

# Legal Holds and Preservation Orders Within the Firm

*ILTA 2010*

# Presenters



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# Agenda



## Managing Internal Legal Holds: Meeting the Preservation Obligation at the Firm

- The preservation obligation
  - Recent case law & reasonable processes
  - Defensible compliance
- Tools & Technology:
  - Technology in the courts
  - Technology for legal holds
- Best practices & defensible processes
- Reducing costs and mitigating risk
- Discussion

# The Hype of Pension Committee



*The legal hold is one of the most heavily litigated processes and recent cases have renewed the focus on eDiscovery, reasonableness, and sanctions:*

## ***Pension Committee v. Banc of America Securities caused a large commotion:***

“Possibly after October, 2003, when Zubulake IV was issued, and definitely after July, 2004, when the final relevant Zubulake opinion was issued, the failure to issue a written litigation hold constitutes gross negligence because that failure is likely to result in the destruction of relevant information.” (footnotes omitted)

2010 WL 184312 (S.D.N.Y. Jan. 15, 2010), \*3



***However, the key point that most miss:***

***“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.”***

2010 WL 184312 (S.D.N.Y.), \*1 (emphasis added)

# Pension Committee and the Duty to Preserve



## Pension Committee reviews the duty to preserve (i.e., the “legal hold”)

- Duty to preserve arises when a party reasonably anticipates litigation
  - For a plaintiff, that likely occurs before the action is commenced
- Once litigation is anticipated, a party must:
  - Issue a ‘litigation hold’ to preserve relevant documents
  - Suspend its routine document retention/destruction policy

## Pension Committee acknowledges that:

- Discovery issues are fact-intensive with decisions made on a case-by-case basis
- Sanctions motions are “very, very time consuming, distracting, and expensive”
- An increase in sanctions motions “is not a good thing.”
- The “most careful consideration should be given before a court finds that a party has violated its duty to comply with discovery obligations and deserves to be sanctioned.”

***“Courts cannot and do not expect that any party can meet a standard of perfection.”***

# *Rimkus v. Cammarata*: A Different Approach



*Rimkus Consulting Group v. Cammarata* took a dramatically different approach compared to *Pension Committee* (2010 WL 645253 (S.D.Tex. Feb. 19, 2010))

- **Difficult to draw bright-line distinctions between acceptable and unacceptable preservation efforts**
  - Either prospectively or with the benefit (and distortion) of hindsight
- **The extent of the duty to preserve also requires a careful analysis of the specific facts and circumstances**
- **The acceptability of preservation efforts depends upon reasonableness, proportionality and consistency**



# *Rimkus*: Reasonableness and Negligence



***Rimkus* examines the standards and requirements in other jurisdictions and in light of *Chambers v.***

***Nasco*:**

“Other circuits have also held negligence insufficient for an adverse inference instruction. The Eleventh Circuit...The Seventh, Eighth, Tenth, and D.C. Circuits also appear to require bad faith. The First, Fourth, and Ninth Circuits hold that bad faith is not essential to imposing severe sanctions if there is severe prejudice, although the cases often emphasize the presence of bad faith.”

**“The circuit differences in the level of culpability necessary for an adverse inference instruction limit the applicability of the *Pension Committee* approach.** And to the extent sanctions are based on inherent power, the Supreme Court’s decision in *Chambers* may also require a degree of culpability greater than negligence.” (*emphasis added*) (See *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-46 (1991))

# Reasonableness and the Preservation Obligation



Preservation obligation is clearly defined and extends to only **relevant information** on reasonable anticipation of litigation

*“[T]he 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...”*

*Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Secs.*

*“The duty to preserve evidence, once it attaches, does not extend beyond evidence that is relevant and material to the claims at issue in the litigation.”*

*Hynix Semiconductor Inc. v. Rambus Inc., 2006 WL 565893 (N.D.Cal. Jan. 5, 2006) at \*27*

## **Sedona Principle 5:**

*“Reasonable and good faith efforts to retain information that may be relevant to pending or threatened litigation...”*



# Reasonable Process Beyond the Notice

*“Generally, the duty to preserve arises when a party has notice that the evidence is relevant...[or] should have known that the evidence may be relevant to future litigation...[it] extends to documents or tangible things... or to individuals likely to have discoverable information....” Rimkus at \*6*

## **A hold notice alone is not reasonable:**

- *In re NTL, Inc. Securities Litigation, 2007 WL 241344 (S.D.N.Y. Jan. 30 2007)*
- *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Secs.*

## **Courts want to know what was done beyond the notice:**

- *Google, Inc. v. Am. Blind & Wallpaper Factory, Inc., 2007 WL 1848665 (N.D. Cal. June 27, 2007)*
- *Exact Software North America, Inc. v. Infocon, Inc., 2006 WL 3499992 (N.D. Ohio, Dec. 5, 2006)*

# Compliance Is More Challenging, Challenged and Expensive



*It is the failure to preserve evidence and the resulting spoliation that drives the sanctions. The hold notice or lack thereof, and the finding of gross negligence, is caused by the spoliation:*

**Wilson v. Thorn Energy** (2010 WL 1712236) where sanctions were granted due to data lost from a USB drive that failed:

- “A failure to preserve evidence that results in the loss or destruction of relevant evidence is ‘surely negligent, and, depending on the circumstances, may be grossly negligent.’”
- It was “gross negligence or at least willfulness” to not collect evidence from a key witness in a timely manner.

**Merck Eprova AG v. Gnosis S.P.A.**, 07 Civ. 5898 (S.D.N.Y. April 20, 2010) where a \$25,000 sanction was issued for failure to preserve data and playing a “cat and mouse game” with eDiscovery. Defendant:

- Failed to alter document retention policies
- Failed to diligently search for responsive documents
- Made decisions that were not “supervised or known by the lawyers”
- Was sanctioned because it was “clear that Defendants made no significant effort to ensure preservation of relevant documents.”

# The Legal Hold Requires Preservation of Relevant Data



See *NTL, Inc. Securities Litigation*, 2007 WL 241344 (S.D.N.Y. Jan. 30 2007), *Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc.*, 2007 WL 684001 (D.Colo., Mar. 2, 2007), *Samsung Electronics Co., Ltd. v. Rambus, Inc.*, 439 F.Supp.2d 524, 565 (E.D. Va. 2006), *Google Inc. v. Am. Blind & Wallpaper Factory, Inc.*, 2007 WL 1848665 (N.D. Cal. June 27, 2007)

Even prior to Pension Committee and Rimkus, it was clear:

- A hold notice alone is not reasonable
- If using self-collection, the process should be systemized and repeatable
- Courts want to know what was done beyond the notice

The obligation: preserve relevant data

The preservation obligation and legal hold require that relevant documents be preserved. The hold notice alone does not protect a party from spoliation claims or obviate the need to ensure data is preserved.



# Preservation: Custodian Self-Collection Challenges



## Custodian Self-Collection:

- Employees are typically not experts, can alter ESI, and are asked to make judgment calls
- Must be systemized to reduce the possibility for error
- If utilized, audit the process
  - **Crown Castle USA Inc. v. Fred A. Nudd Corp.**, 2010 U.S. Dist. LEXIS 32982 (W.D.N.Y. Mar. 31, 2010) where in-house counsel's requesting custodians to search for their own documents was challenged and failed to uncover relevant documents. It also led to spoliation of data as they deleted emails weekly and had no instruction to stop.

### **Additional Custodian Collection Cases:**

- **Samsung Electronics Co., Ltd. v. Rambus, Inc.**, 439 F.Supp.2d 524, 565 (E.D. Va. 2006)
  - “It is not sufficient...for a company merely to tell employees to 'save relevant documents,'... this sort of **token effort** will hardly ever suffice.”
- **Wachtel v. Health Net, Inc.**, 2006 WL 3538935 at \*8 (D.N.J., Dec. 6, 2006)
  - Court states that “Health Net’s process for responding to discovery requests was **utterly inadequate**” as they “**relied on the specified business people** within the company to search and turn over **whatever documents they thought were responsive**, without verifying that the searches were sufficient.”
- **Cache La Poudre Feeds, LLC v. Land O’Lakes, Inc.**, 2007 WL 684001 (D.Colo., Mar. 2, 2007)
  - Court faults Land O’Lakes for directing employees to produce relevant information and relying on those same employees to exercise their discretion to determine what was relevant.

# Courts are Beginning to Look at Technology



## ***Victor Stanley, Inc. v. Creative Pipe, Inc.***, 250 F.R.D. 251 (D. Md. 2008)

- Magistrate Judge Grimm wrote that *“all keyword searches are not created equal; and there is a growing body of literature that highlights the risks associated with conducting an unreliable or inadequate keyword search....”*

## ***Disability Rights Council of Greater Washington v. Washington Metropolitan Transit Authority***, 242 F.R.D. 139 (D.D.C. 2007)

- Magistrate Judge Facciola discussed the search and review of a large volume of data: *“I bring to the parties’ attention recent scholarship that argues that concept searching, as opposed to keyword searching, is more efficient and more likely to produce the most comprehensive results.”*

## ***Asarco, Inc. v. United States Env’tl Prot. Agency***, 2009 WL1138830 (D.D.C. Apr. 28, 2009)

- The plaintiff contended that the defendant’s keyword search was conducted in bad faith as it used only one search term. The court ordered an additional keyword search utilizing four additional key terms.
- The court stated that *“keyword searches are no longer the favored methodology.”*

# Increasing Support and Interest in Advanced Search Technology



Advanced search and analytics can **increase accuracy, reduce over-collection, and improve efficiency**. These techniques include conceptual search, automated clustering and contextual analysis.

- No single approach works best
  - Most reliable search technology includes a combination of all search techniques, including:
    - Conceptual and contextual analysis
    - Automated clustering
    - Keyword, Boolean and metadata

## The challenge of legacy techniques include:

- Over- and under-inclusiveness
- Inability to identify slang, abbreviations, or misspellings
- Keyword searches may find only approximately 22% of relevant data.

(See Paul, George L. and J.R. Baron, "Information Inflation: Can The Legal System Cope?" 22-24, Richmond Journal of Law and Technology [2006], <http://law.richmond.edu/jolt/v13i2/article10.pdf>.)

# Technology and Legal Holds



Technology can assist in managing the notices, interviews, and responses, but ensuring proper preservation and collection as part of an overall process is **essential**:

- *Hold Notification*
- *Interviews & Custodian Identification*
- *Data Source Identification & Management*
- *Preservation and Collection of Relevant Data*

**Preservation step can now be separated from collection with “*hold in-place*” technology**

- *Minimize spoliation risk and reduce over-preservation*
- *Technology available for most sources, including laptops*
- *Legal hold enforced continuously*

**Remember: Proper collection process is essential**

- *Forensically sound collections*

# Best Practices Considerations



***Based on Pension Committee, Rimkus, other recent cases and the FRCP, consider the following as some of the key steps:***

- ***Identify key players and sources of relevant information***
  - *Take appropriate steps to identify individuals, data sources and data types*
- ***Take adequate steps to preserve information***
  - *Notify custodians of the preservation obligation and ensure preservation*
  - *Take appropriate steps to preserve relevant data and ensure compliance*
    - *Automated processes can greatly assist*
- ***Monitor, supervise and document***
  - *Notice and interview responses*
  - *Preservation and collection*
- ***Provide assistance in assessing relevant information***
  - *Automation and technology can provide a consistent process across data sources*
- ***Take care when describing the process in declarations***
- ***Utilize appropriate experts***



# Creating and Assessing a Defensible Process



## Factors to consider:

### Governance

- The records management policy should include how legal holds are treated and their impact on normal record retention cycles



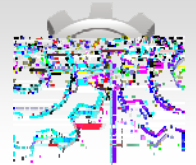
### Process

- A common and consistent set of defensible procedures for administering legal holds to support the various groups or practice areas
- Common procedures for collecting/preserving relevant data lend to their defensibility



### Technology

- Choose the right technology to meet the goals of a defensible legal hold and preservation process



### Awareness & Training

- Communicate how legal holds impacts normal business and retention practices to foster an understanding
- Provide contacts within the company who can assist in this understanding



# Reducing Costs and Mitigating Risk

- ***Automate the process and eliminate manual efforts***
  - Reduce personnel overhead
- ***Utilize advanced search and analysis technologies***
  - Ensure a defensible collection
- ***Target preservation and collection to only potentially relevant data***
  - Reduce storage costs
  - Reduce processing and downstream review costs
- ***Render data sources and file types searchable***
  - Laptops and desktops are most challenging
  - Voice, video and IM





***Thank You!***

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