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# Document Preservation: Creating an Effective Legal Hold Process

WMACCA

November 9, 2011

# SPEAKERS



Bill Belt is the Team Leader of the Discovery Solutions Practice at LeClairRyan. For the past twenty years he has helped clients find solutions to meet their electronic discovery and compliance obligations. The *National Law Journal*, the flagship publication of the Litigation Services Network, selected Bill and his team's defense verdict as one of the "Top 10 Defense Wins for 2002," and the American Bar Association recognized him for his work on the Exxon Valdez litigation.



Daryl Shetterly is a partner at LeClairRyan and focuses his practice on eDiscovery. Daryl has managed many eDiscovery projects for Fortune 500 companies. He often serves as eDiscovery counsel in complex litigation - working with those litigating the case to ensure the eDiscovery issues are handled in a way that is both defensible and cost effective. Daryl is a regular contributor to the LeClairRyan blog: [e-discoverymyth.com](http://e-discoverymyth.com). Follow him at Twitter [@DarylShetterly](https://twitter.com/DarylShetterly)

## SPEAKERS (cont'd)



*Raquel Tamez is Deputy General Counsel of CSC, Inc., a Fortune 150, information technology, business process, and outsourcing services provider with 96,000 employees worldwide and \$16 billion in annual revenue. In this role, she is responsible for the management of all litigation matters and e-discovery operations for the company.*



Miriam Smolen serves as Associate General Counsel in the Litigation Department for Fannie Mae, in Washington D.C.. Miriam manages complex commercial litigations, response to government investigations, and serves as e-Discovery counsel for the company.

# The Legal Hold Rule

“[O]nce a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' . . . to ensure the preservation of relevant documents.”  
[emphasis added]

- *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003).

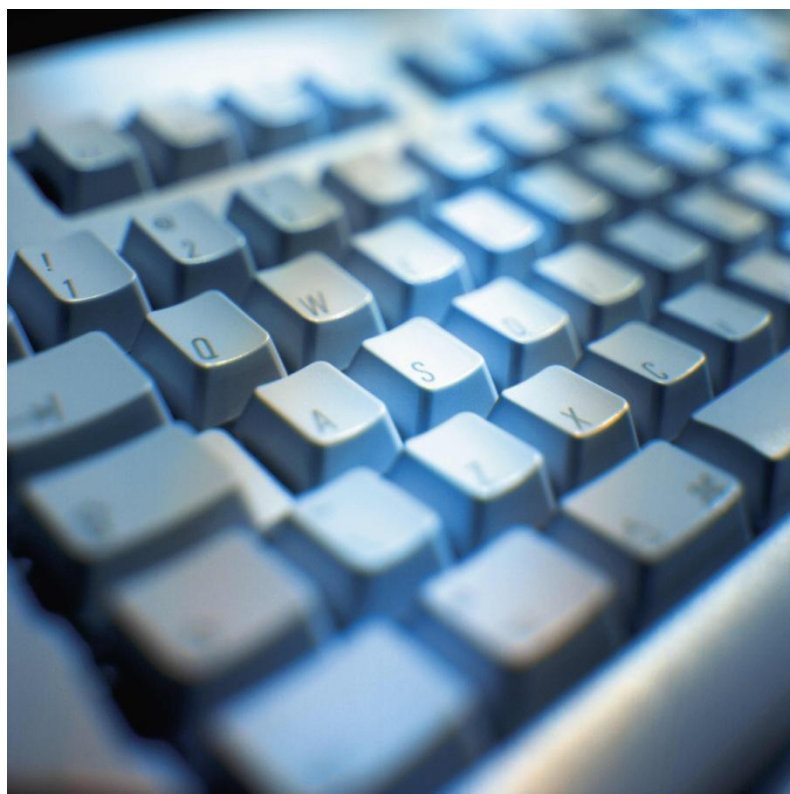
## *Pension Committee*

“By now, it should be abundantly clear that the duty to preserve means what it says and that a failure to preserve records – paper or electronic – and to search in the right places for those records, will inevitably result in the spoliation of evidence.” [emphasis added]

- *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC, 685 F.Supp.2d 456 (S.D.N.Y. 2010)*

# Legal Hold Considerations

- Has our duty to preserve been triggered?
  - Deliberative process
  - Reasoned consideration
  - Factors to consider
- The Legal Hold
  - Timeline
  - Memorialized
  - The format
  - Input / Approval
  - Content



# Preserving Relevant Information

- Scope: broad v. targeted
- Method: preserve in place v. collect to preserve
- Identification: legal v. custodian identified (“self-collect”)



# Self-Collection Risks:

- Over / Under Collecting
- Misuse of Technology
- Metadata Spoliation
- Failure to Collect From All Sources
- Inconsistent and Not Repeatable
- 30(b)(6) - Defensibility Of Collection Process
- Risk tolerance varies by case





# A Defensible Collection Includes:

- Supervision by Qualified Attorney (“Attorney Managed”)
- Written Protocol
- Custodial Involvement
- Documented Custodian Interviews
- Forensic Document Collection Techniques
- Quality Control
- Reasonableness



# Monitoring Compliance

- Ongoing certifications
- Negative consequences for non-compliance
- Audit (comprehensive or statistical)
- Technical solutions

# Advance Preparation

- Develop a “Litigation Response Plan”
- Build an interdepartmental litigation response team
- Inventory document locations
- Assess how and where information is created, modified, stored and destroyed
- Review regulatory and business requirements for preservation
- Funnel “trigger” information to the correct people
- Training for both legal and business employees



# Releasing the Legal Hold

- Is this data subject to a separate litigation hold?
- Who approves data destruction?
- Have you considered all data locations?
- How are custodians notified?
- When is the case considered closed?

**CASE CLOSED**

## Case Law

- *Zubulake v. UBS Warburg*
  - Counsel must monitor employees
  
- *Jones v. Bremen High School District*
  - Interested employee improperly asked to preserve relevant documents
  
- *Pension Committee v. Banc of America*
  - Counsel must review, sample or spot-check collection
  
- *Roffe v. Eagle Rock*
  - Counsel must “get on a plane” and find relevant documents

# Usage

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