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How (Not) to Lose Data and Alienate Judges

Courts wrestle with preservation standards for electronically stored information

By Jennifer Rearden & Farrah Pepper

Recent electronic data discovery decisions abound with examples of litigants making document preservation faux pas, some inadvertent and some intentional. The cases highlight the sometimes colorful bad behavior that has resulted in spoliation and sanctions, such as using a wiping program on your computer after litigation has commenced, [FOOTNOTE 1] throwing a laptop with relevant data off a building and running it over with a car, and making jokes about going to jail for the destruction of evidence – all the while destroying that evidence.[FOOTNOTE 2] But what lessons can be learned by the well-meaning litigant who wants to do the right thing when it comes to data preservation?

If only it were as easy as referring to a widely accepted national set of standards for preservation. Unfortunately, no such guidance exists. The federal case law addressing standards is inconsistent, even within some districts. In *Victor Stanley II*, 269 F.R.D., magistrate judge Paul Grimm of the U.S. District Court for the District of Maryland observed that, for this reason, preservation is especially daunting for corporations that operate in multiple states and circuits. "Unfortunately, in terms of what a party must do to preserve potentially relevant evidence, case law is not consistent across the circuits, or even within individual districts," he wrote.

In light of competing guidelines, Grimm asks, how can these corporations develop sound preservation policies that limit their exposure? "The 'only safe' way to do so is to design [a preservation policy] that complies with the most demanding requirement of the toughest court to have spoken on the issue, despite the fact that the highest standard may impose burdens and expenses that are far greater than what is required in most other jurisdictions in which they do business or conduct activities," he says.

Enter Judge Shira Scheindlin of the Southern District of New York – author of EDD opinions in *Zubulake v. UBS Warburg* and, more recently, *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC,* 685 F. Supp. 2d 456, 461 (S.D.N.Y. 2010). Although Scheindlin observed that there are well-established EDD contemporary standards, the *Pension Committee* opinion does not enumerate all of them, leaving readers to glean those standards for themselves. "Courts cannot and do not expect that any party can meet a standard of perfection. Nonetheless, the courts have a right to expect that litigants and counsel will take the necessary steps to ensure that relevant records are preserved when litigation is reasonably anticipated, and that such records are collected, reviewed, and produced to the opposing party," Scheindlin wrote.

This article considers some of the document preservation themes and lessons that have emerged from *Pension Committee* and notable federal decisions in its wake. In many instances, the decisions simply reaffirm best practices that have been developing in this field. In others, the case law is murky and sometimes contradictory, making it more difficult to identify universal standards.

Here is some of the guidance that seems to be emerging:

Issue a timely litigation hold notice: Parties must be attentive to facts and circumstances suggesting that a preservation obligation has been triggered. Scheindlin has reaffirmed that the legal hold obligation attaches when litigation is either pending or reasonably anticipated. Litigants "must act diligently and search thoroughly at the time they reasonably anticipate litigation." That duty may arise before the commencement of litigation, especially for plaintiffs. "A plaintiff's duty is more often triggered before litigation commences, in large part because plaintiffs control the timing of litigation."

Ensure that legal holds are worded clearly and carefully: *Pension Committee* held that failure to directly instruct employees to preserve all relevant data (both paper and electronically stored information) amounted to inadequate preservation. An added reason for caution: Although legal hold notices are presumptively immune from discovery in federal court, an exception has

developed where a preliminary showing of spoliation is made. See, e.g., *Ingersoll v. Farmland Foods, Inc*., 2011 WL 1131129 (W.D. Mo. Mar. 28, 2011).

Carefully identify the "key players" in a matter, and be thorough in preserving their documents: Scheindlin noted that failure "to identify all of the key players and to ensure that their electronic and paper records are preserved" supports a finding of gross negligence. It is worth noting that the scope of the subsequent duty to collect is narrower than the duty to preserve. The first and second versions of *Pension Committee* stated that it was likely negligent and possibly sanctionable to fail to "obtain records from all employees (some of whom may have had only a passing encounter with the issues in the litigation), as opposed to key players." But Scheindlin later amended the opinion, clarifying that "the failure to obtain records from all those employees who had any involvement in the issues ... could constitute negligence."

Identify data sources for preservation, which may or may not include backup tapes: Courts require that "a party and [its] counsel must make certain that all sources of potentially relevant information are identified and placed' on hold.'" *Orbit One Commc'ns, Inc. v. Numerex Corp*., 271 F.R.D. 429, 437 (S.D.N.Y. 2010), citing *Zubulake*.

Parties should follow the trail to identify all possible sources of data – not just active data, but also "outlier" data that exists off the beaten track. Sources may include hard copy files, servers, work and home computers, external media, backup tapes, cell phones, voice mail systems, legacy data, BlackBerry devices and other PDAs.

Courts also continue to stress that ESI is not limited to e-mail, and that parties must preserve all categories of ESI. See *United States v. Suarez*, 2010 WL 4226524, at *6 (D.N.J. Oct. 21, 2010), holding that government had duty to preserve text messages in criminal case, and *Pension Committee's* assertion that parties must preserve "all relevant records – both paper and electronic."

With regard to backup tapes, *Pension Committee* requires litigants "to preserve backup tapes when they are the sole source of relevant information or when they relate to key players, if the relevant information maintained by those players is not obtainable from readily accessible sources."

Suspend routine document destruction: *Pension Committee* stated that "once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy."

Preserve relevant documents of former employees that are in the parties' possession or control: Again, *Pension Committee* stated that "failing to collect information from the files of former employees that remain in a party's possession, custody, or control after the duty to preserve has attached" constituted gross negligence.

For counsel in particular, monitor compliance with litigation holds (as well as with contemporaneous or subsequent collection efforts): Again, *Pension Committee* stated that an employee charged with collecting documents was ill-equipped to handle the company's discovery obligations without supervision. "Given her inexperience, the employee should have been taught proper search methods, remained in constant contact with counsel, and should have been monitored by management," said Scheindlin.

Leave a paper trail: No preservation effort can be perfect, as even Scheindlin acknowledges: "Courts cannot and do not expect that any party can meet a standard of perfection." But a well-documented account of good faith efforts to preserve potentially relevant information may help to confirm that such steps were reasonable.

Two significant areas in which the case law seems to conflict – and, therefore, judgment calls must be made regarding preservation best practices – are (1) whether legal holds must be in writing to be valid, and (2) the role that proportionality can and should play in preservation standards.

Legal holds must be in writing – or not: Courts have not been uniform in their views on whether legal holds must be in writing. On one side of the debate, Scheindlin clearly believes that legal holds should be written. Scheindlin told the audience at Georgetown Law Center's 2010 Advanced E-Discovery Institute, "Instead of fighting with me about it – just do it. Just do it. You will have a defensible process and people will have guidance about what they have to hold on to," reported the Legalholds blog.

In *Pension Committee*, Scheindlin stated that the failure to issue a written legal hold is tantamount to gross negligence, because it will likely lead to spoliation of data. However, even within the same federal district court – the Southern District of New York – there is dissent. Magistrate Judge James Francis in *Orbit One* disagreed with Scheindlin when he concluded that a written legal hold is not necessarily the best approach in every matter."For instance, in a small enterprise, issuing a written litigation hold may not only be unnecessary, but it could be counterproductive, since such a hold would likely be more general and less tailored to individual records custodians than oral directives could be," Francis wrote. See also *Merck Eprova AG v. Gnosis S.P.A*., 2010 WL 1631519, at *5 (S.D.N.Y. Apr. 20, 2010), noting that "there might be circumstances in which a non-written litigation hold could suffice – for example, when the party ... is a small company whose intra-office communications are primarily oral."

Moreover, in *Victor Stanley II,* Grimm posited that *Pension Committee*'s logic on this point could lead to a standard akin to strict liability for the failure to issue a written litigation hold, inevitably resulting in the award of an adverse inference without additional analysis. If a court adopts the position of *Pension Committee*, "that a failure to institute a written litigation hold is gross negligence *per se,* and therefore presumes relevance and prejudice, it is inexorably poised to give an adverse jury instruction without further analysis," wrote Grimm.

In contrast, other courts have held that the failure to issue a written litigation hold notice does not even amount to gross negligence. See, e.g. , *Major Tours Inc. v. Colorel*, 720 F. Supp. 2d 587 (D.N.J. 2010) (holding that failure to issue a litigation hold was negligent).

Even The Sedona Conference e-discovery think tank has waded into this debate, joining the growing number of judges who have held that a written hold is not always necessary.

In light of the competing views and Grimm's advice to comply

with the toughest court on the block, the most conservative approach would be to issue a written legal hold in every matter. Issuing litigation hold notices in writing generally seems to make sense, regardless of the strict legal requirements, given the extent to which such notices assist litigants in tracking and organizing their preservation process.

Reasonableness and proportionality are important considerations, but not necessarily guiding principles in every court: Scheindlin was notably silent in *Pension Committee* about proportionality and the role it might play in preservation analysis. The concept of proportionality is certainly not foreign to Scheindlin, as she recently urged courts to employ proportionality when considering the form of production. See *Nat'l Day Laborer Organizing Network v. U.S. Immigration and Customs Enforcement Agency*, 2011 WL 381625, n.44 (S.D.N.Y. Feb. 07, 2011), noting that when no agreement is reached regarding the form of production, then the court will determine the form "taking into account the principles of proportionality and considering both the needs of the requesting party and the burden imposed on the producing party."

A number of other recent cases, however, including *Victor Stanley II* and *Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598 (S.D. Tex. 2010) have urged that preservation compliance be guided by principles of "reasonableness and proportionality."

Yet like other concepts in the preservation best practices area, this one is not without dissent. In *Orbit One,* for example, Francis observed that the standard of reasonableness and proportionality "may prove too amorphous to provide much comfort to a party deciding what files it may delete or backup tapes it may recycle." In fact, it is not entirely clear what level of effort would be deemed reasonable and proportional, and thus, this remains a highly fact-specific issue. Francis therefore concluded: "Until a more precise definition is created by rule, a party is well-advised to 'retain all relevant documents (but not multiple identical copies) in existence at the time the duty to preserve attaches.'"

Indeed, few bright line rules exist for determining the reasonableness of preservation efforts, and there is no magic balancing test for assessing what steps are proportional. It remains to be seen if proportionality continues to gain traction or, as *Orbit One* speculates, the concept remains too ill-defined to have much practical impact.

For the time being, practitioners probably would be well advised to continue to make honest efforts to cooperate with opposing counsel to limit the scope of preservation, using the underlying principles of proportionality as guideposts but without relying blindly upon them as a shield when preserving documents.

Preservation analysis involves an inherently fact-intensive inquiry, starting with identification of the trigger and continuing throughout the process – which may or may not end with an evaluation of culpability and prejudice resulting from alleged preservation failures. As such, preservation compliance seems to be more of an art than a science. That said, adhering to the principles above and striving to conduct preservation in good faith should help avoid spoliation and carry weight in even the "toughest" courts.

::::FOOTNOTES::::

FN1 *Victor Stanley, Inc. v. Creative Pipe, Inc.*, et al., 269 F.R.D. 497, 501 (D. Md. 2010) ("Victor Stanley II") (referring to the defendants as the "gang that couldn't spoliate straight" for their use of various traceable document destruction methods).

FN2 *Daynight, LLC v. Mobilight, Inc.*, 2011 WL 241084, at *1 (Utah Ct. App. Jan. 27, 2011) (affirming award of default judgment where "actions and words attributable to the [third-party defendant] after it filed suit, including throwing the laptop off the building; running over the laptop with a vehicle; and stating '[If] this gets us into trouble, I hope we're prison buddies' unquestionably demonstrate bad faith and a general disregard for the judicial process").

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