatly increased when the directive comes from someone with authority in the company so that employees know to take the notice seriously or risk dire consequences. Often, the sender is someone from the Office of the General Counsel or a predefined legal communication mailbox (e.g., legalhold.com). Choosing the right sender for your company is key, and will likely depend on internal organizational structure. It's important to set in place the position's responsibilities as part of your overarching legal governance plan, so the organization can respond to potential litigation with consistent and defensible legal hold language and processes.

Once the right person is chosen, the IT manager needs to coordinate with the sender to identify individuals who may have relevant information and facilitate the preservation process systematically. For remote users and laptop users who store data on local or removable drives, the hold notice should also include information of what to do/not to do with that information.

All of these steps must be evaluated against a backdrop of good faith, reasonableness, a reasonable investigation and an evaluation of the relevant facts and circumstances. Additionally, language and communication should be mapped back to the Legal GRC principles, and to overall company goals and objectives. Lastly, to make the proper impact,

these notices should be reissued on a regularly scheduled basis. That reissuance should reflect a collaborative understanding between all of the responsible individuals and departments. This team-oriented approach will encourage responsiveness.

STEP 4

Collect the data. Retrieving relevant information when there are various forms of electronic evidence in disparate locations is a significant challenge, but IT officials can manage it with proper planning. With governance, risk management and compliance processes are carefully considered, rules are consistently followed and a data map is strictly and regularly maintained, the cost and time it takes to perform data collection becomes far less exhaustive.

The organization must identify the scope and sources of collection — bearing in mind that it needs to find all required material in a fashion that avoids adversarial conflict or judicial intervention and is cost-effective. Success requires organizations to collect the data early to allow enough time for evaluation, consider the long-term benefits of collecting it in native format if there is potential for reuse in future litigation, cull the data in advance to enhance efficiency for review and production, and maintain strict records to ensure defensibility.

Moreover, retention and subsequent collection of this material must take place in a consistent, repeatable and defensible fashion. In the current litigious environment over discovery, this effort is essential. It affects the long term strategy in that later discovery problems could force unforeseen concessions and influence short-term case development by fostering a greater understanding of the issues in dispute.

STEP 5

Establish and maintain your project plan. To use the old adage, measure twice, cut once. In the legal hold context, make a detailed project plan for how you will deal with data custodians' potentially relevant information. Work closely with records managers and IT to see that it is followed. Record the plan for future use, and thoroughly explain it to

STEP 5 cont.

the IT team. The IT team must work hand-in-glove with the legal team as well as records managers, and the challenge of ensuring that the two groups are speaking the same language cannot be underestimated. Both groups must feel a sense of shared ownership in the outcome and apply their distinct skill sets to the challenges associated with notification, preservation and follow-up. In fact, modern litigation is rarely successful in anything but a environment of shared responsibility, understanding and communication.

The legal team must feel comfortable communicating with its counterparts in human resources, IT professionals, records managers and other employees across different business units, as well as the executive c-suite. Disconnected teams often operate in firefighting mode to address legal concerns, which is inefficient and can create an intolerable level of risk.

Organizations can integrate technology and automate their processes to transform the issue from a legal quandary to a business-process concern. Developing and sticking to a project plan is the best way to accomplish this.

CONCLUSION

In today's climate, a company's approach to e-discovery issues must be built around well-defined business processes that can be consistently applied. For companies facing more than occasional litigation, setting in place sound legal governance, risk management and compliance processes can eliminate human errors, produce faster response time for requests and increase consistency, thereby decreasing an organization's exposure to potential sanctions.

With a sound, defensible approach to handling e-discovery requirements that meets today's compliance requirements, legal teams can begin to lay the groundwork to build automatic approaches to legal hold and e-discovery requests. Legal teams will be more easily able to quickly identify and track legal holds, from data collection through review and pro-

duction, and spend less time reinventing processes for each new hold. Being able to explain what was done and when in a credible way to any court will help avoid a possibly devastating problem in the future.

Note: The Electronic Discovery Reference Model (edrm.net) provides more background on this issue, and a view of the entire process as a continuum. In addition, the case law is well-defined, with *Zubulake v. UBS Warburg, LLC* offering very useful guidance.

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