



# IN PRACTICE...with CNA®

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## Protection Protocol: Appropriately Managing and Responding to Legal Hold Notices

### Introduction

Lawyers are often tasked with assisting clients in responding to or complying with a Legal Hold Notice. In general terms, a Legal Hold Notice is a directive requiring the recipient of a notice to preserve and maintain evidence related to a matter which is the subject of litigation or which may become the subject of litigation in the future. A Legal Hold Notice can come from many sources. It can be issued by a corporation to various departments or individuals within the corporation; it can be issued by defense counsel to a client requesting assurances that evidence will not be lost or destroyed; and it can come from opposing counsel or an opposing party in the form of a preservation letter.

Regardless of the source, the demand for preservation of evidence in a Legal Hold Notice must be taken seriously, and compliance must be confirmed. Once a Legal Hold Notice or preservation letter is issued, failure to preserve the evidence made the subject of the Legal Hold Notice may have dire consequences in the litigation context.<sup>1</sup> While the potential penalties differ from jurisdiction to jurisdiction, the penalties for non-compliance can be significant. In some jurisdictions, the failure to preserve crucial evidence after the issuance of a Legal Hold Notice or preservation letter will result in an adverse jury charge. In other jurisdictions, the party failing to preserve evidence can be defaulted as a sanction. Still other jurisdictions go so far as to allow a direct claim, even against a third-party, for failing to preserve evidence crucial to the outcome of litigation. This article examines the best practices for assisting a client who receives a Legal Hold Notice or preservation letter.

### 1. Act Immediately

If you or your client receive a Legal Hold Notice or preservation letter from an adversary or potential adversary, act immediately, and do not procrastinate. The following paragraphs discuss the steps that should be taken to ensure compliance with the Legal Hold Notice. However, at the outset, it must be stressed that these actions should be taken immediately. Information made the subject of a Legal Hold Notice or preservation letter often can be within days, weeks, or months of being destroyed when the Legal Hold Notice is received.<sup>2</sup>

There are two principal reasons why time is of the essence. First, in some cases it is possible that the client may not have an effective legal hold policy in place, or it may not have established an effective compliance program to ensure that the policy is implemented. In such cases, it may be a race against time to preserve records before their accidental loss or destruction.

Try to think like your opposing counsel. What would your opponent be looking for? Where would your client look bad if it failed to preserve evidence?

<sup>1</sup> *Marsulex Env'tl. Tech. v. Selip S.P.A.*, Civ. A. No. 15:CV-00269, 2019 WL 2184873 (M.D. Pa. May 21, 2019)

<sup>2</sup> *Bursztein v. Best Buy*, No. 20-cv-00076 (AT) (KHP) (S.D.N.Y. May 17, 2021)

Second, some organizations may have the opposite problem: an efficient document management system with short retention policies with regard to certain documents. Moreover, some of those retention policies are put into practice automatically, such as automatic e-mail deletion. E-mails are typically held for a fairly significant period of time, but that is not the case with all clients especially once a user “deletes” the message from their regular inbox. Further, other items that may be crucial to litigation could have a much shorter retention or automatic deletion periods. For instance, security video is often deleted or overwritten in only a few days or weeks. Further, machinery or automobiles made the basis of litigation that may have been damaged in an incident are often scheduled for immediate repairs. A lawyer should always verify with the client at the outset of litigation, or upon notice of a potential claim, whether there is any evidence that could be altered or destroyed.

Often, a Legal Hold Notice is the first notice of a potential claim and thus requires immediate action. No lawyer wants to be in a situation where evidence was destroyed after receipt of a Legal Hold Notice or preservation letter because the preservation instructions did not make it to the right department or right individual immediately upon receipt. In summary, a Legal Hold Notice should be made a priority where there is any danger whatsoever of any evidence being lost, destroyed, or altered.

## **2. Interpret the Legal Hold Notice Broadly, but Instruct Your Client with Specifics**

In order to properly assist your client in responding to a Legal Hold Notice (or issuing a Legal Hold Notice to appropriate departments or divisions), you must first understand the litigation or potential litigation. Legal Hold Notices are often written in very broad, general terms. However, in order to advise your client as to the appropriate implementation of the Legal Hold Notice, you have to understand the potential evidence that may be important. For instance, you need to understand whether the case could involve internal communications, external communications, electronic files, paper files, employment records, etc.

Once you have an understanding of the case and the potential universe of evidence that may be at issue, you then need to explain to your client in very specific terms what documents must be maintained. A large corporation will not want to simply freeze all automatic e-mail deletion. Instead, your client will expect that you will provide them specific search parameters so that e-mails and other communications can be maintained in their original electronic form. You must also remind your client that, in looking at the Legal Hold Notice in a broad manner, relevant evidence can be far more than e-mails. They can include text messages, social media exchanges, and of course paper correspondence.<sup>3</sup> You must specifically instruct your clients that all such materials, whether electronic or in paper form, must be preserved. Try to think like your opposing counsel. What would your opponent be looking for? Where would your client look bad if it failed to preserve evidence? These are the areas where you must provide specific instructions to the client as to individual documents or other evidence that must be maintained. At the same time, consider your defense of the case. What evidence do you need that is crucial to your defense? You must, of course, ensure that all evidence is preserved and not just evidence that may be requested by your opponent.

Where possible, shift the burden of identifying and preserving documents to your opponent or opposing counsel. Where a broadly and generally worded Legal Hold Notice is received, particularly with regard to communications, you should advise your opponent of the search parameters utilized in compliance with the Legal Hold Notice. If opposing counsel expresses no disagreement with the parameters that you suggest, it will be difficult for him/her to complain later that you failed to preserve a sufficient number of documents or specific documents that did not meet that search criteria. If they do object, you can then shift the burden to the opponent to advise as to what they believe to be the appropriate search criteria and appropriate time period. Keep in mind that the mere fact that you preserve evidence does not make it discoverable or admissible. However, shifting the burden to opposing counsel to define the appropriate search criteria ensures that you will not be sanctioned for spoliation of evidence or violation of the Legal Hold Notice.

<sup>3</sup> *In re Gold King Mine Release in San Juan Cty., Col.*, No. 1:18-md-02824-WJ (D.N.M. Aug. 6, 2021)

### 3. Know the Recipient List

Once you have an understanding of the facts of the case and the evidence that should be maintained, it is time to determine who in the client's organization should receive a copy of the Legal Hold Notice and further instructions. Again, an understanding of the potential claim is crucial. For example, in defending an employment case, the human resources department, the supervisor of the potential claimant, and all individuals involved in the alleged adverse employment decision must be advised as to what files should be maintained. In an industrial accident case, all potential witnesses, supervisors, and all individuals involved with potential maintenance or repairs on the machinery involved should receive the notice. In a professional liability or breach of contract case, all individuals involved in the project at issue should be advised as to the scope of the Legal Hold Notice and their duties to comply.

Of course, this must be done on a case by case basis. There is no "one size fits all" instruction. You need to work hand in hand with your client to understand where files are maintained, how files are maintained, and who is responsible for maintenance of the information in order to properly advise as to the recipient list.

When possible, the litigation hold request should come from you as counsel as opposed to intra-organization communications. Instructions to individuals or departments within the organization which come directly from counsel will, in most cases, be protected by the attorney-client privilege and not subject to discovery. In the event of alleged non-compliance or a failure to properly preserve, intra-organization communications which are not attorney-client communications would likely be discoverable, and could create fodder for cross-examination and an adverse inference if strict compliance is not achieved.

### 4. Confirm Your Clients' Skills and Limitations

Once you have an understanding of the evidence to be preserved and the names of the individuals who must receive the Legal Hold Notice, you must also make sure that your clients understand how to implement the Legal Hold Notice. It is imperative that those managing the collection of information are not a party to or have a personal interest in the litigation. This is especially true dealing with electronically stored information "ESI." As noted above, ESI is often subject to automatic deletion after a certain period of time. Preserving that information in its original format may require skills beyond the capability of the individuals receiving Legal Hold Notice. Smaller clients (and even some larger clients) may not have in-house IT support, and you cannot simply assume that the recipients of the Legal Hold Notice will have the ability and understanding of how to go about preserving information, especially where it must be preserved in its native format. If your client does have IT support in-house, make sure each of the recipients understands the importance of full compliance with the Legal Hold Notice. Alternatively, satisfy yourself that the client has adequate skill and knowledge to fully comply. Otherwise, you should absolutely advise that outside IT consultants be brought in to assist. While there may be costs involved, the cost of non-compliance could easily outweigh the cost of compliance.

There is no "one size fits all" instruction. You need to work hand in hand with your client to understand where files are maintained, how files are maintained, and who is responsible for maintenance of the information in order to properly advise as to the recipient list.

## 5. Follow-up for Compliance

Once a Legal Hold Notice has been disseminated to the appropriate individuals and once the scope has been agreed upon, be sure to follow up in the days or weeks following the initial instructions to verify that each recipient of the notice has complied with the preservation request. Simply advising the client as to the documents to maintain may protect you from a future malpractice claim, but it will not protect your client in litigation if any recipient failed to comply.<sup>4</sup> The best practice is to obtain written confirmation from each recipient of the Legal Hold Notice confirming that the evidence in their possession has been properly identified and confirming the manner in which it is being preserved. If possible, all that preserved evidence should be kept in a specified location either in an electronic file or storage facility or some combination thereof. Finally, you should diary the matter for periodic follow-ups to ensure that your clients are continuing to maintain all necessary evidence. This will also allow you to release the hold once the dispute has concluded, which takes the burden off of your client for continued compliance after it is no longer necessary.

### Conclusion

There is no magic formula for compliance with a Legal Hold Notice. Each Notice must be drafted or complied with commensurate to the facts and allegations of that particular dispute. Understanding the nature of the claim and identifying the potential evidence is crucial, and identification of the recipient list is paramount. Act quickly and verify strict compliance to avoid potential sanctions and to properly serve your client.

<sup>4</sup> *In the Matter of In Re Skanska USA Civil Southeast Inc., et al.*, No. 3:20-CV-05980-LC/HTC (N.D. Fla. Aug. 23, 2021)

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