Operation: Preserve ESI

An Update on E-Discovery Case Law Regarding ESI Preservation
and "Litigation Holds" Guidelines from the *Zubulake*, *Pension Committee*, and *Rimkus* Decisions

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I. Introduction

The evolution and development of e-discovery have been convoluted partially based on rapidly changing technologies and based on the need for lawyers, judges, and businesses to determine how electronically-stored information (ESI) needs to be preserved and then later produced during the throes of litigation. Many lawyers remain concerned about the procedures and policies, in effect an "Operation Preserve ESI," that need to be launched when litigation is reasonably anticipated. *Pension Committee*, 2010 WL 184312 at *4 (S.D.N.Y. Jan. 15, 2010). As explained by Judge Scheindlin, "once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents." *Id.* at *4, *quoting Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003) (*Zubulake IV*). Questions remain about knowing how, when, and to whom these directives regarding preserving ESI must be given.

Two of the main concerns addressed in case law and commentary are the process and timing of issuing a litigation hold letter to key players directing them to preserve ESI once litigation is

reasonably anticipated. The Southern District of New York judges, in particular Judge Shira Scheindlin, have taken leading roles in analyzing this process. On January 15, 2010, Judge Scheindlin issued her highly-anticipated *Pension Committee* decision, which builds on the ESI preservation steps she established in 2003 in her *Zubulake* opinions. Shortly after the *Pension Committee* decision, Judge Lee Rosenthal, from the Southern District of Texas, issued a lengthy, 139-paged opinion, addressing willful destruction of ESI and appropriate sanctions for such behavior. *Rimkus Consulting Group, Inc. v. Cammarata*, 2010 WL 645253 at *1 (S.D. Tex. Feb. 19, 2010). The *Zubulake*, *Pension Committee*, and *Rimkus* decisions provide guidelines for issuing litigation holds and provide an analysis of when ESI preservation failures should trigger sanctions.

The timeline of e-discovery law had two main milestones up until 2010: 1) the *Zubulake* opinions and 2) the 2006 amendments to the Federal Rules of Civil Procedure. As many are aware, in 2003, Judge Shira Scheindlin of the Southern District of New York authored the famous *Zubulake* opinions. These opinions were the first opinions to examine in depth the impact of e-discovery, the need for litigation holds and document retention policies, and the sanctions available for counsel who fail to issue litigation holds which may permit the company to negligently, grossly negligently, or willfully destroy relevant electronically stored information (ESI).[1] In 2006, the Federal Rules of Civil Procedure were amended to incorporate the term "electronically stored information" and provide some guidelines on the types of ESI that may be available for production in litigation. "Electronically stored information" is broadly defined under the Rules and encompasses every single piece of information maintained by the company "stored in any medium."[2] Parties may now refer to electronically stored information in responses to interrogatories and opt to produce data in electronic form.[3] The procedures for pretrial conferences and initial conferences were also revised to require parties to discuss provisions for the disclosure and discovery of electronically stored information in pretrial conferences and initial scheduling conferences.[4] Parties are also now required to discuss potential privilege claims, including possible agreements to govern the inadvertent disclosure of privileged documents or electronically stored information.[5]

To help better understand the importance of these amendments and the development of the case law thus far, these cases will be explored in detail below.

A. *Zubulake* Opinions

The *Zubulake* opinions arose from an employee gender discrimination case. UBS's conduct resulted in an adverse inference charge to the jury instructing the jury that the deleted emails would have negatively affected its case. The main issues in these opinions centered on retrieving deleted emails relevant to the plaintiff's case, who should bear the costs of retrieving the deleted emails from UBS's backup tapes, and whether sanctions should be imposed on UBS for not taking efforts to preserve those deleted emails.

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[1] *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 209 (S.D.N.Y. 2003) (*Zubulake I*); *Zubulake v. UBS Warburg LLC*, 230 F.R.D. 290 (*Zubulake II*); *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280 (S.D.N.Y. 2003) (*Zubulake III*); *Zubulake v. UBS Warburg LLC* (*Zubulake IV*); *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y 2004) (*Zubulake V*).

[2] *See* FED. R. CIV. P. 34 (a).

[3] FED. R. CIV. P. 33 (d); 34.

[4] FED. R. CIV. P. 16 (a) (5); 26 (f) (3).

[5] FED. R. CIV. P. 16 (a) (6) ; 26 (f) (4).

In *Zubulake I*, the court found that UBS should bear the costs of restoring the backup tapes containing the deleted emails. *Zubulake v UBS Warburg, LLC*, 217 F.R.D. 209 (S.D.N.Y. 2003). In *Zublake II* (not connected with the email production dispute), the court denied the Plaintiff's request to report certain information contained in a deposition to the NYSE. *Zubulake v. UBS Warburg, LLC*, 230 F.R.D. 290, 293 (S.D.N.Y. 2003). In *Zubulake III*, the court applied a seven-factor cost allocation test and found that UBS still had to restore the backup tapes containing the deleted emails, produce the emails, and pay 75% of the collection and production costs. *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 284 (S.D.N.Y. 2003). *Zubulake IV* addressed the plaintiff's requests for sanctions against UBS. *Zubulake v.UBS Warburg LLC*, 220 F.R.D. 212, 217 (S.D.N.Y 2003). The court had to determine what data were accessible versus inaccessible and determined that "accessible" data were data contained on backup tapes "actively used for information retrieval." *Id.* at 217-218. "Inaccessible" data were data stored on disaster recovery backup tapes. *Id.* at 217. Parties had a duty to preserve accessible data, but not inaccessible data (except potentially the inaccessible data for "key players" to the litigation). *Id.* at 217-218.

Zubulake V addressed a litigant's duties to preserve and produce ESI. It was in this final opinion that Judge Scheindlin determined that an adverse inference charge should be issued against UBS regarding the deleted emails. *Zubulake v.UBS Warburg LLC*, 229 F.R.D. 422, 424 (S.D.N.Y. 2004). Judge Scheindlin explained that lawyers have a duty to issue carefully worded litigation holds to key players of the company when litigation is reasonably anticipated and should monitor these litigation holds after they are issued. *Id.*

In the *Pension* case, as outlined below, Judge Scheindlin revisited in more detail the process of issuing and monitoring a litigation hold letter and when sanctions may be imposed for not properly or timely issuing a litigation hold letter.

B. *Pension Committee*

In *Pension Committee v. Banc of America*, 2010 WL 184312 at *3 (S.D.N.Y. Jan. 15, 2010), Judge Scheindlin emphasized that "the courts have a right to expect that litigants and counsel will take the necessary steps to ensure that relevant records are preserved when litigation is reasonably anticipated, and that such records are collected, reviewed, and produced to the opposing party." *Id.* at *1. This case involved a suit by investors to recover losses stemming from liquidation of two hedge funds in which they held shares. *Id.* at *1. During the discovery process, the defendants claimed that there were substantial gaps in the plaintiffs' document production. *Id.* The Court ultimately found that the defendants demonstrated that the plaintiffs had destroyed or failed to preserve relevant evidence, including numerous emails, and instructed that an adverse inference jury instruction be issued regarding the lost emails. *Id.* at *23.

Judge Scheindlin made it clear in the Southern District of New York, failure to issue a *written* litigation hold constitutes gross negligence. *Id.* at *3 (emphasis added). This finding may differ in other jurisdictions but, to be on the safe side, counsel at a minimum should issue a written litigation hold when litigation is "reasonably anticipated." In the *Pension* decision, the court made several key holdings including:[6]

1. the failure to issue a written litigation hold is gross negligence;

[6] DRI Webcast presentation outline.

2. the failure to preserve email or backup tapes of key players after a duty has attached is gross negligence or willfulness if no active data are available; and
3. the failure to evaluate the accuracy and validity of search terms is negligence.

Judge Scheindlin organized her opinion into three main sections. The court (1) discussed how to define negligence, gross negligence, and willfulness in the discovery context and what conduct falls into these categories; (2) reviewed the law on sanctions for spoliation of discovery; and (3) applied the governing law to the thirteen plaintiffs' discovery misconduct. 2010 WL 184312 at *2 (S.D.N.Y. Jan. 15, 2010).

Judge Scheindlin explained that in the discovery context and the e-discovery context in particular, the first step is the preservation of evidence which commences with the issuance of a written litigation hold. Judge Scheindlin recognized that every case is different, and established a continuum range of negligent—grossly negligent—willful failure to preserve ESI. *Id.* at *2. The severity of the sanctions imposed depends on the degree of culpability for the behavior. Judge Scheindlin set the baseline for negligence as the failure to preserve electronic records. Judge Scheindlin indicated that it is safe to assume, and the court will assume, that if counsel fails to timely issue a written litigation hold, then relevant documents will be lost or destroyed. *Id.* at *2. As noted earlier, Judge Scheindlin considers failure to issue a written litigation hold gross negligence "because that failure is likely to result in the destruction of relevant information." *Id.* at *3. The second step in the discovery process is collection and review of the evidence. *Id.* at *3.

In *Pension Committee*, Judge Scheindlin emphasized that litigants have the duty to preserve electronic communications and records of former employees that are in the company's possession, custody, or control. Judge Scheindlin also noted that a potentially higher burden may rest on plaintiffs to issue written litigation holds faster because plaintiffs are in a better position to anticipate litigation far sooner than the defendants.

C. *Rimkus*

On February 19, 2010, approximately one month after Judge Scheindlin issued her *Pension Committee* decision, Judge Lee Rosenthal of the Southern District of Texas issued *Rimkus Consulting Group, Inc. v. Cammarata*, 2010 WL 645253 at *1 (S.D. Tex. Feb. 19, 2010), a lengthy, 139-paged opinion addressing willful destruction of ESI and the appropriate sanctions for such destruction. This case arose from two parallel lawsuits regarding the validity of a non-compete agreement. In this case, a former employee of Rimkus Consulting left Rimkus and opened his own consulting firm. Several other Rimkus employees left with him to join his new consulting firm in Louisiana called U.S. Forensic. At Rimkus, this former employee (as well as the other former employees) had signed a non-compete agreement. In the fall of 2006, he filed a declaratory action in a Louisiana court to declare the non-compete agreement invalid. Near the same time, Rimkus filed suit in Texas against this former employee to enforce the non-compete agreement.

In this case, Judge Rosenthal addressed the issue of sanctions against the defendants (the former employees) for destroying emails. Rosenthal found that the former employees deliberately destroyed emails even after they knew that litigation was coming. *Id.* at *1. Based on the evidence, Judge Rosenthal found that the former employees' actions were done in "bad faith" which warranted the severe sanction of an adverse inference instruction. *Id.* The Judge determined that he would inform the jury that "if it finds that the defendants intentionally deleted evidence to prevent its use in

anticipated or pending litigation, the jury may, but is not required to, infer that the lost evidence would have been unfavorable to the defendants." *Id.* The court also awarded attorneys' fees and costs to the plaintiffs that were reasonably incurred in "identifying and revealing the spoliation and in litigating the consequences." *Id.* at 3.

In determining whether sanctions were warranted, the court considered both the spoliating party's culpability and the level of prejudice to the party seeking discovery. Judge Rosenthal agreed with Judge Scheindlin's methodology of analyzing culpability and prejudice on a continuum. Rosenthal recognized that a party's culpability can range from inadvertent destruction to intentional destruction to prevent the use of documents in litigation, while prejudice to the other party can range from no impact to preventing the party from defending itself or proving its claims. *Id.* at *6.

In analyzing whether destruction of emails was intentional or not, a judge must look to see if the Federal Rules of Civil Procedure 37(e) safe harbor applies. The "safe harbor" rule of 37(e) involves the "routine good-faith operation" of an electronic information system that may result in the loss of some of the information. *Id.* at *5. Judge Rosenthal emphasized that deletions, alterations, or losses of electronic evidence "cannot be spoliation unless there is a duty to preserve that information, a culpable breach of that duty, and resulting prejudice." *Id.* at *5.

Judge Rosenthal differed from Judge Scheindlin and found that the sanction of an adverse inference jury instruction is only warranted if the destruction of electronic evidence has been done in "bad faith" or intentionally. *Id.* at *6. Judge Scheindlin, in contrast, found that emails or other electronic evidence lost through gross negligence warranted an adverse inference jury instruction. *Id.* at *6, referencing *Pension Committee*, 2010 WL 194312 at *10-11.

Ii. Litigation Holds - Practical Guidelines

A. Litigation Holds Checklist

As previously discussed, a litigation hold is an "affirmative act by an organization to prevent the destruction of documents, including ESI and paper, relevant to a lawsuit."[7] John Jablonski, a New York practitioner, and the co-author of the book *Seven Steps for Legal Holds of ESI and Other Documents*, suggests that attorneys use the following outline as a guide for analyzing litigation holds:[8]

1. Identify trigger events
2. Analyze preservation duty—is a legal hold required?
3. Define the scope of the legal hold
4. Implement the legal hold
5. Enforce and Examine the Effectiveness of the legal hold
6. Modify the legal hold (if necessary)
7. Monitor and remove the legal hold
8. "When"—Defining a trigger event

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[7] Jabolonski, John J. "Electronic Discovery: Case Studies in Executing Effective and Practical Discovery Holds and Data Preservation Strategies for Products in a Global Environment," presented at the DRI Products Conference, April 2010, Las Vegas, Nevada, at 700.

[8] As referenced in Jabolonski, John J. "Electronic Discovery: Case Studies in Executing Effective and Practical Discovery Holds and Data Preservation Strategies for Products in a Global Environment," presented at the DRI Products Conference, April 2010, Las Vegas, Nevada, at 701.

As emphasized by Judge Scheindlin and the Sedona Conference, a written litigation hold letter should be sent when litigation is "reasonably anticipated." Judge Scheindlin in *Pension Committee* explained that the litigation "trigger" for a plaintiff may occur sooner than for a defendant, because a plaintiff often knows best when the loss occurred that forms the basis for a cause of action. *Pension Committee*, 2010 WL 184312 at *9-10. In fact, Judge Scheindlin found that the Plaintiff's delay in issuing a written litigation hold until 2007, when they had anticipated litigation since 2003, constituted gross negligence. *Id.* at *10.

A study in 2007 commissioned by ARMA International Education Foundation ("AIEF"), authored by John J. Isaza, Esq., formulated a list of events that would most likely trigger a duty to preserve ESI for anticipated litigation. This "trigger event" list includes:[9]

1. creation of a list of potential opponents before filing a lawsuit;
2. date notice is provided to an insurance carrier;
3. date claims are filed with administrative agencies;
4. dates of substantive conversations with supervisors and others about a potential lawsuit;
5. letter requesting explanation for non-hiring;
6. circulation of internal "document hold" memoranda; and
7. severity of injuries combined with the totality of circumstances.

The Committee also discussed possible trigger events including 1) pre-litigation correspondence, 2) the date of retention of counsel and/or experts, 3) partial settlement of claims, and 4) imminent lawsuit apparent with other red flags.

Once a trigger event has occurred, the duty to preserve ESI has attached, and a party from that point on must issue the litigation hold and "suspend its routine document and retention/destruction policy." *Zubulake*, 220 F.R.D. at 218.

1. "Form"—Written

It was very important to Judge Scheindlin for counsel to issue written litigation holds. Judge Scheindlin suggests that emails alone are not enough, and that letters should be sent to the "key" players and other personnel in key departments (the recipient list is discussed further below). Counsel should also have a meeting with key players in person and invite IT personnel to this meeting to discuss the scope of the litigation hold and the procedures that will be used to implement the litigation hold. Judge Scheindlin also emphasized the importance of making the litigation hold letters very specific and avoiding "general" form letters. The employees need to be clear about their obligations. For example, in *Pension Committee*, Judge Scheindlin found that emails, memoranda, and emails from counsel to plaintiffs requesting documents and emails necessary to draft the complaint did not meet the standard of a litigation hold. These emails and memoranda did 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*, 2010 WL 184312 at *8 (S.D.N.Y. 2003) (emphasis in original).

[9] As referenced in Jabolonski, John J. "Electronic Discovery: Case Studies in Executing Effective and Practical Discovery Holds and Data Preservation Strategies for Products in a Global Environment," presented at the DRI Products Conference, April 2010, Las Vegas, Nevada, at 701.

Judge Scheindlin thus recognized the need for counsel to monitor the process of collecting the data. Additionally, Judge Scheindlin explained that the written litigation hold must explicitly instruct the employees to not destroy records (which the communications from counsel to plaintiffs failed to do in *Pension Committee*). *Id.*

To be effective in drafting the litigation hold and collecting the relevant electronic materials, counsel must be familiar with the type of document retention system its client or corporation uses. Judge Scheindlin in *Zubulake* emphasized that counsel must "become fully familiar with [the] 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*).

2. "Who"—Recipients of the Written Litigation Hold

Judge Scheindlin explained that the litigation hold letter should be sent at a minimum to "key players" of the organization with knowledge relevant to the litigation, but counsel needs to analyze whether the data from other non-key or lower-level employees may also need to be included within the scope of the litigation hold. Counsel needs to analyze the potential or actual causes of action and which individuals or departments may have the most knowledge related to the plaintiff's litigation and issue the written litigation hold to the entire department if necessary. Another factor that counsel needs to keep in mind is determining whether certain key employees or employees within the key department have left, and take steps to notify the IT department of the company to preserve the emails and deleted emails of those former employees. Counsel also needs to be made aware if any key employees or employees from the key departments are about to leave the company, to ensure that all relevant data or materials from the individual's home computer or laptops or removable data cards are retrieved from those employees before they leave the company.

It goes without saying that counsel for a corporation must issue the litigation hold letter to the IT department or personnel of the corporation and must work with IT staff to implement and monitor litigation holds. The IT department will have superior knowledge of how the company's computer systems are operated and what steps need to be taken to preserve data.

3. Process—Implementation, Monitoring, and Revising

Judge Scheindlin suggested that it is not enough for counsel to just issue the litigation hold and then later wait until discovery responses are due to check on the ESI preservation efforts. Attorneys need to be constantly monitoring the implementation of the litigation hold and revise the terms of the hold as necessary as the litigation develops. If a lawsuit is filed, or new parties are added, or new causes of action alleged, counsel may need to re-assess the terms of the litigation hold and expand or change the scope of the hold.

4. Cost Hindrances—Seeking Protection for Costs of Producing ESI

If ESI discovery will impose an "undue burden or expense" on the responding party, the court can engage in a cost-shifting analysis to determine whether the requesting party should share some of the costs in production. *Zubulake*, 217 F.R.D. 209, 318 (S.D.N.Y. 2003). A burden is undue when "it outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues." *Id.*, quoting Fed. R. Civ. P. 26(c). The court should consider a cost-shifting analysis only when "electronic data is relatively inaccessible, such as in backup tapes." 217 F.R.D. at 324. The court then can require the

responding party to "[r]estore and produce responsive documents from a small sample of the requested backup tapes" to more accurately determine the costs of producing the data. *Id.* Lastly, the court can consider the seven (7) cost-shifting facts developed by the *Zubulake* court: 1) the extent to which the request is specifically tailored to discover relevant information, 2) the availability of such information from other sources, 3) the total cost of production, compared to the amount in controversy, 4) the total cost of production, compared to the resources available to each party, 5) the relative ability of each party to control costs and its incentive to do so, 6) the importance of the issues at stake in the litigation, and 7) the relative benefits to the parties of obtaining the information. *Id.* at 322.

Iii. Failure To Preserve ESI - Consequences

A. Burden of Proof

The *Zubulake*, *Pension Committee*, and *Rimkus* decisions discussed the continuum of sanctions depending on the culpability of the spoliating party. As explained by these courts, the sanctions can range from further discovery, cost-shifting, fines, adverse inference jury instructions, preclusion of claims, and entry of default judgment or dismissal. *See Pension Committee*, 2010 WL 184312 at *3 (S.D.N.Y. Jan. 15, 2010). Judge Scheindlin provided that a party requesting sanctions against an opposing party for failing to preserve ESI must demonstrate that the missing ESI is relevant and that the party has been prejudiced by the failure to produce the ESI. *Id.* at *5. In addition the requesting party must prove that the spoliating party: 1) had control over the evidence and an obligation to preserve it at the time of the destruction or loss; 2) acted with a culpable state of mind upon destroying or losing the evidence; and 3) the missing evidence is relevant to the party's claim or defense. *Id.* at *5. While the Second Circuit (due to Judge Scheindlin) is more likely to impose more serious sanctions such as adverse inference jury instructions on the basis of gross negligence, other circuits, including the Fifth Circuit, require a finding of "bad faith" or intentional destruction of ESI and prejudice to the requesting party before an adverse inference jury instruction will be given. *See Rimkus*, 2010 WL 645253, at *6, *31; *contra Pension Committee*, 2010 WL 184312, at *10-11.

It is important to check the law of your circuit to determine at what level of culpability the court will impose a more serious sanction such as an adverse inference jury charge. The burden is still on the requesting party to prove that information has been lost or destroyed, and that the information is relevant, and that the requesting party is prejudiced because of lack of production of the information. *Rimkus*, 2010 WL 645253, at *5. The requesting party will need to obtain extrinsic evidence "of the content of at least some of the deleted information from other documents, deposition testimony, or circumstantial evidence" to show the relevance of the information and the prejudice from the loss of the information. *Rimkus*, 2010 WL 645253, at *8. If the information can be found elsewhere, or through third-parties, then the level of prejudice will likely be low. If the information can be retrieved from no other sources, then the level of prejudice will likely be high. In addition to sanctions, the court will often also award attorneys' fees to the requesting party to cover their efforts to prove the spoliation. *Id.* at *39. *See Appendix A, attached to this paper for a Chart of Preservation Failures and Possible Sanctions.*

B. Practical Tips – Checklist for Litigation Holds [10]

[10] As suggested (with modifications in the DRI's Electronic Discovery Committee Webcast Presentation entitled "Are Written Litigation Holds Required to Avoid Sanctions in Federal Court?" presented on April 14, 2010 by John Jablonski and Jim Lehman. *See also Appendix B to this paper for additional guidelines.*

1. Written Form—Required
2. Clearly articulated preservation instructions—develop scope and road map
3. Timely issuance of written litigation hold—when litigation is "reasonably anticipated"
4. Suspend automatic deletion
5. Preserve backup media—when it is the only source
6. Supervision by counsel
7. Priority on key players—start with key players and expand the list if and when necessary
8. Affirmative custodian responses—make sure they understand their responsibilities
9. Conduct key custodian interviews
10. Modify scope to match your court papers—you need to match your litigation hold list with your witness lists/lists of people with knowledge of relevant facts
11. Review and issue routine hold reminders
12. Consider a defensible collection process—that you are prepared to defend in court
13. Preserve ESI of departing employees—don't routinely wipe hard drives of departing employees
14. Training/Auditing
15. Release litigation holds—once case is over
16. Refine your process—once case is over

C. Texas Law and the Practical Application of ESI

Like many states, Texas law provides for the discovery of ESI following the adoption of the new Federal Rules of Civil Procedure. However, Texas provides its own twists and nuances to the analysis of production of ESI. In Rule 192.3(b) of the Texas Rules of Civil Procedure, the Texas Rules provide for the discovery of documents, which are defined to include ESI that is relevant to the subject matter of the proceeding. Tex. R. Civ. P. 192.3(b). Rule 196.4 addresses the production of documents and specifically applies to the production of "data or information that exists in electronic or magnetic form." *Id.* at 196.4. Rule 196.4, however, provides a more stringent application required to obtain specific ESI than those provided in the federal court opinions addressed herein. Rule 196.3 states, "[t]o obtain discovery of data or information that exists in electronic or magnetic form, the requesting party *must specifically request production of electronic or magnetic data and specify the form* in which the requesting party wants it produced." *Id.* (emphasis added).

In the seminal case *In re Weekley Homes, L.P.*, the Court addressed circumstances pertaining to the request for production of deleted emails. *In re Weekley Homes, L.P.*, 295 S.W.3d 309 (Tex. 2009). In this case, the lower court allowed a party's expert to search the computers of the builder's employees for deleted emails. *Id.* at 311-13. The Texas Supreme Court held that the lower court abused its discretion by permitting experts to search the builder's employees' computers for deleted emails because there was no indication that experts were familiar with the particularities of the employees' hard drives, or that they were qualified to search the hard drives, and the proposed methodology for searching the hard drives was not reasonably likely to yield the information sought. *Id.* at 319-22. Specifically, the Court indicated "a trial court may order production of information that is not reasonably available only 'if the requesting party shows good cause.'" *Id.* at 316. In addition, the Court stated to show good cause, the trial court must consider whether the burden or expense of the

discovery outweighs its likely benefit considering the needs of the case, amount in controversy, the party's resources, importance of issues at stake, and importance of discovery to resolve issues. *Id.* at 316-22. In order for an opposing party to gain direct access to the hard drives of the other party's computers to search for data, the requesting party must show 1) the responding party has somehow defaulted in its obligation to search its records and produce the requested data; and 2) the responding party's search "has been inadequate and that a search of the opponent's [electronic storage device] could recover deleted relevant materials." *Id.* at 317. "[M]ere skepticism and bare allegations" are insufficient to show the responding party failed to adequately search for relevant information. *Id.* at 318.

In sum, the Texas Supreme Court articulated the proper procedure for requesting ESI in accordance with Rule 196.4 as follows:

1. The party seeking to discover electronic information must make a specific request for that information and specify the form of production.
2. The responding party must then produce any ESI that is "responsive to the request and...reasonably available to the responding party in its ordinary course of business."
3. If "the responding party cannot – through reasonable efforts – retrieve the data or information requested or produce it in the form requested," the responding party must object on those grounds.
4. The parties should make reasonable efforts to resolve the dispute without court intervention.
5. If the parties are unable to resolve the dispute, either party may request a hearing on the objection at which time the responding party must demonstrate that the requested information is not reasonably available because of undue burden or cost.
6. If the trial court determines the requested information is not reasonably available, the court may nevertheless order production upon a showing by the requesting party that the benefits of production outweigh the burdens imposed subject to discovery limitations outlined in Rule 192.4.
7. If the benefits are shown to outweigh the burdens of production and the trial court orders production of information that is not reasonably available, sensitive information should be protected and the least intrusive means should be employed. The requesting party must also pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information.
8. When determining the means by which the sources should be searched and information produced, direct access to another party's devices containing ESI is discouraged, and courts should be extremely cautious to guard against undue intrusion.

Id. at 322. The Court also instructed counsel for parties involved in litigation to share relevant information discussing how ESI is stored, the types of systems used to store ESI, and storage methodologies so agreements may be reached regarding "protocols" or to aid trial courts in drafting discovery orders that are not unduly intrusive or overly burdensome. *Id.* at 321. Borrowing from the Federal Rules of Civil Procedure, the Texas Supreme Court stated it is of "critical importance" to learn relevant systems for storing ESI early in the litigation to avoid complicated preservation issues in the latter portion of the litigation. *Id.* at 322.

Sharing the types of storage systems housing ESI and the methodology for doing so is imperative when producing voluminous ESI. Take, for example, a case involving the construction of a sports arena that required a municipality to condemn land in order to obtain the grounds to construct the facility and the subsequent documents and information derived from the construction of a sports arena. Clearly, a multitude of emails, plans, and other ESI required to bring the construction of a sports arena to conclusion will be created and stored over a period of years. In these matters, millions of emails are created, stored, and deleted, which may also include millions of attachments that may pertain to traffic plans, construction plans, zoning ordinances, community meetings, and a multitude of other matters. In sum, coordinating the production of this volume of ESI can be a nightmare.

In order to comply with Federal Rules of Civil Procedure or state rules, it is necessary to quickly meet with the client to determine where this information is stored, how that information can be obtained, and whether the information is easily transferrable. Commonly, this requires an information technology ("IT") professional who will provide information that is far superior to the knowledge of an average attorney. Thus, coordinating with a third-party vendor may be imperative to quickly and accurately transmit information for production to a requesting party. However, the task of producing several million emails, reviewing these emails, and removing any privileged or irrelevant emails can take weeks, if not months, of attorney time. Therefore, it is oftentimes necessary to attempt to come to an agreement with the requesting party as to necessary search terms to reduce the ESI produced. Taking the example of the construction of a sports arena, the parties could agree on search terms like sports arena, team name, arena name, team owner's name, and stadium construction and also tailor these key search terms to a relevant time period. An agreement is imperative in an effort to provide documents without the possibility of inadvertently withholding relevant documents. Without an agreement as to the search terms, a responding party would be forced to spend every waking minute tolling through millions of emails. Once an agreement is reached, several different types of software will allow a responding party to upload the documents and review the same for privilege or relevancy. Once the relevant documents are reviewed, they can quickly be submitted to the requesting party for review via the same system. These agreements can save time for counsel for both parties and also show the Court that the parties are attempting to work through voluminous discovery requests.

IV. CONCLUSION

The ESI failure to preserve/sanctions cases of *Zubulake*, *Pension Committee*, and *Rimkus* teach counsel of the crucial importance of knowing when the "trigger date" for preservation of ESI occurred; in other words, when litigation was "reasonably anticipated." Once this date is determined, counsel must send a detailed written litigation hold letter to key players outlining in detail the data that needs to be preserved and placing a halt on the routine deletion or destruction of data that the client may have in place. Counsel should meet with the client's IT personnel and learn how the client's computer and email systems operate in order to better compose the litigation hold letter and provide more specific guidelines to the key players and IT personnel about preserving hard and electronic forms of data relevant to the lawsuit. Counsel needs to be aware of preserving electronic data from former employees and protecting data of employees planning to leave the company during the pendency of litigation. Counsel must monitor the data preservation and collection efforts to ensure all appropriate data are preserved.

All of these steps need to be documented in order to protect the client in case a Motion to Compel or Motion for Sanctions is filed against the client. Counsel need to be proactive about preserving data in anticipation of litigation and during the pendency of litigation. Additionally, counsel should work with opposing counsel to find reasonable solutions for reviewing and producing relevant electronic data such as agreeing to have a third-party vendor host the ESI for both parties and agreeing upon the appropriate search terms for the data. These vendors can provide a place for each counsel to review electronic documents efficiently and then allow the counsel to produce data quickly to the other party once the data have been reviewed for privileges.

If counsel takes the appropriate steps to preserve and collect the relevant electronic data, then counsel will be taking the necessary precautions to protect the client from possible sanctions in the future. The goal at the end of a case is to have confidence that counsel took every effort to preserve, collect, produce, and analyze the client's ESI so that the counsel can affirmatively say "Mission: Accomplished" to their "Operation: Preserve ESI."

Appendix A

Chart of Preservation Failures and Possible Sanctions

Failure	Culpability	Sanctions Possible	Factors
To Issue Written Litigation Hold after the duty to preserve has attached and destruction of relevant evidence results	Gross Negligence –*see Pension Committee*, 2010 WL 184312 at *3, *7 (S.D.N.Y. Jan. 15, 2010)	Range from further discovery, cost-shifting, fines, adverse inference jury instructions, and preclusion to entry of default judgment or dismissal. *See Pension Committee*, 2010 WL 184312 at *3 (S.D.N.Y. Jan. 15, 2010)	Level of Culpability on the part of the producing party and the Level of Prejudice to the requesting party
To Timely Issue Written Litigation Hold	Could constitute Gross Negligence	Range from further discovery, cost-shifting, fines, adverse inference jury instructions, and preclusion to entry of default judgment or dismissal. *See Pension Committee*, 2010 WL 184312 at *3 (S.D.N.Y. Jan. 15, 2010)	Level of Culpability on the part of the producing party and the Level of Prejudice to the requesting party
To identify key players and ensure that their electronic and paper records are preserved	Constitutes Gross Negligence or willfulness (*See Pension*, 2010 WL 184312 at *3, *7 (S.D.N.Y. Jan. 15, 2010)	Range from further discovery, cost-shifting, fines, adverse inference jury instructions, and preclusion to entry of default judgment or dismissal. *See Pension Committee*, 2010 WL 184312 at *3 (S.D.N.Y. Jan. 15, 2010)	Level of Culpability on the part of the producing party and the Level of Prejudice to the requesting party
To preserve backup tapes after the duty to preserve has attached when they are the sole source of relevant information or when they relate to key players, if the relevant information maintained by those players is not obtainable from readily accessible sources	Constitutes Gross Negligence or willfulness (*See Pension*, 2010 WL 184312 at *7 (S.D.N.Y. Jan. 15, 2010)	Range from further discovery, cost-shifting, fines, adverse inference jury instructions, and preclusion to entry of default judgment or dismissal. *See Pension Committee*, 2010 WL 184312 at *3 (S.D.N.Y. Jan. 15, 2010)	Level of Culpability on the part of the producing party and the Level of Prejudice to the requesting party
To Monitor Litigation Hold	Could constitute Gross Negligence	Range from further discovery, cost-shifting, fines, adverse inference jury instructions, and preclusion	Level of Culpability on the part of the producing party and the Level of Prejudice to the requesting party

		to entry of default judgment or dismissal. *See Pension Committee*, 2010 WL 184312 at *3 (S.D.N.Y. Jan. 15, 2010)	
To preserve former employee records under the company's possession, custody or control	Could constitute Gross Negligence	Range from further discovery, cost-shifting, fines, adverse inference jury instructions, and preclusion to entry of default judgment or dismissal. *See Pension Committee*, 2010 WL 184312 at *3 (S.D.N.Y. Jan. 15, 2010)	Level of Culpability on the part of the producing party and the Level of Prejudice to the requesting party
To Produce Relevant ESI	Range from Negligence to Gross Negligence to willfulness	In 2nd Circuit, "gross negligence" can result in adverse inference jury instruction. *See Pension Committee*, 2010 WL 184312, at *10-11. In 5th Circuit, "bad faith" plus prejudice to the requesting party is required for adverse inference jury instruction. *See Rimkus*, 2010 WL 645253, at *6, *31.	Level of Culpability on the part of the producing party and the Level of Prejudice to the requesting party

Appendix B

Document Retention Policies & Litigation Holds: A Summary Checklist

A Guideline for Document Retention Policies

Does a program exist to preserve ESI when litigation is reasonably anticipated?

1. Should immediately enact a program if one does not exist.
    i. If program has been established, it should be reviewed with corporate compliance department, in-house counsel and/or risk managers, IT departments, and outside counsel. Schedule an annual follow-up meeting to review policy and implement necessary revisions.
        1. Consider an e-discovery / document retention "task force." Should be comprised of these specific departments.
        2. Companies should consider designating an IT or in-house representative as the company's representative on all issues. This person should have authority to speak on the company's behalf, and should be vested with knowledge of all e-discovery and document retention programs and protocols. This person should be willing to testify and/or sign affidavits on the company's behalf on these issues.
2. Considerations in establishment of document retention policy and/or review of current policy:[11]
    i. Consult the Sedona Guidelines when drafting or revising document retention policies.[12]
    ii. Policy must be based on sound business considerations.
        1. Industry
        2. Company's history
        3. Are certain aspects of the company prone to litigation?
        4. Are certain products or services prone to litigation?
        5. Are certain locations more prone to litigation or regulatory violations than others? This could give rise to an increased retention time, even if no threat of litigation appears imminent.
    iii. Types of documents and data both paper and electronic
        1. Location of documents. What types of documents are found at corporate headquarters, each plant location, office, and other locations?
        2. What is current method of storing documents, either electronic or paper?
        3. How long are documents currently preserved? Why? The policy must articulate the rationale for storage periods, such as industry regulations, increased instances of litigation for certain items, and any other pertinent reasons.

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[11] For a good overview of document retention considerations and practices following the enactment of the e-discovery amendments to the *Federal Rules of Civil Procedure*, *see* J. Mark Coulson, *The Wild, the Innocent and the E-Discovery Shuffle*, In-House Defense Quarterly, Winter 2007.

[12] *The Sedona Guidelines: Best Practices & Commentary for Managing Information and Records in the Electronic Age*, Guideline 5, The Sedona Conference Working Group Series, September 2005 *available at* http://www.thesedonaconference.org.

4. "Data" may be different things to different companies. E-mails, voicemails, metadata, GPS data, and other electronically stored information must be retained.

iv. Commentary recognizes destruction of documents may be acceptable when documents or data lose their "business purpose." The establishment of a document retention policy based upon business considerations greatly increases the reasonableness of document destruction. The "business purpose" must be specifically articulated in the policy. It is critical to enact a reasonable policy.[13]
   1. What is the effective date of the policy?
   2. What should be done (or can be done) with the documents / data prior to the establishment of this policy?
   3. The document retention policy must also discuss litigation hold procedures, and ensure procedures are in place to stop the destruction of documents or data when the litigation hold becomes necessary.

v. Consider a separate procedure for e-mails, including centralizing storage and limiting personal or home use of e-mail to ensure all e-mails may be stored according to corporate policy.

vi. Specifically define the length of time required to store each type of documents. Consider an overall policy to articulate the basis for retention and destruction, with a separate exhibit thereto detailing specific categories of documents and retention periods for each.

3. How is the policy articulated and disseminated?
   i. Could be a discoverable document.
   ii. Should be clearly stated with defined categories, but written broadly to permit reasonable interpretation in the future.
   iii. Employ safeguards to ensure policy is followed to underscore credibility.
   iv. Should the policy simply be placed along with other corporate documents, or should each employee sign an acknowledgement and understanding of the policy?
   v. Consider establishing a "help line" and/or an internal website to address specific questions from employees.

"Litigation Hold" Procedures

a. Litigation Hold Letters[14]
   i. Does a policy exist? If so, it should be reviewed with corporate compliance department, in-house and/or risk management, IT department, and outside counsel.
   ii. Relevant considerations for the implementation of a litigation hold letter policy (or for reviewing current policies):

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[13] *The Sedona Guidelines: Best Practices & Commentary for Managing Information and Records in the Electronic Age*, Guideline 4, The Sedona Conference Working Group Series, September 2005 *available at* http://www.thesedonaconference.org.

[14] For an excellent overview of considerations involved in litigation hold letters and a sample form, *see* Mark S. Sidoti and Renee L. Monteyne, *The Effective Internal Litigation Hold Letter*, In-House Defense Quarterly, Winter 2007. Several of the suggestions for litigation hold letters and policies discussed herein are adapted from this article.

1. Should not be a mere form letter.
2. Could be a discoverable document.
3. Should be sent by high-level executives and cc: other executive offices and CEO.
4. Define corporate audience. Not necessarily required to be sent to all employees, perhaps only those department(s) or plant(s) implicated in possible litigation. Should err on the side of inclusion and broad dissemination.
5. Should be concise and direct. Should not exceed more than a few paragraphs, and should be easy to understand. Should not provide a detailed explanation of the litigation. Avoid mentioning specific trigger date for litigation or the reasonable anticipation thereof (could be an admission). Instead, state an obligation to preserve all presently existing material.
6. Stress the importance of the matter to the company.
7. Critical to define the "documents and data" to be preserved. Should note that not all "documents" are paper- many are now electronic.
8. Must be written to include *all* electronic data, such as e-mails, voicemails, backup tapes, and metadata. Consider appropriate storage and safeguards for special issues such as GPS data and blackberries.
9. Reiterate the importance of preserving all paper and electronic data and that serious consequences could result if such documents are destroyed.
10. Should state that the company and its safety and corporate compliance department and/or outside counsel will be following up on the process. Should also provide the name and number of contact persons (in the IT department and/or safety and corporate compliance department) to answer questions.
11. Should the letter be sent only to specific persons / offices, or globally? This is often determined on a case by case basis.
12. How should the document be sent? (i.e., e-mail, hard copy, posting in offices). The company must prove not only the existence of litigation hold procedures, but the proper implementation of those procedures.

iii. The obligation to impose a "hold" arises when litigation is reasonably anticipated. *This date could arise well before the initiation of litigation and therefore requires proactive monitoring and action from safety and corporate compliance department and outside counsel.*

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