



Monday, October 1, 2012

9:00 AM - 10:30 AM

1000 – Response Required! Legal Holds for the Small and Large Enterprise

Murphy J. Burke III

Vice President & Assistant General Counsel - Litigation
Zurich Corporate Law

Dean Gonsowski

eDiscovery Counsel
Symantec Corporation

Daniel Lim

Vice President, Deputy General Counsel
Guidance Software, Inc.

Raquel Tamez

Deputy General Counsel
Computer Sciences Corporation

Faculty Biographies

Murphy J. Burke III

Murphy J. Burke III is vice president and assistant general counsel for Zurich American Insurance Company, where, in addition to other responsibilities, he manages corporate litigation.

Prior to joining Zurich corporate law, he was a trial attorney, most recently with Zurich Staff Legal, and his practice areas included insurance defense, construction litigation and products liability litigation.

He is actively involved in Zurich's pro bono program.

Mr. Burke received a BBA from Loyola University, New Orleans, and a JD from the Tulane University of Louisiana. He has also completed the National Institute of trial advocacy basic and advanced trial programs.

Dean Gonsowski

As a former general counsel and assistant general counsel, Dean Gonsowski brings over fifteen years of e-discovery consulting and legal practice experience to his position as senior e-discovery counsel for Clearwell, now a part of Symantec. He is a member of the Sedona Conference working group on electronic document retention and production (WG1), the electronic discovery reference model (EDRM) and the Association of Corporate Counsel (ACC). He has contributed articles to a number of leading industry publications including *Business Week*, *ACC Docket*, *ILTA Peer to Peer*, *Inside Counsel* and the *Legal Tech Newsletter*. He has also been quoted in a number of leading publications, including the *Financial Times*, *Forbes* and *MSNBC*.

Prior to joining Clearwell/Symantec, Mr. Gonsowski held a variety of leadership positions with Daticon, Navigant Consulting, Inc. and Fios, Inc. where he assisted law firms such as Fish & Richardson, Cooley Godward, and Gibson, Dunn & Crutcher, as well as corporations including Qwest Communications, Alcatel, and Ford Motor Company solve complex electronic discovery and records management issues.

Mr. Gonsowski received his JD from the University of San Diego School of Law and his BS from the University of California, Santa Barbara.

Daniel Lim

Daniel Lim is vice president and deputy general counsel for Guidance Software, Inc., a leading digital investigations software provider based on Pasadena, CA. Mr. Lim manages Guidance's AGC team, which consults with corporate and government clients

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on e-discovery, privacy, and digital investigations. He and the AGC team provide support to Guidance on corporate strategy, sales, product development, marketing, and legal issues relating to the company's software and services offerings. He speaks and publishes frequently on legal issues pertaining e-discovery, privacy, and security.

Mr. Lim joined Guidance Software as assistant general counsel. Prior to joining Guidance, he was an attorney in Jones Day's Trial Practice group and part of the firm's E-Discovery Committee. He also practiced litigation at McGlinchey Stafford, and Beck, Redden & Secrest. He served as a law clerk for the Honorable Vanessa Gilmore, U.S. District Court, Southern District of Texas, Houston Division.

Mr. Lim is chair of the ACC's Litigation Committee and a council member of the Texas Bar's computer and technology section. He participates in several industry thought-leadership forums, including the Sedona Conference Working Group 1, Georgetown Law Institute, and E-Discovery Institute. He serves on the executive leadership of New Life Fellowship Church of Houston.

Mr. Lim is a graduate of Columbia Law School (JD) and Southern Methodist University (BA English, BS in economics with finance applications). He has completed courses in computer forensics.

Raquel Tamez

Raquel Tamez is deputy general counsel of CSC, Inc., a Fortune 150, information technology, business process, and outsourcing services provider with 96,000 employees worldwide and \$16 billion in annual revenue. In this role, she is responsible for the management of all litigation matters. She also serves as the e-discovery counsel for the company managing all phases of the e-discovery process. Ms. Tamez is a frequent presenter on litigation management and e-discovery topics. Prior to joining CSC, Ms. Tamez was in private practice at a law firm in Dallas TX, where she represented CSC as a client.

Ms. Tamez has substantial experience advising senior executives and managers in large corporations on complex litigation matters. After starting her legal career as trial attorney in the U.S. Department of Labor Solicitor's Office, she joined Mary Kay, Inc., an international cosmetics company. She then served as vice president and corporate counsel for Affiliated Computer Services, Inc.


Ms. Tamez is an active member of several professional organizations, including D.C.'s Hispanic Bar Association. She has received national recognition as a recipient of the Hispanic Corporate Achiever Award bestowed by the HBA on corporate responsibility. Currently, Ms. Tamez is a Fellow in the Leadership Council on Legal Diversity (LCLD) talent development program.

Ms. Tamez dedicates significant time to pro bono matters, and is a regular participant in the Corporate Legal Diversity pipeline program.

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Ms. Tamez received her JD from St. Mary's University School of Law in San Antonio, TX, and her BA from The University of Texas at Austin.

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Presenters

Dean Gonsowski
Sr. eDiscovery Counsel – Symantec Corporation

Raquel Tamez
Deputy General Counsel – Computer Sciences Corporation

Murphy J. Burke III
Vice President & AGC (Litigation) – Zurich Corporate Law

Daniel Lim Vice President
Vice President & Deputy General Counsel – Guidance Software, Inc.

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Agenda

- 1 Legal hold basics
- 2 Legal hold hypotheticals (with polling)
- 3 Best practices discussion
- 4 Q/A
- 5 Appendix

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Why Legal Hold Matters?

THE LEGAL WORKSHOP
DUKE LAW JOURNAL

15 November 2010
Law Review Article

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Sanctions For E-Discovery Violations: By The Numbers

Dan H. Willoughby & Rose Hunter Jones & Gregory R. Antline

Posted in Discovery, E-discovery, Sanctions, Statistics

E-discovery sanctions are at an all-time high. We identified 230 sanction awards in 401 cases involving motions for sanctions relating to the discovery of electronically stored information (ESI) in federal courts prior to January 1, 2010. We analyzed these cases for a variety of factors, including sanctioning court, sanctioning authority, sanctioned party, sanction type, and sanctioned misconduct.¹ Our analysis indicates that although the annual number of e-discovery sanction cases is generally increasing, there has been a significant increase in both motions and awards since 2004.² Motions for sanctions have been filed in all types of cases and all types of courts. The sanctions imposed against parties in many cases are severe, including dismissals, adverse jury instructions, and significant monetary awards. Sanctions against counsel, although uncommon, are on the rise. All the while, the safe harbor provisions of Rule 37(e) of the Federal Rules of Civil Procedure have provided little protection to parties or counsel.

Sanctions at an all-time high:
up 271% since 2005

Damages awarded were as high as
\$8.8 million

Most common misconduct was
the failure to preserve


Counsel sanctions have
steadily increased since 2004

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Spoliation History

- **Armory v. Delamirie (1722)**
- *“The law, in hatred of the spoliator, baffles the destroyer, and thwarts his iniquitous purpose, by indulging a presumption which supplies the lost proof, and thus defeats the wrongdoer by the very means he had so confidentially employed to perpetrate the wrongdoing.”*



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The First Step in eDiscovery: Legal Hold

<p>1. The Trigger ("When" must a hold be initiated?)</p> <p>When a party "reasonably anticipates litigation."</p>	<p>2. The Scope ("What" must be preserved and "who" is implicated?)</p> <p>"Evidence that a party knows or should know is relevant."</p> <p>"Key Players" must be included, but IT and others should be notified as well.</p>	<p>3. The Communication ("How" must the hold be relayed?)</p> <p>Written notice of a litigation hold to key players may be required. Custodians should be periodically reminded and their compliance monitored."</p>	<p>4. The Compliance ("How" often must the Hold be refreshed?)</p> <p>The communication can't be "one and done." Periodic reminders must be sent out, particularly as the matter morphs over time.</p>
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Future Rule Changes? - Trigger


- The duty to preserve can be triggered when litigation is initiated, “reasonably anticipated,” or “reasonably foreseeable.”
- “For the purposes of a preservation rule, however, we suggest that the Committee might want to consider more of a bright line standard such as litigation that is ‘reasonably certain’.”




Future Rule Changes? -- Culpability

- FRCP 37 could be amended to increase the required level of culpability before sanctions could be imposed:
- “the party’s failure to preserve discoverable information was willful or in bad faith and caused [substantial] prejudice in the litigation.”

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Acme Heavy Industries, Inc. v. Zenith Sumo

Wrestling with Notice, Procedure and Policy

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Let's Meet Acme!

- Small company with 100 employees
- Promotes Sumo matches in American Midwest

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Zenith: Danger, Opportunity or Both?

- Zenith – a rival Sumo promoter
- Rumors about “fixed” matches
- Acme's lunch with *The Sumo Tattler*
- Chance to cash in?




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Lawyer up!

- USDC – Northern Mariana Islands
- Acme - Subpoenas and depositions
- Acme Intervenes



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Question One

Acme should have issued a litigation hold:

1. After the lunch.
2. When it first learned of the law suits.
3. When it filed its intervention.
4. Not until it receives discovery.

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Pension Committee **685 F. Supp. 2d 456**

- *[T]he duty to preserve evidence arises when a party reasonably anticipates litigation.*
- *A plaintiff's duty is more often triggered before litigation commences, in large part because plaintiffs control the timing of the litigation.*

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Discovery and Response

- Written discovery
- Oral instruction, but no written hold.
- Can't find all of the documents.
- Motion to compel and for sanctions.

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Question Two

Is no written hold a problem?

1. Yes – litigation holds should be in writing to avoid sanctions.
2. No – circumstances dictate whether holds should be in writing.

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Steuben Foods **2011 WL 1549450**

[T]he requirement of a written litigation hold notice, as stated in the Pension Committee case, as a ground to presume or infer loss of relevant documents has not been adopted in this district.


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Ms. Earline

- Ms. Earline is Acme's document retention policy.
- Goes through all documents and keeps what she thinks are important; destroys the rest.
- Documents destroyed that are responsive to discovery.


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Question Three


Is using Ms. Earline as a document retention policy a problem?

1. No problem – you can run your business any way you want.
2. Yes a problem - you can run your business any way you want, but don't hide behind Ms. Earline when things go south.


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Adams v. Dell


621 F. Supp. 2d 1173

- *[A] litigant is not required to simply accept whatever information management practices a party may have.*
- *The absence of a coherent document retention policy is a pertinent factor to consider when evaluating sanctions.*


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Catherine O. Aragon v. Ye Olde Henry VIII Eaterie

*A Turkey Leg, a Tankard of Mead,
and Thou, My Queen*

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A Faire Feast Gone Much Awry

- Renaissance-themed buffet.
- COA struck in the head by a turkey leg that another diner hurled at her.
- “Simmer down” – to no avail.
- COA struck in the head a second time, but with a pewter tankard of mead.
- Assistant manager, first aid, incident report

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Revenge should have no bounds. --*Hamlet*

- Catherine lawyers up.
- Her lawyer writes a letter to Ye Olde - making a claim and document preservation notice.
- Suit – discovery – no hold.

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Question One

When should Ye Olde have realized that it was under an obligation to preserve documents relative to Catherine's claim?

1. At the time of the personal injury, since a claim was reasonably foreseeable even then.
2. When it received the letter from Catherine's lawyer.
3. When Catherine sued it.
4. When it received discovery.

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Adams v. Dell **621 F. Supp. 2d 1173**

In the 1999 – 2000 environment...[defendant] should have been preserving evidence.

Why, may not that be the skull of a lawyer? Where be his quiddities now, his quillities, his cases, his tenures, and his tricks? --*Hamlet*

- Electronically stored synopsis of the accident report, but not the original hand-written report.
- Catherine claims: handwritten report - the manager saw the patron throw the turkey leg and tankard at Catherine, details not in synopsis.

Question Two

Catherine files a motion for sanctions (adverse presumption). At the hearing:

1. Ye Olde has the burden of proving exactly what the handwritten report contained and that its loss would not prejudice Catherine's case
2. Despite Ye Olde's negligence in destroying the document, Catherine nonetheless has to prove that her case was prejudiced by the loss of the document.

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Question Three

What factors could Ye Olde rely on in opposing Catherine's motion?

1. The failure of Ye Olde to issue a litigation hold is immaterial.
2. Catherine has no evidence at all that the hand written report states what she claims it states.
3. Since Ye Olde had the computer synopsis, the hand written report was not relevant.

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Whitney v. JetBlue 2008 WL 2156324

Here, although there was a disturbing amount of carelessness on defendant's part in the retention and production of the IIRs, plaintiff has not demonstrated that the information in the handwritten IIR would be favorable to her case, or that she has been prejudiced by its absence.

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Legal Hold Process - Best Practices

- Planning
- Timing and Prioritizing
- Issuing a Written Legal Hold
- Elements of a Legal Hold Notice
- Meeting and Confering
- Identifying and Interviewing Custodians
- Preserving in Place v. Preserving by Collection
- Monitoring Compliance with a Legal Hold
- Reissuing the Legal Hold
- Accounting for Custodian Mobility and Turnover ("Off-boarding")
- Releasing the Legal Hold
- Communicating, Documenting, and Auditing
- Holding Relevant Stakeholders Accountable
- Following the Legal Hold Process Consistently and Repeatedly Results in Defensibility
- Planning for Transparency


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Questions?


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Appendix – Legal Hold Cases (part 1)

Citation	Trigger	Scope (Employees)	Scope (Content Sources)	Compliance	Sanction Issued
<i>Apple Inc. v. Samsung Electronics</i> (N.D. Cal. July 25, 2012)	[2010 Notice] 19 days after pre-filing negotiations [2011 Notice] 6 days after filing	[2010 Notice] 27 employees [2011 Notice] 2,300 employees	Advises employees to manually retain potentially relevant emails, but does not turn off auto-delete	Failure to follow-up on compliance and turn off auto-delete warranted adverse inference	Adverse inference (in favor of Apple)
<i>Chin v. Port Authority of New York & New Jersey</i> , (2nd Cir. July 10, 2012).	N/A (Should have issued after filing of EEOC charge)	N/A	N/A	Failure to issue a litigation hold does not constitute gross negligence per se	Affirmation of no sanctions
<i>E. I. DuPont de Nemours v. Kolon Industries</i> (E.D. Va. July 21, 2011).	1 st notice: 2 days after knowledge of filing 2 nd notice: One week later	*Only to certain upper-level employees" // 2 nd Notice sent companywide	Insufficient instruction was given to employees re: preserving evidence. Second notice sent to Korean employees but only in English.	Counsel failed to monitor compliance and key employees deleted files and emails after being apprised of duty to preserve	Attorneys' fees and costs incurred in moving for sanctions AND adverse inference regarding spoliation (in favor of DuPont)
<i>Green v. Blitz USA</i> , 2011 WL 806011 (E.D. Tex. Mar. 1, 2011).	No litigation hold was ever communicated, instead they began systematically destroying evidence in 2004 (this lawsuit was filed in 2007). In 2009 Blitz began "scrubbing its servers" to satisfy discovery obligations.	Company-wide emails	Advises employees to <i>double delete</i> all emails as often as possible	Compliance with systematic destruction of evidence by rotating backup tapes every 2 weeks so they would be overwritten	\$250,000 in sanctions paid to plaintiff and potential \$500,000 sanction if Blitz fails to promulgate a memo to every plaintiff in every lawsuit it has been involved in for the last two years. In addition, Blitz must file this memo with its first pleading or filing for every additional action in the next five years.






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Appendix – Legal Hold Cases (part 2)

Citation	Trigger	Scope (Employees)	Scope (Content Sources)	Compliance	Sanction Issued
<i>Northington v. H & M International</i> (N.D. Ill. Jan. 12, 2011).	Fifteen months after filing of charge	Limited to "interested employees"	Copied and preserved plaintiff's HR file and very limited amounts of ESI at only one facility	Hold was either ignored or too little too late	Reasonable costs and fees for plaintiff's preparation of motion for sanctions AND instruction to jury regarding defendants obligation and failure to preserve (DF also required to re-do search to find responsive documents to plaintiff's original request for production V in order to meet its discovery obligation)
<i>Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities</i> , 685 F. Supp. 2d 456 (S.D.N.Y. 2010).	2 years after obligation triggered in 2005	Did not properly include key players like board members	Insufficient instruction, did not direct employees to preserve all relevant records or provide collection mechanism	No supervision	Rebuttable adverse inference that plaintiff had been grossly negligent in fulfilling discovery obligations AND attorney's fees and costs associated with reviewing the declarations submitted, deposing them, and bringing this motion.
<i>Orbit One Communications, Inc. v. Numerex Corp.</i> , 271 F.R.D. 429 (S.D.N.Y. Oct. 26, 2010).	<1 month of receiving letter threatening litigation	Orally to an individual, email to three executives with instructions to forward to anyone in the company with possession of relevant files	Insufficient instruction, Primary responsibility for preserving information was left to the discretion of an interested party	No compliance, data was removed from servers after the hold imposed	Sanctions denied – insufficient evidence that relevant information was destroyed


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Planning

- Understanding where and what types of data and documents are involved and taking the time well in advance to appropriately identifying the resources needed to preserve and collect them is key to an effective Legal Hold process.
- Less error-prone and less costly if you plan ahead and address the Legal Hold process proactively.
- Identify and get involved, all the relevant stakeholders: Legal, IT/Forensics, RIM, HR, Compliance/Data Privacy, Data Security and Business Units as appropriate.
- Consider retaining e-Discovery Consultant/Counsel as value-add:
 - wider range of expertise/experience
 - neutral facilitator


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Timing and Prioritizing

- An effective Legal Hold Process includes procedures/guidelines for indentifying when the obligation to preserve arises.
 - What constitutes a "trigger event" for the Company.
- Due to the transitory nature of some ESI, its critical to act quickly to prevent the destruction, modification, or other loss of data due to normal operations and the action/inaction of potential relevant custodians.
- Know the following about your data:
 - where it resides;
 - the format or type of the data;
 - the retention cycle; and
 - the window of opportunity for preserving or collecting it within the Company's acceptable levels of risk.
- Prioritize preservation efforts by identifying early on which data is at risk for spoliation.



Elements of a Legal Hold Notice

- Clearly instruct individuals not to destroy records.
- Describe the substantive scope of what must be preserved.
- Describe the potential types and sources of the material to be preserved.
- Provide instructions for preservation and/or collection.
- Inform recipients of their legal obligations and the potential penalties for noncompliance
- Provide instructions for communicating about the Legal Hold.



Meeting and Confering

- The duty to preserve is triggered before the FRCP Rule 26(f) Meet and Confer occurs but use this opportunity to limit the scope of preservation, collection and production and discovery, generally, to more reasonable and cost-justified parameters.

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Identifying Custodians

- Identify sources of discoverable information such as
 - “Key Players” identified in the litigation or investigation
 - Custodians of Relevant Information such as IT professionals, assistants and support staff
 - Newly Identified Custodians
 - Managers of Noncustodial Data such Records Information Management (RIM), IT Administrators (those responsible for automated janitorial functions like automated deletion of email)
 - Third Parties (separate Legal Hold should be used)

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Interviewing Custodians

- Custodian Questionnaire
- Individual Custodian Interviews
 - Planned series of questions to identify
 - types of relevant records;
 - sources for these records; and
 - how to access these sources
- IT Personnel Interviews
 - what systems are used;
 - where information may be stored;
 - what document retention policies are in place; and
 - identification of relevant data/databases;
 - how data is stored;
 - whether data is accessible or inaccessible;
 - what the archival process for the data is;
 - what data is routinely retained; and
 - whether hardware is ever recycled or stored; how backup tapes are retained, rotated, or destroyed

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Preserving in Place v. Preserving by Collection

- Preservation of records must actually be implemented after the Legal Hold is issued.
- Various ways to manage electronic data but the end result: a complete set of relevant documents.
- One approach: **preservation in place**
 - Involves instructing custodians about what records must be preserved
 - Low cost option but places heavy-reliance on each custodians.
- Another approach: **preservation by collection**.
 - Involves going to reach custodian and collecting all potentially relevant data
 - More costly but avoids risks associated with custodian-driven preservation.
 - **Key word search**
 - A variation of the preservation by collection
 - Run queries across enterprise systems to preserve electronically
- Third approach: **hybrid preservation**
 - Preserve in place for all custodians and collect for key players and/or high-risk custodians.
- Preserve in Native Format.
 - Avoid modifying metadata by opening, printing, copying, or forwarding files.

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Release of a Legal Hold: Guidelines

- Evaluate any applicable protective order and any return/destruction requirements.
- Return produced data from opposing and third parties, including co-counsel, experts, and e-Discovery vendors.
- Determine whether the Company can use the data and documents in other cases (collection dataset or production dataset).
- Evaluate whether data and documents are subject to legal hold(s) for other matters.
- Set the appropriate time period and manner of preservation of the data, if any.
- Appropriately dispose of other collected, reviewed, and produced data.
- Distribute Release Notices to all individual custodians and systems custodians who had been subject to the legal hold.

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Communicating, Documenting, Auditing

- Effective data preservation is a team effort.
- Clear lines of communications across the Company and with outside service providers relating to roles, responsibilities, specific tasks, deadlines is critical.
- Document actions taken during the Legal Hold Process:
 - the forms and timing of legal holds notices; and
 - follow-up steps taken, by whom, when and why; and
 - reasons for not preserving/collecting certain data.
- Create an audit trail to keep track of completed and outstanding tasks and provide sufficient evidence to rebut allegations of spoliation, negligence or other discovery failures.

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Holding Relevant Stakeholders Accountability

- The Legal Hold Process is only as strong as the weakest link in the chain.
- Clearly identify each person/stakeholder's role, responsibilities, and the procedures to follow.
- Set up various checks and balances.


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Consistency + Repeatability = Defensibility

- An effective Legal Hold Process is one that is built upon defined processes and policies and appropriate and timely implementation, communication, training, enforcement, and monitoring for compliance.
- The defined processes and policies must be followed consistently and repeatedly in order to be effective and ultimately defensible.
- Create a “playbook” that memorializes in detail the Company’s overall e-discovery process/operations including the Legal Hold Process.
- Develop and bake into the Legal Hold Process a feedback mechanism and continuous improvement program.


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Planning for Transparency

- At some point in time, the Company’s internal processes and actions may be placed under scrutiny and the Company may be asked to produce the records of identification, preservation, collection, and production processes and activities.
- Be careful not to include potentially-privileged information like attorney notes and legal impressions in the same lists/reports that may need to be produced to the Court or opposing counsel.