APRIL 2011

DOES FAILURE TO ISSUE A WRITTEN LITIGATION HOLD AMOUNT TO NEGLIGENCE?

According to Judge Scheindlin, the answer is yes. Indeed, in *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC*, 685 F. Supp. 2d 456, 488 (S.D.N.Y. 2010), this respected jurist concluded that "the failure to issue a written litigation hold in a timely manner amounts to gross negligence."[1] Several other courts, however, have rejected such an absolute rule. Although courts consistently recognize that written litigation holds are common features of litigants' efforts to comply with the duty to preserve potentially discoverable information, several have held that the failure to issue such a formal litigation hold is not necessarily a breach of that duty. Rather, these courts focus on the overall reasonableness of a party's efforts to preserve relevant evidence. The implementation of a formal litigation hold is but one factor, albeit a significant one, that these courts assess in the course of analyzing the facts relevant to the particular litigants' preservation efforts.[2]

Magistrate Judge Grimm, in an effort to provide guidance to litigants, took the opportunity in a recent sanctions case to analyze the law of all the federal circuits regarding the duty to preserve. In *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 522-23 (D.Md. 2010), after discussing the analytical approaches for the various circuits, he concluded that a standard that many, although not all, courts apply (and that he advocates more courts should follow) is whether the preservation that took place was reasonable, which depends, in part, on whether what was or was not done was proportional to the issues in the case and the burden on the preserving party.

1 Judge Scheindlin's per se gross negligence rule has practical consequences. A finding of gross negligence in failing to preserve potentially relevant evidence establishes the grounds to impose serious spoliation sanctions, including preclusion of evidence and negative inferences at trial.

2 *See, e.g., Orbit One Commc'ns, Inc. v. Numerex Corp.*, 271 F.R.D. 429, (S.D.N.Y. 2010); *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 524 (D.Md. 2010); *Jones v. Bremen High Sch. Dist. 228*, No. 08 C 3548, 2010 WL 2106640, at *7 (N.D. Ill. May 25, 2010); *Haynes v. Dart*, No. 08 C 4834, 2010 WL 140387, at *4 (N.D. Ill. Jan. 11, 2010).

Therefore, he notes, a litigation hold might not be necessary under certain circumstances because reasonableness of the conduct is the appropriate standard.

A similar conclusion was reached by Judge Conlon in *Haynes v. Dart*, 2010 WL 140387, at *4 (N.D. Ill. Jan. 11, 2010). In *Haynes*, defendants conceded that they had not issued a litigation hold until at least nine months after the duty to preserve arose. Defendants argued, however, that "they ha[d] actively taken steps to retain and disclose relevant documents throughout the pendency of the case."[3] The court, in turn, stated that "[t]he failure to institute a document retention policy, in the form of a litigation hold, is relevant to the court's consideration, but it is not per se evidence of sanctionable conduct."[4] In holding that "the absence of a large-scale litigation hold was [not] objectively unreasonable," the court took into consideration that: 1) the case was one of approximately 800 lawsuits pending against defendants, 2) a formal litigation hold in each of those cases could cause an undue burden, and 3) the plaintiffs' claims and discovery requests were broad. The court was further influenced by its conclusion that plaintiffs had not been deprived of any necessary discovery.[5]

On the other hand, in *Jones v. Bremen High School District 228*, 2010 WL 2106640, at *7 (N.D. Ill. May 25, 2010), Magistrate Judge Cox, acknowledging that a litigation hold may not be necessary in all cases, held that defendant acted unreasonably by not issuing a litigation hold.[6] The court, focused on the substance of defendant's actions, stated that "in this case there is no evidence that a simple litigation hold to preserve existing electronic mail would have placed any burden on defendant" and added that "defendant's technology department could have easily halted the auto-deletion process and asked all employees who supervised plaintiff … to preserve information."[7] Instead of doing so, defendant "directed just three employees (one of whom was at the center of plaintiff's complaints) to search their own email without help from counsel and to cull from that email what would be relevant documents."[8] Further, the court found it noteworthy that those three employees could permanently delete unfavorable email from defendant's system.[9] Given these facts, the court found that there was a "distinct possibility that emails relevant to plaintiff's case were destroyed by [defendant's] employees."[10]

Despite courts' efforts to provide some clear standards, fulfilling the duty to preserve continues to be one of the greatest challenges for all litigants. While issuing a formal litigation hold may not be absolutely necessary, the courts that have addressed the issue recognize that the issuance and implementation of a litigation hold is definitely a factor when deciding whether a litigant's preservation efforts were reasonable. Other factors that show a reasonable preservation effort include: steps taken independently of a hold to preserve, timing of the issuance of a hold, the burden that the litigation hold would impose, and whether the burden is proportional to the case overall. Perhaps most important, however, is whether any relevant evidence was lost that would have otherwise been preserved by virtue of a well-implemented litigation hold.

On a practical level, most litigants will not choose to risk defending a decision not to issue a written hold even if they have undertaken a careful and well-documented process in proposing not to do so. Instead, they will make the written litigation hold a proactive step toward avoiding the distraction and expense of defending a spoliation motion.

---

3 *Haynes*, 2010 WL 140387, at *4.

4 *Id.*

5 *Id.* This court, at least, concluded that prejudice to other parties, although not directly related to preservation procedures, should be considered when adjudicating the reasonableness of the preservation undertaking.

6 2010 WL 2106640, at *7.

7 *Id. at *7-8.*

8 *Id. at *7.*

9 *Id.*

10 *Id. at *8.*

A related question that often arises when deciding to implement a hold is whether written litigation holds are discoverable. As a general rule, written litigation holds are not discoverable when there has been no allegation of failure to preserve.[11] Typically, courts have not hesitated to find that written holds are subject to the attorney-client privilege and/or work product doctrine[12] or simply are not relevant to the litigation.[13] If there is a preliminary showing that a party failed to preserve evidence, however, courts have allowed discovery of written litigation holds, usually without even reviewing the notice *in camera*.[14]

In *Major Tours, Inc. v. Colorel*, 2009 WL 2413631, at *5 (D.N.J. Aug. 4, 2009), plaintiffs made a preliminary showing of defendants' failure to preserve relevant evidence. Defendants waited until two years after the duty to preserve arose before informing key individuals of the litigation and then waited another year and a half before writing a formal litigation hold letter.[15] Moreover, one of the defendants admitted that he did not save any of his emails, and defendants' Rule 30(b)(6) witness stated that he did not know what a litigation hold was.[16] Based on these points, the court inferred that some relevant evidence was lost and ordered production of both of defendants' letters.[17] The court agreed with the general proposition that written litigation holds are privileged and limited the production order to "only those portions of the letter[s] that refer[red] to litigation hold or preservation issues."[18] At the same time, the court maintained that "most applicable authority from around the country provides that litigation hold letters should be produced if there has been a preliminary showing of spoliation."[19]

In *United Medical Supply Company, Inc. v. United States*, 77 Fed. Cl. 257, 261-64, 273-74 (2007), plaintiffs showed that the government breached its duty to preserve evidence through its inadequate retention and undisputed destruction of documents. Although the court found the government's actions grossly negligent, rather than willful, it nevertheless ordered the government to produce "any general notices [it] sent … requesting or relating to the preservation of relevant documents."[20] The court then evaluated the written holds in deciding how to rule on plaintiffs' motion for spoliation sanctions.[21]

Unlike the courts in the previous two cases, the court in *Rambus, Inc. v. Infineon Technologies AG*, 222 F.R.D. 264, 287 (E.D. Va. 2004), focused on an overt exception to the attorney-client privilege and work product doctrine: the crime/fraud exception. The court stated that plaintiff, with the aid and advice of in-house and outside counsel, "devis[ed] and implement[ed] a plan to destroy documents as a core part of [its] patent licensing and litigation strategy."[22] Purportedly privileged documents, which provided legal advice as to the document retention policy, actually demonstrated plaintiff's plan.[23] In response to these facts and defendant's showing of plaintiff's clear failure to preserve evidence, the court held that "the crime/fraud exception should operate to pierce [plaintiff's] asserted privileges."[24]

---

11 *See Major Tours, Inc. v. Colorel*, No. 05-3091, 2009 WL 2413631, at *2 (D.N.J. Aug. 4, 2009).

12 *See, e.g., Muro v. Target Corp.*, 250 F.R.D. 350 (N.D. Ill. 2007) (attorney-client privilege); *Gibson v. Ford Motor Co.*, 510 F. Supp. 2d 1116 (N.D. Ga. 2007) (work product); *Turner v. Resort Condominiums Int'l*, LLC, No. 1:03-cv-2025-DFH-WTL, 2006 WL 1990379 (S.D. Ind. July 13, 2006) (attorney-client privilege); *Ford Motor Co. v. Hall-Edwards*, 997 So.2d 1148 (Fla. Dist. Ct. App. 2008) (both); *Capitano v. Ford Motor Co.*, 831 N.Y.S.2d 687 (N.Y. Sup. Ct. 2007) (attorney-client privilege); *Kirk v. Ford Motor Co.*, 116 P.3d 27 (Idaho 2005) (attorney-client privilege).

13 *See, e.g., India Brewing, Inc. v. Miller Brewing Co.*, 237 F.R.D. 190, 192 (E.D. Wis. 2006) (Plaintiff "has failed to persuade the court that the document retention policy … is relevant to any claim or defense alleged in the pleadings").

14 *See, e.g., Major Tours*, 2009 WL 2413631, at *2; *United Med. Supply Co., Inc. v. United States*, 77 Fed. Cl. 257, 262 (2007); *Rambus, Inc. v. Infineon Techs. AG*, 222 F.R.D. 280, 298 (E.D. Va. 2004).

15 *Id. at *1, 4.*

16 *Id. at *4.*

17 *Id. at *4-5.*

18 *Id. at *2, 5.*

19 *Id. at *5.*

20 *Id. at 262.*

21 *Id.*

22 *Id. at 298.*

23 *Id.*

24 *Id.*

As these cases show, there is no solid course of action that would ensure that written litigation holds remain protected from discovery in a given case. The Sedona Conference® Commentary on Legal Holds verifies this observation by acknowledging that "the legal hold policy and … the process of implementing the hold in a specific case … may be subject to scrutiny by opposing parties and review by the court."[25] The Commentary therefore recommends that organizations consider taking certain actions, including:

- Documenting their legal hold policy and, when appropriate, their efforts to implement specific holds;
- Avoiding the documentation of legal strategy and analysis, beyond that needed to provide instruction to the recipients, in the written litigation hold notice itself; and
- Maintaining and providing sufficient documentation "to demonstrate to opposing parties and the court that the legal hold was implemented in a reasonable, consistent, and good faith manner should there be a need to defend the process."[26]

In short, while the drafting of the litigation hold should be done with an eye to the possibility that it will be disclosed, the focus should be on writing it so that it provides meaningful instruction and guidance to the recipients and reflects a thoughtful and reasonable approach to fulfilling the particular preservation obligation. For a discussion of some of the points to be included in a litigation hold, please see "A Judicial Primer on Litigation Holds," February 2010 *Jones Day Commentary*, available at http://www.jonesday.com/judicial_primer.

LAWYER CONTACT

For further information, please contact your principal Firm representative or the lawyer listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com.

Irene Savanis Fiorentinos
Chicago
+1.312.269.4155
ifiorentinos@jonesday.com

25 11 Sedona Conf. J. 265, 284 (2010).

26 *Id.*