

**PRE-SUIT DOCUMENT
PRESERVATION AND COMPLIANCE
IN THE ELECTRONIC AGE:
AVOIDING THE PITFALLS**

**MARGUERITE S. WILLIS
NEXSEN PRUET, LLC**

**CLIFFORD BOURKE, JR.
SOUTHEASTERN FREIGHT LINES, INC.**

SEPTEMBER 17, 2010





TODAY'S IMPORTANT "LESSON"

- Event that triggers duty to preserve relevant information ("Trigger")
- Process by which information is identified and preserved when duty is triggered ("Legal Hold")

WHEN IS TRIGGER “PULLED”?

- Duty to preserve arises when litigation is “reasonably anticipated”

See Fujitsu Ltd. v. Federal Express Corp., 247 F.3d 433, 436 (2nd Cir. 2001)

SO, WHAT DOES A “LEGAL HOLD” ENTAIL?

- Identifying “**key**” players, including former employees
- Insuring their “**relevant**” information is preserved
- Suspending “**pertinent**” document destruction/
deletion procedures
- Issuing “**timely**” instructions in writing

MS. WILLIS CONSIDERS ALL THIS “VERY BAD NEWS”

- No “bright line” standards
- Issues as to “Triggers” and “Legal Holds” arise only in “adversarial” moments
- And who decides what is “reasonably anticipated” or who is a “key” player?

IN THE OPINION OF MS. WILLIS . . .

- Many judges are (text deleted)
- Relatively few judges actually (text deleted)
- Judges who are (text deleted) and who do not actually (text deleted) are more likely to
 - Lose their patience
 - “Get it wrong”
 - Impose sanctions

THE NUMBER ONE RULE OF
“TRIGGERS,” “LEGAL HOLDS,”
AND LITIGATION IN GENERAL

“DO NOT
HACK OFF THE
JUDGE!”

M.S. Willis

WHO IS THE “SCARIEST” WOMAN IN AMERICA?

- Hon. Shira A. Scheindlin (S.D.N.Y.)
- By July 2004, had authored Zubulake I-V
- In January of this year, authored Pension Committee of University of Montreal Pension Plan v. Banc of America Securities, LLC, 2010 U.S. Dist. LEXIS 4546, January 15, 2010.

THE ZUBULAKE FIVE

- Zubulake IV
 - “**Legal Hold**” when party “**reasonably anticipates**” litigation
 - Counsel must monitor preservation process to insure
 - Relevant information (or sources) has been identified
 - Relevant information is retained on a continuing basis
 - Relevant non-privileged material is produced in response to proper discovery demands
- Zubulake V
 - To insure that relevant information is “**preserved**” and “**on hold**,” counsel must
 - Become familiar with client’s document retention policies
 - Understand client’s data retention “architecture”
 - To meet this “**continuous duty**,” counsel must
 - Issue legal hold
 - Communicate directly and clearly with “**key**” players
 - Instruct all employees to produce electronic copies of relevant active files
 - Insure that all “**required backup media**” is identified and stored in a safe place

YOU SAY “POTATO” -
I SAY “POTATO”

It is pronounced Zubulake –
like a place to go fishing.

PENSION COMMITTEE: “ZUBULAKE REVISITED”

- Defines negligence, gross negligence, and willfulness in the context of electronic discovery
- Failure to issue written legal hold: **GROSS NEGLIGENCE**
- Failure to identify/collect information from “key” players: **GROSS NEGLIGENCE OR WILLFULNESS**
- Failure to collect information from files of former employees: **GROSS NEGLIGENCE**
- Failure to collect information from all employees (as opposed to “key” players): **NEGLIGENCE**
- Failure to take “all appropriate measures” to preserve electronically – stored information: **NEGLIGENCE**
- Failure to assess accuracy/validity of search terms: **NEGLIGENCE**

AND THERE'S MORE FROM JUDGE SCHEINDLIN IN PENSION COMMITTEE

- Rejects the practice of “self-collection” by employees
- States explicitly that collection process must be overseen by attorney who can “review, sample, or spot-check the collection effort”
- And, as to the “**Trigger**” date, was it . . .
 - April 2003: Hedge funds filed for bankruptcy
 - Summer 2003: Investors formed “committee” to monitor court proceedings and retain counsel as needed
 - September 2003: Investors interviewed prospective counsel
 - October/November 2003: Counsel retained
 - February 2004: Complaint filed

DO YOU THINK JUDGE SCHEINDLIN WAS “UPSET”?

- Plaintiffs failed
 - to execute “**comprehensive**” search
 - to “**sufficiently**” supervise document collection
 - to collect documents from “**key**” players
 - and one destroyed backup data after duty to preserve was “**triggered**”
- Almost every Pension Committee Plaintiff
 - “... submitted a declaration that – at best – lacked attention to detail, or – at worst – was **intentionally vague** in an attempt to mislead ... the Court.”

ONCE AGAIN . . .

**What is the Number One
Rule?**

OTHER PRE-LITIGATION “TRIGGERS”

- Possible “smoking gun” types of “Triggers”
 - 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, for example, EEOC
 - substantive conversations with supervisors and/or others
 - retainer of counsel and/or experts
 - severe injuries combined with the totality of circumstances
- Zubulake: “at the latest” when Zubulake filed an EEOC charge, maybe earlier since “everyone associated with Zubulake” recognized she might file suit

PAGING LAURA ZUBULAKE . . .

- Jury returned a verdict for \$29.2 million (\$9.1 million compensatory / \$20.1 million punitive)
- Do you think the jury instruction on spoliation made a difference?

“CLIENT ON LINE ONE, ATTORNEY SMITH.”

- Actions if client has already issued “Legal Hold”
- Actions if client has not yet issued “Legal Hold”
 - Consider “Trigger”
 - Issue written hold that describes litigation and instructs employees what “relevant” documents/information must be preserved
 - Identify/consult “key” players
 - Become familiar with electronic systems/data architecture
 - Insure “relevant” information is preserved
 - Do this over and over and over . . .

“IT’S FIVE O’CLOCK SOMEWHERE”

- Rule Number Two: Know your own limitations
- Consider recommending/retaining “electronic discovery” counsel

HOW TO HELP YOUR CLIENT

- Make sure she understands current “law” on electronic discovery
- Recommend establishing “reasonable” and “consistent” process to evaluate duty to preserve (“**Triggers**”) and to implement/monitor preservation (“**Legal Hold**”)
- Suggest a “reading list” of useful background materials

“SUMMER READING” LIST

- Zubulake I-V Opinions
- Pension Committee Opinion
- Local Federal and State Rules on Electronic Discovery
- Sedona Conference Commentary
 - Legal Holds
 - Achieving Quality in the E-Discovery Process

AND IF YOU LIKE REALLY SCARY STORIES . . .

- Judge Barbara Major's decisions in Qualcomm Inc. v. Broadcom Corp.
 - \$8.5 million sanction for failing to produce 46,000 emails and documents
 - Outside lawyers had to hire lawyers to avoid being sanctioned for relying on “fifteen clients, including lawyers” who on “thirty-one occasions” confirmed the disputed facts to them

**CLASS
DISMISSED**

Copyright 2005 by Randy Glasbergen.
www.glasbergen.com



“I sent you an e-mail and forwarded a copy to your PDA, cell phone, and home computer. I also faxed a copy to your office, your assistant, and laptop. Then I snail-mailed hard copies to you on paper, floppy, and CD. But in case you don’t receive it, I’ll just tell you what it said...”

Preservation Duty Checklist

- **Who determines whether a legal hold is necessary?**
- **Collect Facts To Make Determination**
- **Organizational Analysis**
- **Legal analysis**

Define Scope of the Hold

- Scope to be determined on a case by case analysis with special attention to possible data locations:
 - Email
 - System Log Data
 - Loose PC files
 - Flash Drives
- What is reasonable?
- Records and Other ESI Requiring Special Attention

COMPANY LAWYER

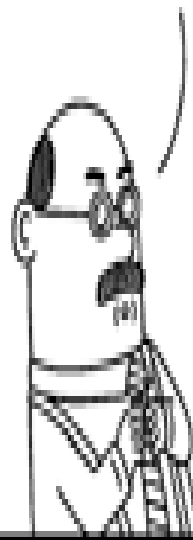
THE COURT ORDERED
US TO TURN OVER ALL
OF OUR E-MAIL
RECORDS.



scottadams@aol.com

www.dilbert.com

GOSH. I SURE HOPE
THEY DON'T GET
DELETED DURING
REGULARLY SCHEDULED
SYSTEM MAINTENANCE.



10-18-05 ©2005 Scott Adams, Inc./Dist. by UFS, Inc.

OH NO.
THAT
WOULD
BE BAD!
WINK!
WINK!



GOOD GRIEF,
MAN! HOW
CAN YOU BE
FLIRTING AT
A TIME LIKE
THIS?



Implement the Legal Hold

- Who issues Hold order?
- Who receives Hold order?
- Form of Hold orders (notices & content)
- Coordinating with IT
- Technical Considerations (the Data Map)

Enforce and Examine Effectiveness of the Hold

- Verify Receipt of Hold Notice
- Interview Key Witnesses
- Get Together with IT
- Consult with counsel

Modify the Legal Hold

- Re-check scope of Distribution
- Broadening or Narrowing
- Adding Custodians
- Discussions with Potential Litigants
- Modify Scope

Monitor and Remove the Legal Hold

- Audits
- Record Hold Reminders
- Issuance to New Employees
- Narrow Over Time
- Monitor Holds and Re-Check
- Management of Terminated Employees
- Releasing Legal Holds