

LAW.COM

December 16, 2009

To Have and to Hold: A Romantic Guide to Document Preservation

FARRAH PEPPER

Special to Law.com

December 16, 2009

"Romantic" would probably not be the first word – or even the last – that comes to mind when considering the case law and emerging best practices regarding document preservation. Yet, there is an unmistakable parallel between the preservation of documents and the preservation of a romantic union. The same common-sense principles guiding relationships that countless advice columnists have offered also apply to successful document preservation. As many companies still do not have litigation hold processes in place to deal with document preservation,[FOOTNOTE 1] mastering the following basic principles of document preservation is more important than ever, especially considering the steady flow of decisions in 2009 addressing the topic.[FOOTNOTE 2]

Timing is everything. For litigation hold notices, as in love, timing is important. If Romeo waits too long to ask Juliet out, he may find that the object of his affection has moved on to another suitor. A litigation hold notice issued too late – or not at all – can lead to similarly tragic results, in this case in the form of spoliation and sanctions.[FOOTNOTE 3] The first step for a preserving party is to assess the "trigger date" for its preservation obligation. The duty to preserve attaches at the time that litigation is reasonably anticipated – in other words, when a party knew or should have known that evidence may be relevant to future litigation.[FOOTNOTE 4] The trigger date can be no later than the start of the litigation, but may also be sooner.[FOOTNOTE 5] Whether a preservation obligation has been triggered depends on the facts and requires careful analysis.[FOOTNOTE 6]

Get to know each other. Early courtship is a time for extended candlelit conversations to aid the process of getting to know each other. These early conversations are crucial in evaluating whether to take things to the next level – or whether to leave a suitor standing at the curb without even a good night kiss to show for their efforts. Document preservation requires getting to know the preserving party, so as to determine who should receive the litigation hold notice. These key players are the individuals who are "likely to have information relevant to the events that underlie the litigation." [FOOTNOTE 7] The preserving party should not overlook support staff or others who have access to key players' information and, consequently, should also receive the litigation hold notice.[FOOTNOTE 8] In addition to the key players, the preservation obligation must be communicated to any IT personnel (internal or outsourced) who could prevent destruction of relevant data.[FOOTNOTE 9] One area where IT personnel is critical is in the suspension of any auto-delete features that would otherwise lead to destruction of relevant data.[FOOTNOTE 10]

Uncover hidden issues early. Although the euphoria of early courtship can be intoxicating, it is important to investigate whether there are any proverbial hidden skeletons lurking in the closet before getting too attached to someone. Similarly, in document preservation, it is crucial to take stock of all the sources of potentially relevant information that may exist, even those that may be hidden at first glance (such as the proverbial backup tapes in the closet). Courts require that "a party and her counsel must make certain that all sources of potentially relevant information are identified

and placed 'on hold.'"[FOOTNOTE 11] Parties should follow the trail to figure out all the possible sources of data – not just active data, but also inactive and archived sources that include hard copy files, servers, work and home computers, external media, backup tapes, cell phones, voicemail systems, legacy data, BlackBerrys, and other PDAs and smartphones.[FOOTNOTE 12]

At the outset, keep your options open. When two people first start dating, their relationship may be casual and non-exclusive. This is both understandable and often advisable so as not to smother the fledgling relationship. Likewise, in document preservation, at the outset a party should keep its options open, which means preserving broadly. Just because a party preserves something does not necessarily mean it ultimately will have to produce it. Failure to preserve unique relevant data – even inaccessible data, such as backup tapes – can lead to sanctions in the event that subsequently there is good cause for its production.[FOOTNOTE 13] Under certain circumstances, even documents that are transitory in nature must be preserved.[FOOTNOTE 14] A party may select any number of ways to preserve electronic data (so long as it does not render the data inaccessible or degrade it in any way).[FOOTNOTE 15]

Relationship history matters. While the dreaded conversation about a former significant other (ex) may not be enjoyable, it can be very informative as a predictor of issues in the present relationship. In the preservation context, it is important to learn about ex-employees who may have had (or still have) relevant information so that the information can be preserved. While tossing a box of an ex's belongings into the dumpster may be cathartic when a relationship ends, it is not appropriate for a party subject to a preservation obligation. Wait until the case is over (assuming there are no ongoing preservation obligations).

An even more delicate question in the early stages of a relationship, before exclusivity is presumed, is whether either party is seeing other people. A similar question needs to be asked on the preservation front to ensure preservation of relevant information in the possession of any non-parties or party agents that could be considered to be under the preserving party's "custody or control." [FOOTNOTE 16] A party is deemed to control a document if it has "the legal authority or practical ability" to ensure its preservation.[FOOTNOTE 17] Preservation obligations also extend to experts that a party retains.[FOOTNOTE 18]

Communicate clearly and regularly. Communication is key to a healthy relationship. It is also key to proper document preservation. A litigation hold notice should be sufficiently detailed to be clear what documents are relevant and must be preserved.[FOOTNOTE 19] Moreover, even a perfectly crafted litigation hold will be ineffective if it is not disseminated in an appropriate fashion to its recipients, which includes "timely reminders." [FOOTNOTE 20]

Get it in writing. While not classically romantic, it is sound advice that, when finally ready to make a relationship legal, one should consider a written prenuptial agreement. Likewise, litigation hold notices must be committed to writing.[FOOTNOTE 21] Bear in mind that while



FARRAH PEPPER

the general rule in federal courts is that litigation hold notices are not discoverable, an exception has developed where there is a preliminary showing of spoliation.[FOOTNOTE 22] Therefore, much like a good pre-nup, the language used in a litigation hold notice should be iron-clad and not left susceptible to multiple interpretations.

Be committed. A successful relationship consists of two parties committed to each other for the long haul. Document preservation is no different. A litigation hold notice issued without anything more is the romantic equivalent of a one-night stand. There is an ongoing obligation for counsel to "take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched [and in this case, preserved]."[FOOTNOTE 23] The continuing obligation for individuals to preserve relevant documents should be memorialized in the litigation hold notice as well.[FOOTNOTE 24]

Love means having to say you are sorry. If you are in the doghouse with your partner, it is time to step up the charm. Do something thoughtful, be it sending flowers or buying tickets to a big game. This is also sound advice when you are in the doghouse with the court and the opposing party because relevant documents have been destroyed. When facing the potential wrath of the court, it can pay dividends to take immediate steps to reduce the impact of the loss of data. A recent example of a successful execution of this technique was exhibited in the "Pinstripe" case, where the defendant, Manpower, Inc., used extra-remedial efforts and managed to avoid case terminating sanctions or an adverse factual inference.[FOOTNOTE 25]

Know when to let go. A sad but inevitable part of a relationship that has run its course is the painful stage of saying goodbye. Though it is unlikely that anyone would shed a tear over the notion of lifting a litigation hold, there will come a time when the preservation obligation has ended and it is appropriate to resume the regular retention practices that pre-dated the litigation or investigation. In both instances, it should be discussed openly and thoughtfully whether ending things is warranted. Often, such a decision can only be made in consultation with wise counsel (be it your best friend in matters of the heart or legal counsel in matters of preservation). It is not a step to be taken lightly without sufficient analysis and support for the conclusions reached.[FOOTNOTE 26]

Love and litigation are complex and nuanced topics that do not lend themselves easily to a one-size-fits-all checklist. That said, keeping these basic principles in mind will give you a head start on achieving both a healthy relationship and healthy preservation practices.

Farrah Pepper is a senior litigation associate in the New York office of Gibson, Dunn & Crutcher LLP. Ms. Pepper is founder and chairperson of the firm's Electronic Data Discovery Initiative, a task force devoted to issues of e-discovery and records management.

;;;FOOTNOTES;;;

FN1 In a recently released Kroll Ontrack survey, only 57 percent of U.S. companies reported having a mechanism in place to suspend their document destruction policies in response to litigation or an investigation. See Kroll Ontrack, Third Annual ESI Trends Report (October 2009).

FN2 This article focuses on themes that have emerged from recent federal case law regarding document preservation and litigation hold notices, with primary emphasis on 2009 cases. Notably, various state courts have begun to adopt federal standards for document preservation as well. See, e.g., *Einstein v. 357 LLC*, No. 604199/07, 2009 WL 381377 (N.Y. Sup. Oct. 21, 2009) (New York case applying federal preservation case law).

FN3 Opinions issued from various jurisdictions in 2009 illustrate the broad range of possible outcomes that can result from the failure to issue a timely litigation hold notice. Compare *KCH Servs., Inc. v. Vanaire, Inc.*, No. 05-777-C, 2009 WL 2216601 (W.D. Ky. July 22, 2009) (issuing adverse inference against defendant for continued deletion of data after phone call from plaintiff complaining about illegal use of software, which served as pre-litigation "trigger"), with *Pinstripe, Inc. v. Manpower, Inc.*, No. 07-CV-620-GKF-PJC, 2009 WL 2252131 (N.D. Okla. July 29, 2009) (Cleary, Mag. J.) (declining to apply default judgment or adverse inference sanctions for defendant's negligent failure to issue litigation

hold drafted by outside counsel, but providing plaintiff with opportunity to seek additional discovery and ordering defendants to pay \$2,500 to local bar association to fund seminar on document preservation), and with *Scalera v. Electrograph Sys. Inc.*, No. CV 08-50 (TCP) (AKT), 2009 WL 3126637 (E.D.N.Y. Sept. 29, 2009) (Tomlinson, Mag. J.) (declining to issue sanctions where defendant negligently failed to preserve documents until nearly two months after duty arose).

FN4 See, e.g., *Green v. McClendon*, No. 08 Civ. 8496 (JGK) (JCF), 2009 WL 2496275, at 4 (S.D.N.Y. Aug. 13, 2009) (Francis, Mag. J.) (citing *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216-17 (S.D.N.Y. 2003) (*Zubulake IV*)).

FN5 See *Green*, 2009 WL 2496275, at 4.

FN6 See, e.g., *Micron Tech., Inc. v. Rambus, Inc.*, 255 F.R.D. 135, 150 (D. Del. 2009) (holding preservation obligation attached more than a year before litigation initiated).

FN7 *Goodman v. Praxair Servs., Inc.*, 632 F. Supp. 2d 494, 512 (D. Md. 2009) (Grimm, Mag. J.). There may also be "key departments" who should receive a litigation hold notice. *ACORN (N.Y. Ass'n of Cmty. Orgs. for Reform Now) v. County of Nassau*, No. CV 05-2301, 2009 WL 605859, at 1, 3 (E.D.N.Y. Mar. 9, 2009) (Wall, Mag. J.).

FN8 See *Treppel v. Biovail Corp.*, 249 F.R.D. 111, 118 (S.D.N.Y. 2008) (Francis, Mag. J.).

FN9 See *Scalera*, 2009 WL 3126637, at 15 ("[o]ne of the primary reasons that electronic data is lost is ineffective communication with information technology personnel") (quoting *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 434 (S.D.N.Y. 2004) (*Zubulake V*)).

FN10 See *Scalera*, 2009 WL 3126637, at 9 ("[O]nce the duty to preserve attaches, at a minimum, a litigant is expected to 'suspend its routine document and retention/destruction policy and to put in place a litigation hold.'") (quoting *Zubulake IV*, 220 F.R.D. at 218).

FN11 *Green*, 2009 WL 2496275, at 4 (citing *Zubulake V*).

FN12 See, e.g., *Se. Mech. Servs., Inc. v. Brody*, No. 8:08-CV-1151-T-30EAJ, 2009 WL 2883057, at 7 (M.D. Fla. Aug. 31, 2009) (Jenkins, Mag. J.) (awarding adverse inference against individual defendants for wiping data from BlackBerry devices).

FN13 See *Forest Labs., Inc. v. Caraco Pharm. Labs., Inc.*, No. 06-CV-13143, 2009 WL 998402, at 4 (E.D. Mich. Apr. 14, 2009) (applying *Zubulake IV*).

FN14 See, e.g., *Arista Records LLC v. Usenet.com, Inc.*, 608 F. Supp. 2d 409 (S.D.N.Y. 2009) (Katz, Mag. J.) (awarding adverse inference due to destruction of usage data and digital music files); but see *Ferron v. EchoStar Satellite, LLC*, Civil Action No. 2:06-CV-453, 2009 WL 2370623, at 5 (S.D. Ohio July 30, 2009) (King, Mag. J.) (declining to apply sanctions for defendant's failure to preserve images and web pages not demonstrated to be under defendant's control).

FN15 See *Scalera*, 2009 WL 3126637, at 9, 12; but see *Phillip M. Adams & Assocs., LLC v. Dell, Inc.*, 621 F. Supp. 2d 1173 (D. Utah 2009) (Nuffer, Mag. J.) (criticizing practice of relying on individual employees to select documents for preservation).

FN16 See Fed. R. Civ. Pr. 34 (a)(1); *Goodman*, 632 F. Supp. 2d at 522 n.16.

FN17 *Goodman*, 632 F. Supp. 2d at 515-16.

FN18 See *Innis Arden Golf Club v. Pitney Bowes, Inc.*, 257 F.R.D. 334, 341 (D. Conn. 2009).

19 See *Samsung Elec. Co. v. Rambus Inc.*, 439 F. Supp. 2d 524, 565 (E.D. Va. 2006) ("It is not sufficient, however, for a company merely to tell employees to 'save relevant documents,' without defining what documents are relevant."). It is generally advisable to document preservation efforts in order to defend against subsequent spoliation allegations.

FN20 See *Keithley v. HomeStore.com, Inc.*, No. C-03-04447 SI (EDL), 2008 WL 383384, at 6 (N.D. Cal. Aug. 12, 2008) (Laporte, Mag. J.).

FN21 See *ACORN*, 2009 WL 605859, at 4 (awarding monetary sanctions for preservation lapses during period in which defendant claimed it issued a "verbal" litigation hold).

FN22 See *Major Tours, Inc. v. Colorel*, Civil No. 05-3091 (JBS/JJS), 2009 WL 2413631, at 2 (D.N.J. Aug. 4, 2009) (Schneider, Mag. J.).

FN23 *Swofford v. Eslinger*, Case No. 6:08-cv-Orl-35DAB, 2009 WL 3818593, at 4 (M.D. Fla. Sept. 28, 2009) (sanctioning in-house counsel for preservation lapses) (quoting *Zubulake V*, 229 F.R.D. at 432).

FN24 *In re NTL, Inc. Sec. Litig.*, 244 F.R.D. 179, 198 (S.D.N.Y. 2007) (Peck, Mag. J.) (issuing adverse inference instructions where continuing obligation was not specified).

FN25 See 2009 WL 2252131, at 4.

FN26 See, e.g., *Pipes v. United Parcel Serv., Inc.*, Civil Action No. 07-1762, 2009 WL 2214990, at 4-5 (W.D. La. July 22, 2009) (Hayes, Mag. J.) (declining to award sanctions for negligent destruction of evidence because, in part, of defendant's good faith belief that obligation ended).