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Electronically Stored Information Preservation and Collection

Navigating the Changing ESI Landscape for Effective Litigation Holds

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Today's faculty features:

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Deloitte.

Electronically Stored Information Preservation and Collection: Recent Developments

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February 27, 2013

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Setting the stage for today's discussion

Origins — where the obligation comes from

Timing — when the obligation to issue a litigation hold is triggered

Scope — what should be preserved

Duration — ongoing duties

Consequences — when bad things happen to good data

Origins

Origins…

- The preservation obligation is referenced, but not defined, in Fed. R. Civ. P. 26(f)(2) ("In conferring, the parties must . . . discuss any issues about preserving discoverable information. . . ."
- Common law
  - Inherent power of the court to manage its docket
    - Duty to avoid spoliation of relevant evidence
    - Preserve the integrity of the judicial process
- Application of Rule 37 of the Federal Rules of Civil Procedure
- Other statutes or regulations
  - Civil
  - Criminal
  - Federal
  - State

Timing

Timing…

- "Reasonably anticipated litigation"
- "Threatened litigation"
- "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." *Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212, at 216 (S.D.N.Y. 2003) (*Zubulake IV*)
- *Cache la Poudre Feeds v. Land O'Lakes*, 2007 WL 684001 (D. Colo. March 2, 2007) ("the duty to preserve relevant documents should require more than a mere possibility of litigation")

Timing… (cont.)

- "It is well established that the duty to preserve evidence arises when a party reasonable anticipates litigation." *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC*, 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010) (first amended order).

- "Counsel are reminded, however, that the duty to preserve potentially relevant ESI is triggered when the litigation is commenced or when litigation is 'reasonably anticipated,' which could occur before litigation is filed." *See* Court of Chancery Guidelines for Preservation of Electronically Stored Information, *available at* http://courts.delaware.gov/forms/download.aspx?id=50988.

Timing… (cont.)

- "[A] duty to preserve is triggered only when an organization concludes, based on credible facts and circumstances, that litigation or a government inquiry is likely to occur." The Sedona Conference, *Commentary on Legal Holds: The Trigger & The Process* (September 2010). For example:
  - Specificity of the complaint or threat
  - Party making the claim
  - Business relationship between the parties
  - Whether the party making the claim is known to be litigious
  - The experience of the industry
    - *See Philip M. Adams & Assocs., LLC v. Winbond Elecs. Corp.*, 2010 WL 3767318 (D. Utah Sept. 16, 2010)
  - Whether the party has learned of similar claims

Application of the obligation

Application of the obligation

- Defendants
- Plaintiffs
  - *See Rambus, Inc. v. Infineon Techs. AG*, 220 F.R.D. 264 (E.D. Va. 2004) (plaintiff, knowing that it was likely to commence patent litigation, could not employ a computer program designed to destroy relevant evidence), subsequent determination, 222 F.R.D. 280 (May 18, 2004). For more on *Rambus*, see *Hynix Semiconductor, Inc. v. Rambus, Inc.,* 2012 WL 4328999 (N.D. Cal. Sept 21, 20012) (on remand, and under new instructions by the Federal Circuit, court determines Rambus did spoliate evidence in bad faith or at least willfully and strikes from the record evidence supporting its claim for a royalty in excess of a reasonable, non-discriminatory royalty) and *Micron Technology Inc. v. Rambus, Inc.,* D. Del., No. 1:00-cv-00792-SLR, Jan. 2, 2013 (finding Rambus's conduct to be "of the worst type: intentional, widespread, advantage-seeking, and concealed," Judge Robinson rules patents-in-suit unenforceable against Micron.)
  - "A plaintiff's duty is more often triggered before litigation commences, in large part because plaintiffs control the timing of litigation." *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities*, 2010 WL 184312, *4 & n. 27 (S.D.N.Y. Jan. 15, 2010) (first amended order).
- Third (non) parties
  - *Auto Club Family Ins. Co. v Ahner*, 2007 WL 2480322 (E.D. La., Aug. 29, 2007)
    - Rules 26(c) and 45 applied
    - Non-party had to make "'a particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements,' in support of its motion."
  - *Guy Chemical Co., Inc. v. Romaco AG*, 2007 WL 1521468 (N.D. Ind. May 22, 2007)
    - Rule 45 subpoena enforced where cost of production if determined to be insignificant

What must be preserved?

What must be preserved?

"While a litigant is under no duty to keep or retain every document in its possession . . . it is under a duty to preserve what it knows, or reasonably should know, is relevant in 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." *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003) (*Zubulake* IV).

What must be preserved? (cont.)

- *In re Flash Memory Antitrust Litig.*, 2008 WL 1831668 (N.D. Cal. Apr. 22, 2008)
  - "All parties and their counsel are reminded of their duty to preserve evidence that may be relevant to this action. The duty extends to documents, data, and tangible things in the possession, custody and control of the parties to this action, and any employees, agents, contractors, carriers, bailees, or other non-parties who possess materials reasonably anticipated to be subject to discovery in this action."
  - "Until the parties reach an agreement on a preservation plan or the Court orders otherwise, each party shall take reasonable steps to preserve all documents, data, and tangible things containing information potentially relevant to the subject mater of this litigation."
  - "Counsel shall exercise all reasonable efforts to identify and notify parties and non-parties of their duties, including employees of corporate or institutional parties, to the extent required by the Federal Rules of Civil Procedure."

What must be preserved? (cont.)

- The fact that the relevant data is located on a source that may make it difficult or expensive to preserve does not diminish a litigant's preservation obligations.
  - *Haskins v. First American Title Insurance Co*., No. 10-5044 (RMB/JS), 2012 U.S. Dist. (D.N.J Oct. 18, 2012)(court finds that defendant had a duty to issue a litigation hold to its independent title agents because litigation was reasonably foreseeable and the duty to preserve extends to third parties, as long as the documents are "within a party's possession, custody, or control," observing that although it did not have physical possession, the defendant controlled the agents' documents because it had "'the legal right or ability to obtain the documents from [the agents] upon demand.'"
  - *Boeynaems v. L.A. Fitness Int'l, LLC*, 2012 WL 3536306 (E.D. Pa. Aug. 16, 2012) (in *putative* class action, court applies cost shifting to lessen preservation burden.)
  - *In re Brand Name Prescription Drugs Antitrust Litig.*, No. 94C897, 1995 WL 360526, at *5 (N.D. Ill. June 15, 1995) (court holds that defendant must bear the burden and expense of preserving and ultimately producing relevant information to the plaintiffs even though those efforts would be costly, given that "the necessity for a retrieval program or method is an ordinary and foreseeable risk" associated with keeping information in the form chosen by the defendant)

What must be preserved? (cont.)

- *Arista Records LLC v. Usenet.com, Inc.*, 2009 WL 185992 (S.D.N.Y. Jan. 26, 2009) (court finds defendant on notice to preserve transitory data — usage data, digital music files, web pages — that is highly relevant to action once those sources identified by plaintiff)
- *Columbia Pictures Indus. Inc. v. Bunnell*, 2007 U.S. Dist. LEXIS 63620 (C.D. Cal. August 24, 2007) (server log data stored in RAM defined as ESI and described as "extremely relevant" to that matter)
- *Healthcare Advocates, Inc. v. Harding*, *Earley, Follmer & Frailey*, 2007 WL 2085358 (E.D. Pa. July 20, 2007) (court denies motion for sanctions for loss of internet cache data)
- *Cf., Nat'l Day Laborer Org. Network v. United States Immigration and Customs Enforcement Agency*, 2011 WL 381625 (S.D.N.Y. Feb. 7, 2011) ("metadata maintained by an agency *as part of an electronic record* is *presumptively* producible under FOIA, unless the agency demonstrates that such metadata is not 'readily reproducible.") (Withdrawn)

What must be preserved? (cont.)

- Back to basics . . .
  - Who has potentially discoverable data?
  - Where is the data?
  - What form is the data in?
  - Remember: ESI can take a variety of forms and can be stored in a number of ways.
  - *See, e.g.*, Standing Order for All Judges of the Northern District of California — Contents of Joint Case Management Statement: Parties must state the "[s]teps taken to preserve evidence *relevant* to the issues *reasonably evident* in the action, including the interdiction of any document-destruction program and any on going erasures of e-mails, voice mails, and other electronically-stored material." (Emphasis added.)

Are there any limits on this?

- ***Zubulake IV*, 220 F.R.D. at 217:**
  - "What is this scope of the duty to preserve? Must a corporation, upon recognizing a threat of litigation, preserve every shred of paper, every e-mail or electronic document, and every backup tape? The answer is clearly, "no." Such a rule would cripple large corporations… that are almost always involved in litigation…"
  - "At the same time, anyone who anticipates being a party or is a party to a lawsuit must not destroy unique relevant evidence that might be useful to an adversary."
- **Sedona Principle 5:**
  - The obligation to preserve ESI requires reasonable and good faith efforts to retain information that may be relevant to pending or threatened litigation. However, it is unreasonable to expect parties to take every conceivable step to preserve all potentially relevant ESI.
- ***See also Miller v. Holzmann*, 2007 WL 172327 (D.D.C. Jan. 17, 2007)** (describing Principle 5 as "reasonable" and reflecting evolving standards); *see also Convolve, Inc. v. Compaq Computer Corp.*, 223 F.R.D. 162, 177 (S.D.N.Y. 2004) (party need not preserve ephemeral oscilloscope data where doing so "would have required heroic efforts far beyond those consistent with [the other party's] regular course of business.")

Are there any limits on this?

- ***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) (emphasis in original).
- ***Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497 (D. Md. 2010)** ("Although … courts have tended to overlook the importance of proportionality in determining whether a party has complied with its duty to preserve evidence in a particular case, this should not be the case because Fed. R. Civ. P. 26(b)(2)(c) cautions that all permissible discovery must be measured against the yardstick of proportionality."
- ***Orbit One Communications, Inc. v. Numerex Corp.,*** 2010 WL 4615547, at *6 n.10 (S.D.N.Y. Oct. 26, 2010) ("Reasonableness and proportionality are surely good guiding principles for a court that is considering imposing a preservation order…. Because these concepts are highly elastic, however, they cannot be assumed to create a safe harbor …. Proportionality is particularly tricky in the context of preservation.)

Are there any limits on this? (cont.)

- **Sedona Principle 6:**
  - "Responding parties are best situated to evaluate the procedures… appropriate for preserving… their own ESI."
  - *See also Zubulake*, 220 F.R.D. at 218 (“[L]itigants are free to choose how this task is accomplished.”)

Obligations of counsel

Obligations of counsel

- "[A] party and her counsel must make certain that all sources of potentially relevant information are identified and placed 'on hold,' . . . To do this, counsel must become fully familiar with her client's document retention policies as well as the client's data retention architecture. *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 432 (S.D.N.Y. 2004) (*Zubulake* V).
- "[C]ounsel should communicate directly with 'key players' in the litigation, i.e., the people identified in a party's initial disclosure and any subsequent supplementation thereto. Because these 'key players' are the 'employees likely to have relevant information,' it is particularly important that the preservation duty be communicated clearly to them." *Zubulake V*, 229 F.R.D. at 433-34.
- "A party's discovery obligations do not end with the implementation of a 'litigation hold' – to the contrary, that's just the beginning. Counsel must oversee compliance with the litigation hold, monitoring the party's efforts to retain and produce the relevant evidence. *Zubulake V*, 229 F.R.D. at 432.
- "Finally, counsel should instruct all employees to produce electronic copies of their relevant files. Counsel must also make sure that all backup media [that] the party is required to retain is identified and stored in a safe place." *Zubulake V*, 229 F.R.D. at 434.

Obligations of counsel

- ***Zimmerman v. Poly Prep Country Day Sch.***, 09 CV 4586(FB), 2011 WL 1429221, at *17-18 (E.D.N.Y. Apr. 13, 2011) (magistrate finds that counsel has the duty to "oversee compliance with the [legal hold], [and] monitor[] the party's efforts to retain and produce the relevant [hard-copy] evidence.")
- ***Northington v. H & M Int'l***, No. 08-CV-6297, 2011 WL 663055, at *19 (N.D. Ill. Jan. 12, 2011) (court finds defendant's preservation efforts were unreasonable because the defendant asked self-interested custodians to search their own hard drives.
- ***Swofford v. Eslinger***, Case No. 6:08-cv-Orl-35DAB (M.D. Fl. Sept. 28, 2009) (court applies obligation to in-house counsel and grants motion for adverse inference and awards fees and costs).
- ***In re A&M Florida Properties II, LLC***, Bkrtcy. No. 09-15173, 2010 WL 1418861,at *6 (“While the delays in discovery were not caused by any intentional behavior, GFI's counsel did not fulfill its obligation to find all sources of relevant documents in a timely manner. Counsel has an obligation to not just request documents of his client, but to search for sources of information…. 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.’“)(citations omitted).

Why this needs to be done right!

The price of failure:

- Adverse inference
- Fees & costs assessed against the company and/or counsel
- Executive officer fined
- Evidence precluded
- Default/terminating sanctions

What's next?

What's next?

- **Differing standards of culpability.** *See, e.g., Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497 (D. Md. 2010) (summarizing cases).
- **Prejudice.** See, e.g., *Rimkus Consulting Group, Inc. v. Cammarata,* 688 F. Supp. 2d 598 (S.D. Tex. 2010) (“Determining whether sanctions are warranted and, if so, what they should include, requires the court to consider both the spoliating party’s *culpability* and the level of *prejudice* to the party seeking discovery.”) (Emphasis in original).
- **Relevance.** *See, e.g., Chin v. The Port Auth. Of N.Y. & N.J.*, No. 10-1904-cv(L) (2nd. Cir. July 10, 2012) (Citing *Orbit One Commc’ns*, the Second Circuit determined that “’the better approach is to consider [the failure to adopt good preservation practices] as one factor’ in the determination of whether discovery sanctions should issue” and stating that even if the defendant had been grossly negligent in its failure to issue a hold and even if the destroyed files contained relevant evidence, a case-by-case approach should be used to determine whether sanctions should issue; *Orbit One Communications, Inc. v. Numerex Corp.,* 2010 WL 4615547, at *6 n.10 (S.D.N.Y. Oct. 26, 2010) (motion for sanctions denied where party failed to demonstrate relevance of destroyed data.)
- **Proportionality.** *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) (emphasis in original).
- **Timing.** *See, e.g., Actionlink, LLC v. Sorgenfrei*, 2010 WL 395343 (N.D. Ohio Jan. 27, 2010) (court defers ruling on spoliation sanctions pending determination of whether destruction of data "disrupted" opposing party's case).
- **Revision to the Federal Rules of Civil Procedure?**

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ESI Preservation and Collection: Latest Developments

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February 26, 2013

Key Developments in 2012

- *Chin v. Port Authority of NY & NJ*
  - Differences with other courts of appeals
- Issues
  - Significance of a litigation hold letter
  - Culpability versus sanction
  - Proof of relevance and prejudice
  - Concept of "proportionality"

Chin v. Port Authority of NY & NJ

- Second Circuit decision in July 2012
- Background of case
- Spoliation conceded
  - Issue was the sanction
  - No litigation hold issued
  - District court did not abuse its discretion in failing to impose an adverse inference

Pension Committee v. Banc of America Securities

- Authored by Judge Shira Scheindlin (SDNY) (author of *Zubulake* series of opinions)
- Case involves ordinary and gross negligence, not willful conduct
- Court allows adverse inference instruction for gross negligence

Pension Committee

- Court found that 13 plaintiffs were either negligent or grossly negligent in meeting discovery obligations
  - They "conducted discovery in an ignorant and indifferent fashion"
- Six plaintiffs were grossly negligent
  - Adverse inference instruction: (1) instructs jury that plaintiffs were grossly negligent in failing to preserve evidence; (2) jury can presume, if it chooses, that the lost evidence was relevant and helpful to defendants; (3) plaintiffs could rebut that presumption

Pension Committee

- Negligence
  - Failure to preserve relevant information
  - Failure to obtain records from all employees
- Gross Negligence
  - Failure to issue a written litigation hold, because "that failure is likely to result in the destruction of relevant information"
  - Failure to collect records from key players or from former employees' files (can be willful)
  - Destruction of email or backup tapes with unique relevant information

Rimkus Consulting Group v. Cammarata

- Judge Lee Rosenthal (SD Tex)
  - Judicial conference chair
- Allegations of willful misconduct, including intentional deletion of emails and attachments and attempts to conceal the destruction
- Court notes that discovery must be "proportional" to the amount in controversy and the nature of the case

Rimkus Consulting Group

- To impose a severe sanction, such as an adverse inference, the Fifth Circuit requires
  - Intentional, bad faith conduct; negligence is not enough
  - Party seeking sanctions must show that the lost evidence "would have been relevant" and prejudicial
- In this case, both showings were made

Rimkus Consulting Group

- Split of authority
  - Culpability for most severe sanctions
    - *Pension Committee* (gross negligence) versus *Rimkus* (finding of "bad faith")
  - Whether lost evidence was relevant and prejudicial
    - *Pension Committee* (presumed for gross negligence) versus *Rimkus* (must still show relevance and prejudice, even for willful misconduct)

D'Onofrio v. SFX Sports Group, Inc.

- Judge John Facciola (DDC)
- Allegation that, inter alia, defendants scrapped plaintiff's laptop after it determined it could not be used and it had been searched for responsive files
  - Some of this information was subsequently recovered from other ESI sources

D'Onofrio v. SFX Sports Group, Inc.

- DC Circuit subdivides into two categories
- Punitive sanctions (e.g., dismissal, default judgments, attorneys' fees, contempt
  - Clear and convincing evidence of misconduct
- Issue-related sanctions (e.g., adverse inference, preclusion)
  - Remedial
  - Preponderance of the evidence that misconduct tainted the evidence

D'Onofrio v. SFX Sports Group, Inc.

- Court found that:
  - Plaintiff failed to prove by clear and convincing evidence that defendant acted in bad faith
  - After information was recovered, it was unclear what, if anything, was lost and, even if something was lost, whether it was relevant
- Court ordered evidentiary hearing to establish whether plaintiff was prejudiced
- This illustrates a third approach

Southern New England Tel. v. Global NAPs, Inc

- Rare decision from a court of appeals
- Willful misconduct, using "anti-forensic" software to erase 20,000 responsive electronic files
- District court imposed, among other sanctions, default under FRCP 37
  - There was no showing that plaintiff suffered prejudice

Southern New England Tel. v. Global NAPs, Inc

- Second Circuit held that district court did not abuse its discretion
- If conduct is sufficiently culpable, party seeking sanctions does not have to prove prejudice
- Differs from *Rimkus* interpretation of Fifth Circuit caselaw

Summary

- Courts differ on the three key elements of sanctions jurisprudence:
  - Culpability
  - Relevance
  - Prejudice
- In light of the state of the law, what should a party do to reduce the risk of sanctions?

Emerging Issues

- Courts will have to grapple with new technologies being used by businesses
  - E.g., cloud computing, text messages, video files
- Key is to focus on the basic principles when providing guidance
  - The law remains unsettled in this area and is evolving

ESI Preservation and Collection: Latest Developments

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The Duty to Preserve: Translating Legal Developments Into Practical Tips

Do Not Try This At Home

"A failure to preserve evidence resulting in the loss or destruction of relevant information is ***surely negligent***, and, depending on the circumstances, may be grossly negligent or willful."

Pension Committee of University of Montreal Pension Plan v. Banc of America Securities, 685 F.Supp.2d 456, 464 (S.D.N.Y. Jan. 15, 2010). *Contra Chin v. Port Auth. of N.Y. & N.J.*, 685 F.3d 135 (2d Cir. 2012).

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Tip #1: Develop Your Defense on Day 1

Issuing a litigation hold without continuing to monitor preservation efforts or documenting monitoring efforts can give rise to an inference of a culpable mental state for a sanctions analysis.

Apple, Inc. v. Samsung Electronics Co., LTD., --- F.Supp.2d ----, 2012 WL 3042943 at 10-11 (N.D.Cal., 2012).

Tip #1: Develop Your Defense on Day 1

- *What* is the law in your jurisdiction?
- *How* will you comply and tell your preservation story?
- *Who* will testify?

O'MELVENY & MYERS LLP

Tip #1: Develop Your Defense on Day 1

- *What* is your client's story?
  - How will the timeline of the steps your client took to preserve unfold in court?
  - Are there known losses of potentially relevant data or other vulnerabilities to address?
  - Document the steps taken from the very start
  - Generate all work product with an eye towards possible future disclosure during litigation
  - Work qualified witnesses familiar with the technical aspects of preservation and collection

Tip #2: Follow The *Zubulake* Checklist

- Issue legal hold notices (Tip #3);
- Identify players (Tip #4)
- Work with IT to suspend applicable retention policies (Tip #5);
- Address backup tape retention (Tip #6);
- Monitor, monitor, monitor (Tip #7)!

Tip #3: Legal Hold Notices

- Issuing Hold Notices: When?
  - *Potential Plaintiffs* control the timing of the lawsuit. In most circumstances, the duty to preserve will arise before the filing date of the complaint.
  - *Potential Defendants* should constantly evaluate risks of litigation. Ensure that internal information about harassment complaints, for instance, or external information about threats to sue are best evaluated by the appropriate people within an organization based on full information.
  - *Third Parties* – same as for defendants. A Rule 45 subpoena triggers the duty.

Tip #3: Legal Hold Notices

"This instruction does not meet the standard for a litigation hold. It does not direct employees to *preserve* all relevant records-both paper and electronic-nor does it create a mechanism for *collecting* the preserved records so that they can be searched by someone other than the employee."

Pension Committee, 685 F.Supp.2d at 473.

Tip #3: Legal Hold Notices

"[This instruction] is not a 'litigation hold.' It does not instruct [employees] to retain and not to delete the documents collected, nor does it provide a specific directive not to destroy future e-mails and other documents concerning the same subjects."

Point Blank Solutions, Inc. v. Toyobo America, Inc., 2011 WL 1456029 (S.D.Fla., 2011).

Tip #3: Legal Hold Notices

- Plain language: "do not delete"
- Do not sacrifice substance over form
- Considered privileged in most jurisdictions, but expect it to be disclosed

Tip #3: Legal Hold Notices

- Follow up:
  - Periodic reminder notices
  - Add new "waves" of custodians as they are identified
  - Oral or in-person follow-up
    - For large groups of potential custodians, consider presenting on preservation obligations at department meetings.
  - Is your level of custodian contact adequate to instruct custodians to properly preserve?

Tip #4: Identify "Key Players"

- Think beyond the witness stand: who has *access* to potentially responsive data?
- Administrative assistants, contractors
- Former employees – obligation to attempt to collect documents in possession of former employee *See In re NTL, Inc. Securities Litigation*, 244 F.R.D. 179 (S.D.N.Y., 2007).

Tip #4: "Key Players" (con't)

- *Consider Custodian-Based Document Production Stipulation*. Such a stipulation can provide the parties with means for clearly identifying their obligations to preserve and produce a circumscribed universe of documents
- May include mechanism for opposing counsel to designate additional custodians as they come to light
- An effective way to prevent disputes over the scope of "key players"

Tip #5: Evaluate Retention Policies

> Counsel should become *fully familiar with the client's document retention policies*, including its data retention architecture."
>
> *--Zubulake V*

- Work closely with IT and Records to identify every source of potentially relevant data.
- Automatic deletion policies may exist at the organizational, business unit and individual level
- Different policies for different types of information, e.g. email vs. databases

Tip #6: Consider Retaining Backup Tapes

"If a company can identify where particular employee documents are stored on backup tapes, then the tapes storing the documents of 'key players' to the existing or threatened litigation should be preserved if the information contained on those tapes is not otherwise available."

Zubulake IV, 220 F.R.D. 212, 218 (S.D.N.Y., 2003).

Tip #6: Consider Retaining Backup Tapes

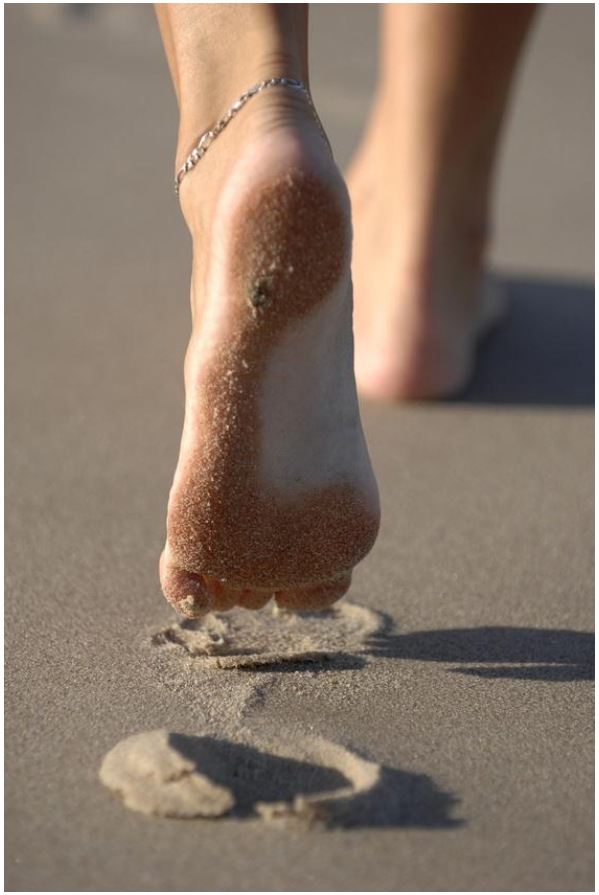
- *Practical Issue:* Backup tapes are a key player's "sole source" if ever there is a failure to preserve active data.

- *Two options:* (1) continue recycling tapes and defend preservation efforts; **or** (2) consider retaining backup tapes on a reasonable, periodic basis to insure against custodian non-compliance.

Tip #7: Monitor! Monitor! Monitor!

"[I]t is *not sufficient to notify all employees of a 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.



Practical Tip #8: Employ Defensible Collection Methods

- In *Pension Committee*, Judge Scheindlin observed that employees left to collect evidence themselves are not likely to capture all potentially responsive data. *Id.* at *8.

- Counsel in charge of document collection should familiarize themselves with the legal standards for electronic data collection and work closely with IT or other e-Discovery professionals to ensure that collection methods will stand up in court.

Tip #9: Consider Software Alternatives

"The day undoubtedly will come when burden arguments based on a large organization's lack of internal e-discovery software will be received about as well as the contention that a party should be spared from retrieving paper documents because it had filed them sequentially, but in no apparent groupings, in an effort to avoid the added expense of file folders or indices."

Capitol Records, Inc. v. MP3TUNES, LLC, No. 07 Civ. 9931, 2009 WL 2568431, at *7 (S.D.N.Y. Aug. 13, 2009)

Tip #9: Consider Software Alternatives

- Legal hold tracking software
  - can assist with implementing, tracking, cross-checking and ultimately lifting litigation holds
  - some offerings interface seamlessly with collection and archiving software
- Archiving systems for email and other forms of ESI
  - Capable of automatically saving all e-mail that is sent or received
  - Also capable of archiving and harvesting form shared network drives, Sharepoints, and internal websites
  - Expensive and time-consuming to implement up front, but later savings down the road

Conclusions

- Clients must be capable of quickly responding to preservation obligations.
- Conventional eDiscovery methods must be followed.
- Cutting edge software systems are becoming necessary to comply with the law.

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Questions & Contact Information

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