# THE DUTY TO PRESERVE IN TODAY'S DIGITAL AGE: MINIMIZING EXPOSURE TO DISCOVERY SANCTIONS BY MEETING YOUR ETHICAL OBLIGATIONS

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# THE DUTY TO PRESERVE IN TODAY'S DIGITAL AGE: MINIMIZING EXPOSURE TO DISCOVERY SANCTIONS BY MEETING YOUR ETHICAL OBLIGATIONS

## I. INTRODUCTION – SCOPE OF ARTICLE

Over the past decade, court decisions related to electronic discovery and preservation of evidence have highlighted the duties of counsel in four key areas: competence, communication, diligence, and supervision. Numerous decisions addressing alleged preservation or other discovery failures have emphasized the need for attorneys to understand their clients and their clients' Information Technology infrastructure. While many courts express their preference for handling disputes on their merits and judges often voice their reluctance for issuing sanctions, many cases demonstrate that courts have imposed sanctions ranging from monetary fines, adverse jury instructions, evidentiary exclusions, dismissal of claims, referral to the relevant State Bar authorities, or other censure when parties or their counsel have failed to adequately preserve evidence.

Most courts do not invoke the American Bar Association's ("ABA") Model Rules of Professional Conduct ("Model Rules") when addressing disputes related to the adequacy of a litigant's preservation or discovery efforts. Instead, judges are largely focused on a party's alleged missteps or shortcomings and their relationship to—or deviation from—rules governing procedure, the court's standing orders, or the parties' agreed upon discovery protocols. In many instances, however, when a court finds that a party's actions are not in accord with the requirements of the rules or other authority, such discord often can be traced to a lapse in one of the four key areas identified above.

As the law regarding the duty to preserve electronic evidence is constantly evolving and every state does not have the same ethics rules, it is important to note that this paper is not intended to provide a state-by-state survey of applicable ethical rules, nor does it attempt to suggest that there is one case, ruling, or jurisdiction that sets forth national standards on how every counsel should approach eDiscovery in every case. Indeed, most cases addressing allegations of spoliation, discovery misconduct, or other failures highlight the fact that an examination of the allegations is, by necessity, a case-by-case assessment based on the specific facts and circumstances presented in a particular matter.

This paper (1) describes the Model Rules identified above as well as others related to eDiscovery, (2) reviews recent law that touches upon the duties of counsel and illustrates common pitfalls in carrying out the duty to preserve, and (3) offers some best practices that organizations and their counsel should consider implementing in an effort to reduce the risks and the myriad challenges associated with preserving evidence in today's digital age.

## II. COUNSEL'S ETHICAL DUTIES

Recognizing that technology pervades nearly all facets of legal work, in 2012, the ABA's Commission on Ethics 20/20 (the "20/20 Commission") recommended, and the ABA House of Delegates adopted, updates to the Model Rules. The 20/20 Commission indicated that such updates were necessary because "technology has irrevocably changed and continues to alter the

practice of law in fundamental ways."[2] The 20/20 Commission went on to state that, "[l]awyers must understand technology in order to provide clients with the competent and cost effective services that they expect and deserve."[3] The 20/20 Commission recommended changes to only one of the Model Rules identified below. Despite the fact that additional updates have not occurred in relation to the other duties mentioned below, their purpose and intent must be considered in context with the updates to the language regarding attorneys' competence in the digital age.[4]

### A. Competence

Model Rule 1.1 requires that lawyers provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. "Reasonable" or "reasonably," when used in relation to conduct by a lawyer, denotes the conduct of a reasonably prudent and competent lawyer.

Comment 8 to Model Rule 1.1 (formerly Comment 6) relates to "Maintaining Competence." As part of the 20/20 Commission's efforts, this Comment was updated and now states that "[t]o maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, **including the benefits and risks associated with technology**…."[5]

The 20/20 Commission noted that practicing law in today's digital age "now require(s) lawyers to have a firm grasp on how electronic information is created, stored, and retrieved" and stated that "lawyers need to know how to make and respond to electronic discovery requests and to advise their clients regarding electronic discovery obligations."[6]

While the 20/20 Commission did not expand more granularly on what types of technological knowledge a lawyer must have in order to meet her duty of competence, a 2008 publication by the Litigation Section of the State Bar of California suggests that "Every Litigator Must Understand" the following topics, which are described as "Basic Knowledge" and asks, "[d]o you have a working knowledge of the following concepts that today's litigators must understand?

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[2] ABA Commission on Ethics 20/20, REPORT TO THE HOUSE OF DELEGATES: INTRODUCTION AND OVERVIEW, at 3 (Aug. 2012), *available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120508_ethics_20_20_final_hod_introdution_and_overview_report.authcheckdam.pdf* ("20/20 Commission Report").

[3] *Id.*

[4] Indeed, one recent instance where the Massachusetts Board of Bar Overseers was called upon to assess an attorney's actions (or inaction) in advising a client on preservation of evidence found that the attorney violated his ethical duties related to communication and competence in first failing to advise his client on the duty to preserve and then providing advice that allowed for spoliation of relevant evidence "without adequate research or associating with or conferring with experienced counsel, and without any attempt to confirm the nature and content of the [client's] proposed deletions…." Public Reprimand No. 2013-21, at 3 (Oct. 9, 2013), *available at http://www.mass.gov/obcbbo/pr13-21.pdf.*

[5] *http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence/comment_on_rule_1_1.html* (emphasis added).

[6] 20/20 Commission Report, at 4.

• Metadata, RAM, computer logs
• Native format, TIFF, PDF
• Fields, queries, & relational databases
• Preservation duties, letters, and orders
• Spoliation & its remedies
• Backup tapes, data archives and storage
• Keyword, contextual and concept search
• Hard drive, server, flash memory
• Computer and network forensics
• Spreadsheet formulas
• Forensic copy
• ESI: electronically stored information
• Records management"[7]

Notwithstanding the breadth of knowledge that lawyers allegedly must master offered by the State Bar of California, the 20/20 Commission recognized that there are different ways for a lawyer to meet her duty of competence even if she is not an expert in technology or would not consider the bullet points listed above as "Basic Knowledge." Specifically, the 20/20 Commission stated, "[i]n some situations, a matter may require the use of technology that is beyond the ordinary lawyer's expertise. For example, electronic discovery may require a sophisticated knowledge of how electronic information is stored and retrieved. Thus, another development associated with technology is that lawyers are increasingly disaggregating work by retaining other lawyers and nonlawyers outside the firm (i.e., outsourcing work to lawyers and nonlawyers) to perform critical tasks."[8]

As described in the next section regarding recent case law in this area, the failure of an attorney to be technologically competent can have serious consequences for the client, and in extreme cases could lead to sanctions against the lawyer. To that end, a lawyer must recognize that being competent includes knowing when she needs help and that it is not only appropriate but also very sound practice to seek out and retain a more knowledgeable or experienced service provider or law firm when necessary.

### B. Diligence

Model Rule 1.3 requires lawyers to act "with reasonable diligence and promptness in representing a client."[9] There were no updates to this rule or its related comments as part of the 20/20 Commission's efforts.

### C. Communication

Model Rule 1.4 contains several obligations in relation to lawyers communicating with their clients. Paragraph (a)(4) requires a lawyer to "promptly comply with reasonable requests for information."[10] Comment 4 to Model Rule 1.4 states, "[w]hen a client makes a reasonable

[7] E-Discovery Pocket Guide – What Every California Litigator Must Know (available at *http://litigation.calbar.ca.gov/Portals/21/documents/2008_e-discovery-guide.pdf*).
[8] 20/20 Commission Report, at 5.

request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. A lawyer should promptly respond to or acknowledge client communications."[11]

### D. Supervision

Lawyers are responsible for supervising nonlawyers throughout the e-discovery process. These obligations are found in Model Rules 1.13 (for in-house attorneys), and 5.1 and 5.3 for outside counsel. Essentially, these rules require that if an attorney delegates certain work to nonlawyers, such as paralegals, a "discovery team", or IT personnel, the attorney ensures that the nonlawyers perform the work that has been delegated to them in compliance with the Rules of Professional Conduct. This obligation may apply to circumstances where an attorney delegates certain portions of a legal hold process to a nonlawyer. Here, the attorney should ensure that the nonlawyer is knowledgeable, experienced, and adequately trained to do such work in a thorough and accurate matter. Further, these obligations may impose a duty to audit or monitor the client's and/or its employees' understanding of and compliance with instructions to preserve evidence.

## III. CASE LAW REGARDING THE DUTY TO PRESERVE

Although case law not uniform in this regard, it if often stated that duty to preserve begins when there is "reasonable anticipation" of litigation or a regulatory proceeding (a "matter"). Once the duty to preserve has been "triggered," an organization's regular records and information retention policies must be suspended as necessary to ensure that relevant information is not lost or destroyed. The process by which the preservation obligation is carried out is generally referred to as a "Legal Hold."[12]

When carrying out the Legal Hold process, counsel must determine what to preserve. While the scope of preservation will vary from case to case, the obligation to preserve requires retention only of *relevant* information.[13] There are, however, inherent challenges in implementing a Legal

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[9] *http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_3_diligence.html*

[10] *http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_4_communications.html*

[11] *http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_4_communications/comment_on_rule_1_4.html*

[12] "Legal Hold," as used in this paper, refers to the *process* undertaken to preserve evidence that is relevant to an anticipated "matter." An organization may issue a written Legal Hold Notice to its employees or others as part of its overall Legal Hold process.

[13] *See, e.g.,* The Seventh Circuit's Proposed Standing Order Relating to the Discovery of Electronically Stored Information, Principle 2.04 (a) ("Every party to litigation and its counsel are responsible for taking reasonable and proportionate steps to preserve relevant and discoverable ESI within its possession, custody or control. Determining which steps are reasonable and proportionate in particular litigation is a fact specific inquiry that will vary from case to case. The parties and counsel should address preservation issues at the outset of a case, and should continue to address them as the case progresses and their understanding of the issues and the facts improves.")*;* THE SEDONA GUIDELINES FOR MANAGING INFORMATION AND RECORDS IN THE ELECTRONIC AGE, SECOND EDITION (2007), Principle 2 ("When balancing the cost, burden, and need for electronically stored information, courts and parties should apply the proportionality standard embodied in Fed. R. Civ. P. 26(b)(2)(C) and its state equivalents, which

Hold. For instance, it is often difficult to determine what efforts are reasonable and what evidence may be relevant early in any given matter. In addition, the volume and distribution of ESI and the various means by which it is created, managed, and retained throughout the company often further complicates the Legal Hold process. Finally, because a court's evaluation of a party's preservation efforts are necessarily made in hindsight, the party must be prepared to persuade the court to evaluate the adequacy of its efforts approach with reference only to the facts known to the party at the time decisions were made as to what was reasonable and relevant.

Once the preservation duty is triggered, companies often issue written Legal Hold Notices. Depending upon the nature of the dispute and the circumstances of the claims, the Legal Hold Notice may need to address data in multiple locations (e.g., network, workstation, laptop, mobile devices, databases, etc.), and provide specific instructions on how to accomplish appropriate preservation.

Rather than requiring perfection in the preservation process, courts require litigants to engage in good faith and reasonable efforts to identify and preserve evidence relevant to a dispute.[14] Courts recognize that a party's duty to preserve unique, relevant evidence does not require freezing of *all* electronic documents and data.[15] Furthermore, "[a] party's duty to preserve specific types of documents does not arise unless the party controlling the documents has notice of those documents' relevance."[16]

Where a litigant has violated its preservation obligations, whether through destruction of evidence or by failure to disclose responsive documents, many courts have imposed discovery sanctions against the offending party and, in some cases, its counsel. When a party has engaged

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require consideration of the technological feasibility and realistic costs of preserving, retrieving, reviewing, and producing electronically stored information, as well as the nature of the litigation and the amount in controversy.").

[14] *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am., LLC*, 685 F. Supp. 2d 456, 476-77 (S.D.N.Y. 2010) ("*Pension Committee"*) ("Courts cannot and do not expect that any party can meet a standard of perfection . . . . courts have a right to expect that litigants and counsel will take the necessary steps to ensure that relevant records are preserved when litigation is reasonably anticipated, and that such records are collected, reviewed, and produced to the opposing party"); *see also Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010) ("Whether preservation or discovery conduct is acceptable in a case depends on what is reasonable, and that in turn depends on whether what was done—or not done—was proportional to that case and consistent with clearly established applicable standards."); *see also The Sedona Guidelines for Managing Information and Records in The Electronic Age, Second Edition* (2007), Comment 5.e. ("[t]he scope of what is necessary to preserve will vary widely between and even within organizations depending on the nature of the claims and information at issue.").

[15] *Wiginton v. CB Richard Ellis, Inc*., 2003 WL 22439865, at *4 (N.D. Ill. Aug. 9, 2004) ("A party does not have to go to extraordinary measures to preserve all potential evidence … [i]t does not have to preserve every single scrap of paper in its business.") (*citing China Ocean Shipping (Group) Co. v. Simone Metals Inc.*, 1999 WL 966443, at *3 (N.D. Ill. Sept. 30, 1999) and *Danis v. USN Communications, Inc*., 53 Fed. R. Serv. 3rd 828, 2000 WL 1694325, at *32 (N.D. Ill. Oct. 20, 2000)); *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003) (organizations need not preserve "every shred of paper, every e-mail or electronic document, and every back-up tape"); *Wm. T. Thompson v. Gen. Nutrition Corp.*, 593 F. Supp. 1443, 1455 (C.D. Cal. 1984) ("While a litigant is under no duty to keep or retain every document in its possession once a complaint is filed, it is under a duty to preserve what it knows, or reasonably should know, is relevant to the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery, and/or is the subject of a pending discovery request.").

[16] *In re Old Banc One Sec. Litig.*, 2005 WL 3372783 at *3 (N.D. Ill. Dec. 8, 2005); *see also Cohn v. Taco Bell Corp.*, 1995 WL 519968 at *5 (N.D. Ill. Aug. 30, 1995).

in spoliation, a court ordered sanction can be requested by the requesting party and ordered by the court and in one or more of the following categories:

1. use of an adverse inference jury instruction for lost or destroyed evidence;
2. exclusion of evidence at trial;
3. admission of evidence of discovery misconduct at trial;
4. monetary penalties, including an award of attorney's fees and costs;
5. striking the pleadings of the party not in compliance, resulting in dismissal if the plaintiff is the offending party;
6. entering a default judgment in favor of the nonoffending party; or
7. imposing criminal penalties, including criminal and civil contempt orders and indictments for obstruction of justice.

The severity of the sanction awarded typically will vary depending upon the state of mind of the spoliator (i.e., culpability) and the degree of prejudice suffered by the other party or parties, though developing jurisprudence in this area does not always require a finding of willfulness or bad faith on the producing party or prejudice to the requesting side to impose sanctions. Also, courts have often awarded a combination of the above sanctions, frequently imposing a monetary penalty in conjunction with one of the other sanctions.

Often, it is through one party's allegations that another party's preservation efforts are insufficient that a court is asked to examine the efforts expended by a litigant as part of its Legal Hold process. Important legal issues with respect to the implementation of a Legal Hold include the following:

- **Taking Appropriate Action when the Duty to Preserve has been Triggered.** In light of the varying (and even contradictory) case law regarding the standards to be applied to a parties' preservation efforts, there is no single blueprint for identifying events that trigger the duty to preserve and what a party's or counsel's next steps must be. Once the duty to preserve has been triggered, courts have found that "[t]he preservation obligation runs first to counsel, who has 'a duty to advise his client of the type of information potentially relevant to the lawsuit and of the necessity of preventing its destruction.'"[17] Determining whether an event or series of events trigger the duty to preserve is not a static or formulaic inquiry. Instead, the decision and approaches taken to preserve evidence must be made on a case-by-case basis and with informed judgment in light of the particular facts and circumstances that exist at the time, and upon the determination that there is a credible probability that the organization will become involved in a matter.[18] In addition, counsel must be made aware if her client is contemplating *bringing* a legal action, as its preservation obligation is likely triggered before the lawsuit is filed. In most cases where a litigant's

[17] *In re NTL, Inc. Securities Litigation*, 244 F.R.D. 179, 197-98 (S.D.N.Y. 2007) (quoting *Chan v. Triple 8 Palace, Inc.*, 2005 WL 1925579, *6 (S.D.N.Y. Aug. 11, 2005); *see also Fayemi v. Hambrecht and Quist, Inc.*, 174 F.R.D. 319, 326 (S.D.N.Y.1997).

[18] *See generally* THE SEDONA CONFERENCE®, THE SEDONA CONFERENCE® COMMENTARY ON LEGAL HOLDS: THE TRIGGER & THE PROCESS, 11 SEDONA CONF. J. 265 (2010); *see also id* at 276-77 (describing factors to consider when evaluating whether the duty to preserve may be triggered and citing cases).

preservation efforts are being challenged, the court is requested to (and often will) determine when the duty to preserve arose and assess whether the party's preservation steps were timely and appropriate.

- **The Content of the Legal Hold Notice**. While at least one court has expressed that "the failure to issue a written Legal Hold Notice constitutes gross negligence because that failure is likely to result in the destruction of relevant information,"[19] this view has been rejected by some courts based on the particular facts and circumstances pending before them when evaluating a party's preservation efforts.[20] Still, it is likely a best practice to issue a written Legal Hold Notice unless the particular circumstances of an issue or matter suggest that a written Legal Hold Notice may negatively impact preservation measures or where it may be unnecessary to issue such a notice if appropriate preservation efforts may be accomplished by other means. When a written Legal Hold Notice is issued, it should provide a sufficient description of the subject matter and categories of information to be retained, as courts have been critical of preservation efforts when the Legal Hold Notice does not properly reflect the subjects at issue in a particular matter or the scope of the preservation obligation.[21]

- **Identifying and locating relevant information sources in determining the scope of the Legal Hold Notice**. The Legal Hold Notice does not need to reach all employees, but must reach those who are likely to have possession, custody,

[19] *Pension Committee*, 685 F. Supp. 2d at 464.

[20] *See Chin v. Port Auth. of N.Y. & N.J.*, 685 F.3d 135, 162 (2d Cir. 2012) (failure to institute a written litigation hold is not gross negligence *per se*, but one factor for consideration in determining whether discovery conduct is sanctionable); *Steuben Foods, Inc. v. Country Gourmet Foods, LLC*, 2011 WL 1549450, at *5 (W.D.N.Y. Apr. 21, 2011) ("the 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"); *Orbit One Commc'ns Inc. v. Numerex Corp.*, 271 F.R.D. 429, 441 (S.D.N.Y. 2010) ("under some circumstances, a formal litigation hold may not be necessary at all"); *Kinnally v. Rogers Corp.*, 2008 WL 4850116, at *6 (D. Ariz. Nov. 7, 2008) (holding that "[w]hile a party must 'put in place a 'litigation hold' to ensure the preservation of relevant documents, there is no requirement that it must be written").

[21] *See, e.g., Pension Committee*¸ 685 F.Supp. 2d at 473 (counsel's communications to its clients in 2004 by telephone, email, and memorandum instructing clients to gather hard copy and electronic documents for the purposes of drafting the complaint, but not otherwise informing clients of the duty to preserve did not "meet the standard for a litigation hold"); *Wiginton v. Ellis*, 2003 WL 22439865, at *5 (N.D. Ill. Oct. 27, 2003) (finding that the initial notice sent to employees to preserve only those documents pertaining to the named plaintiff in a class action employment suit was insufficient, as it did not properly reflect the scope of the preservation obligation; broader revised notice was sufficient); *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 169 F.R.D. 598, 612, 615-16 (D.N.J. 1997) (finding that defendants' earlier preservation hold notices were inadequate and that senior management should have advised employees of the pending litigation, as well as provided them with a copy of the court order and informed them of their potential civil or criminal liability for noncompliance); *see also* THE SEDONA CONFERENCE®, THE SEDONA GUIDELINES: BEST PRACTICE GUIDELINES & COMMENTARY FOR MANAGING INFORMATION & RECORDS IN THE ELECTRONIC AGE (2007), at 49 ("The [legal hold] notice need not be, and most likely should not be, a detailed catalog of documents to be retained, but instead should provide a sufficient description of the subject matter of the documents to be preserved that would allow the affected document custodians to segregate and preserve identified information and records.")

or control of relevant information.[22] It is critical that skilled counsel work and communicate with representatives from the company's business and IT departments to conduct an analysis that addresses: (1) the claims and facts of the case; (2) the key people who may possess relevant information; (3) the key people who know where and how information is stored; and (4) the locations and forms of relevant ESI.[23] While counsel has final responsibility for the Legal Hold, input from other disciplines can be invaluable in helping to determine its proper scope. An appropriately tailored Legal Hold will help minimize the burden and cost to the company and its employees. Counsel must use their experience, information obtained from the client, and discretion to develop practices and procedures that properly determine the scope of the preservation duty, while also providing adequate notice, instructions, and supervision to those who are likely to have relevant materials.[24]

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[22] *See, e.g., Flagg v, City of Detroit*, 2011 WL 4634249, *13 (E.D. Mich. Aug. 3, 2011) (where defendant city's Corporation Counsel did not issue a Legal Hold Notice of otherwise inform key custodians of the preservation requirements established in court orders, the court imposed an adverse inference instruction and monetary sanctions against the city and its Corporation Counsel based, in part, on the attorney's "utter delinquen[ce] in his duty to see that his clients complied with Judge Rosen's orders."); *Consolidated Aluminum Corp. v. Alcoa, Inc.*, 244 F.R.D. 335, 341-342 (M.D. La. 2006) (where defendant identified nearly 100 individuals in its initial disclosures as "likely to have discoverable information," but sent a Legal Hold Notice to only 11 employees and defendant failed to include consultation with a manager with knowledge of the employees and issues as part of its legal hold process, the court found defendant's preservation efforts to be "inadequate").

[23] *See, e.g., Pillay v. Millard Refrigerated Servs., Inc.*, 2013 WL 2251727, *3 (N.D. Ill. May 22, 2013) (court granted plaintiff's motion for an adverse inference where defendant failed to preserve or prevent the automatic deletion of relevant underlying data despite the fact that plaintiff's counsel requested various preservation steps be taken on several occasions, including through a letter sent to defendant's general counsel; court noted that "[a]s general counsel, Mr. Offner is charged with knowledge of the duty to preserve evidence after receiving the December 10, 2008 letter from plaintiffs' counsel. There is no evidence that he took any action to intercept the automatic deletion of relevant evidence. As such, recklessness and bad faith are permissible inferences."); *GFI Acquisition, LLC v. Am. Federated Title Corp*. (*In re A & M Fla. Props. II, LLC*), 2010 WL 1418861, *6-7 (Bankr. S.D.N.Y. Apr. 7, 2010) (court imposed monetary sanctions against plaintiff and its counsel where evidence was not lost, but counsel's failure to obtain an understanding of the client's information systems caused significant production delays, as well as frustration and unnecessary motion practice by the requesting party; the court stated, "[a] diligent effort would have involved some sort of dialogue with Garfinkle and any key figures at GFI to gain a better understanding of GFI's computer system."); *Phoenix Four, Inc. v. Strategic Res. Corp.*, 2006 WL 1409413, *5 (S.D.N.Y. May 23, 2006) (court imposed monetary sanctions where certain defendants were unable to timely locate relevant evidence and further opined that counsel's effort to discover all sources of relevant information must include "communicating with information technology personnel and the key players in the litigation to understand how electronic information is stored."); *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 432 (S.D.N.Y. 2004) (counsel must communicate with the client, identify all sources of relevant information, and "become fully familiar with [the] client's document retention policies, as well as [the] client's data retention architecture.")

[24] *See, e.g., Greene v. Netsmart Techs.*, 2011 WL 2225004, *8 (E.D.N.Y. Feb. 28, 2011) (after finding that no unique relevant evidence had been destroyed, court imposed monetary sanctions against plaintiff and his counsel upon finding that plaintiff's delays in identifying and locating relevant evidence was likely due to a clear "breakdown in communication between Plaintiff and his counsel regarding document preservation and collection"); *Wells v. Orange County Sch. Bod.*, 2006 WL 4824479, *2-3 (M.D. Fla. Nov. 7, 2006) (court awarded plaintiff costs for filing discovery motions but not additional sanctions against defendant or its counsel after there was a significant delay in locating relevant emails due to an inadequate search based on instructions established by defendant's general counsel and the fact that taking additional steps "did not occur to him"; court noted that "[b]etter communications and diligence - *e.g.*, through personal interaction rather than email between general counsel the IT director-would have avoided one year's delay in producing relevant documents.")

- **Monitoring Compliance with the Legal Hold Process.** While one court initially recognized that "[a] lawyer cannot be obliged to monitor her client like a parent watching a child," that court further stated that, "[c]ounsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched."[25] Years later the same court intimated that to meet the standard for appropriately implementing a Legal Hold, the preservation instructions provided to the client must include "a mechanism for *collecting* the preserved records so that they can be searched by someone other than the employee. . . [and must not] place[] total reliance on the employee to search and select what that employee believed to be responsive records without any supervision from Counsel."[26] While no standard has emerged that clearly defines what level of monitoring or supervising is required, courts have expressed significant concerns where no or minimal guidance is provided to the client after a Legal Hold Notice is issued, where too much reliance is placed on the client or its employees in identifying what is relevant, or where there is inadequate oversight by outside counsel in their client's efforts to search for, locate, or preserve relevant evidence.[27]

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[25] *Zubulake*, 229 F.R.D. at 432.

[26] *Pension Committee*¸ 685 F.Supp. 2d at 473 (emphasis in original).

[27] *See, e.g., Apple, Inc. v. Samsung Elecs. Co., Ltd.*, 881 F.Supp.2d 1132, 1150-51 (N.D. Cal. 2012) (finding that the defendant "at all times" failed to monitor employees' preservation efforts to ensure compliance with its legal hold and "in effect . . . kept the shredder on long after it should have known about this litigation, and simply trusted its employees to save relevant evidence."); *In re Delta/AirTran Baggage Fee Antitrust Litig.* 2012 WL 360509, *5, 21-22 (N.D. Ga. Feb. 3, 2012) (although relevant evidence had been preserved, due to "misunderstanding between [defendant's] counsel . . . its internal technology department," which included the absence of complete responses by the IT department and lack of follow up by defendant or its counsel, the court imposed monetary sanctions against the defendant and allowed discovery to be reopened where such evidence had not been adequately searched for or identified in a timely manner for production to the requesting party); *Atlas Resources, Inc. v. Liberty Mut. Ins. Co.*, --- F.R.D. ---, 2011 WL 10563364, at *9-10 (D.N.M. Sept. 8, 2011) (magistrate judge recommended that the court impose monetary sanctions against the defendant and its outside counsel law firm after finding that counsel failed to "exercise control over the discovery process and to ensure that its client cooperates fully in discovery. . . . "); *ChampionsWorld LLC v. U.S. Soccer Fed'n*, 276 F.R.D. 577, 583 (N.D. Ill. Aug. 17, 2011) (where plaintiff had not preserved evidence over an critical time period likely to do in-house counsel's assumption that another employees was preserving evidence but, along with outside counsel, failing to confirm such understanding and action, the court awarded and adverse jury instruction and stated that in-house and outside counsel "should have done more to ensure that relevant evidence was preserved[.]"); *Jones v. Bremen High Sch. Dist. 228*, 2010 WL 2106640, at *7 (N.D. Ill. May 25, 2010) (holding that defendant's preservation efforts were reckless and grossly negligent where "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. . ." and further stated that, "[m]ost non-lawyer employees, whether marketing consultants or high school deans, do not have enough knowledge of the applicable law to correctly recognize which documents are relevant to a lawsuit and which are not. Furthermore, employees are often reluctant to reveal their mistakes or misdeeds."); *Merck Eprova AG v. Gnosis S.P.A.*, 2010 WL 1631519, *3 (S.D.N.Y. Apr. 20, 2010) (court imposed a $25,000 fine against defendant and indicated that the defendant and its counsel should determine how to apportion liability between themselves for discovery failures, including the failure to issue or communicate a legal hold, defense counsel's lack of meaningful supervision over the discovery process to which the court noted, "'[d]iscovery is not supposed to be a game of cat-and-mouse where clients are left to just rummage around'" or where key decisions regarding discovery requests are not 'supervised or known by the lawyers. It's not supposed to work that way.'").

- **Updating and Reminding of Legal Hold Notices**. The duty to preserve is ongoing, and as litigation continues, the scope of relevant information that must be preserved may change, requiring that new or updated notices be sent out. Newly obtained information requiring an update or modification to the Legal Hold Notice may come from numerous sources, such as document requests served by the requesting party, information obtained through custodian interviews, or information obtained from Records Management or IT resources, to name only a few. When made aware of this new information, counsel must assess whether additional or modified information or instructions should be added to the existing Legal Hold Notice, or whether additional personnel should receive the Legal Hold Notice to ensure they are aware of the duty to preserve. Even if there are no modifications to the Legal Hold Notice, sending out reminder notices to advise that Legal Hold obligations are continuing and ongoing is a good practice for lengthy litigation.[28]

- **Preservation of Evidence Held by Nonparties.** Counsel must consider whether a Legal Hold Notice or other similar communication should be sent to nonparties. Rule 34 states that a party's preservation obligations extend to relevant documents or ESI in its "possession, custody, or control."[29] Even if information is not in the company's physical possession, if the company has legal control over the information, the preservation duty can attach. Nonparties who need to be notified may include corporate affiliates, external IT service providers, vendors, suppliers, accountants, and consultants.[30] If outside counsel is known to have relevant material or information from prior or related cases, then they should be notified as well.

- **Devoting the Appropriate Attention and Resources to the Process**. Courts have repeatedly stated that evidence preservation issues are significant matters. Companies must devote sufficient attention and resources to meet their preservation duties, especially in light of the consequences for failing to do so.[31] Although the issue may not arise in every matter, litigants should be prepared to describe and expect to be questioned about their efforts to identify and preserve

[28] *See Zubulake*, 229 F.R.D. at 422, 433 (recommending periodic re-issuing of litigation hold notices).
[29] *See* Fed. R. Civ. P. 34(a)(1).
[30] *See, e.g.*, *Sekisui Am. Corp. v. Hart*, 945 F.Supp.2d 494, 507 (2013) (among the Legal Hold process and implementation failures by plaintiff which the court found to be "egregious" was the fact that, after belatedly issuing a Legal Hold Notice, it took plaintiff "another six months to notify its IT vendor— *i.e.*, the company responsible for actually preserving the relevant documents—of that duty to preserve"); *Haskins v. First America Title Ins. Co.*, 2012 WL 5183908, *5 (D.N.J. Oct. 18, 2012) ("Because First American's contractual language establishes that it has possession, custody, or control over relevant documents in the physical possession of its independent title agents, First American's litigation hold must include these documents.").
[31] *Peter Kiewit Sons' Inc. v. Wall Street Equity Group*, 2012 WL 1852048, *8,20 (D. Neb. May 18, 2012) (after a protracted dispute regarding the completeness of defendant's document productions, the reasonableness of its searches for relevant evidence, and where a computer forensic expert identified nearly 4,000 files with a "key word" search after defendant's "most computer literate" employee who initially conducted the search identified only two such files, the court imposed monetary sanctions and an adverse inference instruction against defendant finding, among other things, that "by relying on an employee's simple key word search from her work station, the court finds Defendants did not conduct a good faith search for the electronically stored information.").

relevant evidence. As such, parties should ensure that adequate attention and appropriate resources are used throughout the process, and that the process is documented along the way.[32]

## IV. SUGGESTED COMPONENTS FOR AN EFFECTIVE LEGAL HOLD PROCESS

While there likely will never be a one-size-fits-all approach to every case, there also is no definitive or authoritative guidance that defines the attributes that any party or organization must have in order to comply with its duty to preserve evidence and/or its attorneys' ethical duties to their clients and to the courts. Nevertheless, an organization that has adopted or implemented the following components as part of its approach to litigation and the discovery process will likely enjoy better compliance with and fewer challenges against its efforts to locate and preserve relevant evidence:

1. A documented (and consistently and periodically updated) high level understanding of who, where, how, and for how long certain records and information are managed or retained;
2. A cross-functional team of people who are consistently charged with implementing and overseeing the Legal Hold process;
3. A process that enables timely and reasonable assessments of potential "trigger" situations to allow for the implementation of a Legal Hold processes when required, and/or response or disclosure to the opposing or requesting side;
4. A process by which the appropriate scope (e.g., subject matter, custodians, business units, geographies, commonly used systems or applications) for Legal Holds can be identified in a timely manner;
5. Distribution of Legal Hold Notices to affected personnel and nonparties in a timely and effective manner, with follow-up and confirmation of receipt, as well as responsiveness if questions arise;
6. Preservation and collection processes that reduce or eliminate the risk that custodians can adversely impact the defensible collection of relevant information;
7. Collection processes that minimize or eliminate the risk that content or metadata can be deliberately or inadvertently modified;

[32] *See, e.g., Sloan Valve Co. v. Zurn Indus., Inc.*, 2012 WL 1886353, at *14 (N.D. Ill. May 23, 2012) (where court found numerous failures in defendant's efforts to locate relevant evidence and expressed concerns about the preservation process, the court required defendant to submit an affidavit that "(1) identifies the specific procedures [defendant's] IT personnel undertook upon receiving the litigation hold memorandum in February 2010 to ensure that [defendant] would preserve its electronic data; (2) identifies the extent to which back-up files for the relevant time periods exist and for what data; and (3) identifies what steps [defendant] undertook to preserve relevant hard copy documents. . . ."); *Chura v. Delmar Gardens of Lenexa, Inc.*, 2012 WL 940270, *12 (D. Kan. Mar. 20, 2012) (magistrate judge requested that the defendant in an employment discrimination provide the judge with the following information in an subsequent hearing on plaintiff's motion for sanctions: "1) At the time of the initial charge of discrimination, what did Defendant's system of creating and storing ESI consist of; 2) When and how a litigation hold was instituted; 3) What employees were notified of the litigation hold; 4) What efforts were made to preserve ESI; 5) What or whose computers or components of the computer systems were searched for responsive ESI; 6) How the computers or computer information systems were searched (e.g., keyword searches, manual review, computer-assisted coding); and 7) Who performed the searches.").

8. Auditing mechanisms that ensure individuals understand the preservation instructions and are taking appropriate measures to ensure relevant evidence is preserved;
9. Training for regarding preservation and collection requirements and processes for those closely involved in implementing the Legal Hold process, as well as those who may receive a Legal Hold Notice; and
10. A mechanism to bring in knowledgeable and experienced internal or external resources when necessary (e.g., data volume, system complexity, number/location of custodians, etc.) to ensure relevant evidence is not destroyed.

## V. CONCLUSION

Conducting discovery in today's digital age forces attorneys to face challenges that were much less prevalent a few decades ago. As technology is frequently and rapidly changing, lawyers must be aware of and confront these challenges head on. Furthermore, not only must attorneys now understand technology to some degree (or bring in a resource that can provide knowledgeable assistance in this regard), they also should have familiarity with the evolving case law, standards, and judicial expectations of lawyers and their clients to ensure they properly implement a Legal Hold once the duty to preserve has been triggered.