# Internal Litigation Hold Letters

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While the Federal Rules of Civil Procedure in the U.S. have long-required corporations and parties to preserve evidence, see Fed. R. Civ. P. 26(a)(1), 33, 34, 45, the trend toward electronic data storage is leading state and federal courts to issue opinion after opinion on the issue. Today, it is imperative that every corporation have well-known records retention policies as well as clear procedures in place for responding to litigation hold letters.

A litigation hold letter is a letter directing persons to hold and preserve certain documents which may be relevant to (or lead to the discovery of relevant evidence in) potential or pending litigation, regulatory investigation or audit. Internal litigation hold letters are issued by the party to its employees in an effort to ensure record location, retention and preservation. Unfortunately, litigation hold letters are often poorly drafted, disseminated with no follow-up, written without an understanding of how or where documents or data or stored or the retrieval process, or unaccompanied by clear processes for retention of data once it is located.

In one of the earliest document retention decisions that now seems prescient, in *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 169 F.R.D. 598 (D.N.J. 1997), the Court imposed a sanction against Prudential of one million dollars for destruction of documents in violation of a court order to preserve documents. While there was no evidence that Prudential executives intended for the documents to be destroyed, the fact of their destruction revealed serious lapses in the company's document retention and litigation hold programs. The court found that a "clear and unequivocal document preservation policy" was lacking at Prudential. The court declared that once there was an order in place to preserve documents, "it became the obligation of senior management to initiate a comprehensive document preservation plan and distribute it to all employees."

Later, the *Zubulake* decisions coming out of the Southern District of New York, provided some best practices for lawyers working in this burgeoning area. In this gender discrimination case against her former employer, the plaintiff sought "[a]ll documents concerning any communication by or between UBS employees concerning the plaintiff." While the defendant produced 350 pages of documents, including 100 pages of email, the UBS failed to produce archived emails claiming undue burden and expense, relying on *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*, 1205 F.R.D. 421 (S.D.N.Y. 2002). The court modified the cost-shifting test announced in *Rowe* and ordered the defendant to produce all the information located on its optical disks, servers and back-up tapes, at its own expense. The court determined that a cost-shifting analysis should occur after the production of documents. *Zubulake v. UBS Warburg*, 220 F.R.D. 212 (S.D.N.Y. 2003) (*Zubulake IV).* After UBS began to search for responsive documents, it discovered that certain back-up tapes were missing or had been erased. Upon the plaintiff's motion for sanctions, the court found that although the plaintiff had not filed suit until August of 2001, by April of 2001, UBS should have known that the emails

would be relevant to potential litigation and UBS' failure to follow its own records retention policy, warranted shifting the costs of additional discovery to UBS in order that plaintiff could take additional depositions on the issue of the destruction of the emails. *Zubulake v. UBS Warburg*, 229 F.R.D. 422 (2004). The court noted that defense counsel failed in its duty to locate relevant information, to preserve that information, and to timely produce that information. "Counsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched," the Court wrote. The Court recognized the obligation to discover, hold, and produce rested on the lawyers who must place a "litigation hold" on the documents, communicate about the hold to relevant employees, and assure the safeguarding of relevant archival material.

In the years since Zubulake, courts nationwide have recognized the duty of corporations to have effective records retention programs, clearly understood by employees. In light of the cases sanctioning parties for spoliation, even where it has not been intentional, the importance of a clear and consistent internal litigation hold practice cannot be understated.

## The scope of a party's duty to preserve electronic evidence

While the scope of a party's duty to preserve evidence during litigation is clear under the Federal Rules, what has been less clear is the duty of a party to preserve documents and data before litigation ensues or is threatened. While the analysis of when a party has a duty to preserve documents will be made on a case-by-case basis, the courts will balance the quality and quantity of notice against the persons receiving it. Judge Scheindlin, in *Zubulake IV* wrote:

> The obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or whern a party should have known that the evidence may be relevant to future litigation. … While a litigant is under no duty to keep or retain every document in its possession . . . it is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request.

220 F.R.D. at 216-17 (internal citations omitted). While Judge Scheindlin conceded that a "firm-wide duty to preserve evidence" is not necessarily triggered when "one or two employees contemplate the possibility that a fellow employee might sue," a party can be assured that where the possibility of future litigation is more widely known, or where mid-level or senior executives have knowledge of the possibility of future litigation and documents are not preserved, the discovery of these facts may form the basis for motions for sanctions for spoliation once litigation ensues. Similarly, if more definitive notice of potential litigation was given to a lower level employee, this would probably be held to trigger the corporation's duty to preserve evidence. Therefore, every corporation should have clear guidance for every employee with regard to receipt of notice that becomes a

triggering event for the obligation to preserve documents. Once a triggering event occurs, a corporation should stand ready to issue an internal litigation hold letter to initiate and communicate a document preservation program.

An effective litigation hold letter accomplishes the following: (1) communicates to all relevant employees, (2) the clearly understood duty to locate and retain, (3) paper or electronic documents specifically described. During the litigation, if an issue arises with regard to the corporation's preservation of evidence, the litigation hold letter may be admissible as Exhibit No. 1. Therefore, attention should be paid to the effectiveness, clarity, dissemination and specificity of the letter itself. An effective litigation hold letter is never a form letter.

## The lawyer's duty to monitor compliance with electronic data preservation and production.

The corporation's duty's with regard to record retention does not end with the issuance of an internal litigation hold letter.

> [T]o the contrary, that's only the beginning. Counsel must oversee compliance with the litigation hold, monitoring the party's efforts to retain and produce the relevant documents. . . . [A] party and her counsel must make certain that all sources of potentially relevant information are identified and placed "on hold," to the extent required . . . . To do this, counsel must become fully familiar with her client's document retention policies, as well as the client's data retention architecture. This will invariably involve speaking with information technology personnel, who can explain system-wide backup procedures and the actual (as opposed to theoretical) implementation of the firm's [backup tape] recycling policy. It will also involve communicating with "key players" in the litigation, in order to understand how they stored information, relevant emails and retained them in hard copy only. Unless counsel interviews each employee, it is impossible to determine whether all potential sources of information have been inspected . . . *In short, it is not sufficient to notify all employees of a litigation hold and expect that the party will then retain and produce all relevant information. Counsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched.* This is not to say that counsel will necessarily succeed in locating all such sources, or that the later discovery of new sources is evidence of a lack of effort. But counsel and client must take some reasonable steps to see that sources of relevant information are located.

*Zubulake V*, 229 F.R.D. at 432.

Counsel, then must learn what documents likely exist, where they are stored, carefully inform employees of their obligations to preserve them, and then follow up with employees to ensure they are meeting their obligations. A document bank process should be implemented to hold all documents and data located after the initiation of the litigation hold. Ensuring that documents and data are not deleted after the litigation hold is only

the first step in the process. Counsel should identify the bank where located documents and data will be retained and stored, and continuously monitor to assure the identified documents are being retained in the bank. Imagine the logistical difficulty after the litigation hold, of producing documents and data from dozens or hundreds of departments, which documents must first be gathered, screened for privilege, work-product, proprietary and protected matter, and responsiveness. Once a bank is identified, counsel's office can begin screening documents far in advance of receiving the actual discovery requests.