



## **DESIGNING, IMPLEMENTING, MAINTAINING AND RELEASING LITIGATION HOLDS**

Browning E. Marean III – [Browning.Marean@dlapiper.com](mailto:Browning.Marean@dlapiper.com)  
Kathy J. Owen – [Kathy.Owen@dlapiper.com](mailto:Kathy.Owen@dlapiper.com)  
Laura T. Vogel

**EDiscovery Webinar Series  
July 24, 2012**

## I. Introduction

The following paper discusses various aspects of a litigation hold: when the duty to preserve attaches(1), determining who to include and how to include them (2), enforcing the litigation hold(3), the litigation hold letter(4), and releasing the litigation hold(5). Two appendices follow. Appendix A lists key cases and appendix B is a sample internal litigation hold letter.

Once a party reasonably anticipates litigation, the party has a duty to preserve evidence relevant to that litigation. A litigation hold satisfies this duty of preserving relevant evidence. A litigation hold suspends current document destruction policies and informs certain persons that they must preserve relevant information.

## II. When the Duty to Preserve Attaches

The duty to preserve evidence attaches when litigation is reasonably anticipated.<sup>1</sup> Whether a party reasonably anticipates litigation is a good faith evaluation based on the individual facts and a circumstance of the case.<sup>2</sup> Whether a litigation hold is initiated depends on the likelihood of future litigation, and the experience and knowledge of the relevant parties to such possible litigation.<sup>3</sup>

Whether a duty of preservation attaches depends on the likelihood of future litigation. While a vague rumor or mere disagreement does not trigger a duty of

---

<sup>1</sup> The Sedona Conference *The Sedona Conference Commentary on Legal Holds: The Trigger & the Process* 11 SEDONA CONF. J. 265 (2010). Note that the reasonably anticipated rule only applies under common law. See *Keithley v. Homestore.Com, Inc.*, 2008 WL 3833384, at \*5 (N.D. Cal. Aug. 12, 2008).

<sup>2</sup> See *Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010) (“duty to preserve arises in a particular case and the extent of that duty requires careful analysis of the specific facts and circumstances.”).

<sup>3</sup> See The Sedona Conference, *supra* note 1, at 267.

preservation, stronger signs of impending litigation can trigger a duty of preservation.<sup>4</sup> A duty of preservation arises, “when an organization is on notice of a credible probability that it will become involved in litigation.”<sup>5</sup> For example, receiving a summons, complaint, or subpoena can constitute reasonably anticipated litigation and initiate a duty of preservation.<sup>6</sup> Other triggers of a duty of preservation are more amorphous, but still depend on whether a party should reasonably anticipate litigation.<sup>7</sup> Such triggers include internal grievances, Human Resources disputes, pre-litigation communication with the opposing party that points towards impending litigation, or litigation involving similar products.<sup>8</sup> However, whether a litigation hold has been initiated, “is fact-intensive and should be made by an experienced person who can make a reasoned judgment.”<sup>9</sup>

Whether a duty of preservation attaches depends on the experience and knowledge of the possible defendant. If a party is aware of the occurrence of events that in the experience of the party typically indicate litigation and certain evidence is routinely requested in this litigation, the party has a duty to preserve this evidence.<sup>10</sup> Conversely, if the experience of the party indicates that such events do not usually lead to litigation or to the request of certain evidence in litigation, the party does not have a

---

<sup>4</sup> See *Goodman v. Praxair Services, Inc.*, 632 F. Supp. 2d 494, 511.

<sup>5</sup> *Spanish Peaks Lodge, LLC v. Keybank Nat. Ass’n*, CIV.A. 10-453, 2012 WL 895465, at \*1 (W.D. Pa. Mar. 15, 2012).

<sup>6</sup> See The Sedona Conference, *supra* note 1, at 271.

<sup>7</sup> See *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003) (“*Zubulake IV*”)

<sup>8</sup> THE SEDONA CONFERENCE, THE SEDONA GUIDELINES: BEST PRACTICE GUIDELINES & COMMENTARY FOR MANAGING INFORMATION & RECORDS IN THE ELECTRONIC AGE 13 (2007) [hereinafter SEDONA BEST PRACTICE GUIDELINES] available at [http://www.thesedonaconference.org/content/miscFiles/TSG9\\_05.pdf](http://www.thesedonaconference.org/content/miscFiles/TSG9_05.pdf).

<sup>9</sup> The Sedona Conference, *supra* note 1, at 272.

<sup>10</sup> See *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec.*, 685 F. Supp. 2d 456, 466 (S.D.N.Y. 2010).

duty to preserve this evidence.<sup>11</sup> Whether a litigation hold has been initiated depends on the individual facts of each case.<sup>12</sup> For example, the duty might attach sooner to a corporation, because a corporation may be better suited to anticipate which claims evolve into litigation.<sup>13</sup>

Plaintiffs also have a duty of preservation once the plaintiff reasonably anticipates litigation.<sup>14</sup> The duty of a plaintiff “is more often triggered before litigation commences in large part because plaintiffs control the timing of litigation.”<sup>15</sup> A plaintiff’s duty of preservation may attach when the plaintiff decides legal action is appropriate,<sup>16</sup> articulates a time frame and strategy for litigation,<sup>17</sup> or when they retain counsel in connection with potential litigation and not yet have not identified a cause of action.<sup>18</sup> Moreover, once a party—plaintiff or defendant—anticipates litigation, “he still has an obligation to give the opposing party notice of access to the evidence or of the possible destruction of the evidence.”<sup>19</sup> Therefore, plaintiffs may have an additional duty to warn possible defendants about destructible evidence.<sup>20</sup>

Since the time a duty of preservation attaches is based on general concepts like good faith and reasonableness, it is important to document and record facts to prove why and how a litigation hold was implemented. The party should record the facts

---

<sup>11</sup> See SEDONA BEST PRACTICE GUIDELINES, *supra* note 8, at 47 (“legal hold should be limited in scope to only that information and records that may be relevant to the litigation.”).

<sup>12</sup> See The Sedona Conference, *supra* note 1, at 272.

<sup>13</sup> Heidi Fessler, Online Conference: Litigation Holds – the Good, the Bad and the Ugly (Nov. 11, 2008).

<sup>14</sup> See *Rambus, Inc. v. Infineon Tech. AG*, 220 F.R.D. 264, 281 (E.D. Va. 2004) (“[O]nce a party reasonably anticipates litigation, it has a duty to suspend any routine document purging system that might be in effect and to put in place a litigation hold.”) (emphasis added).

<sup>15</sup> *Pension Comm. of Univ. of Montreal Pension Plan*, 685 F. Supp. 2d at 466

<sup>16</sup> See *Milenkamp v. Davisco Foods Int’l*, 562 F.3d 971, 981 (9th Cir. 2009)

<sup>17</sup> See *Rambus, Inc.*, 220 F.R.D. at 284-85.

<sup>18</sup> See *Innis Arden Golf Club v. Pitney Bowes, Inc.*, 257 F.R.D. 334, 340 (D.Conn.2009).

<sup>19</sup> *Silvestri v. General Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001).

known at the time as well as the decision-making process used to implement the litigation hold.<sup>21</sup> Working from a company-specific set of guidelines that outline when a litigation hold is necessary may be helpful. For example, a party may wish to document why these guidelines apply to its circumstances. Given work-product and attorney-client issues, the documentation process may exclude extended discussions of strategy or legal analysis.<sup>22</sup>

### III. Determining Scope of a Duty of Preservation

An effective litigation hold captures only information that is relevant to the anticipated litigation.<sup>23</sup> Therefore, only people who possess this relevant information have a duty of preservation.<sup>24</sup> This includes people who made relevant documents, people for whom the relevant documents were made, and people directly named in the litigation.<sup>25</sup> Particularly, concerning corporations the duty of preservation of relevant material extends to all “key players” in the potential litigation.<sup>26</sup> A duty of preservation attaches not only to those named in the suit, but to those with relevant information and this may include data stewards, records management personnel, information technology personnel, and other potentially knowledgeable personnel.<sup>27</sup>

Determining which persons hold relevant information to the potential litigation is once again a factually determined analysis and requires a careful analysis of the scope

---

<sup>20</sup> *See Id.*

<sup>21</sup> Stanley M. Gibson, *Litigation Holds: Turning On—And Off—The Switch to Avoid Sanctions and Costly E-Discovery Blunders*, 158-59 (2007).

<sup>22</sup> *See* The Sedona Conference, *supra* note 1, at 284.

<sup>23</sup> *Zubulake*, 220 F.R.D. at 217 (“party need not preserve all backup tapes even when it reasonably anticipates litigation”).

<sup>24</sup> *See* The Sedona Conference, *supra* note 1, at 284.

<sup>25</sup> *Zubulake*, 220 F.R.D. at 218.

<sup>26</sup> *Id.* at 432.

<sup>27</sup> *See* The Sedona Conference, *supra* note 1, at 283.

of the litigation.<sup>28</sup> It may be helpful to first learn the company's personnel structure and document retention policies. The litigation can also inform hold procedures. For example, an employment-discrimination case may require capturing documents from several levels of personnel, while an SEC investigation may require targeting only certain departments.<sup>29</sup> Once specific persons are identified, a party may wish to expand the hold to that person's administrative department and supervised employees. Administrative or lower-level employees may ghostwrite emails or letters, or discard emails or letters, for their supervisors. Considering these details will help increase a litigation hold's effectiveness.

A litigation hold should be tailored to only ensnare relevant information as such tailoring increases the effectiveness and contains the cost of the litigation hold.<sup>30</sup> Including everyone in the hold ensures relevant information will be retained, but netting every employee is costly.<sup>31</sup> A broad hold will also ensnare a larger volume of unresponsive documents thus taking more time and effort to organize anything collected. Further, needlessly subjecting employees to litigation hold notices may reduce effectiveness because the warnings become too normalized.<sup>32</sup> A smaller hold also lessens the risk that information about the litigation leaks outside the company. Tailoring the hold to small groups, however, risks losing relevant information. A small hold could also trigger document destruction if the affected employees believe they are

---

<sup>28</sup> See *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 522 (D. Md. 2010).

<sup>29</sup> EDRM, Preservation – Implementation of Preservation/Litigation Hold, [www.edrm.net/wiki/index.php/Preservation\\_-\\_Implementation\\_of\\_Preservation/Litigation\\_Hold](http://www.edrm.net/wiki/index.php/Preservation_-_Implementation_of_Preservation/Litigation_Hold)

<sup>30</sup> THE SEDONA PRINCIPLES, SECOND EDITION: BEST PRACTICES, RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 28 (2007), available at <http://www.thesedonaconference.org/dltForm?did=SedonaPrinciples200401.pdf>.

<sup>31</sup> *Id.* at 6.

<sup>32</sup> *Id.* at 11.

under investigation.<sup>33</sup> While it is important to tailor litigation hold specifically, a party should not attempt to restrict its litigation to the extent that relevant information may not be preserved.

#### IV. Enforcing the Litigation Hold

Initiating the litigation hold is only the first step. Once the hold is in place, “counsel and client must take *some reasonable steps* to see that sources of relevant information are located.”<sup>34</sup> Furthermore, a party initiating a litigation hold must realize that, “preservation...depends on what is *reasonable*, and that in turn depends on whether what was done—or not done—was *proportional*.”<sup>35</sup> Enforcement requirements depend on the size and scope of the hold. No matter the size and scope, “it is *not* sufficient to notify all employees of a litigation hold and expect that the party will then retain and produce all relevant information.”<sup>36</sup>

Effective enforcement begins with the initial distribution of the hold. Consider communicating the hold using a variety of methods. E-mail distribution is generally accepted, but the message can be reinforced by also circulating letters, or having legal counsel talk to employees individually.<sup>37</sup> A litigation hold should contain information on who to contact for further information.<sup>38</sup> Track the receipt of a hold notice, either

---

<sup>33</sup> *Id.* at 35.

<sup>34</sup> *Zubulake*, 229 F.R.D. at 432. (emphasis in the original).

<sup>35</sup> *Rimkus Consulting Group, Inc. v. Cammarata*, 688 F.Supp.2d 598 (S.D.Tex.2010) (emphasis added).

<sup>36</sup> *Zubulake*, 229 F.R.D. at 432. (emphasis added)

<sup>37</sup> EDRM, Preservation – Implementation of Preservation/Litigation Hold, [www.edrm.net/wiki/index.php/Preservation\\_-\\_Implementation\\_of\\_Preservation/Litigation\\_Hold](http://www.edrm.net/wiki/index.php/Preservation_-_Implementation_of_Preservation/Litigation_Hold)

<sup>38</sup> *Id.*

automatically or by including a certification that should be signed and returned stating that the recipient understood his obligations.<sup>39</sup>

To ensure compliance with the litigation hold parties should issue periodic notices and reminders about the litigation hold.<sup>40</sup> These reminders update the party on developments in the litigation that dictate the scope of the duty of preservation.<sup>41</sup> Solicit ideas from various departments, including IT, Human Resources, legal, and records to develop a variety of methods. Reminders could include posting the litigation hold on the company's intranet, periodically issuing pop-up messages on individuals' work computers, leaving recorded messages on work phones, or simply reissuing the original litigation hold notice.

#### IV. The Litigation Hold Letter

A litigation hold letter formally requests that the recipient institute a litigation hold. This letter is not a discovery request; it is an attempt to avoid losing computerized data, either through misconduct or normal document preservation policies.<sup>42</sup> At a minimum, the letter should instruct the party to preserve digital evidence relevant to issues in the case or evidence that may lead to the discovery of that evidence.<sup>43</sup> The letter should request the suspension of regular document preservation policies, describe the data to be preserved, and identify possible evidence locations.<sup>44</sup> The letter should request preservation of evidence as specifically as possible and warn of the possible

---

<sup>39</sup> *Id.*

<sup>40</sup> *See* The Sedona Conference, *supra* note 1, at 285.

<sup>41</sup> *Id.*

<sup>42</sup> *Stone v. Lockheed Martin Corp.*, 2009 WL 267688, at \*2 (D. Colo. 2009) (describing the contents of a litigation hold letter and including references).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*



consequences for not preserving this evidence.<sup>45</sup> Broad preservation requests can be returned in-kind.<sup>46</sup> Therefore it may be helpful to carefully tailor the letter's document requests or establish a set scope of discovery.

## V. Releasing the Litigation Hold

A party can release a litigation hold when litigation has concluded or is no longer reasonably anticipated. Litigation is concluded when all parties sign a final settlement and release, the court enters a dismissal with prejudice as to all parties, or the deadline for any further appeals has run and the entered judgment is final.<sup>47</sup> Determining when litigation is no longer reasonably anticipated is not as straightforward. Courts look for whether the party based the release decision on a good faith and reasonable evaluation of the facts and circumstances known at the time.<sup>48</sup> This evaluation involves the same facts used in determining whether a litigation hold was originally triggered, such as potency of the claim, and the experience and knowledge of the possible defendant.

Litigation hold releases have three requirements: (1) documentation, (2) reviving normal document retention policies, and (3) notification to employees and third-parties. First, the company should document when and why a release was implemented.

Litigation hold decisions are based on subjective concepts like reasonableness and good

---

<sup>45</sup> See The Sedona Conference, *supra* note 1, at 286.

<sup>46</sup> CHRISTOPHER H. MILLS & RHONDA WILCOX, E-DISCOVERY CHECKLIST (2008) <http://www.abanet.org/labor/lel-annualcle/08/materials/data/papers/063.pdf>.

<sup>47</sup> Alan M. Anderson, Issuing and Managing Litigation-Hold Notices, 64-AUG BENCH & B. MINN. 20, 23 (2007).

<sup>48</sup> Consolidated Aluminum Corp. v. Alcoa, Inc., 244 F.R.D. 335, 345 n.18 (M.D. La. 2006) (referencing THE SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DEVELOPMENT PRODUCTION).

faith, and documentation helps demonstrate why the decision was reasonable at that time. As with litigation hold implementation decisions, the company may wish to memorialize the known facts and the decision-making process.<sup>49</sup>

Secondly, the company should revive normal document retention policies. Before reviving, however, a party should determine whether the held documents are subject to other holds.<sup>50</sup> If some documents might be relevant to future claims while others are no longer necessary, a party may decide only to partially release a hold.<sup>51</sup> Any documents previously held may be folded into regular document retention policies.

Finally, the company should notify all employees and third parties subject to the hold. These employees could include records management, IT personnel, and any other department involved in structuring the litigation hold. The importance of following the release should be emphasized. Unnecessarily retaining records can cause inefficiency, inconsistency, overloaded computer systems, and increased discovery costs.<sup>52</sup>

---

<sup>49</sup> Gibson, *supra* note 20, at 158-59.

<sup>50</sup> See SEDONA BEST PRACTICE GUIDELINES, *supra* note 8, at 17.

<sup>51</sup> See *Consolidated Aluminum Corp.*, 244 F.R.D. at 345.

<sup>52</sup> Gibson, *supra* note 20, at 161.

## Appendix A: Key Cases

### When the duty of preservation attaches:

- *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003) (“*Zubulake IV*”) (duty attaches “at the time that litigation was reasonably anticipated.” In that case, meaning when the plaintiff’s former supervisors became reasonably aware of possible litigation).
- *Stevenson v. Union Pac. R.R. Co.*, 354 F.3d 739, 746 (8th Cir. 2004) (duty attaches when party “knew or should have known that the documents would become material” and “should have preserved them”).
- *Kronish v. United States*, 150 F.3d 112, 126 (2d Cir. 1998) (duty attaches “when the party has notice that the evidence is relevant to litigation – most commonly when suit has already been filed, providing the party responsible for the destruction with express notice, but also on occasion other circumstances, as for example when a party should have known that the evidence may be relevant to future litigation.”).
- *Testa v. Wal-Mart Stores, Inc.*, 144 F.3d 173, 177-78 (1st Cir. 1998) (duty attaches when there is “institutional notice – the aggregate knowledge possessed by a party and its agents, servants and employees.”).
- *Silvestri v. General Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001) (duty attaches when the party knows or reasonably should know that the evidence may be relevant to pending or anticipated future litigation).
- *Fujitsu Ltd. v. Federal Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001) (duty attaches “when the party has notice that the evidence is relevant to litigation or when a party should have known that evidence may be relevant to future litigation.”).
- *In re Kmart Corp.*, 371 B.R. 823, 842 (N.D. Ill. 2007) (duty attaches to specific documents only if “the party controlling the documents has notice of those documents’ relevance.”).
- *Rambus, Inc. v. Infineon Tech. AG*, 220 F.R.D. 264, 281 (E.D. Va. 2004) (“[O]nce a party reasonably anticipates litigation, it has a duty to suspend any routine document purging system that might be in effect and to put in place a litigation hold to ensure the preservation of relevant documents-failure to do so constitutes spoliation.”).

- *Keithley v. Homestore.com, Inc.*, 2008 WL 3833384, at \*5 (N.D. Cal. Aug. 12, 2008) (“preservation obligation may arise from many sources, including common law, statutes, regulations, or a court order in the case.”).
- *Phillip M. Adams & Assocs., L.L.C. v. Dell, Inc.*, 2009 WL 910801, at \*13 (D. Utah Mar. 30, 2009) (preservation duty triggered when defendant’s industry was “sensitized to the issue” in the case; also discusses importance of centralized document retention policies).
- *Goodman v. Praxair Services, Inc.*, 632 F. Supp. 2d 494, 511 (D. Md. 2009) (“letter openly threatens litigation, then the recipient is on notice that litigation is reasonably foreseeable and the duty to preserve evidence relevant to that dispute is triggered.”).
- *Rimkus Consulting Group, Inc. v. Cammarata*, 688 F.Supp.2d 598 (S.D.Tex.2010) (a party “about to ‘preemptively’ sue... had an obligation to preserve documents and information—including electronically stored information—relevant to these disputes.”).
- *Cedar Petrochemicals, Inc. v. Dongbu Hannong Chem. Co., Ltd.*, 769 F.Supp.2d 269, 289 (S.D.N.Y.2011) (“given that the condition of the phenol [chemical samples]...is the central issue in this case, the duty to preserve samples of that phenol was plain from the very first moment that a dispute over liability for the phenol's corruption arose.”).
- *Innis Arden Golf Club v. Pitney Bowes, Inc.*, 257 F.R.D. 334, 340 (D.Conn.2009) (“working to identify the parties responsible...then to pursue recovery of costs establishes that litigation was reasonably anticipated from the very beginning of the investigation and remediation process” initiates a litigation hold).
- *In re Semrow*, No. 3:09CV1142, 2011 WL 1304448 at \*3 (D. Conn. March 31, 2011) (“litigation likely if not certain” initiates a duty of preservation).
- *Pippins v. KPMG*, No. 11 Civ. 0377 (CM) (JLC), 2011 WL 4701849 at \*1 (S.D.N.Y. Oct. 7, 2011) (duty of preservation attaches to all “key players” of corporation if they hold relevant information even if they are entry-level employees).
- *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 803 F. Supp. 2d 469, 506 (E.D. Va. 2011) (“alteration of evidence is spoliation.”).

## Scope of Duty of Preservation

- *Mosaid Techs. Inc. v. Samsung Elecs. Co.*, 348 F.Supp.2d 332, 336 (D.N.J. 2004) (a litigant is under no duty to keep or retain every document in its possession, but it must preserve what it knows, or reasonably should know, will likely be requested in foreseeable litigation).
- *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 324 (S.D.N.Y. 2003) (“*Zubulake I*”) (plaintiff is entitled to all relevant electronic documents, including backup tapes; because of the burden and expense of restoring inaccessible backup tapes, a cost-shifting analysis is appropriate).
- *Concord Boat Corp. v. Brunswick Corp.*, No. LR-C-95-781, 1997 WL 33352759, at \*4 (E.D. Ark. Aug. 29, 1997) (“[T]o hold that a corporation is under a duty to preserve all email potentially relevant to any future litigation would be tantamount to holding that the corporation must preserve all email.”).
- *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354 (D. Md. 2008) (discussing federal discovery rules and lawyers’ discovery responsibilities).
- *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 259-264 (D. Md. 2008) (discussing evidence search and retrieval methodology).
- *Qualcomm Incorporated v. Broadcom Corp.*, 2008 WL 66932, at \*7 (S.D. Cal. Jan. 7, 2008) (demonstrating need for proactive discovery plan and discussing discovery rules).
- *Geiser v. Simplicity Inc.*, No. 5:10CV21, 2012 WL 174951, at \*6 (N.D. W. Va. Jan. 20, 2012) (litigant not under duty of preservation of evidence if litigant is under severe emotional distress).
- *Gaffield v. Wal-Mart Stores East, LP*, 616 F.Supp.2d 329, 337 (N.D.N.Y.2009) (party “had ample opportunity in the nearly two years between the accident and the filing of the complaint” to inspect evidence so adversarial party no longer has a duty of preservation).

- *Spanish Peaks Lodge LLC v. Keybank Nat. Ass'n*, No 10-453, 2012 WL 895465 at \*2. (W.D. Pa., Mar 15, 2012) (duty of preservation attaches if party is “on notice of a credible probability that it will become involved in litigation” and internal conversations of possible litigation without more do not initiate a litigation hold).
- *In re Delta/Air Tran Baggage Fee Antitrust Litigation*, 770 F. Supp. 2d 1299, 1308 (N.D. Ga. 2011) (“unwilling to conclude that upon service of a DOJ-issued CID ([civil investigative demand], a duty to Plaintiffs to preserve documents devolved...even though Plaintiffs did not file this action until three months later.”).

### **Sanctions for destroying electronic documents that should have been preserved:**

- *Victor Stanley v. Creative Pipe, Inc.*, 269 F.R.D. 497 (D. Md. 2010) (As sanction for breach of duty of preservation a court may award a default judgment, adverse inference instruction, or civil penalties such as increased discovery costs or attorney fees).
- *Pension Comm. of Univ. of Montreal Pension Plan Banc of Am. Sec.*, 685 F. Supp. 2d 456, 465 (S.D.N.Y. 2010) abrogated by *Chin v. Port Auth. Of New York & New Jersey*, 10-1904-CV L, 2012 WL 2760776 (2d. Cir. July 10, 2012) (“failure to institute a litigation hold constitutes gross negligence because the failure is likely to result in the destruction of relevant evidence” and sanctions can be issue based on this failure to initiate a litigation).
- *Chin v. Port Auth. Of New York & New Jersey*, 10-1904-CV L, 2012 WL 2760776 (2d. Cir. July 10, 2012) (“reject the notion that a failure to initiate a litigation hold constitutes gross negligence per se” and sanctions cannot be issued based solely on the failure to initiate a litigation hold).
- *Orbit One Commc'ns v. Numerex Corp.*, 271 F.R.D. 429, 441 (S.D.N.Y. 2010) (“rather than declaring that the failure to adopt good preservation practices is categorically sanctionable, the better approach is to consider such conduct as one factor” in determining whether to issue sanctions).
- *Wachtel v. Health Net, Inc.*, 239 F.R.D. 81 (D.N.J. 2006) (deeming facts admitted, precluding evidence, striking privilege claims, striking trial witnesses, and fine).
- *Paramount Pictures Corp. v. Davis*, 234 F.R.D. 102 (E.D. Pa. 2005) (spoliation inference).

- *Ingoglia v. Barnes & Noble College Booksellers*, 852 N.Y.S.2d 337 (N.Y. A.D. 2008) (dismissal).
- *United States v. Philip Morris, USA, Inc.*, 327 F.Supp.2d 21 (D.D.C. 2004) (\$2,750,000 fine and barring witness testimony).
- *Acorn v. County of Nassau*, 2009 WL 605859, at \*4 (E.D.N.Y. Mar. 9, 2009) (awarding motion costs and attorneys fees for failure to implement a litigation hold; holding that “the failure to implement a litigation hold at the outset of litigation amounts to gross negligence.”).
- *Booker v. Mass Dep’t of Health*, 612 F. 3d. 34, (1st Cir. 2010) (holding trial court has wide discretion in giving an adverse inference instruction, but must be some evidentiary foundation for an adverse inference instruction).

## **Appendix B: Sample Internal Litigation Hold Letter**

To:

From:

Cc: .

Date:

Re: XXXXXX-Related Documents

### **DO NOT FORWARD**

### **ATTORNEY-CLIENT-PRIVILEGED AND COMPANY CONFIDENTIAL**

This memorandum is to [inform or remind] you about the ongoing litigation [or potential litigation] in connection with

[redacted] and your [continuing] obligation to preserve all documents that relate in any way to [redacted], in accordance with the policy explained to you [previously, and again] below. We are required by law to preserve all documents and records relevant to the inquiry in any way. You have been identified as a person who may have relevant documents and data, and your assistance is required so that we can preserve all corporate information related to the inquiry. The document retention obligations described in this memorandum are in addition to obligations to preserve documents in connection with other investigations and litigation with respect to [company name], **all of which continue to be in effect.** [Your responsibilities are similar to those that were outlined in previous memoranda concerning document retention with respect to the [describe other matters], but it is important that you review this memorandum and ensure that you understand and are in compliance with the document retention policies it describes.]

**The directive in this memorandum is extremely important; please read it carefully and do not forward it without permission of the sender.**

#### **1. Severe Consequences of Failure to Comply With This Directive**



The failure to preserve relevant documents and data can result in severe sanctions against [redacted] (the "Company"). Thus, it is of critical importance that you comply with the instructions below. Please note that you may be called to give testimony about your document and data preservation efforts. No one is permitted to destroy or delete relevant evidence that could be helpful to an adversary or support our case and/or defenses.

## **2. Departing Employees**

All departing employees in receipt of this memorandum are under an obligation to inform the legal department about any impending departure from the Company. You **MUST** contact [Company Name] Legal Department when you learn of your departure so that we can arrange for a preservation of your electronic data (from your computer and other sources) and collection of all relevant hard copy documents. **Do not send any computer to the deployment center without first going through Legal.** Please contact [redacted] at [redacted] if you are departing.

## **3. The Matter**

[Describe litigation or potential litigation] As a result of this litigation [or potential litigation], the Company requests that you continue to retain all related documents.

## **4. The Types of Data That You Must Retain**

You must maintain hard copies of documents as well as all e-mail and other electronically stored information. Electronic information includes e-mail, voicemail, word processing documents, spreadsheets, databases, calendars, networks, computer systems (including legacy systems), servers, archives, backup and disaster recovery systems, tapes, disks, drives, cartridges, other storage media, laptops, internet records, web pages, personal computers, and other information storage devices. Retain any copies you have on any storage medium, and do not overlook sources of data such as portable hard drives, memory cards, "thumb drives," blackberry, personal digital assistants, mobile telephones, iPods® and smartphones.

The term "documents" includes handwritten notes, drafts, tabulations, calculations, summaries, and work papers; it is not limited only to "formal" or "final" documents. Examples of documents (whether in electronic or hard copy) that should be retained include letters, correspondence, memoranda, reports, tabulations, calculations, invoices, vouchers, ledgers, journals, external and internal literature, books, notes, schedules, worksheets, plans, minutes, bulletins, brochures, catalogs, notices, press releases, transcripts, calendars, diaries, charts, forecasts, and drafts of all such documents that mention or relate to the subject matter of the aforementioned investigation. This list is not exhaustive; it is provided by way of example only, and all documents relating in any way to the topics discussed in this memorandum must be preserved.

If you use a home computer or personal laptop to perform work on behalf of the Company, you must preserve any relevant information from that computer as well. If you use a personal email account to send emails related to work, you must preserve those emails. If you store hard copy documents in locations other than the office, those documents also must be preserved.

**YOU MUST MAKE DILIGENT AND REASONABLE EFFORTS TO PRESERVE RESPONSIVE DOCUMENTS IN ALL LOCATIONS WHERE THEY MAY BE FOUND.**

**5. The Categories of Documents and Data You Must Retain**

Documents you should retain include those that mention or discuss any of the following subjects with respect to [REDACTED]:

- 
- 
- 
- 

There may be other categories of documents relevant to this issue. If you are unsure about the relevance of a document, be cautious and preserve it.

Please do not discard any documents (including email) relating to these topics or any other aspect of the [REDACTED] issue. This request applies to documents now in your possession, as well as those you create or receive subsequent to this memorandum. We also ask that you not create any documents in response to this memorandum. We want to emphasize that normal attorney-client privilege will apply to many documents, so as with all attorney-client consultations, you should be assured that the document itself may remain confidential but you must take the ordinary steps to preserve the attorney-client privilege (e.g., not sharing the document with non-lawyers unless they have a need to know, not sharing the document with those outside the company).

Your only obligation at this time is to identify and preserve relevant documents. Please do not sort, categorize, index or summarize any documents—including electronic documents—that are responsive to this memo, but rather merely identify them and preserve them intact in the way that they were collected or created and filed in the ordinary course of business (e.g., if you created a personal folder in your e-mail, leave it intact and do not try to copy it to a CD or external drive). Also, please do not mark up any documents or create any new documents in response to this memo.

**6. “Instant Messaging”**

[Different language to be used if IM can be saved at server] The instant message/chat application currently in use at [Company] does not allow for messages to be readily saved at a Company level. As a result, and in order to comply with the requirements of this document hold memo, you should refrain from using instant messaging as a means of communicating information in any way relating to [issue subject to hold] until further notice. If you find that someone has communicated with you on via instant messaging in any way relating to [issue subject to hold], the document hold requires that you manually save the entirety of that communication.

## **7. Suspension of Document Destruction Policies**

Please suspend all standard document destruction programs, including programs or processes that automatically delete electronic information at the conclusion of a set period of time. [Destruction of backup tapes must be suspended, as well as any process that overwrites or destroys relevant information - determine how back-ups will be handled and edit accordingly.] If you are unsure whether some of your electronic information is subject to routine destruction, please contact [ ] in the IT Department at corporate extension [ ]. If you are unsure whether you have any archived hard copy documents, please contact [ ] in the Records Department at corporate extension [ ].

## **8. Please Err On The Side Of Retaining Documents, And Contact [Legal Contact] With Any Questions Regarding This Memo or Document Preservation**

We understand that these categories of information are broad; however, we do not know at this time which specific documents or categories of documents may be requested in the future. As a result, the Company must ensure that all documents of potential relevance are preserved. If you are not sure whether particular documents or records should be retained, please err on the side of caution; you must not destroy, discard, or delete those documents without prior approval from [Company] legal. If you have questions as to whether particular documents should be preserved, please contact [Legal Contact]. Further, if you believe that an employee who has documents or records subject to this directive has not been advised of his or her preservation obligations, please contact [Legal Contact] with the name of that employee.

## **9. General Information**

We anticipate that you will have questions about this retention effort, including questions about whether to retain specific documents or about saving email. Please do not hesitate to contact [Legal Contact] with any questions. In addition, if you believe that someone else at the Company may have important related material that should be included in this special document retention program, please contact [Legal Contact] rather than discussing this memorandum with that person.

Please do not discuss the lawsuit or any potential claims or issues with anyone outside the Company unless specifically directed otherwise. This letter is confidential and its contents may not be shared or discussed. Do not forward or distribute this memorandum without the permission of the sender.

We will continue to do our best to minimize inconvenience to you, but the need to comply with Court rules on this issue is very important. We appreciate your ongoing cooperation and assistance with this process.