Dinsmore&Shohl LLP
ATTORNEYS

# E-Discovery Since Zubulake

## Litigation Holds

April 1, 2011

Patrick W. Michael

**As seen in *Bar Briefs* published by the Louisville Bar Association.**

The identification and production of electronically stored information ("ESI") is now part of the everyday landscape of both civil and criminal litigation. In some cases, ESI is printed and provided in paper format to opposing counsel. But as the volume of ESI continues to grow, so does the burden of production. Some surveys indicate that as much as 93% of all business records are stored electronically, and of that amount, less than 30% are ever printed to paper. The average worker receives approximately 55 e-mails every day. For a small business of 100 employees, this translates into approximately 1,375,000 e-mails annually. (*See* Microsoft, *Survey Finds Workers Average Only Three Productive Days Per Week* (Mar. 15, 2005) (http://www.microsoft.com) (U.S. workers reported they receive an average of 56 e-mail messages per day).)

The Federal Rules of Civil Procedure concerning the preservation of ESI were amended effective December 1, 2006. The amendments incorporated a number of concepts that were described by Judge Shira A. Scheindlin of the United States District Court for the Southern District of New York, in the case commonly referred to as *Zubulake. Zubulake v. UBS Warburg LLP*, 220 F.R.D. 212 (S.D.N.Y. 2003).

A number of cases have interpreted these rules changes, but the underlying message is always the same. A litigation hold to preserve ESI must be put into place as soon as litigation is reasonably anticipated. The failure to preserve has resulted in the largest number of cases granting sanctions. "In 230 cases in which sanctions were awarded, the most common misconduct was failure to preserve ESI, which was the sole basis for sanctions in ninety cases." *Sanctions For E-Discovery Violations: By The Numbers*, Duke Law Journal, Vol. 60: 789, 803 (2010).

**Litigation Holds**

The duty to preserve relevant evidence – either paper or electronic – is triggered when civil litigation is commenced or reasonably anticipated. *Zubulake*, 220 F.R.D. at 216. In the case of Plaintiff, the obligation typically arises when plaintiff anticipates the possibility of litigation. With respect to a plaintiff's duty, it is more often triggered before litigation commences, in large part, because plaintiffs control the timing of litigation. *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc. Of Am. Sec. LLC* ("Pension Committee"), 685 F. Supp. 2d 456 (S.D.N.Y. 2010).

The duty to preserve often does not arise until the defendant is served with the complaint. *NuCor Corp. v. Bell*, 251 F.R.D. 191, 197 (D.S.C. 2009). In most cases, the duty to preserve evidence is triggered by the filing of a lawsuit. *Cache La Poudre Feeds LLC v. Land O'Lakes, Inc.*, 244 F.R.D. 614, 621 (D. Colo. 2007). This means that a formal discovery request is not necessary to trigger the duty to preserve. *Krumwiede v. Brigton Assocs., LLC*, No. 05-C-2003, 2006 (WL 1308629 (N.D. Ill. May 8, 2006)).

The emerging trends suggest that the duty to preserve evidence may also extend to that period before the litigation when a party reasonably knows that the evidence may be relevant to litigation. *Silvestri v. General Motors*, 271 F.3d 583, 589 (4th Cir. 2001). For example, prior to filing a complaint, plaintiff's counsel asks defendant by letter to preserve relevant evidence. *Sampson v. City of Cambridge*, 251 F.R.D. 172, 181 (D. Md. 2008); *PML North America v. Hartford Underwriters Insurance Co*., 2006 U.S. Dist. LEXIS 94456 (E.D. Mich. 2006).

In the event the duty to preserve is triggered, outside counsel should take the following steps to comply with his/her obligations and to assure that the client is complying with its preservation obligations.

1. Outside counsel must immediately issue a Litigation Hold Letter to the client. The Litigation Hold Letter should identify the nature of the claims asserted in the lawsuit, the category of documents that must be preserved, the time period for which the hold should be implemented and the steps that must be taken to implement the hold.
2. Outside counsel must meet with the client to discuss the nature of the claims and to identify the "key players" who may have been involved with the underlying claims. In addition, outside counsel should meet with the information technology ("IT") director to determine how the ESI is stored, where it is stored, the ability to retrieve the stored information and the method of producing the data in its native form – the form in which it is stored.
3. Outside Counsel must coordinate with the client the issuance of a Litigation Hold Notice (the "Notice') to the key employees who may have been involved in the underlying claim. This Notice must (a) describe the documents that are to be preserved, (b) the location of the documents, (c) the applicable time period during which the documents would have been created or stored, and (d) the identification of the steps that each of the key players must take to comply with the preservation obligation. In some cases, different Notices may need to be issued to different departments to target the hold in more particularity. Outside counsel must also consider notices to former employees who have left the company or transferred out of the department to which the Notice has been issued. These employees and former employees may also have ESI that is relevant to the underlying lawsuit.
4. Once the Notice is issued, the client should ask its IT director to meet with each of the key players to make copies of their computer hard drives, install the copies on their computers and take custody of the original hard drives. The IT director should also make a backup of any servers including copies of all e-mails created by any of the key players during the applicable time period.
5. Once the preservation of the hard drives has occurred, outside counsel should conduct interviews with each key player to discuss the nature of the claims and the scope of the litigation hold as it pertains to each individual. The interviews should be designed to determine the extent and scope of documents in the custody or control of each the key players. In particular, counsel should determine what ESI was created by each key player and how each one stored the information they created and maintained. In addition, counsel should determine if there is any ESI that may potentially be the subject of a privilege. The interview must also be designed to determine if there are additional employees who should be designated as key players. Any additional individuals who are identified must be provided with the Notice, their hard drives copied, and they must be interviewed for compliance purposes. Outside counsel should use an interview form that is completed during the interview process. Following the interview, counsel should obtain the signature of the key player to document the interview and the key player's compliance with the litigation hold obligations.
6. Outside counsel must send a preservation of evidence letter to opposing counsel. The Preservation Letter should describe the category of documents that must be preserved, the time period for which the hold should be implemented and the steps that must be taken to implement the hold.
7. Outside counsel must periodically confirm with the client that the ESI which is the subject of the Litigation Hold is continuing to be maintained.

**Sanctions for Failure to Preserve Relevant Evidence**

The failure to implement the Litigation Hold and to assure that the client is complying with its preservation obligations can result in sanctions. The following is a sampling of recent cases in the Sixth Circuit involving a motion for sanctions for failure to properly implement a Litigation Hold or to assure that the client has continued to preserve documents that are the subject of the litigation hold.

1. *John B., et al., v. M. D. Goetz, Jr., et al*., Civil No. 07-6373, 531 F.3d 448, 459 U.S. App. LEXIS 13459 (6th Cir. June, 26, 2008).

   Plaintiffs asserted claims to enforce provisions of the Social Security Act. The parties entered into a consent decree. Plaintiffs sought electronically stored information that was to be provided by Defendants in accordance with the terms of the consent decree. Plaintiffs subsequently moved the Court to enter a contempt order based upon the assertion that Defendants violated the consent decree.

   **Sanctions**: The Court held that "it is beyond question that a party to civil litigation has a duty to preserve relevant information, including ESI, when that party has notice that the evidence is relevant to litigation ... or should have known that the evidence may be relevant to future litigation." In denying the motion for sanctions, the Court adopted The Sedona Principles: Best Practices, Recommendations & Principles for Addressing Electronic Document Production, Second Edition (The Sedona Conference Working Group Series, 2007) at 70, "noting that sanctions should be considered only if the Court finds a clear duty to preserve, a culpable failure to preserve and produce relevant ESI, and a reasonable probability of material prejudice to the adverse party."
2. *Anthony Mohrmeyer v. Wal-Mart Stores East, L.P.*, Civil No. 09-69-WOB, 2009 U.S. Dist. LEXIS 109076 at 8 (E.D. Ky. November 20, 2009).

   Plaintiff sustained a fall in the men's room in a Wal-Mart Supercenter on March 3, 2008. Plaintiff moved for sanctions when Wal-Mart failed to produce the maintenance log from the restroom. According to Wal-Mart procedures, the maintenance log is a transient document that is destroyed on a weekly basis. Wal-Mart asserted that the document is destroyed according to its routine policy unless it becomes aware of the possibility of litigation.

   **Sanctions**: The Court denied the motion for sanctions applying *Goetz* stating, "[i]t is debatable whether the principle recently articulated by the Sixth Circuit in *Goetz* concerning ESI can be generalized to establish a broader pre-litigation 'duty to preserve' all evidence no matter how speculative future litigation may be. Even in *Goetz*, the court was careful to state that the pre-litigation duty applies only when a party has been put on notice that evidence is relevant to pending litigation, or when the party 'should have known' that the evidence may be relevant to future litigation." The Court went on further to state that "[t]his opinion is not meant to imply that some type of formal notice of the likelihood of litigation must be received in every case before a duty to preserve arises. In the case of an airline disaster, for example, the 'trigger date' for the preservation of evidence clearly would be the date of the disaster, because of the high likelihood of litigation following such events."
3. *KCH Services, Inc. v. Vanaire, Inc., et al.*, Civil No. 05-777-C, 2009 U.S. Dist. LEXIS 62993 (W.D. KY. July 22, 2009)

   Plaintiff's president telephoned the defendant, Guillermo Vanegas, Sr., in October 2005 notifying Vanegas of his belief that co-defendant, Vanaire, a competitor, was using KCH's software without its permission. Following the telephone conversation, Vanegas instructed the Vanaire employees to delete from the Vanaire computers any software that Vanaire did not own or purchase. KCH filed its Complaint a month later and followed up with an evidence-preservation letter to Vanaire.

**Sanctions**: The Court held that the October 2005 telephone call was sufficient to put Vanaire on notice of the potential litigation involving KCH's software. The fact that Vanegas directed the Vanaire employees to delete the software following the telephone call was adequate proof to establish that Vanaire was aware of the problem and the potential for litigation. Following the filing of the Complaint and receipt of the preservation letter, Vanaire failed to preserve e-mails and other electronic evidence by continuing to delete and overwrite the electronically stored information. The Court granted KCH's motion for an adverse inference instruction concerning the deleted e-mails and software.