



2018 CLM & Business Insurance-Restaurant, Retail & Hospitality Conference  
February 7<sup>th</sup>-9<sup>th</sup>  
Dallas, TX

## Litigation Hold Letters-How to properly and effectively respond

### I. Electronically Stored Information (ESI) & Metadata

#### What is Electronically Stored Information (ESI)?

As the name suggests, ESI is any information created or maintained on an electronic device such as a computer system or mobile device. The majority of information we work with on a day to day basis comes from a computer, tablet, or smartphone – not a book. So why is ESI important? Well the Federal Rules of Civil Procedure 34(a)(1)(A) specifically discusses a party’s right to seek the “production” of ESI. The Rule states: “A party may serve on any other party a request within the scope of Rule 26(b) to produce and *permit the requesting party or its representative to inspect...the following items in the responding party’s possession, custody, or control: (A) any designated documents or electronically stored information-- including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations-- stored in any medium from which information can be obtained either directly, or, if necessary, after translation by the responding party into a reasonably usable form.*”

#### Metadata: Data about Data

Metadata is ESI that describes the history, tracking, or management of an electronic document. This includes hidden text, formatting codes, and other information associated with an electronic document. *Aguilar v. Immigration & Customs Enf’t Div. of U.S. Dep’t of Homeland Sec.*, 255 F.R.D. 350, 354 (S.D.N.Y. 2008); *MC Asset Recovery, LLC v. Castex Energy, Inc.*, WL 12919263 (N.D. Tex. April 26, 2012). The Sedona Conference describes metadata as including all of the contextual, processing, and use information needed to identify and certify the scope, authenticity, and integrity of active or archival electronic information or records. Importantly, metadata is generally discoverable when specifically requested. Courts have considered whether the metadata is relevant, reliable, and privileged in deciding if it is discoverable. *Williams v. Sprint/United Mgmt. Co.*, 230 F.R.D. 640, 652 (D. Kan. 2005); *U.S. ex rel. Carter v. Bridgepoint Educ., Inc.*, 305 F.R.D. 225, 246 (S.D. Cal. 2015).

#### Three Types of Metadata

There is substantive metadata, which is the application metadata which is embedded in the document and shows modifications to a document such as prior edits and editorial comments. A District

Court working group has suggested that substantive metadata need not be routinely produced absent a showing of good cause. See Md. Protocol at <http://www.mdd.uscourts.gov/news/news/ESIProtocol.pdf>.

There is system metadata, which is data which reflects information created by the user or the IT management system, including the author, date and time of creation and modification of a document. The district court working group has suggested that most system metadata lacks evidentiary value and is not relevant. *Id.*

Lastly, there is embedded metadata, which is text, numbers, content or other information that is inputted into a native file by a user, which is not typically visible to the user viewing the “output display.” The district court working group has suggested that embedded metadata is generally discoverable. *Id.*

## **II. Litigation Holds**

### **The Duty to Preserve**

So when does the duty to preserve evidence arise? 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 (S.D.N.Y. 2003) (*Zubulake IV*); *Tantivy Communications, Inc. v. Lucent Technologies, Inc.*, LEXIS 29981, (E.D. Tex. Nov. 1, 2005). This could be prior to being served with a summons and complaint. It could also be when there is a letter sent from opposing counsel that threatens litigation or demands preservation of evidence triggers the duty to preserve evidence. Once a party reasonably anticipates litigation, it must suspend its routine document retention and destruction policy and put in place a “litigation hold” to ensure the preservation of relevant documents. (*Zubulake IV*). This requires a collaborative effort between client and counsel.

Put simply, a litigation hold is the preservation and protection of ESI against destruction and alteration. The FRCP make clear that there is not a blanket duty to preserve *all* ESI-- rather, potentially relevant evidence. Florida state courts, as in federal courts, now require preservation of relevant evidence, including ESI, when litigation is reasonably anticipated. *League of Women Voters of Florida v. Detzner*, 172 So. 3d 363, 391 (Fla. 2015). Prior to *Detzner*, Florida law was unclear as to when the duty to preserve evidence was triggered in the absence of a contractual or statutory duty.

### **Demand for Preservation of Evidence**

A response to a preservation demand letter establishes the parameters of what counsel considers relevant to the issues involved in future litigation. A response letter should: State the measures taken to identify and preserve relevant evidence AND let the adverse party know of any disagreement with the scope of the preservation request and offer to consider additional measures only if the adverse party can show that the measures are legitimately warranted under the circumstances

### **What Evidence Needs to be Preserved?**

Parties need to retain all relevant documents in existence at the time the duty to preserve attaches. This includes electronically stored information (ESI)— any information created or maintained on an electronic device such as a computer system or mobile device AND metadata— ESI that describes the history, tracking, or management of an electronic document, which includes hidden text, formatting codes, and other information associated with an electronic document.

### **Areas of Law that the Duty to Preserve Evidence Apply To**

The duty to preserve evidence applies to the various potential areas of law businesses may encounter including, but not limited to: corporate and securities; litigation; restaurant restructurings; financing and tax; securitized lending; business and real estate transactions; labor and employment; and intellectual property.

### **Litigation Hold Notice**

The purpose of drafting and disseminating a litigation hold notice (or letter) is to stop the destruction of documents that would be relevant to pending or anticipated litigation. The notice is just the beginning. It is a lawyer's duty to monitor compliance with the litigation hold by monitoring the party's efforts to retain and produce the relevant documents. An effective litigation hold requires detailed documentation of: dates; custodians; target data; initial scope of the hold; subsequent changes in scope; and reminders and notes associated with each step in the process.

### **Best Practice: Issue a Written Litigation Hold**

Before drafting a litigation hold letter, counsel should understand how the client's computer system works and how data is stored. The letter should: Notify that litigation is underway or anticipated; Identify the custodians of data most likely to have relevant information; Clearly define what information is to be preserved and the likely sources of information; Explain how the preservation is to be undertaken; Explain the duty to preserve and the consequences of non-compliance with the litigation hold; Err on the side of caution; Require confirmation of compliance; and Review periodically and reissue when necessary.

### **How is a Litigation Hold Implemented?**

Consult with IT to develop a uniform protocol for data preservation, identify where specific information is stored, and ensure that data and files are encrypted and backed up on either Wide Area Network (WAN) and/or private networks and/or offsite storage. Make sure to secure servers and other company systems (point of sale, HR, emails, etc.).

Another option is to hire an e-discovery vendor to administer compliant litigation holds. Factors to consider: How much is currently spent with outside vendors on each case in identifying, collecting, or preserving data; How much is spent on e-discovery vendors for other components of the e-discovery process; What is the cost to purchase, implement, and adopt an e-discovery solution or some or part of the e-discovery; and What impact does having an in-house e-discovery cost have on your legal expenses?

### **Key Points on Litigation Holds**

Litigation holds are fluid. During discovery, parties frequently learn new facts that may lead to the identification of new custodians and areas for preservation. A litigation hold: Communicates the duty to preserve ESI by providing instructions to data personnel and all key players; Periodically reminds all key players of their duty to preserve ESI; and Continuously tracks and monitors compliance.

### **III. Sanctions**

#### **Failure to Preserve ESI**

The Federal Rules of Civil Procedure 2015 Amendments codified the “litigation hold” requirement. Importantly, the current rules provide courts with broad discretion in addressing failures to preserve ESI. When a party intentionally deprives the other party of ESI, courts may give an adverse inference instruction and even dismiss the action.

Rule 37(e) Failure to Preserve Electronically Stored Information states: “If ESI that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it (litigation hold), and it cannot be restored or replaced through additional discovery, the court: (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may: (A) presume that the lost information was unfavorable to the party; (B) instruct the jury that it may or must presume the information was unfavorable to the party; or (C) dismiss the action or enter a default judgment.

Failure to preserve evidence can result in sanctions that completely limit a party’s ability to present its case and could even dismiss the case entirely. Courts no longer accept technological ignorance as an excuse for failure to protect and present relevant evidence. The following is a list of possible sanctions:

Substantive: preclude witness; preclude expert; strike affirmative defense; strike complaint; adverse inference; or dismissal

Procedural: re-depositions; re-productions; moving deadlines; cost-shifting; monetary sanctions; or contempt (civil/criminal)(fines or imprisonment).

The nature and extent of the discovery violations influence the severity of the sanctions. The most egregious misconduct could result in dismissal; serious violations could result in adverse jury instructions and monetary awards; and lesser violations could result in evidence preclusion, witness preclusion, prohibiting particular defenses, reduced burden of proof, limitation of jury challenges, abbreviation of closing arguments, supplemental discovery, and additional access to computer systems.

#### **Lawyer’s Obligation**

Lawyers have a duty to counsel their clients about the need to institute and monitor litigation holds. ABA Civil Discovery Standards state: “When a lawyer who has been retained to handle a matter learns that litigation is probable or has been commenced, the lawyer should inform the client of its duty to preserve potentially relevant documents in the client’s custody or control and the possible consequences of failing to do so. “

Consequences can include malpractice claims. Gross negligence example: On the eve of trial, the defendant did a “document dump.” Plaintiffs moved for a default judgment, which the judge denied it, concluding that the defendant’s “shortcomings were neither intentional nor done in bad faith, but rather resulted from the gross negligent oversights of counsel.” The court did permit additional discovery with defendant paying the costs, but the court’s stinging words certainly would seem to tee up a case for legal malpractice. *Preferred Care Partners Holding Corp. et al v. Humana, Inc.*, 2009 WL 982460 (S.D. Fla. 2009) .

For ethical violations see the Model Rules of Professional conduct: 1.1: Lawyer shall provide competent representation; 1.3: Lawyer shall act with reasonable diligence and promptness; and 3.4: Lawyer shall not unlawfully obstruct another party' s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act.