

Are You Ready for the Federal Discovery Rules?

The Impact on Corporate Retention and Preservation Practices

by Deidre Paknad



Are You Ready for the Federal Discovery Rules? The Impact on Corporate Retention and Preservation Practices

Judge Schiendlin's *Zubulake V* decision was an early warning and the *Coleman v. Morgan Stanley* verdict the final warning. The Federal Rules of Civil Procedure have been revised to formally address e-discovery and in the process, have made it a nearly certain element of litigation. Moreover, the rules place a very early focus on existing retention practices and the preservation and discovery of information.

For companies without modern enterprise retention programs and robust legal holds processes, a thoughtful gap analysis and remediation plan is in order. These rules have a profound effect on companies' retention and litigation strategies and practices.

● Early E-Discovery Conference

Litigants must meet very early in litigation to discuss preservation and the discovery plan. The scope of discovery and form of production will also be decided.

Analysis

This requirement makes electronic evidence and discovery a central discussion in every case. Companies can also expect to testify on their retention practices very early in the matter to help their adversary better prepare for this process. The accelerated timeline for the discovery conference leaves little time to conduct early evidence inventories, get acquainted with retention practices, or institute new preservation processes—and the time is ultimately better spent on strategy than getting up to speed on discovery. This rule puts a tremendous premium on readiness, transparency, and process controls for in-house litigators; those with good transparency and good controls have both offensive and defensive avenues and those without have neither.

Requirements for Litigation Dept:

1. Instant access to retention and legal holds data, processes, and controls.
2. Modern, global retention program that the litigation team can rely upon, including what types of information are generated in which businesses, where it is stored and who is knowledgeable about it.
3. Reliable preservation processes that can be instituted without delay or complication.
4. Internal and ongoing expertise on litigation team complemented by some degree of information system savvy.

● Disclosure

The parties will need to disclose the potential sources of relevant information, including those deemed inaccessible or those they do not intend to search or produce, identified by the type and kind of information.

Analysis

This rule presumes that you can readily identify inaccessible information with some degree of specificity, yet few companies have an accurate understanding of accessible – much less inaccessible – data. Without a reasonably accurate map of information by location, compliance with this rule is difficult and fraught with risk.

Requirements for Litigation Dept:

1. Map of information sources systematically synchronized with retention and preservation processes.
2. Ability to effectively identify information and institute legal holds.

● Form of Production

The default form for producing electronically stored information is that “in which it is ordinarily maintained [or] reasonably usable.”

Analysis

With the vast majority of business information generated electronically, this requirement forces companies to revisit their retention programs to ensure that electronic information is included and adequately addressed. Chain of custody from the time of collection to production is more important as well.

Requirements for Litigation Dept:

1. Ability to collect evidence in all forms.
2. Collection traceability and chain of custody on all electronic files, regardless of matters size and scope.
3. Retention programs that define, enforce, and audit lifecycles for electronic information as well as paper.

● Failure to Make Disclosure or Cooperate in Discovery

The safe harbor provision provides that “absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of routine, good-faith operation of an electronic information system.” Committee Notes highlight that ordinary computer use necessarily involves routine alteration and deletion of information for reasons unrelated to litigation.

Analysis

While this provision appears to offer some relief from sanctions in certain instances of destruction of information, it also raises the bar on your legal holds process. It ultimately shines a bright light on “routine, good faith operation” which arguably must include the ability to communicate legal holds promptly and repeatedly and to monitor compliance with them. Without a good process, the safe harbor is difficult to invoke and may offer little safety at all.

Requirements for Litigation Dept:

1. A good defense—consistent, repeatable holds process that is easy to demonstrate.
2. Clear, consistent, and affirmative legal holds communications and effective monitoring capabilities.

A look at the slew of discovery conferences being hosted monthly and the number of judges presenting on the new rules is instructive. Judges clearly expect litigants to understand their discovery obligations and the emerging rules. There is also an expectation that litigants’ document retention programs be tightly coupled with their preservation obligations and processes. There are significant practical and strategic implications for companies with any material volume of litigation. Most corporations are: 1) enhancing their processes for issuing legal holds and tracking collections; 2) looking for ways to reduce the costs of collecting, processing and reviewing electronic data; and 3) looking upstream to reduce the volume of unneeded data through better retention policies that are routinely enforced.

Readiness Roadmap

With well-informed plaintiffs' bar and regulatory agencies, companies should consider a five-point readiness plan:

- 1 **Examine and improve your legal holds process now.** Establish what your threshold for anticipating litigation is (see the *Zubulake* case for guidance), when and how often you will send hold notices, institute confirmations of compliance, establish your interview process, determine the various collection models and team members, develop re-usable collection plans, and establish an audit plan to test your process.
- 2 **Establish your control and transparency requirements.** At a minimum, the person responsible for litigation in-house should have ready access to a current list of all legal holds, all custodians under a hold, and all active collections. Attorneys for each matter should have ready access to accurate information regarding all notices distributed for each matter, interviews conducted and findings, all evidence collected in the matter, and how and when it was collected. The longer it takes to assemble this information, the less reliable and accurate the information is.
- 3 **Build a map of the data sources and the individuals responsible for them.** Conduct an inventory of the systems and sources of data as well as the storage locations for active, inactive, and archived data. A full review of back-up tape stores is prudent and can help predict future discovery costs. In addition to the data sources, note the business processes that generate the data, the business units with ownership, and the staff responsible on both the business and IT sides. Your Sarbanes Oxley internal controls review is an excellent source of information and the SOX project team is an excellent resource for this effort.
- 4 **Revamp your retention program to enable more efficient and effective preservation.** Upgrade the retention program to address electronic information and enterprise legal holds. The policy and schedules should specify lifecycles for all data, not just paper records (the Supreme Court's ruling on the *Andersen* case validated the legitimacy of disposing of information under retention programs). The program should be a primary vehicle for litigation, IT, and business people to collaborate on information preservation and disposal; make sure that these stakeholders have a shared truth on retention schedules and current legal holds. A critical element of your upgrade is the identification of records coordinators, offices of record, and custodial systems—the key linkages to discovery and preservation.
- 5 **Communicate and educate.** Meet with senior management to underscore the importance of legal holds using recent events as examples; educate the executive team on the changes in federal rules. If needed, do an analysis for senior management of the costs of your current process in an accelerated “meet and confer” environment; gauge how litigation costs and defensive options will be impacted. Update your corporate ethics and governance training to include compliance with legal holds and retention policies. Publish revised retention and legal holds policies and consider employee certifications of training and compliance.

Today, e-discovery experience differs vastly, even among companies with similar levels of litigation. With the new rules, this experience gap is likely to close rapidly. Not surprisingly, companies that had significant e-discovery experiences ahead of their peers realized several years ago that ad hoc and informal approaches to managing legal holds and tracking collections were inefficient if not ineffective. Some had to build their own in-house systems for managing the preservation process because commercial alternatives weren't yet available; others have chosen **Atlas LCC** since it became available in 2005.

Practical Challenges, Reasonable Solutions

Fortunately, there are new solutions to managing legal holds, evidence collection, and global retention policies that can reduce the burden, risk, and complexity for corporations. The Atlas suite from PSS Systems is the only solution to provide a critical information map and the necessary process and control framework for litigation and compliance staff. **Atlas LCC** software manages the legal holds and collections process for in-house litigation organizations. It provides a consistent and transparent process for scoping and documenting legal holds, sending hold notices and reminders, planning and conducting interviews with key players, planning and conducting collection from individuals and systems, inventorying evidence collected, and searching to selectively export to counsel and processors. Designed on the *Zubulake* Checklist, **Atlas LCC** makes it much easier to manage multiple concurrent holds and collections and meet more exacting process standards, which reduces litigation costs and risks. It enables counsel to defend their legal hold and collection process and provide the complete and structured information needed to certify completeness and serve as a 30(b)6 witness.

Atlas ERM is an enterprise retention policy management system that enables companies to manage their corporate policies for retention and disposition of information. It is a central system of record for retention policies, corporate classification schema, domestic and international legal research, business-unit retention schedules and related controls. **Atlas ERM** makes it easier to manage corporate policies and information classes while enabling business units and geographies to tailor the policies to their specific needs, laws, and processes and then proceduralize retention in the context of these local requirements. It serves as a “hub” to define, approve, and communicate retention schedules to the diverse people and systems that need them. **Atlas ERM** is a single, cohesive source for disparate retention policies and schedules across systems, business units, and data.

When **Atlas ERM** and **Atlas LCC** are used in concert, litigation staff can quickly identify which records are stored where, which records coordinators and IT staff have responsibility for the records repositories, and put relevant categories and ranges of records on hold. Records staff have instant notifications and visibility as to which records are on hold. With both modules, companies can reliably and consistently dispose of expired records and non-records knowing that litigation holds are in place when and as needed.

With judicial expectations at an all-time high and new federal rules that institutionalize electronic discovery, now is the time to evaluate your legal holds process and your corporate retention program to ensure that they adequately address your risk and reduce your litigation costs. It's the reasonable – and rational – course of action.



PSS Systems

2525 Charleston Road
Suite 201
Mountain View, CA 94043

650.961.1717 tel
650.961.1711 fax

www.pss-systems.com

© 2006 PSS-SYSTEMS
Are You Ready for the Federal Discovery Rules? 072406 v2

