

Litigation Holds Checklist: Monitoring for Departing Employees & Other Key Elements in Active Litigation

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CGOC Discovery Lunch Series

September 26, 2005 | New York

Today's Talking Points

■ Zubulake IV: Preservation Obligations

- Once litigation is reasonably anticipated
- Suspend routine document retention/destruction policy
- Put in place litigation hold to ensure preservation of relevant documents
- Litigation hold generally does not apply to inaccessible backup tapes
 - Unless they are actively used for information retrieval
 - If you can identify where particular employee documents are stored on backup tapes, then key player tapes should be preserved if information is not otherwise available

■ Zubulake V: Duty to Monitor Compliance

- "Above all, the requirement must be reasonable."
- Active interplay between counsel and litigant
- Identify and place litigation hold on all sources of potentially relevant information once litigation is commenced or reasonably anticipated
- Become familiar with document retention policies and data retention architecture (discussions with IT personnel and key players)
- Ensure litigation hold is periodically re-issued
- Communicate directly with key players in the litigation; periodic reminders to them
- Instruct all employees to produce electronic copies of their relevant active files
- Safeguard relevant backup tapes
- "While these precautions may not be enough (or may be too much) in some cases, they are designed to promote the continued preservation of potentially relevant information in the typical case."

■ Departing Employees

- Why do we care?
- Baseline: coverage in document retention/destruction policies
- Intersection with litigation hold memos
 - Scale and scope
 - Institutionalize the procedure
 - Circumstances of departure
 - Who is responsible: HR, IT, in-house counsel, other
 - What sources are we talking about

From the Discussion

The working lunch included a number of in-house litigators from the securities industry as well as legal execs from the largest consumer products companies and the food and beverage industry. Meredith initiated the discussion with a review of Zubulake V and several post-Zubulake rulings.

1. Zubulake V has become black letter law

Although other jurisdictions are not bound by Judge Scheindlin's ruling in Zubulake, it is being broadly applied. The group agreed that Zubulake isn't really a "sea change" but an application of traditional rules. Deidre Paknad commented that what changed is the volume, diversity, and distribution of electronic data and the potential for sanctions and risks associated with failure.

Mosaid v. Samsung: Samsung failed to institute a proper legal hold at the outset of patent litigation. Plaintiff sought sanctions. The court applied the Zubulake standard outright with jury instructions and sanctions designed to "punish" Samsung, "deter others", and third, "make the claimant whole".

Broccoli v. Echostar: Echostar failed to suspend its retention policy. The court said, "under normal circumstances,... [the retention policy] may be a risky but arguably defensible business practice undeserving of sanctions." The court found that Echostar acted in bad faith. The court addressed when the duty to preserve arose in the case expressly citing Zubulake. It granted Broccoli's motion for discovery sanctions, which resulted in an adverse spoliation of evidence jury instruction and limits on Echostar's ability to present certain evidence.

Other Post-Zubulake Cases:

Clark Construction Group v. City of Memphis, 229 F.R.D. 131 (W.D. Tenn. 2005)

E*Trade Securities LLC v. Deutsche Bank AG, ___ F. Supp. 2d ___, 2005 WL 2140807 (D. Minn. Apr. 18, 2005)

Getty Properties Corp. v. Raceway Petroleum Inc., No. Civ. A. 99-cv-4395 (DMC), 2005 WL 1412134 (D.N.J. June 14, 2005)

Chan v. Triple 8 Palace, Inc., No. 03 Civ. 6048 (GEL) (JCF), 2005 WL 1925579 (S.D.N.Y. Aug. 11, 2005)

Tracy v. Financial Insurance Management Corp., No. 1:04-cv-00619 (TAB) (DFH), 2005 WL 2100261 (S.D. Ind. Aug. 22, 2005)

2. Reasonably accessible unreasonably difficult to define

Another major discussion topic was the definition of "reasonably accessible information". This is an aspect of the Zubulake opinions and the proposed rules of civil procedure. Matt Cohen of Skadden Arps suggested that this would be an area of significant contest going forward. In house counsel expressed concern that if data and its location can be identified, is it therefore "reasonably accessible"?

3. Monitoring for departing employees

Monitoring for departing employees in active litigation may be a process gap for many companies. As Zubulake shows, a departing employee is often the plaintiff and the duty to preserve may arise before or at their departure (see also Broccoli v. Echostar). Many companies' processes for retiring computers are disjointed from their HR and litigation holds processes, creating risk of spoliation. In some instances, there is clear advantage for immediately preserving and collecting this information to improve the company's legal position; in other instances, it is simply required.

Another caution from Meredith in such routine disposal of departing employees' electronic files is that these files may be records that have specific retention periods that do not hinge upon employment status but rather on the class and type of information. The normal retention period therefore should apply to the information.

Finally, that when there is an active legal hold in place, companies would be wise to ensure that there is tight linkage between HR and the litigation group to ensure that necessary evidence is preserved and collected. Systems such as PSS Systems Litigation Communications and Collections solution can close this gap automatically, making sure that spoliation doesn't occur without increasing process overhead for the company.



PSS provides the interlocking elements in its AtlasIPM solution



Litigation Communications and Collections Solution

Based on the emerging *Zubulake V* and Delaware standards for preservation and production, the Litigation Communications and Collections solution enables companies to automate and repeat hold notifications, identify and log interviews with affected parties, and plan and thoroughly execute document collection.

Enterprise Retention Management Solution

To address the difficulties in reconciling diverse business and oversight needs, the Enterprise Retention Management solution enables companies to coordinate and synchronize corporate retention policies and division retention schedules, ensuring local control and corporate oversight.

Data Classification and Handling Agent

To bring defensibility and feasibility to corporate policies, the Data Classification and Handling Agent maps applicable retention rules and legal holds to individual employees, automatically tagging information at the point of creation, automating and ensuring proper retention, disposition, holds, and collection as required.

The three Atlas solutions integrate seamlessly with each other to form the AtlasIPM Suite. By using the solutions in concert, you can synchronize information retention, disposal, preservation, and production, thereby reducing legal and IT costs by retaining and collecting only what is needed. Nothing more, nothing less.

For more information on how PSS Systems can help optimize your retention and collections processes, call Virginia Dickson at 650.961.1717, x144.

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October 20, 2005
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This session will tackle the role IT should play in collecting information and how to delegate without abdicating control. Modern monitoring approaches will be discussed.

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