

Litigation Holds Utah Prosecution Council's Government Civil Practice Conference October 15-17, 2014

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Outline of Presentation

CASE IN POINT

by Tom Fishburne



What is a Litigation Hold?

- ▶ Whenever litigation is “reasonably anticipated,” “threatened”, “probable”, or “pending” by or against an organization, that organization is obligated to preserve relevant information.
 - ▶ The Sedona Conference [®] Commentary on Legal Holds (August 2007) at 1; see also Phillip M. Adams & Associates, L.L.C. v. Dell, Inc., 621 F.Supp.2d 1173, 1190 (D. Utah 2009) (“a litigant’s duty to preserve evidence arises when ‘he knows or should know [it] is relevant to imminent or ongoing litigation’” (internal citations omitted)).
- ▶ The duty to preserve extends to hard-copy documents, data complications, electronically stored information, and other tangible evidence. Utah R. Civ. P. 26(a)(1)(B); see also Fed. R. Civ. P. 26(a)(1)(A)(ii).

Sources of authority for the duty to preserve

▶ Utah's Rules of Civil Procedure

◦ Utah R. Civ. P. 37(i):

- Acknowledges the Court's "inherent power" to implement Rule 37 sanctions if a party "destroys, conceals, alters, tampers with or fails to preserve a document, tangible item, electronic data or other evidence in violation of a duty."
- There is no culpability requirement under Rule 37(i). See Daynight LLC v. Mobilight, Inc., 2011 UT App 28, ¶ 2, 248 P.3d 1010.
- Rule 37(i) provides a "safe harbor" if a party fails "to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system."

Sources of authority for the duty to preserve

- ▶ Federal Rules of Civil Procedure
 - Rule 26(b) – discovery scope and proportionality limits
 - Rule 26(b)(2)(B) – specific limitations on electronically stored information
 - Rule 26(g) – requiring counsel to make a reasonable inquiry in complying with discovery requests
 - Rule 26(e) – obligation to supplement
 - Rule 37(e) – safe harbor for failing to provide “electronically stored information lost as a result of routine, good-faith operation of an electronic information system”
- ▶ Court’s inherent authority
 - See Zubulake v. UBS Warburg, LLC (Zubalake V), 229 F.R.D. 422, 430 (S.D.N.Y. 2004); see also Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991) (recognizing the inherent power of the courts to “manage their own affairs” independent of the procedural rules).

When does the duty to preserve arise?

- ▶ Case law is not clear. The best practice is a conservative approach.
 - The duty to preserve is always triggered with the filing of a lawsuit. Philips Electronics N. Am. Corp. v. BC Tech., 773 F. Supp.2d 1149, 1195 (D. Utah 2011).
 - It is also triggered if a party has notice that “future litigation is likely.” Id. In other instances, Utah district court’s have indicated that the duty arises when a party “knew, or should have known, that litigation was imminent.” Brigham Young University v. Pfizer, Inc., 282 F.R.D. 566 (D. Utah 2012).

When does the duty to preserve arise?

- ▶ Two differing opinions within Utah's federal district court.
 - Brigham Young University v. Pfizer, Inc., 282 F.R.D. 566 (D. Utah 2012).
 - Judge Wells rejected BYU's argument that the duty to preserve arose out of an obligation to comply with federal statutes unrelated to the litigation and its own corporate retention policies.
 - Phillip M. Adams & Assocs. V. Dell, Inc., 621 F.Supp.2d 1173 (D. Utah 2009).
 - Judge Nuffer rejected defendant ASUS's claim that the duty to preserve arose when a demand letter was sent and instead found that it arose when similar cases were filed.

When does the duty to preserve arise?

- ▶ Less case law exists from Utah state courts, but recent decisions highlight the litigation implications of failing to preserve and/or properly document preservation efforts.
 - Daynight LLC v. Mobilight, Inc., 2011 UT App 28, (Ut. Ct. App. 2011).
 - KK Machinery destroyed a laptop that “might link [them] to any sort of lawsuit” five days after a complaint was filed. Id., ¶ 2. The court entered a default judgment. KK Machinery challenged the default, arguing that no bad faith existed. Id., n. 1.
 - The Court clarified that it has inherent power to impose sanctions for failing to preserve evidence without a showing of willfulness or bad faith. Id., ¶ 2. (It also found bad faith.)

When does the duty to preserve arise?

- ▶ Ockey v. Club Jam, 2014 UT App 126, ¶ 11, 328 P.3d 880
 - A question of evidence preservation led to the reversal of the district court's summary judgment ruling in favor of the defendant.
 - The Plaintiff claimed she was injured in a fall from a ladder with a latent defect. She alleged that the ladder produced for inspection was not the ladder from which she fell.
 - The appellate court held that for summary judgment purposes, the lower court should have assumed that the ladder was not properly preserved or produced.
 - That assumption should have led to three possible inferences: first, that the defendant intentionally destroyed or concealed the ladder; second, that it lost or destroyed the ladder independent of the lawsuit; and third, that it was mistaken about the ladder used.
 - The possibility of spoliation sanctions was also a factor in precluding summary judgment.

When does the duty to preserve arise? Practical considerations

- ▶ The nature of the event itself may trigger a duty to preserve.
 - Phillip M. Adams & Associates, L.L.C. v. Dell, Inc., 621 F.Supp.2d at 1191 (explaining that a duty to preserve arose after an electrical fire purportedly caused by a manufacturing defect even though no formal threat of litigation had been made)
- ▶ The filing of an administrative action triggers the duty.
 - See Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 216 (S.D.N.Y. 2003) (holding that the duty to preserve arose at the latest when the plaintiff filed an EEOC charge).
- ▶ For governmental entities, notices of claim, GRAMA requests, news stories, non-party subpoenas, and suits against other governmental entities could provide notice of imminent litigation.

Once the duty to preserve is triggered, what is required?

- ▶ Implement litigation hold
 - Written memorandum communicating to key custodians that documents related to the potential litigation should be retained. Identify “categories of relevant information” and describe the nature of the case. Philips Electronics North America Corp. v. BC Technical, 773 F. Supp. 2d 1149 (D. Utah 2011).
- ▶ Monitor compliance with the hold
 - Zubalake V, 229 F.R.D. at 432 (““A party’s discovery obligations do not end with the implementation of a ‘litigation hold’ – to the contrary, that’s only the beginning. Counsel must oversee compliance with the litigation hold, monitoring the party’s efforts to retain and produce relevant documents.”)

Once the duty to preserve is triggered, what is required?

- ▶ Required steps to ensure litigation hold compliance
 - Learn client's back-up procedures, document retention policies AND practices.
 - Learn how your client actually communicates (i.e., texts, messaging, email, database log entries, etc.)
 - Talk to IT personnel. Find out what software programs IT supports and how it is preserved.
 - Suspend routine document deletion protocols for key custodians.
 - Locate and take possession of back-up tapes.
 - Locate and take possession of documents, including electronic information, if possible.
 - Run system wide key word searches and preserve hits.
 - Call key custodians and meet in person if practical.
 - Issue periodic reminders of the litigation hold.

Once the duty to preserve is triggered, what is required?

- ▶ Lawyers have an obligation to help ensure that their clients comply with the duty to preserve:
 - “It is not sufficient to notify all employees of the litigation hold and expect that the party will then retain and produce all relevant information. Counsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched.” Zubulake V, 229 F.R.D. at 432.

Consequences for Failing to Issue an Adequate Litigation Hold

- ▶ Examples of inadequate litigation holds and protocols
 - The Defendant's CEO send an email to all employees after the case had been in litigation for approximately 18 months, stating the employees should "save any electronic records that could possibly be associated in any way to the Philips' litigation."
Philips Electronics North America Corp. v. BC Technical, 773 F.Supp.2d 1149, 1160 (D. Utah 2011)
 - Sanctions were imposed for failing to collect documents from a key custodian or for failing to secure back-up tapes. Zubulake V, 229 F.R.D. at 425. Resulted in adverse jury instruction and fees.
 - Defendants document retention policies were so inadequate that they could not avail themselves of the safe harbor in Rule 37. Sanctions imposed. Philip M. Adams & Assocs. v. Dell, 621 F.Supp.2d 1173 (D. Utah 2009).

Implementation of a Litigation Hold: Suggested Practices

- ▶ Train employees to notify in-house counsel immediately upon:
 - Receiving a complaint
 - Receiving a communication indicating a citizen's intent to challenge an agency action
 - Receiving credible information, in any form, indicating that a citizen intends to sue
 - Receiving a subpoena for documents in a civil case
 - Receiving a demand letter
 - Learning that a similar event has resulted in litigation

Implementation of a Litigation Hold: Suggested Practices

- ▶ Counsel should weigh the following factors in considering whether to implement a hold:
 - The nature and specificity of the complaint or threat;
 - The party making the claim, including whether the claim is made anonymously;
 - The position of the party making the claim;
 - The relationship between the governmental entity and accusing parties;
 - Whether the threat is direct, implied or inferred;
 - Whether the party making the claim is known to be aggressive or litigious;
 - The nature of the purported injury (the more serious, the more likely a hold is warranted);
 - Whether the government entity has received a written notice of claim, demand letter, notice of charge from a state or federal regulatory agency or similar instrument and whether the defendant intends to provide the relief sought;
 - The likelihood of settlement of the matter within two weeks;
 - The strength, scope or value of a potential claim;
 - Whether the governmental entity has learned of similar claims;
 - Whether the type of potential claim has led to litigation against the defendant in the past;
 - Press and/or “industry” coverage of the issue directly pertaining to the client, or of complaints brought against similar government or private entities;
 - Whether the person or entity has begun to pursue administrative remedies.

Implementation of a Litigation Hold: Suggested Practices

- ▶ If a decision is made not to issue a litigation hold, document that decision in writing, citing the previous factors.
- ▶ Consider situations where a litigation hold should always be implemented
 - I.e., officer involved shootings, receipt of EEOC or UALD notices, death or serious bodily injury on government property, etc.

Implementation of a Litigation Hold: Determining its Scope

- ▶ Determine whether a forensic collection of data is necessary
 - A “forensic collection” involves capturing not just documents themselves but also all other electronic data associated with the documents, such as time of creation, revisions (“metadata”), and electronic information remaining on the hardware itself.
 - A forensic collection should be made if fraud, deceit or a cover-up is alleged.
 - A government entity must determine whether the duty to preserve in the specific case could reasonably include the type of information only captured with a forensic collection. Clearone Communications, Inc. v. Chiang, 2007 WL 3275300, at *1 (D. Utah, Nov. 5, 2007) (ordering the imaging of an opposing parties’ computers but commenting that forensic imaging in the context of discovery is “extraordinary”).

Implementation of a Litigation Hold: Determining its Scope

- ▶ Proportionality in discovery can inform the scope of a litigation hold
 - A governmental entity's obligation to preserve evidence is not identical to its discovery obligations once litigation begins, but the scope of an entity's litigation hold for any particular matter should be structured by the concepts of proportionality found in the federal and state procedural rules.
 - Oto Software, Inc. v. Highwall Technologies, LLC, Case No. 08-cv-01897-PAB-CBS, 2010 WL 3842434, at *8 (D. Colo. Aug. 6, 2010) (“Whether preservation . . . is acceptable depends on what is reasonable, and that in turn depends on whether what is done—or not done— was proportional to that case and consistent with clearly established applicable standards.” (internal citations omitted)).

Implementation of a Litigation Hold: Determining its Scope

- ▶ Proportionality limits in the procedural rules
 - In a federal case, a party “need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost.” Fed. R. Civ. P. 26(b)(2)(B).
 - In Utah state court, discovery is proportional if it is “reasonable, considering the needs of the case, the amount in controversy, the complexity of the case, the parties’ resources, the importance of the issues, and the importance of the discovery in resolving the issues.” Utah R. Civ. P. 26(b)(1)(2).
 - The availability of certain discovery tools and the amount of time for standard fact discovery turns on the amount of damages sought. Utah R. Civ. P. 26(c)(5).
 - Proportionality ensures that “the cost of discovery” remains proportional “to what is at stake in the litigation.” See “Scope of Discovery – Proportionality,” Commentary to Utah R. Civ. P. 26.

Implementation of a Litigation Hold – Special considerations re: tangible property

- ▶ To the extent that the facilities, property, or equipment need to be repaired in place, reasonable efforts should be made to fully photograph or otherwise document the damaged facility, property, or equipment before it is repaired, replaced or covered.
- ▶ If materials are removed (i.e., sections of pipe, manhole covers, water meter lids, etc.), they should be preserved.
- ▶ Consider contacting the claimant or opposing counsel for an inspection prior to a repair or property involved in an incident
- ▶ For litigation holds stemming from car accidents, data in electronic data recorders should be read and preserved, if possible. Police departments frequently have this technology, although sometimes this data can only be read by a manufacturer.

Implementation of Litigation Hold: Communication with a party/custodian

- ▶ Utah State Bar – Ethics Advisory Opinion Committee, Opinion No. 13-01, April 9, 2013.
 - Send litigation holds to counsel when an employee is represented in a lawsuit against a government employer.
 - Opinion: “It is a violation for a government entity’s attorney’s office to send a litigation hold email to an adverse represented employee because the e-mail relates to the subject to the litigation and none of the exceptions listed in Rule 4.2 apply.”

Implementation of a Litigation Hold: SLC's practice

From: [SLCAttorney](#)
To: [SLCAttorneyFed](#)
Subject: NOTIFICATION OF LITIGATION HOLD - Lawsuit Has Been Filed
Date: Wednesday, August 08, 2012 9:24:27 AM

PLEASE READ THE ENTIRE DOCUMENT

PLEASE VIEW ON A CITY COMPUTER OR ON A VPN, DO NOT USE SLC MAILBOX, PDA, BLACKBERRY, IPHONE, OR OTHER MOBILE PHONE.

If you do not follow the link at the bottom of this document and respond to the questionnaire completely, you will receive a daily reminder until you do so.

PRIVILEGED AND CONFIDENTIAL
ATTORNEY-CLIENT COMMUNICATION

In re: Bonnie & Clyde v. SLC Police Department

The City has been asked to preserve all documents (including emails, texts, and other electronic communications) related to the following topic, with which you may have had some involvement:

Ms. Bonnie Parker and Mr. Clyde Barrow were shot and killed on May 23, 1934 by four Salt Lake City Police Officers. Their estate is now suing the City regarding their deaths.

The City has been asked to preserve all documents in preparation for litigation which may be filed relating to the 20120629 Bonnie and Clyde v. SLC Police Dept. Litigation. Until further notice from the City Attorney's Office, you should take all steps necessary to retain and preserve any and all materials—PAPER AND ELECTRONIC—referring or relating in any way to the 20120629 Bonnie and Clyde v. SLC Police Dept. Litigation including but not limited to the following:

1. Text messages, voicemail messages, personal calendar entries, documents, or other information maintained on cell phones, Blackberries, iPhones, iPads or other PDAs, (personal or City provided) which entries refer or relate to issues described above;
2. Issue files (including, any and all notes and drafts generated);
3. Correspondence files;
4. Billing/Planning/Licensing/Personnel/Budget, etc. files;
5. Any documents in any personal file(s) created or maintained relating to the issue described above;
6. All external communications referring or relating to the issue described above;
7. All internal communications referring or relating to the issue described above;
8. Any files/documents, including databases and instant messages, stored on computer network (including Servers, and home folders/files) or PC hard drives (desktop, laptop, home computers, personal or City provided) or in the cloud referring or relating to the issues described above;
9. Any e-mail communications in your Outlook mailboxes (including your Inbox, Sent Items, Deleted Items folders and any Personal Folders) or personal e-mail accounts referring or relating to the issues described above;
10. Any files/documents stored on flash drives, discs, CDs, DVDs, or other removable media (personal or City provided) referring or relating to the issues

- ▶ Complete a Litigation Hold Checklist with attorney, key personnel, and IT staff.
- ▶ Automatic email to potential custodians, requiring them to preserve potential evidence. (example at left)

Implementation of a Litigation Hold: SLC's practice

described above;

11. Any audio recordings on tape or digitally preserved, including voice mail.

This material may not be altered, disposed of or deleted unless you are explicitly directed to do so by the City Attorney's Office. You MUST cease any record destruction related to this issue despite the City's retention policy.

All documents, files, and electronic media should be held by you until you are given other instructions. Individuals from the City Attorney's Office will contact you to schedule an appointment to collect your materials. In connection with that meeting or separately, a member of IMS may, at the City Attorney's Office's request, contact you about downloading any electronic files you may have in your possession. For the present, documents should be secured and preserved; they should not be forwarded to the City Attorney's Office until they are requested.

If you are continuing to generate or receive materials related to this issue, you will need to take all steps necessary to preserve new materials as well as old.

Please send me the name of any other individual—in your department or otherwise—who was involved with the issue described above or who may have in his or her possession any document (or electronic document) relating to this matter (including administrative assistants) if that person's name does not appear in the following list:

Martha Stonebrook,
Damon Georgelas,
Shari Faulkner,
SLAttorneyFed email,
Paul Nielson,
Brian Roberts,
Marco Kunz,
Vivian Saumure,
Charleen Smith,
Boyd Ferguson,
Steven Whittaker,
Lynn Pace,
Jaysen Oldroyd,
Margaret Plane,
Duncan Murray,
Heidi Medrano,
Betsy Haws,
Ed Rutan,
J. Wesley Robinson,
Tara Hasenoerl,
Skye Garcia,
Rusty Vetter

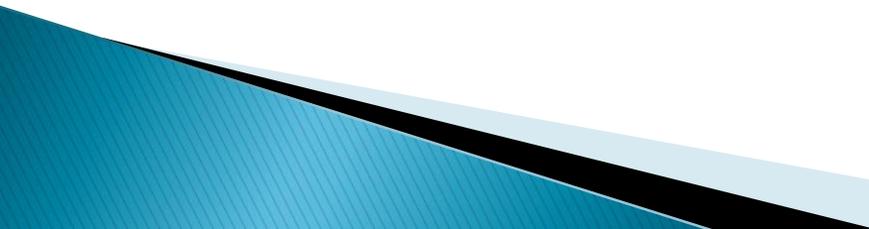
Feel free to contact me with any questions about this e-mail.

Your immediate compliance with this request is important to you and the City; and your assistance with this process is both required and appreciated.

Thank you,

- ▶ Request that information be held until custodians are instructed otherwise by their attorneys.
- ▶ Request that custodians check to see if anyone should be added to the list.

Implementation of Litigation Hold: SLC's practice

- ▶ Custodian questionnaire
 - ▶ Monthly email reminders of obligation to retain information
 - ▶ Collection and retention of electronically stored information
 - ▶ Termination notice when the litigation hold is released, stating that the custodian can return to standard document retention policies.
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Helpful resources

- ▶ American Bar Association working group on e-discovery
 - <http://www.americanbar.org/groups/litigation/resources/e-discovery.html>
- ▶ Some states bar associations have issued best practices on e-discovery.
 - The State Bar of California E-Discovery Pocket Guide, <http://litigation.calbar.ca.gov/Publications/EDiscoveryPocketGuide.aspx>
 - NYSBA, Best Practices in E-Discovery in New York State and Federal Courts, issued July 2011, http://www.nysba.org/Sections/Commercial_Federal_Litigation/ComFed_Display_Tabs/Reports/ediscoveryFinalGuidelines_pdf.html
- ▶ The Sedona Conference Working Group on Electronic Document Retention and Production, <https://thesedonaconference.org/>

Questions?

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THANKS!