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**LEGAL HOLDS FOR “ANTICIPATED
LITIGATION”: New Case Developments to
Determine Triggering Events & Scope of
Production**

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LEGAL HOLDS FOR “ANTICIPATED LITIGATION”: New Case Developments to Determine Triggering Events & Scope of Production

INTRODUCTION

In 2004, the ARMA International Educational Foundation sponsored a study entitled “Legal Holds and Spoliation: Identifying a Checklist of Considerations that Trigger the Duty to Preserve” (hereafter the “2004 Study”).¹ The 2004 Study identified a duty to preserve continuum for records retention in general. It also provided parameters for triggering a “legal hold”² on destruction of records subject to destruction not only under the records retention policy, but also for any other documents or information in the company’s possession at the time.

Since the 2004 Study was published, companies continue to struggle with litigation holds for foreseeable, potential or anticipated litigation, as contrasted with “pending” litigation where the company has already been served or is aware of the lawsuit being filed in court. Foreseeable, potential or anticipated litigation is a thorny case or fact-specific issue. On top of that, the revised Federal Rules of Civil Procedure, effective December 1, 2006, have made the issue a top priority. Accordingly, the purpose of the instant supplemental study is to survey cases that address when the duty to preserve attaches for such potential or anticipated litigation, including the all-important determination of scope (i.e., what to preserve).

As noted in the 2004 Study, a comprehensive treatment of the spoliation doctrine was not within its scope, and the same goes for this supplemental study. Other authors have documented the subject extensively.³ That said, **at the core**, this supplemental study will:

- 1) Discuss spoliation, legal holds and the duty to preserve in general, both of which received extensive treatment in the 2004 Study;
- 2) Provide a brief overview of “pending” litigation as a triggering event for legal holds;
- 3) Identify examples of triggering events for “potential” litigation, treated with specific recent case examples; and
- 4) Provide case law examples of scope of preservation and production issues.

¹ To download a copy of the study, go to www.armaedfoundation.org.

² Also known as “litigation hold” and referred interchangeably throughout this document with the phrase “legal holds.”

³ *See, e.g.*, Kaye, Richard. “Effect of Spoliation of Evidence in Product Liability Action.” 102 ALR 5th 99 (2004 West Group). This article provides a comprehensive and current treatment of the effect of spoliation of evidence in all 50 states; *see also*, Eng, Kevin. “Spoliation of Electronic Evidence.” 5 BU Journal of Sci & Tech 13 (1999); Egan, Christopher. “Arthur Andersen’s Evidence Destruction Policy: Why Current Spoliation Policies Do Not Adequately Protect Investors.” 34 Tex. Tech L. Rev. 61 (2002).

I. SPOILIATION, LEGAL HOLDS AND THE DUTY TO PRESERVE

A. Overview of the Spoliation Doctrine

Although a comprehensive look at spoliation is not within the scope of this supplemental study, a brief summary of the doctrine is a necessary foundation. Failure to preserve evidence (or its destruction) or the failure to produce evidence is generally known as “spoliation.”⁴ It is legally defined as “the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation.”⁵ Courts have a great deal of discretion in imposing sanctions for the destruction of potentially relevant documents. The decision to sanction a party for spoliation depends on several factors, including whether the conduct at issue was intentional, the degree of prejudice to the opposing party, and the availability of alternative evidence. The penalties for spoliation vary widely among the states and can include the following: (1) adverse inference instructions to the jury; (2) evidentiary sanctions; (3) dismissal of the case; and (4) an independent cause of action for either intentional or negligent spoliation. Various state and Federal acts, most notably Sarbanes-Oxley, have increased the reach of the spoliation doctrine from mere litigation matters to pending state and Federal investigations. Incarceration is also a potential penalty for spoliation, such as under Sarbanes-Oxley.⁶

B. The Duty to Preserve in General: Legal Holds

A variety of sources gives rise to a duty to preserve potentially relevant evidence. These include the following continuum of the duty to preserve: (1) statutes or regulations; (2) statutes of limitations; (3) potential, anticipated or threatened litigation; (4) receipt of a preservation letter from opposing counsel or an investigation notice from an agency; and (5) service of a complaint, discovery requests, court orders, or other events that occur in conjunction with litigation. This supplemental study will focus on legal holds and the duty to preserve in the context of potential, anticipated or threatened litigation. This area is the most critical for the “legal hold” decision. It is the most difficult to predict or standardize in light of the courts’ use of the “reasonable foreseeability” test to determine when the duty to preserve arises. As a result, decisions in this context are fact-specific, so similar situations can lead to different results.

⁴ Pronunciation: "spO-lE-'A-sh&n; Function: *noun*

Etymology: Middle English, from Anglo-French *spoliacion*, Latin *spoliation-*, *spoliatio*, from *spoliare* to plunder -- **1 a** : the act of plundering **b** : the state of having been plundered especially in war; **2** : the act of injuring especially beyond reclaim. *Merriam Webster Online Dictionary* at <http://www.m-w.com/dictionary/spoliation>.

⁵ *Zubulake v. UBS Warburg* (S.D.N.Y. July 20, 2004) 220 F.R.D. 212, 217.

⁶ 18 USC 1519 (imposing fines and prison sentences of up to 20 years for anyone who knowingly alters, destroys, mutilates, conceals, covers up, falsifies or makes false entry in any record, document or tangible object with the intent to impede, obstruct or influence the investigation or proper administration of any department or agency of the United States)(Emphasis added.)

C. **The Rambus Decisions: Just How Unpredictable is the Spoliation Doctrine and the Duty to Preserve?**

One instructive example on how unpredictable the doctrine of spoliation can be, especially in the pre-litigation scenario, arose in an intellectual property case. Courts in Virginia and California reached dramatically different conclusions about whether a technology development company had engaged in actionable destruction of documents under the same set of underlying facts. Under the facts in Hynix v. Rambus (N.D. Cal. 2006) 2006 U.S. Dist. LEXIS 30690, as well as Rambus v. Infineon (E.D. Va. 2004) 220 F.R.D. 264, *rev'd on other grounds* 318 F.3d 1081, and Samsung v. Rambus (E.D. Va. 2006) 439 F.Supp. 2d 524, Rambus had created and implemented a retention policy in conjunction with its intellectual property defense strategy. At least two years before filing its patent infringement claims, Rambus employees participated in so-called office "shred days." Hynix v. Rambus (N.D. Cal. 2006) at 30690 (p.11). The goal of the exercise was to make the company "battle ready." Samsung v. Rambus (E.D. Va. 2006) 2006 U.S. Dist. LEXIS 50007. Two Virginia court decisions found that Rambus committed various acts of litigation misconduct, including the intentional destruction of documents. Rambus, Inc. v. Infineon Techs. AG, (E.D. Va. 2004) 222 F.R.D. 280, 286, citing Rambus, Inc. v. Infineon Techs. AG, (E.D. Va. 2001) 155 F.Supp.2d 668, 680-83, *rev'd on other grounds* 318 F.3d 1081. In an interesting twist, the California court did not find spoliation, though its decision was based on the same basic set of facts. This remarkable and unusual set of inapposite decisions lends itself to careful analysis.

The Underlying Facts of the Cases

Rambus is a company that develops and licenses technology to companies that manufacture semi-conductor memory devices. Beginning in early 1998 and continuing through 1999 and 2000, Rambus developed, refined, and implemented a patent licensing and litigation strategy, which was aimed at several specifically identified manufacturers. Among the targeted manufacturers were Infineon, Samsung, and Hynix Semiconductor, Inc.⁷ In October 1997, Rambus hired a consultant to implement its plan to secure royalties from manufacturers whose products Rambus considered infringing its patents and entrenching on its technology. Samsung v. Rambus, 439 F. Supp. 2d at 545. At a meeting with prospective lawyers in early 1998, Rambus stressed that it needed to make itself "battle ready" by gathering critical documents to put into a searchable, coded electronic database and that the company needed a "document retention policy."⁸ Even before the first "shred day" in 1998, Rambus had sent 1,268 computer tapes to be

⁷ Because Rambus technology is so unique, their patents are extensive and fundamental. Thus, companies would not be able to develop Rambus-compatible technology or Rambus-like technology without infringing on multiple fundamental claims of their patents. Samsung v. Rambus, 439 F. Supp. 2d at 545. By the late 1990s, Rambus realized that manufacturers were using its technology and patented inventions to make infringing products. And, by then, Rambus noted that steps must be taken to have the industry take Rambus' intellectual property rights seriously.

⁸ Meeting notes reflected that it would be necessary to clean out all attorney notes from patent prosecution files so that they would conform with the official files. Further notes reported that Rambus needed to litigate against someone to establish its patent rights. Id. at 546. In fact, Rambus had identified, as components of aggressive readiness, the need to prepare a discovery database and the need to select experts. Id.

degaussed on or before July 1, 1998. *Id.* at 50007 (p.36). At least one document identified specific litigation targets and articulated the strategy that those targets should be sued in separate suits, so as to minimize the ability of the targets to cooperate with each other in defending the case.⁹

The California Court's Findings in Hynix v. Rambus

Despite the above noted apparent acts of spoliation in the face of anticipated litigation, the court in California did not find spoliation. The complaint in this case was filed on August 29, 2000. The primary question before the court was whether Rambus adopted and implemented its document retention policy in advance of reasonably foreseeable litigation for the purpose of destroying relevant information. Hynix v. Rambus, (N.D. Cal. 2006) 2006 U.S. Dist. LEXIS 30690 (p.16). The court determined that the retention policy and the so-called "shred days" were not adopted in bad faith. The court first noted that "a legitimate consequence of a document retention policy is that relevant information may be kept out of the hands of adverse parties." *Id.* citing Arthur Andersen LLP v. United States, 544 U.S. 696, 125 S. Ct. 2129, 2135, 161 L. Ed. 2d 1008 (2005).¹⁰ In contrast, however, the court acknowledged that a document retention policy adopted or utilized to justify the destruction of relevant evidence is not a valid document retention policy." *Id.* at 30690 (p.16).

Although Rambus began to plan a litigation strategy as part of its licensing strategy, the court deemed that it could not be said to be "reasonably probable" because several patent-issuance contingencies had to occur before Rambus could engage in litigation. Thus, the court ruled that Rambus's adoption and implementation of what it deemed a "content neutral" Document Retention Policy was a permissible business decision. The destruction of documents on the shred days in 1998, 1999 and even into 2000 pursuant to the policy did not constitute unlawful spoliation. *Id.* at 30690 (p.18-19). Even a reference to "work product" on privilege logs did not support the conclusion that litigation was anticipated. *Id.* at 30690 (p.19). The court clarified that California law protects a lawyer's work-product even if prepared "in a non-litigation capacity." *Id.* citing County of Los Angeles v. Superior Court (2000) 82 Cal.App.4th. 819, 833. The evidence did not demonstrate that Rambus targeted any specific document or category of relevant documents with the intent to prevent production in a lawsuit such as the one Hynix initiated. Finally, the evidence did not show that Rambus destroyed specific, material documents prejudicial to Hynix's ability to defend against Rambus's patent claims. *Id.* at 30690 (p.22).¹¹

⁹ One of the slides used in a group presentation identified a list of discoverable documents including email messages, files stored on individual computers, corporate databases, backup tapes, system records and logs, and computers. *Id.* at 50007 (p.35).

¹⁰ The court in Arthur Andersen stated that "Document retention policies, which are created in part to keep certain information from getting into the hands of others, including the Government, are common in business. It is, of course, not wrongful for a manager to instruct his employees to comply with a valid document retention policy under ordinary circumstances." *Id.*

¹¹ Even so, the California court noted in dicta that its conclusion does not mean a party can destroy documents with impunity prior to contemplation of actual litigation. The implementation of a document retention policy that was intentionally designed to discard damaging documents should litigation later become probable or actually commence would be improper. *Id.* at 566.

The Opposite Findings in the Virginia Courts: Samsung v. Rambus and Rambus v. Infineon

In reaching a completely opposite conclusion based on the same facts, the court in Samsung v. Rambus noted that

“[o]ne does not make oneself ‘battle ready,’ nor establish a discovery database, nor identify potential venues, nor identify specific litigation targets, nor select experts, to address a vaguely anticipated litigation potentiality...Several of Rambus' top executives confirmed that they were told that eliminating discoverable documents (paper and electronic) was a principal impetus for the adoption of the document retention plan. Id. at 556-557.

Thus, the Samsung court deemed that by the time Rambus implemented its document destruction policy on Shred Day in September 1998, it had identified the most likely and attractive litigation targets, and had settled on a number of possible legal theories to press against specific targets, depending upon whether the target was already a licensee. Id. at 559. According to the court,

“[t]he record proved that Rambus engaged in pervasive document destruction in 1998 and 1999 while it anticipated litigation, or reasonably should have anticipated litigation, and in 2000 while it was actually engaged in litigation. Id. at 560.¹²

The court in Samsung further noted that spoliation occurs not only when the destruction of evidence in anticipation of litigation is willful, but also when the destruction is the result of inadvertent, albeit negligent, conduct. Id. at 540. The court acknowledged, however, that determination of when a party anticipated litigation is necessarily a fact intensive inquiry, and a precise definition of when a party anticipates litigation is elusive. Id. at 542.¹³

As far as the implementation of legal holds at Rambus, the employees were simply advised to “look for things to keep.” Id. at 563. Rambus’ meager attempt at a litigation hold by instructing employees to look for things to keep infuriated the court. The court noted that

¹² According to the Samsung court, Rambus' document retention policy was intended to target discoverable documents, including email messages, files on individual computers, network servers or floppy disks, corporate databases, backup tapes, system records and logs, and computers and disks. Id. at 560. Rambus also destroyed email archives and other electronic files. Id. at 561. In total, Rambus destroyed 1,054 boxes (2.7 million pages), not including the computer tapes it degaussed. Id. at 562.

¹³ The Samsung court found a helpful analytical tool for determining anticipated litigation in the more widely developed standard for anticipation of litigation under the work product doctrine. The work product doctrine provides that documents and tangible things prepared in anticipation of litigation or for trial, which are otherwise discoverable, are only discoverable upon a showing that the party seeking them has substantial need of them in preparation of its case and that the materials cannot be obtained by other means without undue hardship. Id. at 542. See Fed. R. Civ. P. 26(b)(3); Hickman v. Taylor, 329 U.S. 495, 67 S. Ct. 385, 91 L. Ed. 451 (1947).

“considering the lack of specificity in defining what documents would be relevant to litigation, considering that the document retention policy focused on destruction of documents discoverable in litigation, considering that Rambus kept no records of the kinds of documents that were destroyed, considering the volume of documents destroyed, and considering the extent and kind of evidence destroyed after the vague "hold" instruction was given, the naked instruction not to destroy relevant documents is not sufficient...” Id. at 564.

The same court in Rambus v. Infineon, 220 F.R.D. 264, had similar findings. The issue before the court came down to whether Rambus reasonably anticipated litigation when it developed its retention policy. Id. at 287. The record showed that Rambus implemented a document retention policy, in part, for the purpose of getting rid of documents that might be harmful in litigation. One executive testified that one of the reasons for the document destruction was that the documents might be discoverable in future litigation, although he also stated that the policy was just a "house-keeping thing." Id. at 286. Thus, the Court found, as a matter of fact, that Rambus anticipated litigation when it instituted its document retention program. Id. at 287.

In addition, Rambus' privilege log illustrated that Rambus was developing both a patent litigation strategy and its document retention program at the same time. Id. at 287. For instance, privilege log entries reflected memoranda written in early 1998 from Rambus' in-house legal department, which established that Rambus was developing a "strategy" in "anticipation of litigation," at the very same time that it was developing its document purging system. Infineon thus presented evidence that, taken together, strongly indicated Rambus explicitly linked development of its document retention policy and the shredding of documents with preparing for patent litigation. Id.

Both of these Virginia court decisions essentially viewed the “shred days” as pretext for destroying relevant documents. Also, the court was suspect of the timing of the development of the records management program and the simultaneous creation of a litigation strategy.

Rambus Lessons Learned

Perhaps the most noteworthy aspect of these three intellectual property decisions is that all three are based on essentially the same acts of spoliation, yet the decisions were not unanimous. This demonstrates how unpredictable the issue of spoliation can be, particularly in the context of anticipated or potential litigation. A few other lessons are evident. First, avoid calling implementations “shred days.” Second, do not associate the retention policy with the creation of a list of prospective opponents. Third, and related thereto, companies should be mindful of the timing of the creation and implementation of a records management program along with a simultaneous intellectual property protection strategy or other major litigation. Fourth, although most companies tend to focus on litigation holds in anticipation of being sued, the Rambus cases highlight how legal holds also apply to anticipated litigation when the company itself may choose to initiate the lawsuit. Fifth, the hold process requires proactive participation, not just lip service.

II. BRIEF DISCUSSION OF TRIGGERING EVENTS FOR “PENDING” LITIGATION

With respect to pending litigation, the triggering events for a litigation hold are, in general, more clear-cut than in cases of potential or anticipated litigation. Specifically, this duty to preserve evidence is triggered by summonses, court orders, and discovery. Every state’s discovery statutes and the revised Federal Rules govern how civil discovery is to take place. Technically, then, the legal holds would not come into play until a lawsuit has been served or discovery demands have begun. Thus, for purposes of establishing a legal hold, the edict is clear: Once the lawsuit, discovery or some court order or agency demand has been served, a company must place a legal hold on all accessible information (the scope of which is discussed in greater detail below at Section IV) related to the lawsuit. Tulip Computers International B.V. v. Dell Computer Corporations (D.Del.2002) 2002 WL 818061 [“...once Dell had knowledge of the case, it had an affirmative obligation to preserve potentially responsive documents....”]. See also, Trigon Ins. Co. v. United States (E.D. Va. 2001) 204 F.R.D. 277, 287 [stating that a party has a duty to preserve documents once the party “has notice (by a discovery request, by the provisions of a rule requiring disclosure or otherwise), that evidence is necessary to the opposing party’s claim”].

III. TRIGGERING EVENTS FOR POTENTIAL LITIGATION

Pre-litigation, potential or anticipated legal hold decisions are more complicated than for those cases where the lawsuit is already pending, as discussed above, or even where counsel has sent a notice letter prior to filing the lawsuit, as discussed below. Where there is no such letter or notice, companies must make a judgment call for when the duty to preserve attaches. Although case law has not revealed a discernible pattern regarding when to issue litigation holds for potential or anticipated litigation, some general guidelines are apparent. For instance, a leading California case favors placing the litigation hold when the action is contemplated, rather than merely possible. Willard v. Caterpillar (Cal. 5th App. Dist. 1995) 40 Cal.App.4th 892, 923, *overruled on other grounds by* Cedars-Sinai v. Superior Court (Cal. 1998) 18 Cal. 4th 1. Even with this oft-cited standard, the Willard case and the Rambus decisions emphasize the need to make the determination on a case-by-case basis.

Following is an analysis of the types of cases addressing pre-litigation trigger issues. The scenarios discussed below are essentially smoking gun triggering events in cases of “contemplated” litigation, and they include: 1) the date notice is provided to an insurance carrier; 2) the date claims are filed with administrative agencies; 3) the dates of substantive conversations with supervisors and others about a potential lawsuit; 4) the date of retention of counsel and/or experts; 5) imminent appearance of a lawsuit or other red flags; 6) partial settlement of claim; 7) letter requesting an explanation for non-hiring; 8) circulation of internal “document hold” memoranda; and 9) severity of injuries combined with the totality of circumstances. Besides these scenarios, the Rambus decisions in Virginia discussed above show a tenth smoking gun event, which is the

creation of a list of potential opponents before filing a lawsuit. From these smoking gun scenarios, a company's own retention decisions must be derived on a case-by-case basis.¹⁴

Before jumping to those scenarios, we begin with the more discernible pre-litigation correspondence scenarios.

A. Pre-Litigation Correspondence

Within the murky realm of potential or anticipated litigation, receipt of pre-litigation correspondence sets a clear triggering event for litigation holds. Notice in these instances is evident when the opposing counsel or investigating agency sends a letter advising of the potential for litigation or specifically requesting preservation of key data.

1. *Letter from Party Threatening Legal Action*

PML North America v. Hartford Underwriters Insurance Co (E.D. Mich. 2006) 2006 U.S. Dist. Lexis 94456 dealt with a litigation hold in the context of threatening letters from the insured Plaintiff. On November 17, 2004, Plaintiff entered into a contract with Co-Defendant ACG to provide workers' compensation insurance for Plaintiff's employees. As early as December 2004, Defendant ACG began sending insurance certificates to Plaintiff, and on December 8, 2004, Plaintiff received a coverage letter stating that the insurance policy was effective through Defendant Hartford. Plaintiff then paid its premiums to Defendant ACG. *Id.* at p.3-4.

Some time later, Hartford denied coverage to Plaintiff on the basis that the coverage letter and insurance certificates that ACG issued were fraudulent. *Id.* at p.4-5. On January 25, 2005, Plaintiff threatened legal action in writing for fraud against Hartford. Plaintiff filed its amended complaint for breach of contract and conversion on May 10, 2005. (The filing date for the original complaint is not stated.) *Id.* at p.6.

The court found that Defendant's duty to place a litigation hold arose upon its receipt of Plaintiff's January 25, 2005 letter threatening legal action, since Defendant was then placed on notice of the potential for litigation. *Id.* at p.16-17. Plaintiff's forensic expert examined 5 hard drives produced by Defendant and found signs of physical tampering with some of the equipment. Based on the expert's examination, the court ordered Defendant to produce certain computer equipment which Defendant did not do. Through expert testimony, the court was able to determine the Defendant had used some of the requested equipment as late as October 2005. Several additional hard drives were not located without any explanation from Defendant. And the hard drive from one of Defendant's computers was reformatted on July 21, 2005. Based on the above evidence, the court concluded that Defendant engaged in spoliation of evidence after January 25, 2005 when it was placed on notice of possible litigation.

¹⁴ Because no clearly discernible patterns are evident, an attorney should be consulted for determining the scope of litigation hold, per identified case, once the litigation is pending or otherwise becomes apparent or contemplated.

2. *Letters From Party's Attorney Before Litigation*

In Optowave v. Nitikin (M.D. Fla. 2006) 2006 U.S. Dist. LEXIS 81345, Defendant's duty to preserve electronic evidence arose with receipt of a letter from Plaintiff's attorney placing Defendant on notice of possible litigation. Plaintiff and Defendant contracted for the sale of technical equipment. At issue in the case were the terms contained in the parties' written agreement and the drafting process thereof. In order to support its claims, Plaintiff sought emails, notes and other data allegedly contained on Defendant's computer system. During the course of the dispute, but before the complaint was filed, Plaintiff's attorneys sent two letters, one dated November 17, 2004, and the other dated May 9, 2005, either of which the court considered sufficient to provide notice of potential litigation and create a duty to place a litigation hold. Id. at p.30-31.

Despite being highly competent with respect to advanced computer technology, Defendant allowed another party to reformat the hard drives of his employees' computers without first preserving relevant files contained on those computers almost five (5) months after receiving the first letter from Plaintiff's counsel in November 2004. Id. at p.32. For this reason, the court found that Defendant allowed relevant evidence (customer file and emails regarding the contract drafting process and subsequent equipment complaints) to be destroyed in bad faith and sanctioned Defendant by allowing an adverse inference instruction on two important issues in the case. Id. at p.38-39. The evidence at issue was directly relevant to the terms of the contract between the parties to the extent that it addressed the content of the parties' written contract. Id. at p.33-34.

B. Notice to Insurance Carrier

In Phoenix Four v. Strategic Resources Corporation (SD NY 2006) 2006 WL 1409413, Plaintiff sued Strategic Resources Corporation ("SRC"), Plaintiff's investment adviser, for breach of fiduciary duty, negligent misrepresentation and fraud. Plaintiff filed the complaint on May 19, 2005, but prior to that there had been much activity in the case. On April 21, 2004, SRC gave notice to its insurance carrier that a dispute existed with Plaintiff. Id. at 1409413 (p.1). In February 2005, SRC was evicted from its corporate offices. When SRC vacated in March, 2005, it left behind some of Plaintiff's marketing documents, old prospectuses, trade publications and 10 computer work stations (which the landlord promptly destroyed). Id. at 1409413 (p.2).

The court granted an adverse inference instruction for abandoning the hard copy documents and computer workstations. The court found that SRC had an obligation to preserve these abandoned items because they should have known that the evidence might be relevant to litigation that ensued, about which SRC had notified its insurer over one year before Plaintiff filed the complaint. Id. at 1409413 (p.4). The court noted that

"It is a pity that we do not have copies of the actual notices [to the insurance carrier], but these references to future litigation, while thin, are adequate to support a finding that the SRC Defendants were obligated to preserve the

abandoned evidence... Their indifference constituted an act of gross negligence that is not excused by the disarray of their business affairs...counsel's obligation is not confined to a request for documents; the duty is to search for *sources* of information.” Id.

Thus, under Phoenix Four, the act of giving notice to the company’s insurance carrier was considered a triggering event for litigation holds. And, of course, being disorganized is not an excuse for spoliation when documents are destroyed, even if inadvertently.

C. Filing Claims with Administrative Agencies

The Zubulake v. UBS Warburg case illustrates one of the most discernible pre-litigation events that would trigger a litigation hold. (SDNY 2003) 220 F.R.D. 212. In Zubulake IV,¹⁵ Plaintiff filed a discrimination claim against her employer. Prior to filing the lawsuit, Mrs. Zubulake filed a claim with the EEOC, of which defendant was aware. Id. at 216. Even before that, Mrs. Zubulake had caused quite a stir throughout the company, causing many of her superiors to chat among themselves via emails regarding her potential claims. Id. at 217.

When it surfaced at trial that her employer had destroyed emails pertaining to Mrs. Zubulake, the court noted:

“In this case, the duty to preserve evidence arose, **at the latest**, on August 16, 2001, when Zubulake filed her EEOC charge...But the duty to preserve may have arisen even before the EEOC complaint was filed.” Id. (Emphasis added.)

The facts in Zubulake revealed other circumstances before the EEOC complaint was filed to trigger the duty to preserve, as discussed below. However, the court states clearly that, at minimum, the triggering event occurred when the EEOC claim was filed.

D. Substantive Conversations with Supervisors & Others

In Zubulake IV, the court concluded:

“Merely because one or two employees contemplate the possibility that a fellow employee might sue does not generally impose a firm-wide duty to preserve. But in this case, it appears that almost everyone associated with Zubulake recognized the possibility that she might sue.” Id. at 218.

The court took note of the emails that Mrs. Zubulake’s co-workers and her supervisors exchanged regarding her termination and her general threat to the firm. The emails were even marked “UBS attorney client privilege [sic].” This only served to

¹⁵ Zubulake IV is the fourth in a series of opinions written by the District Court. It contains the most concise statements regarding legal holds and is hence cited here to the exclusion of the other opinions.

highlight the authors' knowledge of the sensitive nature of the discussions, even though their attorneys did not actually receive copies of the emails when first sent. Id.

Similarly, in Broccoli v. EchoStar (D. MD 2005) 229 FRD 506, 516-17, a sexual harassment and employment discrimination case, Plaintiff informed two of his supervisors at EchoStar, both orally and via email, of the sexually harassing behavior. Broccoli made numerous complaints to them about the inappropriate behavior throughout 2001. Id. at 511. His supervisors subsequently relayed, verbally and via email, the complaints to their own superiors at EchoStar. Id. at 512. In addition, EchoStar's management went to extreme measures to purge emails and other potential evidence as soon as possible after creation.¹⁶ Id.

The court granted Broccoli's motion for sanctions and included an adverse spoliation of evidence instruction in the jury instructions. The evidence of a regular policy at EchoStar of "deep-sixing" nettlesome documents and records (and of management's efforts to avoid their creation in the first instance) was found to be "overwhelming" evidence of intent to spoliolate. Id. at 512.

Both Zubulake IV and EchoStar illustrate the critical junction where threats to sue rise to the level of anticipated litigation. The threats by one or two employees may not give rise to such anticipation. However, when several others begin to chat about it and emails are channeled to supervisors for comments, the threat rises to a new level.

In a related employment context, a court has held that, absent other events, a mere internal investigation of an employee does not give rise to the duty to preserve. Ross v. IBM Corp. (D. Vt. 2006) 2006 U.S. Dist. LEXIS 36031. In Ross, Plaintiff sued her former employer for implied breach of contract and gender discrimination following her termination. Id. at p.9-10. Plaintiff worked for Defendant over 20 years, ultimately as a manager in the Systems and Technology Group, and received a series of positive job evaluations. Id. at p.1. In January 2004, Defendant conducted an internal audit including a review of inventory management processes in Plaintiff's area among others. During the audit process, Plaintiff allegedly falsified a document and told her subordinate to provide it to the auditor. The subordinate did not do so; instead, she contacted two other employees who, in turn, contacted Plaintiff's manager. Together, these four employees decided the document was misleading and should not be given to an auditor and they destroyed it. On February 12, 2004, one of the four employees reported the alleged incident to her manager and, ultimately, Defendant conducted a human resources investigation. As a result, Defendant terminated Plaintiff on March 15, 2004. Id. at p.8.

¹⁶ Commenting on EchoStar's 14-day email destruction policy, the court noted that

"Under EchoStar's extraordinary email/document retention policy, the email system automatically sends all items in a user's "sent items" folder over seven days old to the user's "deleted items" folder, and all items in a user's "deleted items" folder over 14 days old are then automatically purged from the user's "deleted items" folder...The user's purged emails are not recorded or stored in any back up files. Thus, when 21-day-old emails are purged, they are forever irretrievable... The electronic files, including the contents of all folders, sub-folders, and all email folders, of former employees are also completely deleted 30 days after the employee leaves EchoStar...Under normal circumstances, such a policy may be a risky but arguably defensible business practice undeserving of sanctions." Id. at 511.

During discovery, Plaintiff claimed that Defendant engaged in spoliation of evidence by destroying the allegedly falsified document. Id. at p.11-12. The court denied Plaintiff's claim on the grounds that no duty to preserve the document existed at the time it was destroyed, because Defendant was not on notice that litigation was likely at that point. In particular, the court noted that the destruction occurred before Defendant even began an investigation into potential misconduct by Plaintiff let alone before the decision to terminate was made. Id. at p.13-14.

From the Ross case, one can extrapolate at least one guideline regarding the attachment of a preservation duty and when an employer may be placed on notice about the potential for litigation. To wit, absent other circumstances, a mere internal investigation into alleged misconduct of an employee does not necessarily give rise to a duty to preserve.

E. Retainer of Counsel and/or Experts

In Silvestri v. GM (4th Cir. 2001) 271 F.3d 583, notice was triggered when plaintiff retained counsel and an expert. An airbag failed to deploy in an automobile accident involving plaintiff Id. at 587. While Silvestri was in the hospital, his parents retained an attorney. This attorney retained two accident experts "in anticipation of filing a lawsuit." One of the experts even advised Plaintiff that the car should be preserved for the defense to inspect. Subsequently, Silvestri fired his attorney and retained a new one. Id.

At trial, GM sought spoliation sanctions because Plaintiff did not notify GM that the vehicle at issue was to be destroyed. The court granted sanctions by dismissing the case. Id. at 595. In doing so, the court held that destruction of the vehicle resulted in extraordinary prejudice to GM (i.e., the inability to defend itself). Notice occurred, at the latest, when Plaintiff's attorney retained its own experts in anticipation of filing a lawsuit, but actually earlier when Plaintiff first retained an attorney.

Silvestri does not stand for the proposition that an attorney or an expert need to be retained for litigation to be anticipated. See generally, Samsung v. Rambus, supra. The case simply serves to provide another clear point when litigation may be anticipated, vis-à-vis the retainer of counsel or experts. Furthermore, as in the Rambus decisions, Silvestri illustrates another scenario where the party initiating the lawsuit committed spoliation despite anticipation of its own lawsuit.

F. Imminent Lawsuit Apparent or Other Red Flags

The case of In Re: Napster Litigation (N.D. Cal. October 24, 2006) 2006 U.S. Dist LEXIS 30345, involved a lawsuit against investors in Napster, including Hummer Winblad ("Hummer"). Hummer invested in Napster in May 2000, knowing of pending lawsuits against Napster. As a result, Hummer issued an email in June 2000 reminding employees of their email policy, and essentially putting the onus on the employees not to

retain emails in their files.¹⁷ Id. In June 2000, one of the plaintiffs told Hummer of his intent to sue Napster, though not specifically of any intent to sue Hummer directly. On June 26, 2000, Hummer was named in one lawsuit. In August 2001 counsel for Plaintiffs also wrote Hummer an intent to sue letter. As of April 2002, Hummer admitted that “[w]e know we are going to be sued.” The instant action was filed in April 2003 and served in August of 2003. Id.

The court held that “Hummer deleted emails it had a duty to preserve.” The court found that the duty to preserve attached in June 2000, when it issued the email instructions. Besides that, at least one Plaintiff told defendant of his intent to sue Napster. Although notice pertained to suing Napster, Hummer’s reminder to everyone of the email policy highlighted its anticipation of litigation. Thus, preclusion of evidence, adverse inference and financial sanctions were granted against Hummer. Id.

G. Partial Settlement of Claims

Quinby v. WestLB AG (S.D. NY 2006) 2006 U.S. Dist. LEXIS 64531 involved a claim for employment discrimination based on gender and retaliatory firing. It addressed both the attachment and scope of the duty to preserve evidence, which extends to “key players” in litigation.

Plaintiff claimed that Defendant had a duty to maintain emails in a particular format (e.g. one that was accessible) and that because Defendant violated this duty, it could not now seek cost-shifting for restoring the emails from an inaccessible state. Specifically, Defendant sought to shift to Plaintiff the costs associated with restoring backup tapes and searching the emails of six of its former employees in response to a document request. Id. at p.1. Defendant argued that the duty to preserve evidence does not require a party to maintain electronic data in any particular format. Id. at p.26. Ultimately, the Quinby court shifted from Defendant to Plaintiff 30% of the costs for restoring and searching the emails of only one of the former employees based on the analysis set forth below. Id. at p.1, 51-52.

Plaintiff was employed as an Associate Director/Vice President and later as a Director in the Equity Markets Group by Defendant from May 1999 through June 8, 2003, and again from September 2003 through April 16, 2004. Id. at p.2. She was part of a six-person sales team. In November 2002, Plaintiff filed a formal grievance alleging gender discrimination with Defendant’s human resources department. Id. at p.3-4. She made several more such complaints regarding the same issue in early 2003. Id.

¹⁷ The email instructions stated as follows:

“1. we do not retain emails, it is your responsibility to delete your handled emails immediately; 2. we do not use email to chat about matters related to public companies or matters such as the above; 3. we do not retain written copies of emails in our files; 4. our document retention policy is that we do not retain documents on any public or acquired company and retain limited information on private companies. all retained information is stored in central files, pls do not retain other docs in your own files unnecessarily; 5. we do not retain files separate from our central files which are periodically checked for compliance to policies” Id.

In March 2003, the parties settled the internal grievance investigation. Plaintiff received a “bonus” in exchange for a release of all claims against Defendant for acts occurring prior to 2003. Id. (Emphasis added). However, in her eventual lawsuit, Plaintiff contended that the discrimination continued throughout 2003. Id. On June 8, 2003, Plaintiff was terminated reportedly as the result of a workforce reduction. Id. at p.5. On July 17, 2003, Plaintiff filed a charge with the EEOC against Defendant claiming gender discrimination. Id. at p.5-6.

In September 2003, Plaintiff was fully reinstated to her former position with Defendant. Plaintiff did not receive a bonus for 2003 and filed an internal grievance with Defendant regarding this situation sometime in March 2004. Plaintiff filed an amended charge with the EEOC on April 8, 2004, claiming the failure to pay her a bonus was retaliation. On April 16, 2004, Defendant again terminated Plaintiff’s employment. Soon thereafter, Plaintiff filed a second amended charge with the EEOC claiming that her firing was retaliatory. Id. at p.6-7. Plaintiff eventually filed her complaint in the instant litigation.

During the litigation, Plaintiff requested that Defendant search the email accounts of several former employees. Id. at p.9. When an employee leaves WestLB, it is Defendant’s practice to delete the employee’s emails from its accessible database and maintain them solely on backup tapes. Defendant contended that in order to search and produce many of the emails requested by Plaintiff, it had to restore and search backup tapes. Data stored on these tapes is in an inaccessible, compressed format, and the restoration takes substantial amounts of time and money. Id. at p.10.

Following a discovery dispute, the court ordered Defendant to search the emails of 17 individuals, eight (8) of whom were former employees. Previously Defendant had converted six (6) of the eight (8) former employees’ emails into the inaccessible format while retaining emails from the other two, Plaintiff and her immediate supervisor, on its accessible database. Id. at p.12. The six former employees whose emails were converted to the inaccessible format included three of Plaintiff’s co-workers at the sales desk and two who worked in human resources. As such, the latter two were the recipients of several of Plaintiff’s claims of discrimination and played a role in determining Defendant’s response to Plaintiff’s complaints. Id. at p.13. The sixth former employee was the direct supervisor of Plaintiff’s supervisor and made many decisions regarding employee compensation and firing. Id. at p.14-15.

In making its determination on whether to shift costs, the Quinby court relied on the release by Plaintiff of discrimination claims arising out of acts occurring prior to 2003. According to the court, Defendant reasonably should have anticipated litigation at the time the settlement was executed in March 2003, since the agreement did not cover acts after 2002. Id. at p.30-31. Moreover, the court found that Plaintiff’s release shaped the scope of which emails Defendant should reasonably have foreseen would need to be produced in future litigation. Id. at p.31. Only one of the six former employees, Barron, left Defendant’s employ prior to March 2003 when the duty to preserve was triggered by the execution of the parties’ release agreement. Id. at p.32. The court determined that

Barron's emails might still be discoverable but that Defendant could not reasonably have anticipated that they would have to be produced at the time they were converted to the inaccessible format. All other former employees were employed at some point after the time period covered by Plaintiff's release and, therefore, it was reasonably foreseeable that their emails would be requested in discovery during future litigation. Id. at p.32-33.

It is instructive that the court in Quinby mentioned how a colleague expressly disagreed with this conclusion. In particular, another judge in the same court system found that "permitting the downgrading of data to a less accessible form – which systematically hinders future discovery by making the recovery of the information more costly and burdensome – is a violation of the preservation obligation." [See Quinby at p.27, n. 12, *citing* Treppel v. Biovail Corp. (S.D.N.Y. 2006) 233 F.R.D. 363, 372 n.4.] The appropriate balance between the need for accessibility and the hardships that document retention can impose on corporate entities is a constant struggle not only for the parties but also for the courts, particularly with respect to electronic data.

H. Letter Requesting Explanation for Non-Hiring May Have Triggered Duty to Preserve

In Irion v. County of Contra Costa (N.D. Cal. 2005) 2005 U.S. Dist. LEXIS 4293, Plaintiff brought an action for reverse discrimination and various other claims against Defendant after the County declined to hire Plaintiff as a firefighter. Plaintiff was notified of the decision not to hire on June 19, 2002. Id. at p.21.

Following receipt of his rejection letter, Plaintiff wrote a letter to the fire chief, dated June 24, 2002, requesting an explanation of the County's decision. Id. On July 18, 2002, Plaintiff filed a detailed Freedom of Information Act ("FOIA") request seeking information as to the scores of other candidates, to which the County responded on August 5, 2002. Id. Sometime later in August, Plaintiff's own score sheet was provided to him by the County. Id. at p.37. Further, a fire district employee testified at deposition that score sheets would "certainly" have been kept until the end of the relevant hiring period, which in this case was July 31, 2002.

Based on the foregoing facts, the Irion court determined that Defendant had notice of the likelihood of potential litigation by July 2002. Id. at p.36. It is unclear, however, whether the court concluded that Plaintiff's June 24th letter triggered the duty, or the July 18th FOIA request. At the very latest, once the FOIA request had been made, Defendant had an obligation to preserve relevant information regarding its employment decisions. Id. Additionally, the court found that Defendant had a statutory duty to retain these documents for two years pursuant to Cal. Gov. Code section 12946. Id. Defendant violated said statutory duty to preserve.

Plaintiff brought a motion to exclude evidence on the grounds that Defendant destroyed score sheets for some of the firefighting candidates with whom he competed for the open positions after Defendant was on notice that the documents were relevant to potential litigation. Id. at p.29. Specifically, the facts indicate that the score sheets were destroyed although the court noted that it was unclear exactly when the destruction took

place and under what circumstances. Id. at p.38. Nevertheless, the court was able to determine that the destruction likely took place after the duty attached in July 2002 based on information above that some score sheets were available and produced as late as August 2002.

As a result, the court held that Plaintiff could present evidence to the jury concerning Defendant's apparent destruction of the candidate score sheets in support of Plaintiff's claim for spoliation of evidence. Id. at p.38-39. Further, the court stated its intent to grant an adverse inference instruction for Plaintiff in the event that the jury found that Defendant destroyed the score sheets intentionally. Id.

I. Circulation of Internal "Document Hold" Memoranda

The case of In Re NTL, Inc. Securities Litigation; Gordon Partners, et al. v. Blumenthal, et al. (S.D. NY 2007) 2007 U.S. Dist. LEXIS 6198, involved a class action alleging violations of federal securities laws. Plaintiffs claimed that Defendant NTL's directors, officers, and managers made poor decisions that resulted in Defendant entering bankruptcy. They alleged that Defendant falsely reported to the public that it was financially healthy up to that time. Id. at p.7. Plaintiffs sought and were granted discovery sanctions against Defendant NTL for hindrance of discovery and destruction of evidence including emails of approximately 44 of Defendant's "key players". Id. at p.50.

Defendant sent out its own internal "document hold" memoranda on March 12 and March 13, 2002, including a description of the types of documents to be preserved. Id. at p.12-13. The class action lawsuit was subsequently filed on April 18, 2002. Defendant entered bankruptcy on May 8, 2002; and, the Gordon plaintiffs filed their complaint on September 13, 2002. Id. at p.7-8, 52. In this case, the court determined, and Defendant conceded, that the preservation duty arose in March 2002 when Defendant circulated its internal "hold" memoranda. From that point forward, Defendant was on notice as to the potential for litigation. Id. at p.52.

J. Severity of Injuries Combined with Totality of Circumstances

1. *Pace Case*

In Pace v. Amtrak (D. Conn. 2003) 291 F. Supp. 2d 93, Plaintiff was a railroad conductor who brought a claim for personal injury when he tripped on a track buffer and severely injured his back. Plaintiff sued his employer, Defendant Amtrak, and the jury returned a verdict in Plaintiff's favor. Thereafter, Defendant moved for a new trial on various grounds including that the trial court erred in charging the jury on spoliation of evidence. Id. at 96. After reviewing the evidence, the court affirmed the verdict on appeal.

The data at issue were several maintenance and inspection reports which Plaintiff argued would provide relevant information as to the condition of the buffer plates on which he tripped. Id. at 97. Defendant first learned of Plaintiff's injury in July 1999. Id.

Defendant destroyed the reports pursuant to its standard two-year retention policy in approximately late August 2001. The court determined that it was reasonably foreseeable to Defendant that litigation would result from Plaintiff's injury before the two year period ended and, therefore, Defendant had a duty to preserve the reports.

Although the court did not cite one specific triggering event, it considered several factors which, taken as a whole, led to the conclusion that the Defendant was on notice of potential litigation prior to August 2001 when the documents were destroyed. Specifically, the court considered the following: (1) the extent and severity of Plaintiff's injuries, especially the fact that Plaintiff underwent surgery in May 2000; (2) Defendant's retention in May 2001 of an expert to report on the extent of Plaintiff's injuries and conduct an independent medical examination; (3) there was a claims person working on the case; and (4) Defendant conducted video surveillance on Plaintiff from May 2000 through August 2000. *Id.* Taken together, these facts created a duty on Defendant to preserve the maintenance and inspection reports at some point prior to the date of destruction in August 2001.

2. *Hanke Case*

Similarly, in Hanke v. California Auto Dealer's Exchange (2004 Cal. App.) Unpub. LEXIS 6118¹⁸, the court weighed the severity of injuries along with the totality of the circumstances to conclude that Defendant owed a duty to preserve videotapes taken of the accident. The Defendant appealed a judgment entered in Plaintiff's favor on personal injury and related claims. One of the bases for Defendant's appeal was that the court improperly instructed the jury on the willful destruction of evidence. *Id.* at p.1. The court rejected this contention and upheld the verdict in its entirety. *Id.* at p.2.

The injury occurred while Plaintiff, a used car dealer and owner of an auto rental franchise, was attending an auto auction conducted by Defendant on September 15, 1999. Specifically, one of Defendant's employees drove a car over Plaintiff's foot. Plaintiff's complaint was filed in February 2000. *Id.* at p.3.

Defendant routinely videotaped its auctions. Its general manager testified that Defendant normally kept the tapes for a "couple of months" and that company policy in the case of an accident was to keep tapes even longer. Defendant's safety manager prepared an accident report on the day of the accident and the general manager learned of it "shortly thereafter". Defendant had no explanation as to how the tape from that day was destroyed. Further, although Plaintiff minimized the severity of the accident initially, his injury nonetheless required him to go to the hospital for emergency care. Given the totality of the circumstances, the court found a duty for Defendant to preserve the video which, although not expressly stated, appears to have arisen at the time of the

¹⁸ Note that this California case is not published and cannot be cited or relied upon in other matters. However, it may prove instructive in determining when a pre-litigation hold attaches when one is confronted with a similar set of facts.

accident itself and certainly within the two months that Defendant normally retained such tapes before reusing or destroying them. *Id.* at p.19-20.

IV. DETERMINING THE SCOPE OF THE LEGAL HOLDS

Once the duty to preserve documents for a litigation hold is triggered, a company's primary obligation is to determine the scope of what to hold and hence decide what documents and information it must preserve. Generally speaking, courts have held that the duty to preserve extends to what the company "knows, or reasonably should know, will likely be requested in reasonably foreseeable litigation." *Mosaid v. Samsung* (D.N.J. 2004) 348 F.Supp.2d 332, 333, citing *Scott v. IBM Corp.*, 196 F.R.D. 233, 247 (D.N.J. 2000), see discussion *infra*. Simply instructing employees to "look for things to keep" or to not destroy relevant documents is insufficient. *Samsung v. Rambus*, *supra*, at 500007 (p.51). In other words, once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy to ensure that relevant documents are preserved. *In Re NTL, Inc. Securities Litigation, et al.*, (S.D.N.Y. 2007) 2007 U.S. Dist. LEXIS 6198, *supra*, citing *Zubulake* (S.D.N.Y. 2003) 220 F.R.D. 212. *supra*. In practice, determining the appropriate scope of the duty to preserve can be difficult, particularly with respect to electronic data. Therefore, this article will discuss the issue of scope primarily in the electronic information context.

A. Determining Scope of Litigation Holds for Electronic Records in General

Legal holds and the duty to preserve information can potentially cripple a company, and the courts and other experts are keenly aware of the dilemma. For instance, Sedona Principle No. 5 recognizes that "it is unreasonable to expect parties to take every conceivable step to preserve all potentially relevant data." The new Federal Rules echo this sentiment with the parameters they have set for non-discovery of "inaccessible" information, unless the inaccessible information is otherwise unique.

1. The Sedona Principles

The Sedona Principles and related guidelines are the result of a think tank of attorneys, legal academicians and judges looking for solutions to electronic discovery issues. Until the recent adoption of the revised Federal Rules, the Sedona Principles, along with the *Zubulake* case, were the most cited authorities on the issue.

Sedona Principle No. 8 attempts to address the types of electronic documents that must be preserved. It states that

"the primary source of electronic data and documents for production should be active data and information purposely stored in a manner that anticipates future business use and permits efficient searching and retrieval. Resort to disaster recovery backup tapes and other sources of data and documents requires the

requesting party to demonstrate need and relevance that outweigh the cost, burden, and disruption of retrieving and processing the data from such sources.¹⁹

Furthermore, under Sedona Principle No. 9, the panel states that “absent a showing of special need and relevance a responding party should not be required to preserve, review, or produce deleted, shadowed, fragmented, or residual data or documents.”

Finally, Sedona Principle No. 12 gives guidance regarding metadata, stating that “[u]nless it is material to resolving the dispute, there is no obligation to preserve and produce metadata absent agreement of the parties or order of the court.” This principle may fly in the face of some case law, but at least it sets an approach for metadata. Even so, there is still ambiguity regarding the so-called “materiality” discussed in Principle No. 12.

2. *The New & Revised Federal Rules*²⁰

¹⁹ Under Sedona Principle No. 5,

“the obligation to preserve electronic data and documents 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 data.”

This broad attempt to capture pre-litigation records and the scope recognizes the practical dilemma of determining how broad to go with the scope of the legal hold, even though a precise guideline is not provided.

²⁰ Following is summary of the key provisions of the Revised Federal Rules, as summarized by the American Bankers Association, Toolbox Book Seven: Record Hold and Discovery (not released as of the date of this supplemental study).

- **Rule 16(b)(5)& (6): Pretrial Conferences, Scheduling Management.**
After receiving a report from the parties under Rule 26(f), this rule provides a process for a judge to make scheduling order that includes provisions for disclosure or discovery of electronically stored information and permits the parties to reach agreements for asserting claims of privilege or protection as trial-preparation material after production.
- **Rule 26(a)(1)(B): General Provisions Governing Discovery; Duty of Disclosure; Required Disclosures; Methods to Discover Additional Matter.**
This rule requires that parties, without awaiting a discovery request, provide to other parties a copy of, or description by category and location of, all documents, electronically stored information, and tangible things that are in the possession, custody, or control of the party and that may be used to support its claims or defenses.
- **Rule 26(b)(2)(B): General Provisions Governing Discovery; Duty of Disclosure; Discovery Scope and Limits; Limitations.**
This rule provides that a party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On both a motion to compel discovery or for a protective order, the burden is on the responding party to show that the information is not reasonably accessible because of undue burden or cost. Even if that showing is made, the court may nonetheless order discovery from that party if the requesting party shows good cause, considering the limitations that are set forth in Rule 26(b)(2)(C) (i.e. whether the discovery sought is cumulative, duplicative or obtainable from some other more convenient source or at less cost or that the burden of expense outweighs the benefit, etc.). The court may also specify conditions for the discovery.
- **Rule 26(b)(5)(B): General Provisions Governing Discovery; Duty of Disclosure; Discovery Scope and Limits; Claims of Privilege or Protection of Trial Preparation Materials; Information Produced – Claw back and Quick Peek.**
This rule provides that if information is produced in discovery that is subject to a claim of privilege or protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party is required to promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party is required to preserve the information until the claim is resolved.
- **Rule 26(f)(3) & (4): General Provisions Governing Discovery; Duty of Disclosure; Conference of Parties; Planning for Discovery.**
This rule, known as the “meet and confer” rule requires that parties discuss any issues relating to preserving discoverable information and any issues related to disclosure or discovery of electronically stored information. This includes the form or forms in which electronically stored information should be produced, and any issues relating to claims of privilege or protection as trial-preparation material. If the parties agree on a procedure to assert such claims after production, the parties should discuss whether to ask the court to include this agreement in an order.

The above noted principles essentially are codified in the revised Federal Rules of Civil Procedure²¹, with the exception of Principle No. 12 regarding metadata. Under Rule 26(b):

“A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify terms and conditions for the discovery.”

Specifically regarding scope, Federal Rule 26(a) requires parties to disclose “a description by category and location of ... electronically stored information.” This includes, of course, identification of sources under Rule 26(b)(2) that are “not reasonably accessible.” The rule exempts the party from having to produce discovery from such inaccessible sources unless the adversary moves to compel.

Despite the attempts to codify and explain the scope of legal holds for litigation, the practical application of these principles leaves lingering doubts about the precise scope. Because these principles are still vague and subject to much dispute, once again

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- **Rule 34(a) & (b): Production of Documents, Electronically Stored Information, and Things and Entry Upon Land for Inspection and other Purposes; Procedure.**
This rule adds “electronically stored information” as a specific category of discoverable information and provides that any party may serve on any other party a request to produce electronically stored information. The rule permits the party making the request to inspect, copy, test or sample electronically stored information stored in any medium from which information can be obtained - translated if necessary by the responding party into a reasonably usable form. The rule provides that the request may specify the form or forms in which electronically stored information is to be produced. The producing party may object to the requested form or forms for producing electronically stored information stating the reason for the objection. If an objection is made to the form or forms for producing electronically stored information - or if no form was made in the request - the responding party must state the form or forms it intends to use. If a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable. A party need not produce the same electronically stored information in more than one form.
 - **Rule 37(f): Failure to Make Disclosures and Discovery Sanctions; Electronically Stored Information.**
This section of Rule 37 provides that absent exceptional circumstances, a court may not impose sanctions under the rules on a party for failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system.
 - **Rule 45 Subpoena; Form; Issuance.**
This rule updates the subpoena provisions to reflect the rule changes relating to electronically stored information and expands the scope of subpoenas to cover non-party production of ESI. In addition, a subpoena may specify the form or forms in which electronically stored information is to be produced. Subpoenas may be served to not only inspect materials but to copy, test or sample those materials. Incorporating the provisions of Rule 34, if a subpoena did not specify the form or forms for producing electronically stored information, a responding party is required to produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable; and a party need not produce the same electronically stored information in more than one form.
 - **Form 35: Report Parties Planning Meeting.**
The form adds a provision for the parties to set forth their proposals for handling the disclosure or discovery of electronically stored information.

²¹ The complete set of e-discovery amendments, with the accompanying Advisory Committee notes, is available at <http://www.uscourts.gov/rules/>.

companies must revert to case-by-case analysis to determine the scope of the legal holds. Set forth below are some illustrative examples on the issue of scope.

B. Specific Case Examples Regarding the Scope of Litigation Holds

Case examples on the issue of scope and discussed below include: 1) Manufacturing & Product Design Records, 2) Audiotapes, 3) Maintenance Inspection Records, 4) Technical Emails, 5) Ephemeral Information, 6) Key Player Documents, 7) Drafts of Employee Evaluations, 8) Employment Decision Documents, 9) Computer Networks & Hard Drives, 10) Co-Worker Emails, 11) Server Log Data and 12) Back-up Tapes.

1. *Manufacturing & Product Design Records*

In Willard v. Caterpillar, *supra*, Plaintiff injured himself while attempting to repair a 35-year-old tractor. He sued the tractor manufacturer and the tractor owner for products liability and negligence. In the 35 years, there had been a negligible history of accidents like Plaintiff's. The alleged harm to Plaintiff was the loss of product design documents that may have demonstrated Caterpillar's risk/benefit analysis and design decisions for the 1955 model tractor. *Id.* at 919. Regarding the issue of whether said design documents were within the scope of records to preserve, the court was keenly aware that thousands of the tractors were in use for up to 35 years before a claim of injury arose. This demonstrated the unlikelihood that the design reports revealed any otherwise unavailable information as to the risk of such injury. *Id.* at 920.

Conversely, in Carlucci v. Piper Aircraft Corp. the Plaintiff alleged various design defects relating to the longitudinal stability of the aircraft involved in the accident. (S.D. Fla. 1984) 102 F.R.D. 472. The court entered Piper's default based, in part, on its pre-litigation destruction of design documents. *Id.* In the 1960's and 1970's, Piper's flight test engineers were instructed to purge the department files and to eliminate documents that might prove detrimental to Piper in any lawsuit. *Id.* at 482. (Emphasis added.) Thereafter, the destruction of potentially harmful documents was an ongoing process. *Id.* Although Piper did not anticipate the present case, the court nevertheless determined that regular destruction of potentially harmful documents in general rose to the level of spoliation. This was evident in Piper's utter failure to show it implemented its retention policy consistently. *Id.* at 487.

Thus, product design documents must be preserved to the extent the manufacturer suspects there may be claims of liability on the product, as manifested by real life experience per Willard. A policy created for the sole purpose of eliminating potentially detrimental product design documents may be suspect in the eyes of the court.

2. *Audiotapes*

In Stevensen v. Union Pacific (8th Cir. 2004) 354 F.3d 739, defendant's train struck and killed Plaintiff's wife and injured Plaintiff. At trial, Plaintiff sought sanctions against Defendant, because it destroyed a voice tape of conversations between the train crew and dispatch at the time of the accident and track maintenance records from before

the accident. *Id.* at 743-744. Both prior to the filing of the lawsuit and during its pendency, Union Pacific destroyed the tapes of any recorded voice radio communications between the train crew and dispatchers on the date of the accident. *Id.* at 746.

The accident occurred on November 6, 1998. The Stevensons filed this lawsuit on September 20, 1999, and mailed their requests for production of the voice tape on October 25, 1999. By that time, Union Pacific had long since destroyed the voice tape from the accident by recording over it in accordance with the company's routine procedure of keeping voice tapes for 90 days and then reusing the tapes. *Id.*

The court upheld sanctions against Union Pacific for its pre-litigation destruction of the voice tapes. *Id.*; see also *Lewy*, 836 F.2d at 1112 (stating that "even if the court finds the policy to be reasonable given the nature of the documents subject to the policy, the court may find that under the particular circumstances certain documents should have been retained notwithstanding the policy"). An important factor here was that the voice tape was the only contemporaneous recording of conversations at the time of the accident. Such evidence will always be highly relevant to potential litigation after an accident. Furthermore, the record here indicated that Union Pacific made an immediate effort to preserve other types of evidence but not the voice tapes. The district court noted that Union Pacific was careful to preserve a voice tape in other cases where the tape proved to be beneficial to Union Pacific. *Id.* at 747-749. This weighed heavier in this case than the lack of actual knowledge that litigation was imminent at the time of the destruction.

Thus, the voice tapes should have been held from destruction, at minimum, immediately after the accident, even though litigation was not certain at that time. The court seemed to find no fault with the recycling of voice tapes after 90 days.

3. Maintenance Inspection Records

In the same case of *Stevensen v. Union Pacific*, the court found differently regarding the maintenance inspection track records for the location of the accident. Union Pacific demonstrated that its policy was to destroy them after one year and replace them with new inspection records. These records generally noted defects that appear at a crossing on the day of its inspection and list the name of the person who inspected the track on that particular day. They would not show the exact condition of the tracks on the day of the accident. *Id.*

The court thus found that the pre-litigation destruction of track maintenance records was not in bad faith. Maintenance records would only be relevant to potential litigation "to the extent that they are relatively close in time to the accident" and defective track maintenance was alleged to be the cause of the accident. Even then, track maintenance records are of limited use. While they may have revealed defects in the track that existed at the time of the last inspection, they did not show the exact condition of the track at the time of the collision. The condition of the track was not formally put into issue until the second amendment to the complaint.²² *Id.* at 749.

²² Even so, the court sanctioned Union Pacific for continued destruction of track maintenance records after this lawsuit was initiated. Another illustration on maintenance records is *Petersen v. Union Pacific* (C.D. Ill. 2006) 2006 U.S. Dist. LEXIS 49921, a train injury case where the court dealt with discovery requests of pre-litigation maintenance records. Regarding a request for

One clear edict that comes out of this case is that pre-litigation records must be preserved if they are of the type that might somehow be unique proof of either a claim or defense. Companies must assess their internal systems for critical functions as they pertain to pre-litigation concerns once, of course, the potential case is identified. In this case, the accident and injuries were so severe that the defense should have known how far to go in its preservation obligations.

4. *Technical Emails*

The court in Mosaid v. Samsung (D. NJ 2004) 348 F.Supp.2d 332, 333 attempted to articulate a standard for determining the scope of production as follows:

"While a litigant is under no duty to keep or retain every document in its possession, even in advance of litigation, it is under a duty to preserve what it knows, or reasonably should know, will likely be requested in reasonably foreseeable litigation." Id., citing Scott v. IBM Corp., 196 F.R.D. 233, 249 (D.NJ 2000).

In Mosaid, Samsung was charged with spoliation when it destroyed certain emails. Specifically, it never placed a hold on its document retention policy concerning emails that were highly technical in a patent litigation lawsuit. A former Samsung memory designer testified to the extensive use of emails at Samsung, including the complex nature of the discussions within those emails. Id. at 339. To make matters worse, Samsung knew how to institute a legal hold and stop spoliation of the emails. The court took note of Samsung's litigation hold experience from another case heard before the same court. Id.

The court further noted that the offending party's culpability is irrelevant when the opposing party has been prejudiced. If a party has notice that evidence is relevant to an action, and either proceeds to destroy that evidence or allows it to be destroyed by failing to take reasonable precautions, common sense would dictate that the party is more likely to have been threatened by that evidence. Thus, the court concluded that

records that document occasions on which speed indicators were installed, repaired, adjusted, calibrated, or replaced at the accident site for a period of two (2) years prior to the subject accident, the court ordered limited production of records showing when the speed indicators were installed in the lead locomotive or cab car involved in the accident. Next, regarding a request to produce records that document occasions on which any of the event recorders were installed, repaired, adjusted, calibrated, or replaced, for a period of two (2) years prior to the subject accident, the court directed defendants to produce records showing the exact date of the installation of the event registers in the lead locomotive or cab car. Also, regarding a request to produce a copy of UP's Document Retention and Destruction Policy or equivalent, as it existed both at the time of the subject accident and at present day, setting forth UP's policy for the retention of documents and other materials but not limited to, crossing signal test reports, audio recordings of train dispatcher radio and telephone communications, video footage filed from moving trains, data from rail/highway grade crossing event recorders or equivalent, data from defect detectors; maintenance and repair records for track, signals, rail/highway grade crossings, locomotives and rolling stock; and email messages, the court found these policies to be clearly relevant and must be produced. Finally, regarding email messages in the possession of UP that relate to the subject crossing, accident train or crew, or subject accident in general, the court ruled that electronically stored data is clearly discoverable.

“When the duty to preserve is triggered, it cannot be a defense to a spoliation claim that the party inadvertently failed to place a "litigation hold" or "off switch" on its document retention policy to stop the destruction of that evidence... Unless and until parties agree not to pursue e-discovery, the parties have an obligation to preserve potentially relevant digital information. Parties who fail to comply with that obligation do so at the risk of facing spoliation sanctions.” *Id.* at 340.

Accordingly, once litigation is anticipated, emails of a technical nature must be preserved.

5. *Ephemeral Information*

In *Convolve v. Compaq* (S.D. NY 2004) 223 FRD 162, Convolve, Inc., and Massachusetts Institute of Technology (collectively, "Convolve") asserted claims of patent infringement and theft of trade secrets against Compaq Computer Corp. ("Compaq") and Seagate Technology, Inc. ("Seagate"). Convolve alleged that the defendants breached certain confidentiality agreements by misappropriating disclosed technology and incorporating it into their own products. *Id.* at 177. The district ruled on several discovery abuse motions.²³

The most substantive contention alleged certain “intermediate wave forms” existed at least as electronic data displayed on an inventor’s oscilloscope. They alleged that he wrongfully failed to preserve them either by printing the screen each time he altered a parameter or by saving the data to a disk. This argument failed for two reasons. First, the wave forms were relevant, if at all, only with respect to damages. Second, the preservation of the wave forms in a tangible state would have required heroic efforts far beyond those consistent with Seagate's regular course of business. To be sure, as part of a litigation hold, a company may be required to cease deleting emails, and so disrupt its normal document destruction protocol. But emails, at least, normally have some semi-permanent existence. They are transmitted to others, stored in files, and are recoverable as active data until deleted, either deliberately or as a consequence of automatic purging. By contrast, the court deemed that the data at issue here was “ephemeral.” *Id.* at 177. They exist only until the tuning engineer makes the next adjustment, and then the document changes. No business purpose ever dictated that they be retained, even briefly. Therefore, absent the violation of a preservation order, which was not alleged here, no

²³ One spoliation motion dealt with a request that Seagate be sanctioned for failing to preserve emails between two inventors at Seagate. The court found that Convolve established only that one inventor "communicated by email and telephone" with the other inventor "from time to time." Yet Convolve made no effort to determine the substance of those communications in anything but the most general terms. Thus, Convolve failed to justify spoliation sanctions. *Id.* In arriving at its decision, the court noted as follows:

“[I]n the world of electronic data, the preservation obligation is not limited simply to avoiding affirmative acts of destruction. Since computer systems generally have automatic deletion features that periodically purge electronic documents such as email, it is necessary for a party facing [anticipated] litigation to take active steps to halt that process...” *Id.*, citing *Zubulake v. UBS Warburg LLC* (S.D.N.Y. 2003) 220 F.R.D. 212, 218.

The other instance of "spoliation" alleged by Convolve involved a scientist’s creation of certain other wave forms using a program called TOME. As a tuning engineer, the scientist's responsibility was to make adjustments to Seagate drives, that is, to "tune" them, in order to maximize their performance. He would do this by starting with a particular wave form or trajectory. The initial wave forms, sometimes generated by TOME, were contained in records known as MATLAB scripts. There was no evidence that the tuning process required the creation of any permanent documents, so again sanctions were not warranted.

sanctions were warranted. *Id.*; see also John Street Leasehold, LLC v. Capital Management Resources, L.P., 154 F. Supp. 2d 527, 540-51 (S.D.N.Y. 2001), *aff'd*, 283 F.3d 73 (2d Cir. 2002) [destruction of documents in normal course of business no basis for sanctions absent showing of intent or negligence plus relevance of documents.]²⁴

6. Key Players and Their Documents

In Consolidated v. Alcoa (M.D. LA 2006) 2006 U.S. Dist. LEXIS 66642, Consolidated contended that Alcoa deleted relevant emails and other electronic data for years after it reasonably anticipated this litigation, and even after this litigation actually commenced, in violation of its affirmative duty to preserve all potentially relevant evidence. The primary issue here was whether Alcoa took all reasonable steps to preserve the necessary evidence. The court from the outset acknowledged that Alcoa, upon recognizing the threat of litigation, did not have to preserve "every shred of paper, every email or electronic document, and every backup tape... [T]he duty to preserve extends to those employees likely to have relevant information, *i.e.* the "key players" in the litigation."²⁵ *Id.* at 66642.

Alcoa's counsel met with and/or participated in telephone conferences with four (4) individuals to establish a "document hold" in conjunction with its issuance of a demand letter from Consolidated in November 2002, almost one full year before the lawsuit was filed in September of 2003. One of several spoliation claims thus pertained to retention of records regarding certain other individuals, than the aforementioned four. In attempting to explain why it did not preserve the emails of other individuals, Alcoa contended they were plant level employees with minimal interaction with the corporate level "key players." Alcoa essentially argued that for every email sent and received by plant level individuals, there was a corresponding key-player recipient. Thus, Alcoa claimed, there was no reason to preserve non-key player records such as those involving the plant level individuals. In addition, Alcoa asserted that the only pertinent information the plant employee had with respect to this case related to his "historical knowledge" of the facility, which can only be obtained through deposition testimony as to his memory of events, not through contemporary documents or emails. *Id.* at 66642.

The court disagreed with Alcoa's view about this plant employee. Statements by Alcoa indicated that he was one of the "key players" in this litigation who was likely to have relevant information in his emails, which Alcoa had a duty to preserve from the time this litigation became reasonably anticipated, even if he was a plant level employee who was not directly involved in the ongoing environmental investigations underlying this case.²⁶ The Court also found unpersuasive Alcoa's argument that any information

²⁴ The court also noted in dicta that a somewhat analogous situation arises in the use of Instant Messenger functions. There the question may be a closer one both because at least some Instant Messenger programs have the capability, like email, of storing messages, and because such information is intended to be transmitted to others.

²⁵ Instead, the duty to preserve extends to any documents or tangible things made by individuals "likely to have discoverable information that the disclosing party may use to support its claims or defenses." *Id.*, citing Zubulake IV., at 218. The duty also extends to documents prepared for those individuals and to information that is relevant to the claims and defenses of *any* party, or which is "relevant to the subject matter involved in the action." *Id.*

²⁶ The Court also found that Alcoa potentially spoiled relevant evidence through its failure to override its standard document destruction policies when this litigation became reasonably foreseeable in November 2002. Alcoa attributed its failure to institute a "litigation hold" in November 2002 to the fact that it did not learn of the "previously concealed scope and magnitude of

contained in his emails had nevertheless been preserved because his emails to and from their designated "key players" had been preserved. Since the Court construed the plant employee to be a "key player," emails sent and received by him, other than those involving the designated key players would be relevant to this matter and should have been preserved. To make matters worse, Alcoa's initial disclosure dated February 28, 2005 identified approximately one hundred (100) individuals as being "likely to have discoverable information that Alcoa may use to support its claims and defenses." Hence the Court found that instructing only eleven (11) Alcoa employees to abide by the "litigation hold" in May 2005 was inadequate to fulfill its preservation obligations.²⁷ *Id.* at 66642.

Thus, under Consolidated, companies must pay particular attention to the employees deemed key players, especially if during the onset of litigation counsel errs on the side of caution by naming as many individuals as possible to be potential witnesses at trial. See also In Re NTL, Inc. Securities Litigation; Gordon Partners, et al. v. Blumenthal, et al. (S.D. NY 2007) 2007 U.S. Dist. LEXIS 6198 [in class action for securities violations court granted discovery sanctions for destruction of evidence including emails of approximately forty-four (44) of Defendants' "key players".]

7. Drafts of Employee Evaluation Documents

In McGuire v. Acufex (D. MA. 1997) 175 FRD 149, Plaintiff moved for sanctions under Fed. R. Civ. P. 37, against the defendant Acufex Microsurgical, Inc. ("Acufex"), based on the deletion by Acufex's Human Resources Director of a paragraph from an evaluation memorandum concerning McGuire authored by one of the Plaintiff's supervisors. The supervisor drafted the memorandum based on his conversation with the Plaintiff about her charges of sexual harassment against her former supervisor. HR deleted the paragraph from the memorandum as part of routine HR procedure in November of 1993. At the time of the deletion, McGuire had already filed charges of sexual harassment. The missing paragraph was later "found" on the supervisor's personal computer hard drive, just before his deposition. *Id.* at 151. A hearing was held to

Consolidated's pollution" until it conducted interviews with a variety of current and retired employees after being served with Consolidated's complaint in September 2003. Given the scope of the information allegedly known to Alcoa at that time, the Court found that Alcoa's original "litigation hold" was not so unreasonable as to demonstrate bad faith. At that time, litigation was only "reasonably foreseeable," and Alcoa was not required to preserve every shred of paper but only those documents of which it had "actual knowledge" that they would be material to future claims. Even if Alcoa failed to preserve all emails that it had a technical duty to preserve, the court considered the likelihood in this case that information relevant to this matter was contained in other sources. Although adverse inference instructions were not warranted in this case, the Court nevertheless found that Alcoa was negligent and its failure to preserve electronic evidence did not go unpunished. Accordingly, the Court ordered that Alcoa bear Consolidated's costs for re-deposing certain witnesses for the limited purpose of inquiring into issues raised by the destruction of evidence and regarding any newly discovered emails. *Id.*

²⁷ Similarly, in Thompson v. HUD (D. MD. 2003) 219 FRD 93, Plaintiffs brought a housing discrimination case against the defendant housing authorities. The spoliation issue turned on the destruction of certain emails. Defendants argued that, despite the Plaintiffs' serial Rule 34 requests clearly seeking electronic records, they were justified in deleting or failing to maintain the email records of departing housing officials whose employment ended during the pendency of this suit. Plaintiffs, after all, failed to seek an order from the court directing the preservation of their electronic records. The court did not buy Defendants' argument and ruled that among the electronic records subject to the "litigation hold" were those generated or maintained by the "key players" in the case. The court concluded that Defendants were under a duty to preserve key player email records. *Id.*

determine whether there was any misconduct when HR altered the supervisor's memorandum knowing of the filed charges. The court did not find sanctionable misconduct. Id. at 152.

In late September of 1993, McGuire had complained of specific instances of misconduct. Id. On November 1, 1993, McGuire filed her charge with MCAD (the Massachusetts equivalent of the EEOC). She informed her supervisor of this during a meeting on November 2. The following week HR conducted an investigation of the charges. After speaking with at least ten Acufex employees, HR concluded there was a lack of evidence to substantiate McGuire's charges. On November 2, after the meeting with McGuire at which she informed him of the MCAD charges, and described them, her supervisor drafted the memorandum at issue here. On November 3, 1993, he brought his draft on a computer disk to HR, where, in his presence, HR inserted the words "sexual favor" in place of a more graphic description of the events. HR eventually deleted the graphic description of events. HR then placed the edited memorandum into McGuire's personnel file. The paper copy of the draft was discarded consistent with company practice, and was not saved in any investigative file. Id.

The court found that deletion of a paragraph in a document arguably could qualify as an "act of destruction." Id. at 155. After all, the evidence was discoverable. A proceeding had begun before the MCAD, which Acufex had to take very seriously. A lawsuit was imminent, unless the parties settled during the MCAD proceeding, or the MCAD successfully "conciliated" the claim. Moreover, Acufex's obligations were especially clear in the light of the recent changes to Rule 26(a) implementing automatic discovery obligations, without the necessity of filing discovery requests. Id.

Giving Plaintiff such utmost benefit of the doubt, the court nevertheless found that HR's job was to make sure that no false information was knowingly placed into any personnel files, including McGuire's. HR had the responsibility to read and edit the supervisor's memorandum to make sure there was nothing false in it. Id. at 156. Under the very specific circumstances of this case, the court found no actionable misconduct (i.e., that it lacked the right to edit out the deleted references, or that it somehow had an affirmative obligation to portray its staff, warts and all.) The court noted that "to hold otherwise would be to create a new set of affirmative obligations for employers, unheard of in the law -- to preserve all drafts of internal memos, perhaps even to record everything no matter how central to the investigation, or gratuitous." Id. at 157.

Thus McGuire murks the issue of preservation of draft documents when litigation is anticipated or virtually pending. This may be a dangerous precedent for record keeping purposes, as the general rule has been that all relevant information must be preserved once litigation is anticipated. In McGuire the court opened the door for an exception to litigation hold of draft documents pertaining to HR functions that are otherwise customary.

8. *Employment Decision Documents*

In contrast to McGuire, the court in Scott v. IBM found spoliation of documents created as part of the decision-making process for the Plaintiff's termination. Scott v. IBM (DNJ 2000) 196 FRD 233, 247-48. The spoliation issue before the court focused on

lay-off documents, including flip charts and criteria used to terminate Plaintiff from employment as part of a large lay-off at IBM. Plaintiff brought suit against his former employer, IBM, alleging that IBM discriminated against him on the basis of his race, age, and disability. The flip chart was the sole documentation of how managers intended to implement the lay-off directives. The flip charts used to arrive at the lay-off determination were destroyed the day after the meeting. This denied Plaintiff the ability to discover exactly what the managers wrote down during the decision-making process. Significantly, there is no original documentation as to nine other potential lay-off candidates, nor where Mr. Scott ranked on this list in relation to the others. *Id.* at 240.

Supervisors met with Scott at the end of January 1996 to inform him that he had been declared surplus, and that unless he could secure other employment at IBM his last day would be at the end of March 1996. Plaintiff filed a discrimination complaint with the EEOC dated March 8, 1996. He filed suit in state court on July 20, 1998. *Id.*

At trial, Scott argued that IBM committed evidence spoliation by destroying several key pieces of evidence in this case. The Court found that under the particular facts of this case, IBM's decision to destroy these documents could give rise to a "spoliation inference" which could be found by a reasonable jury to cast doubt on IBM's proffered legitimate reasons for discharge. *Id.* at 246. Plaintiff contended the destruction of the flip chart and name ranking deprived him of any objective evidence concerning whether IBM truly followed their internal parameters when deciding to lay him off. The Court agreed with Plaintiff that, because the flip chart was destroyed, there was little documentation as to what really went on during the decision-making process. *Id.*

There was no direct evidence that the documents were knowingly destroyed after Plaintiff filed his EEOC complaint, nor did they "disappear" after a court order for their production.²⁸ *Id.* at 247. IBM was aware that any documents relating to the lay-off process would be subject to discovery. While litigation was not guaranteed, it could be viewed as reasonably foreseeable. IBM managers knew that Mr. Scott, if not others, was protected by federal employment discrimination laws. Mr. Scott had made previous claims of race discrimination within IBM, and thus IBM had ample notice that it was discharging a potentially litigious employee when it fired him. *Id.* at 249.

The court deemed that common sense would dictate preserving all helpful documentation when dealing with the discharge of an employee with a litigious history. Because IBM did not do so, the inference was that the destroyed documents were unhelpful to IBM's case.²⁹ Based on the foregoing, the Court found that IBM should have foreseen that litigation might follow the lay-off and should have foreseen that all documentation concerning the decision-making process could become relevant. *Id.*

²⁸ The circumstances were also susceptible of an innocent explanation, including mere negligence in failing to preserve possibly important documents. While a litigant is under no duty to keep or retain every document in its possession, even in advance of litigation it is under a duty to preserve what it knows, or reasonably should know, will likely be requested in reasonably foreseeable litigation.

²⁹ IBM tacitly acknowledged that litigation was foreseeable when it required all laid off employees to sign a contract waiving their right to sue IBM before releasing their severance package benefits, which Scott also refused to sign. *Id.*

However, in a similar situation, the court in Sarmiento reached a different conclusion. Sarmiento v. Montclair State University (D. NJ. 2007) 2007 U.S. Dist. LEXIS 33969. In this case, Plaintiff was a professor who brought a discrimination claim for failure to hire against Defendant when he was not offered a tenure track position. Among other things, Plaintiff contended that Defendant engaged in spoliation of evidence in that the hiring committee destroyed documents pertaining to the hiring process, including notes used by committee members to rank the various applicants as well as portions of the applications received from Plaintiff and two other candidates. Under C.F.R. section 1602.49, any personnel and employment record made or kept by an institution of higher education shall be preserved for a period of two (2) years. (Emphasis added.) So it appears the duty to preserve was established by a regulation as with Irion, supra.

The court found that there was no spoliation of evidence in this case. Specifically, the Sarmiento court noted that, even where the duty to preserve is established by regulation, the element for a spoliation claim must still be established before a sanction will be imposed. Here, the court determined that it was not reasonably foreseeable that the evidence would later be discoverable at the time the notes were destroyed. The court found persuasive Defendant's contention that such notes were routinely destroyed shortly after the committee's decision-making meeting for reasons of confidentiality and academic freedom. In this case the notes were destroyed before Plaintiff was notified of the decision not to hire on or about March 26, 2002. The court concluded that litigation was not reasonably foreseeable until Plaintiff filed an EEOC claim on July 18, 2002.

With respect to the application materials, the court declined to find Defendant had engaged in spoliation on the basis that any relevance was minimal and, in any case, the court had not considered these materials in evaluating the relative strength of the other finalists' qualifications in relation to Plaintiff's.

9. *Computer Networks and Hard Drives*

In St. Andrews Park v. Corp of Engineers (SD Fla. 2003) 299 F.Supp.2d 1264, the Plaintiffs were the owners of a parcel of property known as the St. Andrews Park Site. The United States Corps of Engineers ("Corps") asserted jurisdiction over the isolated wetlands on the Site that culminated in this suit challenging the Corps' assertion of jurisdiction. Id. at 1265. Prior to filing the suit, Plaintiffs submitted via email multiple Freedom of Information Act, 5 U.S.C. § 552, ("FOIA") requests seeking records related to the Site. Id. In a letter dated March 8, 2002, counsel for Plaintiffs reactivated the FOIA requests originally submitted by Plaintiffs to the Corps by email on December 31, 2001, and requested all file documents, papers, and correspondence, including email communications, relating to the St. Andrews Park Site. The FOIA request extended to any emails or electronic communications which still were stored on any intermediate servers utilized by the Corps to transmit email and on any computer hard-drive upon which such emails or message still existed. Id. at 1266. The Corps failed to search for documents located on individual computer hard-drives of Corps employees. They

represented instead that the entire network server was searched, specifically including requested email accounts of identified Corps personnel. *Id.*

Because the defendants did not search the individual computer hard drives, the court found that they did not meet their burden of "thoroughly search[ing] for the requested documents where they might reasonably be found." *Id.* at 1271, citing Miller v. United States Dep't of State, 779 F.2d 1378, 1383 (8th Cir. [*1270] 1985); see also Oglesby v. United States Dep't of Army (D.C. Cir. 1990) 920 F.2d 57, 68 (an agency cannot limit its search to only one record system if there are others that are likely to turn up the information requested). *Id.*

Thus, under St. Andrews individual computer hard drives are subject to search, in addition to network systems. Destruction of those records, by extension, could be construed as spoliation when litigation is anticipated. In this case the FOIA requests set in motion the duty to preserve for the defendants.

10. *Co-Worker Emails*

Based on the discussion set forth above in the Quinby case, it appears that in the context of an employment case, co-workers who interacted regularly in the normal scope of work with the employee in question, or who had contact with respect to job performance or complaints, would be persons who are reasonably likely to have relevant information related to employment claims. *Id.* at p.12-15. In other words, such co-workers are considered "key players" for purposes of determining the scope of a litigation hold. Accordingly, co-worker emails would fall within the scope of a litigation hold once a duty to put one in place has attached.

Further, the Quinby case instructs that a release of claims entered into between an employer and employee can shape the scope of which documents can reasonably have been foreseen to be produced in future employment litigation. *Id.* at p.31.

11. *Server Log Data*

In Columbia Pictures Industries v. Bunnell (C.D. Cal. 2007) 2007 U.S. Dist. LEXIS 46364, the court addressed Plaintiffs' discovery motion to compel Defendants to preserve and produce electronic data and for evidentiary sanctions in a copyright infringement case. Although the court did not issue sanctions in this case, the preservation duty may create an obligation to modify or suspend features of routine operation of an electronic information system to prevent the loss of potentially discoverable evidence. *Id.* at pp.54-55.

Plaintiffs filed a complaint for copyright infringement on February 23, 2006, asserting that Defendants' operation of their website involved piracy of Plaintiffs' copyrighted works. *Id.* at p.4. Thereafter, Plaintiffs sent notice to Defendants on May 15, 2006, to preserve potentially discoverable evidence but failed to specifically mention or identify Server Log Data

(“SLD”)³⁰. *Id.* at pp.17-18. Defendants operate a website which offers dot-torrent files for download by users. (“Dot-torrent files” indicate the format of files downloaded by an application running on the user's computer to locate and download content over a computer network, typically the Internet.) If the website’s logging function is enabled, the web server copies the request into a log file, as well as the fact that the requested file was delivered. If the logging function is not enabled, the request is not retained. *Id.* at pp.9-11. Defendants’ web server has logging functionality – meaning it has the capacity to retain the SLD - but it was never enabled to do so. The decision not to enable the logging function was made, in part, on the belief that it would make the website more attractive to users who did not want their identities known for whatever reasons. So, although Defendants did not affirmatively retain the SLD through logging or other means, the data went through and was temporarily stored in the RAM of Defendants’ website server for approximately six (6) hours.³¹ *Id.* at pp.12-13.

In this case of first impression, the court evaluated the nature of SLD and reached several conclusions. First, the court concluded that data in RAM qualifies as “electronically stored information” within the scope of F.R.C.P. section 34(a) absent specific precedent on this issue. Specifically, the court found that SLD was electronically stored information because the data is copied temporarily to the RAM while user requests are processed. Second, the court determined that the SLD was within the “possession, custody or control” of Defendants whether it was routed to Defendants’ server directly or to Defendants’ partner’s server on the basis that Defendants at all times had the ability to manipulate at will how the SLD was routed.

The court expressly noted that its ruling should not be read to require litigants in all cases to preserve and produce electronically stored information that is temporarily stored only in RAM – they made mention of the specific facts in the case and the unique nature of the legal claims (i.e. copyright infringement). *Id.* at pp.53-54. n.31. However, it is certainly possible that other cases would fit the criteria that the court used here to determine whether the information at issue was within the scope of a litigation hold. In other words, where electronic data temporarily stored in RAM is key and potentially dispositive to a case, is otherwise unavailable, and there is no evidence that preserving and producing the data is unduly burdensome and costly, it may be within the scope of a litigation hold.

Here, the court found that the failure of Defendants to retain SLD nevertheless was not worthy of sanctions in that Defendants acted on a good faith belief that preservation of data temporarily stored only in RAM was not legally required, particularly in the absence of a specific request for such data by Plaintiffs. The court’s rationale was that (1) there was no prior precedent in the discovery context; (2) there was no specific discovery or other request to preserve the information at issue; and (3) there was no violation of a preservation order. For these reasons, the court held that sanctions for spoliation were not appropriate.

³⁰ Specifically, Plaintiffs sought the preservation and production of the following data: (1) the IP addresses of users of Defendants’ website who requested “dot-torrent” files; (2) the requests for “dot-torrent” files; and (3) the dates and times of such requests (collectively “Server Log Data”). *Id.* at p.5.

³¹ At some point close to the time Plaintiffs’ filed their motion, Defendants altered the method through which the website operates. Defendants’ server no longer receives the SLD, or at least not in the same way. Instead, Defendants contracted with a third party (“Panther”) which essentially serves as a middleman for the process. Panther now receives the SLD at issue in its RAM but does not retain logs of such information either. *Id.* at p.14-16.

It is noteworthy that a court in the future is likely to be less forgiving in a similar, given the guidance now provided in the Columbia Pictures decision.

12. *Inaccessible Back-Up Tapes*

In Oxford House v. City of Topeka (D. Kan. 2007) 2007 U.S. Dist. LEXIS 31731, the court determined that the scope of the duty to preserve does not extend to data contained on inaccessible backup tapes maintained solely for disaster recovery purposes.

Specifically, in a case involving a claim concerning a conditional housing permit, Plaintiffs contended that Defendant failed to produce emails sent to members of the City Council concerning the permit consideration process. Id. at p.7. Here, Defendant received notice of pending litigation on August 12, 2005, upon receipt of Plaintiffs' demand letter. Defendant claimed the responsive emails were destroyed in June 2005. Defendant contended that the emails are not recoverable because, although such data is backed up by a tape system, the tapes are rotated every six weeks and overwritten by subsequent back-up tapes. There was no conclusive evidence that the tapes contained allegedly deleted emails from June 2005 when demand letter was received in mid-August. Id. at p.11.

Plaintiffs contended that Defendant had a duty to preserve the emails in anticipation of litigation and that Defendant's failure to do so constituted spoliation. Id. at pp.9-10. The court disagreed noting that, when parties put a litigation hold policy in action in response to pending litigation, the hold does not apply to inaccessible backup tapes (e.g. those typically maintained solely for disaster recovery purposes) which may continue to be recycled on the schedule set forth in the company's policy. Further, the court noted that, even had the tapes contained the emails, "as a general rule, a party need not preserve all backup tapes even when it reasonably anticipates litigation." Id. at p.12 (citing Zubulake, supra). Based on the foregoing, the court denied Plaintiff's request for an order compelling additional discovery responses from Defendant on the grounds that there are no further responsive documents available and that the requests were unduly burdensome if the court were to order Defendant to search and attempt to retrieve deleted emails from inaccessible backup tapes.³²

CONCLUSION

On the whole, regarding the issue of when to issue a litigation hold, the lines of demarcation are clear for pending litigation, where the summons, complaint or discovery requests have been served or an agency investigation notice or letter from opposing counsel has been received. However, triggering events become more difficult to discern as one moves from pending litigation to potential, anticipated or contemplated litigation.

³² For comprehensive treatment of the issue of back-up tapes, see G. Esposito & T. Mueller, "Backup Tapes, You Can't Live with Them and You Can't Toss Them: Strategies for Dealing with the Litigation Burdens Associated with Backup Tapes under the Amended Federal Rules of Civil Procedure." 13 Rich. J.L. & Tech 13 (Spring 2007).

The cases discussed in this supplemental study illustrate examples of “smoking gun” types of triggering events for these situations. They include the following:

- Pre-litigation correspondence, such as a letter from a party threatening legal action or a letter from a party’s attorney;
- Creation of a list of potential opponents;
- Notice to insurance carrier;
- Filing of a claim with an administrative agency, e.g. EEOC;
- Substantive conversations with supervisors and/or others;
- Retainer of counsel and/or experts;
- Imminent lawsuit is apparent or other red flags;
- Partial settlement of claims;
- Letter requesting information regarding hiring/firing decision;
- Circulation of internal “document hold” memorandum;
- Severe injuries combined with the totality of circumstances.

From these specific case illustrations, companies may be better able to draw their own, informed retention conclusions. They must glean from the above noted checklist of considerations for determining whether a potential, anticipated or threatened litigation or investigation should trigger a legal hold. Any one or a combination of the above events should prompt a company to initiate a legal hold and communicate that hold effectively to its employees. Here, a sound policy and procedure is critical to ensuring that notice of the pending or potential litigation is transmitted to the persons with the authority to initiate the legal hold and ascertain that it is carried out properly, including the company’s IT department.

As far as what to hold, it should be much easier to ascertain scope in “pending” litigation matters. Under the revised Federal Rules, and in many states that call for parties to meet and confer early in the litigation, the parties are to discuss precisely what needs to be withheld from destruction early in the case. The list and scope of what to hold is thus negotiated from the outset.

Still, the law is far from clear as to what documents to hold in cases of “anticipated” or “contemplated” litigation, particularly in an age of increased complexity and reliance on electronic records and storage. Examples covered in this supplemental study include:

- Manufacturing & Product Design Records
- Audiotapes
- Maintenance Inspection Records
- Technical Emails
- Ephemeral Information
- Key Player Documents
- Drafts of Employee Evaluations
- Employment Decision Documents
- Computer Networks & Hard Drives

- Co-Worker Emails
- Server Log Data
- Back-up Tapes

Courts and experts are aware of the potentially crippling effect of forcing a company to put a hold on all potentially relevant information. The question is how far to go in satisfying the revisionist and hindsight view of the courts. The cases surveyed in this supplemental study illustrate how courts have ruled in the past and may help companies set parameters around these thorny issues in the future.

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