



presents

Electronically Stored Information Preservation and Collection: Zubulake Revisited New Requirements for Effective Litigation Holds

A Live 90-Minute Teleconference/Webinar with Interactive Q&A

Today's panel features:

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Zubulake Revisited: Leading Practices
for Effective Litigation Holds

Robert B. “Barry” Wiggins

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March 3, 2010

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Today's talking points

Origins — where the obligation comes from

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

Scope — what must be preserved

Duration — ongoing obligations

Consequences — when bad things happen to good data

Origins

Origins...

- Preservation is referenced, but not defined, in Fed. R. Civ. P. 26(f)(2)
- Common law
 - Duty to avoid spoliation of relevant evidence
 - Inherent power of the court to manage its docket
- 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*)

Timing... (cont.)

- *Cache la Poudre Fees v. Land O'Lakes*, 2007 WL 684001 (March 2, 2007) (“the duty to preserve relevant documents should require more than a mere possibility of litigation”)
- “[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, *Reasonable Anticipation of Litigation and Legal Holds* (August 2007 Public Comment Version)

Timing... (cont.)

- Credible Facts and Circumstances...
 - 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
 - Whether the party has learned of similar claims

See The Sedona Conference Commentary on Legal Holds — *The Trigger & The Process* at 9 (August 2007 Public Comment Version)

Application of the obligation

Application of the obligation

- Duties apply to potential/actual defendants
- Duties apply to potential/actual plaintiffs
 - “Shred day”
 - *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).
 - “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)

Application of the obligation (cont.)

- Third 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.”
 - Motion to quash denied.
- *Guy Chemical Co., Inc. v. Romaco AG*, 2007 WL 1521468 (N.D. Ind. May 22, 2007)
 - Rule 45 subpoena enforced
 - Non-party to bear cost of production if determined to be de minimis

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 matter 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.)

- *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)

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.
 - *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)
 - *Toledo Fair Hous. Ctr. v. Nationwide Mut. Ins.*, 703 N.E. 2d 340, 354 (Ohio Ct. Comm. Pleas 1996) (a “party cannot avoid discovery when its own record keeping system makes discovery burdensome”)

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 take 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? (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.”)

Preservation v. production

Preservation v. production

- Rule 26(b)(2)(B)
 - Party may object to discovery of ESI “not reasonably accessible because of undue burden or cost”
 - If confronted with a motion to compel, party must then demonstrate inaccessibility and, for good cause, may still be subject to judicial discovery order compelling the production of the data
- Production (not preservation) oriented
- "A party's identification of electronically stored information as not reasonably accessible [on account of undue burden or expense] does not relieve the party of its common-law or statutory duties to preserve evidence. Whether a responding party is required to preserve unsearched sources of potentially responsive information that it believes are not reasonably accessible [because of undue burden or expense] depends on the circumstances of each case. It is often useful for the parties to discuss this issue early in discovery." Advisory Committee Note to Fed. R. Civ. P. 26(b)(2).

Questions of privilege

Questions of privilege

- Protected by the work product doctrine. See *Gibson v. Ford Motor Co.*, 2007 WL 41954 (N.D. Ga.
- Protected attorney-client communication. See *Capitano v. Ford Motor Company Maremount Exhaust Products, Inc.*, ___ N.Y.S. ___ 2007 WL 586586 (N.Y. Sup.), 2007 Slip Op. 27074 (Feb. 26, 2007)
- Protection furthers public policy
- Be prepared for *in camera* inspection
- *Major Tours, Inc. v. Colorel*, 2009 WL 2413631 (D.N.J. Aug. 4, 2009) (upon a preliminary showing of spoliation, “most applicable authority from around the country provides that litigation hold letters should be produced if there has been [such a showing].”

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

- Applied to in-house counsel. See *Swofford v. Eslinger*, Case No. 6:08-cv-Orl-35DAB (M.D. Fl. Sept. 28, 2009) (court grants motion for adverse inference and awards fees and costs).

Why this needs to be done right!

The price of failure: adverse inference

- After concluding that “this discovery has all the earmarks... of blind man’s bluff,” court orders adverse inference. *3M Innovative Props. Co. v. Tomar Elecs.*, 2006 WL 2670038 (D. Minn. 2006)
- Jury allowed to infer that evidence UBS failed to produce would have been unfavorable. *Zubulake V*, 229 F.R.D. 422 (S.D.N.Y. 2004) (also awarding fees and costs)
- Similar adverse instruction given for failure to issue litigation hold resulting in non-production of any email. *Mosaid Tech., Inc. v. Samsung Elec. Co.*, 224 F.R.D. 595 (D.N.J. 2004) (also issuing monetary sanction).

The price of failure: Adverse inference (cont.)

- The standards . . .

The price of failure: Adverse inference (cont.)

Zubulake, 229 F.R.D. 422, 430-431 (S.D.N.Y. July 20, 2004)

- Party in control of records had an obligation to preserve data
- Culpable state of mind
 - Ordinary negligence
 - Bad faith (i.e., intentional or willful acts; relevance presumed)
- Destroyed evidence relevant to party's claim or defense
- Applied in *Treppel v. Biovail Corp.*, 2008 WL 866594 (S.D.N.Y. April 2, 2008) (court holding that claimant failed to demonstrate relevance of lost information where backup data negligently destroyed).

The price of failure: Adverse inference (cont.)

Morris v. Union Pacific Railroad, 373 F.3d 896, 899-903 (8th Cir. 2004)

- Party in control of records had an obligation to preserve data
- Culpable state of mind
 - Intentional destruction indicating a desire to suppress the truth
 - Facts and circumstances test
 - Prejudice/unfairness

The price of failure: In-house counsel sanctioned

- *Swofford v. Eslinger*, Case No. 6:08-cv-Orl-35DAB (M.D. Fla. Sept. 28, 2009) (courts grants motion for adverse inference and awards fees and costs).

The price of failure: Fees & costs assessed against the company

- *Bray & Gillespie Management, LLC v. Lexington Ins. Co.*, 2009 WL 546429 (M.D. Fl. March 4, 2009) (court, in an exercise of its discretion and without motion by opposing counsel, sanctions counsel for “willful blindness [that] unreasonably prolonged and multiplied the proceedings regarding the ESI discovery dispute.”)
- Defendant fined \$2.5M for destroying email and barred from presenting key witnesses at trial who failed to follow litigation hold. *U.S. v. Philip Morris, Inc.*, No. 99-2496 (D.D.C. July 21, 2004)
- Prudential fined \$1M for failure to prevent unauthorized destruction of discovery materials. *In Re Prudential Insurance Co. of America Sales Practice Litigation*, 169 F.R.D. 598 (D. N.J. 1997)

The price of failure: Executive officer fined

The failure to take reasonable steps to preserve data at the outset of discovery resulted in a personal fine levied against the defendant's CEO. *Danis v. USN Communications*, 53 Fed. R. Serv. 3d 828 (N.D. Ill. 2000)

The price of failure: Evidence precluded

- Defendant prohibited from cross-examining plaintiff's expert. *United Med. Supply Co., Inc. v. United States*, 2007 WL 1952680 (Fed. Cl. June 27, 2007)
- Defendant precluded from introducing 80K emails into evidence, even to refresh witness recollection, for failure to produce until after discovery cutoff; plaintiff permitted to use records on direct and cross. *Thompson v. United States Dept. of Housing and Urban Development*, 219 F.R.D. 93 (D. Md. 2003)
- Alleged patent infringer precluded from offering any evidence of invalidity or unenforceability where found to have used Evidence Eliminator to destroy requested records. *Kucala, Enter., Ltd v. Auto Wax Co., Inc.*, 2003 WL 22433095 (N.D. Ill. May 27, 2003)

The price of failure: Default

- Default judgment entered on behalf of plaintiff in the face of defendant's willful spoliation of data and "obstreperous" conduct. *Columbia Pictures Inc. v. Bunnell*, C.D. Cal., No. 2:06-cv-01093 (Dec. 13, 2007)
- Default judgment entered where defendant reformatted hard drive before production to plaintiff. *QZO, Inc. v. Moyer*, 594 S.E.2d. 541 (S.C. Ct. App. 2004)
- Default judgment entered where defendant engaged in systematic discovery abuse, including refusal to produce and making outlandish excuses, such as earthquake. *Computer Task Group, Inc. v. Brotby*, 364 F.3d 1112 (9th Cir. 2004)
- Dismissal with prejudice for systematic discovery abuse, including violation of three discovery orders and late production on eve of depositions. *Mariner Health Care, Inc. v. PricewaterhouseCoopers LLP*, No. 02VS037631-F, slip op. (Ga. Fulton Cty. Nov. 9, 2004)

The price of failure: Default (cont.)

- A default judgment was entered against a defendant corporation when its counsel (1) failed to give adequate instructions to the client about client's overall discovery obligations; (2) failed to implement a systematic procedure for the retention of documents, knowing that the client had no document retention plan in place; and (3) delegated the document production tasks to a lay person who lacked an understanding of how broadly the term "document" was defined by the document request. *Metropolitan Opera Ass'n, Inc. v. Local 100 Hotel Employees & Restaurant Employees Int'l Union*, 212 F.R.D. 178 (S.D.N.Y. 2003), *motion for reconsideration denied*, 2004 WL 1923760 (S.D.N.Y. Aug. 27, 2004) (court criticized counsel and client for their "parallel know-nothing, do-nothing, head-in-the-sand behavior in an effort consciously to avoid knowledge of or responsibility for their discovery obligations...)

The price of failure: Some conclusions

- Factors:
 - culpability
 - prejudice or harm
- Courts are becoming more “creative” with the sanctions they impose
- “Enough is enough!”

Deloitte.



ESI Preservation and Spoliation: *Zubulake* Revisited

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March 3, 2010



Pension Committee

- Background
 - Judge Shira Scheindlin (SDNY)
 - Author of *Zubulake* series of opinions
 - Opinion issued January 11, 2010, amended January 15, 2010
- Holding
 - Court grants in part defendant's motion for sanctions
 - Plaintiffs did not act diligently and search thoroughly when they reasonably should have anticipated litigation



Pension Committee

- The merits of the dispute
 - Action by plaintiffs to recover \$550 million in losses from liquidation of hedge funds in which they held shares
 - Funds placed in receivership in SD Fla.
 - Claims brought under federal and state securities laws against various defendants, including former directors and administrators



Pension Committee

- The discovery issue
 - During discovery, defendants noticed “substantial gaps” in plaintiffs document production
 - “Discovery about discovery” from October 2007 through June 2008, including depositions, declarations, etc.
 - Defendants moved for sanctions seeking dismissal against 13 of 96 plaintiffs, alleging they (1) failed to preserve and produce documents; and (2) submitted false and misleading declarations



Pension Committee

- Not a case of deliberate destruction
- All 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

- Two plaintiffs still had backup tapes, and court ordered them to search or explain why they could not be searched
- All plaintiffs were subject to monetary sanctions of reasonable costs, including attorney's fees



Pension Committee

- The opinion (87 pages)
- Sets forth a detailed analytical framework
- Defines culpability in discovery context
 - Negligence (unreasonable conduct)
 - Gross negligence
 - Willfulness (intent or recklessness)
- Standards set “by years of judicial opinions” and depend on their own facts and circumstances



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



Pension Committee

- Burden of Proof
 - Relevance and prejudice
- Presumed if lost from bad faith or gross negligence
 - Presumption is rebuttable; show that information does not support the claims or defenses (relevance) or that the moving party had access to the information (prejudice)
- Must be proven if negligently lost



Pension Committee

- Remedies
 - Case-by-case basis
 - Options include: (1) further discovery; (2) cost-shifting; (3) fines; (4) adverse jury instructions; (5) preclusion; and (6) default judgment
- Subjective and case specific:
 - “A court has a ‘gut reaction’ based on years of experience as to whether a litigant has complied with its discovery obligation and how hard it worked to comply.”



Pension Committee

- Case observations: “bad facts . . .”
 - Incorrect declarations: “lacked detail,” “intentionally vague in an attempt to mislead” defendants and the court, “executed by a declarant without personal knowledge”
 - Large gaps in production (*e.g.*, no documents from 1999 to 2000, few between 2001 and 2002; only 10 emails for entire period)
 - No written holds for years
 - Witnesses were not knowledgeable
 - Handled by employees, not counsel



Rimkus Consulting Group v. Cammarata

- Judge Lee Rosenthal (SD Tex)
- Judicial conference chair
- Allegations of willful misconduct
- Split of authority
 - Adverse jury instruction regarding burden of proof that lost evidence was relevant and prejudicial: *Pension Committee* (presumed) versus *Rimkus* (must show relevance and prejudice, even for willful misconduct)
 - Culpability for most severe sanctions: negligence; balancing fault and prejudice; or finding of bad faith



ESI Preservation and Spoliation: *Zubulake* Revisited

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March 3, 2010



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March 3, 2010



***Zubulake Revisited: Practical Tips Arising
from Pension Committee***

Pension Committee

- *Pension Committee of University of Montreal Pension Plan v. Banc of America Securities*, --- F.R.D. ----, 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010)
- Judge Shira Scheindlin “revisits *Zubulake*” and sanctions institutional-investor plaintiffs for failures to preserve
- Court’s observations and dicta reflect the state of eDiscovery in 2010

Pension Committee

- Litigants Cannot Plead Ignorance
 - At this stage in the development of eDiscovery, litigants are expected to understand their duty to preserve and be prepared to comply.
 - Guidance from “years of judicial decisions,” including *Zubulake*. *Id.* at 3.

Pension Committee

- Failure to follow steps outlined in *Zubulake* may be deemed negligent/gross negligent *per se*
 - Issue legal holds
 - Identify key players' documents
 - Suspend applicable retention policies
 - Retain backup tapes for key players *where those tapes are the sole source of relevant information for those individuals*

*Id. at *7.*

Pension Committee

- No room for error:

*“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, --- F.R.D. ----, 2010 WL 184312 at *3.*

Tip #1: Develop Your Defense on Day 1

In *Pension Committee*, Judge Scheindlin found the declarants to plaintiffs' preservation efforts were uninformed as to what steps were taken and, as a result, had submitted false and misleading declarations. *Id.* at 12.

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?

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);
- Work with IT to suspend applicable retention policies (Tip #5);
- Address backup tape retention (Tip #6);
- Monitor, monitor, monitor!

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, --- F.R.D. ----, 2010 WL 184312 at *8

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 collect documents in possession of former employee
Id. at 14.

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

- 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

- “I am not requiring that *all* backup tapes must be preserved. Rather, if such tapes *are the sole source of relevant information* (e.g., the active files of key players are no longer available), then such backup tapes should be segregated and preserved. When accessible data satisfies the requirement to search for and produce relevant information, there is no need to save or search backup tapes.”

Pension Committee, --- F.R.D. ----, 2010 WL 184312 at *12 n.99.

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.

Practical Tip #7: Employ Defensible Collection Methods

- 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 #8: Consider Software Alternatives

*“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, --- F.R.D. ----, 2010 WL 184312 at *3*

Tip #8: 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 #8: 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 from 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.

Questions & Contact Information



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Jeffrey Fowler is a counsel in the Litigation Department and one of the founders of the firm's Document Retention and Electronic Discovery Practice. He is one of the few litigators in the country whose entire practice is dedicated to handling e-discovery issues. His experience spans a decade and includes some of recent history's largest electronic document productions. Jeff advises institutional clients on related topics, including litigation preparedness, legal hold obligations, electronic data collection and production, and document retention and destruction policies.