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E-Litigation Holds: What We Can Learn From Intel

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May 10, 2007

Do you know what to do when you get notice of a lawsuit? One of the first actions that a party must take is to implement a "litigation hold," directing that any records potentially relevant to the litigation be preserved. "The obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation, or when a party should have known that the evidence may be relevant to future litigation."[1]

Date	Steps taken by Intel
On June 28, 2005	"One time company-wide snapshot" of company data existing on its system preserved
On June 29, 2005	"Hold notice bulletin" sent to 4,000 sales and marketing employees
On July 1, 2005	Detailed litigation holds sent to 629 key employees
Starting July 8, 2005	Information collected from the key employees' hard drives and server space
Starting mid-October 2005	E-mail of key employees moved to five dedicated and consolidated Exchange servers and backed up weekly

(Court File Nos. 293 at p.2 and 321 at pp. 1-2, 6-15, 26-27)

Communication is the key to an effective and defensible litigation hold. This common-sense statement of an old rule has new ramifications in light of current technology. In these days where so much business is conducted electronically, it is essential to effectively communicate a litigation hold both to the Information Technology (IT) staff and to the company personnel implicated by the lawsuit.

The currently-pending case of *Advanced Micro Devices v. Intel Corp.,* C.A. No. 05-441-JJF (D. Del.) (Complaint filed June 27, 2005) (the *Intel* case)[2] brings into focus the real-life implications of this intersection of **law** (the legal requirements of a valid litigation hold) and **technology** (the routine operation of a complex IT System). The *Intel* case demonstrates the outer limits of e-discovery, both because of the broad scope of the claims and the complexity of the organizations and IT systems involved.

As is often the case, the best learning tools are real-life examples. The issues in the *Intel* case extend beyond big cases and big companies. The case "highlights a festering problem with the burdens that the demands of document production in the computer era inflict on" parties. (Court File No. 321 at p. 3) Even small cases can have difficult and far-reaching e-discovery demands. All companies have to manage litigation holds and apply them to their existing IT systems to avoid later claims of spoliation. In short, no company — large, medium or small — is exempt from the burdens that can be imposed by e-discovery.

The Litigation Hold

The *Intel* case started out routinely. Advanced Micro Devices, Inc. (AMD) and Intel Corporation (Intel) are competitors in the x86 Microprocessor Market. AMD filed suit against Intel on Monday, June 27, 2005, alleging that Intel's competition crossed the legal boundaries into illegal monopoly in violation of the Sherman Act, Section 2.[3]

Intel reacted quickly and planned early in instituting a broad litigation hold. By all accounts, Intel's preservation task was a daunting, on-going endeavor[4] that implicated all parts of its huge IT infrastructure:

- 79 IT sites (in 27 countries);
- 137 Exchange servers;
- 139 data centers; and
- 9,500 IT professionals to support
- 100,000 employees overall (in 57 countries).

(Court File 321 at pp. 7, 14)

Further complicating Intel's task was its policy of "routinely delet[ing] e-mails remaining in [its employees'] mailbox[es] after they have aged a certain period of time." AMD identified the routine deletion as occurring "every thirty-five days (or in the case of senior executives, every forty-five to sixty days)." Intel describes this policy as "common in many companies to maintain the efficient functioning of the complex, dynamic environment of e-mail servers."[5] Intel stated that it generated over *4.6 million e-mails per day*. (Court File No. 321 at p. 13) The Company's auto-delete policy would conserve e-mail server space by limiting the number of active e-mails that an employee could retain by a sole criterion: the age of the e-mail.

Intel approached its daunting preservation task by putting into place what it called a "tiered" retention process that combined IT efforts with employee preservation steps. This included the retention steps shown in the table at the top right.

The Implementation Issues

On February 8, 2007 — a year-and-a-half into the lawsuit — Intel advised AMD that it had identified several document retention issues in the implementation of its preservation plan. (Court File No. 293 at p. 1) Subsequently, on March 5, 2007, both Intel and AMD submitted pleadings on the retention issue in conjunction with a scheduled status conference. (Court File Nos. 293 and 294) On April 23, 2007, Intel filed a Report and Proposed Remediation Plan regarding "Intel's Evidence Preservation Issues" (Remediation Plan). (Court File Nos. 320 and 321)

There is no record in the public filing that AMD disagreed in principle with Intel's retention steps after AMD was notified of the retention plan in October 2005. (Court File No. 293 at p. 3) However, Intel stated later that problems arose out of "human errors in implementation" of its plan. (*Id.*; Court File No. 321 at p. 3, 4) The human errors that are detailed below are found in Intel's lengthy letter, and the subsequently submitted Remediation Plan, submitted to the Special Master[6] to provide an overview of the retention issues as Intel understood them. (Court File Nos. 293 at p. 1 and 321)

First, Intel's litigation hold depended on the employees taking the active step of moving their e-mail electronically — Intel did not suspend its auto-delete policy. (Court File Nos. 293 and 321 at p. 12, 19-20) "[R]etention issues" arose because some employees "failed to move e-mails from their sent box to their hard drive, and those sent items were purged by Intel's system of automatically deleting e-mails after they have

aged for a certain period of time." (Court File No. 293 at p. 3) Other employees "thought that Intel's IT group was automatically saving their e-mails." (*Id.* at pp. 3- 4)

AMD characterized the Intel system as "an 'honor system' on selected employees, who were asked voluntarily to identify and move relevant materials to off-network storage on their personal computers." (Court File No. 294 at p. 2) Under an Agreed Order, Intel had until April 17, 2007 to submit more detailed information regarding the approximately 239 custodians and any "preservation issues affecting that [employee], including the nature, scope and duration of any preservation issue(s)." (Court File No. 299 at p. 4)

Second, as the litigation progressed, "[a]nother lapse occurred during the ongoing effort to refine the custodian list" that was subject to the litigation hold. (Court File Nos. 293 at p. 4 and 321 at p. 21-22) In late May 2006 (almost a year after the Complaint was filed), Intel exchanged a "Custodian List" with AMD in which Intel identified "[a]fter reasonable investigation," over 1,000 employees whom it believed "comprise[d] all of its and its subsidiaries' personnel in possession of an appreciable quantity of non-privileged, material, non-duplicative documents and things responsive to" the document requests of AMD. (Court File Nos. 122 and 321 at p. 17-18) But, while Intel identified these additional employees as key employees having substantial information, Intel realized that it "failed to send retention notices to most of these additional designees." (Court File No. 293 at p. 5) Intel identified this as "a single unintentional human error" by "inside counsel responsible for document retention." (Court File No. 321 at p. 22)

Third, Intel "missed capturing the hard drives of 13 custodians who had received retention notices" and had departed the company while the litigation was pending. (Court File No. 321 at p. 22)

Fourth, while Intel's IT was supposed to have "migrated" (or electronically moved) the e-mail boxes of the employees subject to the litigation hold to designated servers, 121 employees were not properly moved. (Court File No. 293 at p. 2, n.1 and 321 at pp. 26-27) Therefore, Intel had to identify any employees who were not moved, and when they were moved. (Court File No. 299 at pp. 2-3)

The Remediation Efforts

This is a story without an ending — at least not yet. Intel is going to now incur certain costs to address what it characterized as its "inadvertent mistakes in the implementation of" its initial preservation hold. (Court File Nos. 293 and 321 at pp. 30-39) These steps include:

- Intel has had to put in place an "e-mail archiving solution that captures all e-mails sent or received by any Intel Custodian still employed at Intel," commonly called "journaling" the e-mail. This system "prevents individual custodians from deleting or altering emails located within the Archive." (Court File Nos. 293; 297 at p. 52-53; 299 at p. 3, 321 at pp. 31-32)
- At the request of the Special Master, the parties are recommending a "neutral electronic discovery expert . . . to assist the Special Master on" the issues of Intel's electronic retention. (Court File Nos. 297 at pp. 42-51; 299 at p. 3) Intel has to pay the costs and expenses of the expert and other costs of the Special Master in dealing with the preservation issues.[7] (Court File No. 299 at pp. 3, 6)
- Intel had to perform a time-consuming and expensive "accounting" of the back-up tapes that it did pull off of the dedicated e-mail servers by April 27, 2007. (Court File Nos. 197 at pp. 7, 10-11, 13; 299 at p. 5) In addition, Intel proposes to use "all available sources of data it has assembled to complete its production." This includes the expensive task of reconciling the "multiple layers of preservation with overlapping sources of information." (Court File No. 321 at pp. 30-35)
- Intel reports that it "already has spent approximately $3.3 million just in outside vendor costs for the initial step of processing the [back-up tapes],[8] and expects to spend millions more to complete the remediation plan...." (Court File No. 321 at p. 3, 4)

Conclusion

While the Intel case is currently pending, it shows that, regardless of the size of the organization or the complexity of the IT system, an effective litigation hold must be ***planned early, effectively communicated, periodically revisited*** and ***reasonably monitored.***

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1. Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 216 (S.D.N.Y. 2003) (internal citations omitted).

2. The Intel case is ongoing and neither the author nor Baker Donelson represents either party. All references to "Court File No. ___" are to the file number of the publicly available pleading, available at www.pacer.psc.uscourts.gov in Docket 05-441.

3. (Court File No. 1.) *See also Advanced Micro Devices v. Intel,* 452 F. Supp. 2d 555, 557 (D. Del. 2006) (summarizing AMD's claims). Intel's Answer claims that AMD seeks to charge higher prices and "obscure [its] goal of shielding AMD from valid price competition" with "colorful language and fanciful claims." (Court File No. 51 at p. 6.)

4. (Court File No. 321 at pp. 2-3 [noting that "Intel not only had to save relevant historical information...but it had to retain an enormous volume of" electronic information "generated by hundreds of Intel employees on a *forward-going basis*" (emphasis added)); p. 15-16 [quoting AMD's position on the enormity of the discovery task].)

5. (Court File Nos. 293, 294 and 321) ["The purpose is to balance the critical need to have a well-functioning, efficient system with the ability of users to maintain that information needed by the corporation and individual users for ongoing business purposes.].) See also *Arthur Andersen v. United States,* 544 U.S. 696, 704, 125 S. Ct. 2129, 161 L.Ed.2d 1008 (2005) ("'Document retention policies," which are created in part to keep certain information from getting into the hands of others, including the Government, are common in business.") *Broccoli v. Echostar Comm. Corp.*, 229 F.R.D. 506, 510 (D. Md. Aug. 4, 2005) (describing a very short retention period for e-mail as "extraordinary," but stating that "under normal circumstances, such a policy may be a risky but arguably defensible business practice undeserving of sanctions"). *Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc.,* No. 04-cv-00329, 2007 WL 684001, *7 (D. Colo. Mar 2, 2007) (addressing an automatic delete policy pursuant to which any "e-mails older than 90 days would be automatically deleted").

6. The Special Master was appointed early in the litigation, by an Order dated April 27, 2006. (Court File No. 106)

7. The parties agreed to appoint Mr. Eric Friedberg to assist the court "as a neutral electronic discovery expert." Mr. Friedberg's rate is $600/hour. (Court File Nos. 306 and 319.)

8. Intel reported that it "has already produced the equivalent of approximately 17 million pages of documents and expects to be producing the equivalent of 47 million pages of documents" from the first custodians identified by AMD. (Court File No. 321 at p. 5)

9. *See Arthur Andersen LLP v. United States*, 544 U.S. 696, 698-702, 125 S.Ct. 2129, 2132-33, 161 L.Ed.2d 1008 (2005).

10. Judge Scheindlin of the United States District Court for the Southern District of New York famously set forth preservation standards for ESI in the context of a dispute involving UBS Warburg. *See Zubulake v. UBS Warburg,* LLC, 220 F.R.D. 212, 217-18 (S.D.N.Y. 2003) (*"Zubulake IV"*).