Hammer Locks, Camel Clutches, Full Nelsons & other Illegal & Legal (Litigation) Holds

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SOURCES & RESOURCES

- SOURCES OF LAW REALLY QUITE SLIM (but see next slide)
  - FRCP/TRCP SILENT
  - CASE LAW – PRIMARY SOURCE
  - ETHICS OPINIONS
- FORMS, POLICIES, MANUALS – IMLA IN THE WORKS;
- NON-BINDING RESOURCES
  - EDRM « The Electronic Discovery Reference Model, http://www.edrm.net/ (by & mainly for vendors but useful) – identification, preservation, & collection steps
  - SEDONA CONFERENCE, Publications, WG1 (Electronic Document Retention and Production) (by & for attorneys & judges) http://www.thesedonaconference.org/content/miscFiles/publications_html?grp=wgs110
  - LAW REVIEWS, online sites – CityAttorneyTech Yahoo Group links
  - http://groups.yahoo.com/group/CityAttorneyTech/ (& separate file)

SOURCES & RESOURCES (2)

SOURCES OF LAW REALLY QUITE SLIM BUT THERE ARE ANALOGOUS CRIMINAL OFFENSE WITH DIFFERING ELEMENTS:

BUT ± 37 states have some form of offense like Pennsylvania's Tampering law (a/k/a obstruction of justice):

18 Pa.C.S.A. § 4910§ 4910. Tampering with or fabricating physical evidence

A person commits a misdemeanor of the second degree if, believing that an official proceeding or investigation is pending or about to be instituted, he:

(1) alters, destroys, conceals or removes any record, document or thing with intent to impair its verity or availability in such proceeding or investigation; or

(2) makes, presents or uses any record, document or thing knowing it to be false and with intent to mislead a public servant who is or may be engaged in such proceeding or investigation.

Statutory Definitions:

Official proceeding. A proceeding heard or which may be heard before any legislative, judicial, administrative or other government agency or official authorized to take evidence under oath, including any referee, hearing examiner, commissioner, notary or other person taking testimony or deposition in connection with any such proceeding. 18 Pa. Cons. Stat. Ann. § 4501

Public servant. Any officer or employe of government, including members of the General Assembly and judges, and any person participating as juror, advisor, consultant or otherwise, in performing a governmental function; but the term does not include witnesses. 18 Pa. Cons. Stat. Ann. § 4501

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See also 18 U.S.C. § 1505. Obstruction of proceedings before departments, agencies, and committees; § 1512(c). Tampering with a witness, victim, or an informant; § 1519. Destruction, alteration, or falsification of records in Federal investigations and bankruptcy.

PROPORTIONALITY V. ABSOLUTE DUTY

- BIG DEBATE; NOT NOW THE LAW AS OF RIGHT BUT DEVELOPING LAW. FRCP AMENDMENTS IN LAUNCHING STAGE. MEANWHILE, KNOW YOUR JUDGES
- DISTINGUISH FROM PRODUCTION – PROPORTIONALITY RULE BECOMING ACCEPTED SUBJECT TO AGREEMENT AND COURT APPROVAL
- FOR LEGAL HOLD – IS RISK MANAGEMENT APPROACH ACCEPTABLE? ETHICAL? PRUDENT?
- IF UNILATERAL – RISK SPOLIATION SANCTIONS?
- GET EARLY AGREEMENT & COURT APPROVAL FOR SCOPE OF LEGAL HOLD, METHODS, & SEARCH TERMS [BUT WHAT ABOUT PRE-LITIGATION HOLDS & PRO SE PLAINTIFFS???]

RELATIONSHIPS TO OTHER PRETRIAL MATTERS

- PRESERVATION OF EVIDENCE (FRCP 27; TRCP 202)
- DEMAND ON POTENTIAL OPPONENTS TO PRESERVE POTENTIAL EVIDENCE
- SETTLEMENT DISCUSSIONS
- ADR
- TORT FOR MALICIOUSLY (without intent to sue)??? (NOT RECOGNIZED BY I'M LOBBYING):
  - Imposing litigation hold on another;
  - Failing to notify potential adversary that suit no longer contemplated

  Cf, *Negligent Spoliation of Evidence, Interfering with Prospective Civil Action, as Actionable*, 101 A.L.R.5th 61 (Originally published in 2002).

TAKE AWAYS

- CLEAR & IMMEDIATE WRITTEN LEGAL HOLD DIRECTIVE FOLLOWED UP MEANINGFULLY WITH CONTINUOUS ATTORNEY OVERSIGHT MANDATORY
- IF NECESSARY, START OVERLY BROAD & NARROW LATER
- THREE-LEGGED STOOL: (1) LEGAL, (2) TECHNICAL, & (3) OPERATIONAL
- DOCUMENT ALL STEPS
- CONFER EARLY WITH OPPOSITION – INCLUDING METADATA ISSUES
- GET AGREEMENT & COURT ORDERS BLESSING METHODOLOGY
- DO NOT TRY TO SELECT SEARCH TERMS WITHOUT CLIENT PARTICIPATION
- FOR E-DATA: TRY AGREED SAMPLING EARLY TO TEST METHOD
- DO NOT FORGET TO END LEGAL HOLD WHEN CASE ENDS!!

TRIGGERING EVENTS

- **REASONABLE ANTICIPATION OF LITIGATION**
  - EVERY THREAT?
  - EVERY ADMINISTRATIVE CLAIM?
- **RELATIONSHIP TO STATE OPEN RECORDS LAWS "ANTICIPATION OF LITIGATION" EXCEPTION?**

  Tex. Gov't Code 552.103 ("**Exception: Litigation or Settlement Negotiations Involving the State or a Political Subdivision")**

  > "The purpose of the litigation exception is to prevent parties in litigation from obtaining documents outside of discovery. *See City of Garland,* 994 S.W.2d at 265; Tex. Att'y Gen. ORD-349 (1982). The exception applies to (1) information relating to litigation, (2) that is either pending or reasonably anticipated. *See University of Texas Law Sch. v. Texas Legal Found.,* 958 S.W.2d 479, 481(Tex.App.-Austin 1997, no pet.)."

  Thomas v. Cornyn, 71 S.W.3d 473, 487 (Tex. App. - Austin 2002, no pet.).

  Cf. "To the extent that Rugiero has sought to use the FOIA to aid his section 2255 action, we repeat that 'a FOIA request is not a substitute for the normal process of discovery in civil and criminal cases.' *Jones,* 41 F.3d at 250 (citing *John Doe Agency v. John Doe Corp.,* 493 U.S. 146, 153, 110 S.Ct. 471, 107 L.Ed.2d 462 (1989), and *Irons v. Bell,* 596 F.2d 468, 475 & n. 15 (1st Cir.1979))."

  Rugiero v. U.S. Dep't of Justice, 257 F.3d 534, 547 (6th Cir. 2001), *cert. denied*, 534 U.S. 1134 (2002)

  - STRONG LIKELIHOOD THAT IF YOU USE THIS EXCEPTION TO DENY ORR/FOIA REQUEST, YOU ARE ADMITTING NEED TO INSTITUTE LEGAL HOLD.
  - Q – FOR HOW LONG?
  - Q – SCOPE OF ANTICIPATED SUIT MAY BE UNCLEAR
- **RELATIONSHIP TO AUDIT LETTER STANDARDS?** NOT DIRECT BUT CHANCES ARE GOOD THAT IF YOU LIST AN ANTICIPATED CLAIM IN AN AUDIT LETTER, YOU SHOULD SERIOUSLY CONSIDER ALSO INSTITUTING LEGAL HOLD
- **RELATIONSHIP TO WORK-PRODUCT/PREPARED IN ANTICIPATION OF LITIGATION STANDARDS?** ***Very close or identical. Assume of you later assert work-product privilege you were obligated to have legal hold in place!!***

  Contra, X. Blake Sparrow, Should The Scope Of Work Product Immunity And The Duty To Preserve Be Coextensive?: Anticipating Litigation In A World Of Electronically Stored Information, 53 How. L.J. 467 (2010).

Triggering Events (2)

FEDERAL & STATE CASES ESTABLISH SIMILAR STANDARDS = REASONABLE ANTICIPATION OF LITIGATION

SOME DICTA ABOUT ANY "CLAIM" CANNOT MEAN WHAT IT SAYS (I hope)

See, e.g., "As a foundation for the submission of the spoliation instruction, the party requesting the instruction bears the burden of establishing that the alleged spoliator had a duty to preserve the evidence in question. *See id.* at 722. Such a duty arises only when a party knows or reasonably should know (1) there is a substantial chance that *a claim* will be filed and (2) the evidence in the party's possession or control will be material and relevant to that claim. *Id.* In the case before us, the first prong of the test is satisfied because it is undisputed that IMEC destroyed the backup tapes in question after appellants filed their lawsuit. To establish that IMEC had a duty to preserve, however, appellants still had to demonstrate there was evidence on the backup tapes that was material and relevant to the case." *MRT, Inc. v. Vounckx*, 299 S.W.3d 500, 510 (Tex. App.-Dallas 2009, no pet.) (emphasis added).

TEXAS LEGAL HOLD TRIGGER

- **Texas Standards/Elements Triggering Legal Hold Obligation**
  - Know or reasonably should know;
  - Information/document/thing relevant to imminent or on-going litigation; and
  - Notice [actual knowledge?] that party is in possession or control.

A party's duty to preserve evidence that it knows or reasonably should know is relevant to imminent or on-going litigation arises as soon as the party has notice that it possesses or controls material evidence relevant to the litigation. *Albertson's, Inc. v. Arriaga,* No. 04-03-00697-CV, 2004 WL 2045389 at *2 (Tex.App.-San Antonio Sept. 15, 2004, no pet). A party who intentionally or negligently fails to preserve relevant information may be held accountable for the loss of such information. *Id.* (citing *Offshore Pipelines, Inc. v. Schooley,* 984 S.W.2d 654, 666 (Tex.App.-Houston [1st Dist.] 1998, no pet.)). The affected party may move for sanctions, or request a spoliation presumption or instruction depending on the circumstances. *Id.* The trial court has discretion "to fashion an appropriate remedy to restore the parties to a rough approximation of their positions if all evidence were available." *Wal-Mart Stores,* 106 S.W.3d at 721. A party is entitled to discovery of all documents, physical models, reports, compilations of data, or other material provided to, reviewed by, or prepared by or for a retained testifying expert. TEX. R. CIV. P. 192.3(e)(6), 194.2(f)(4). A party is entitled to obtain the same information about a consulting expert whose work was reviewed by a testifying expert as it can obtain from the testifying expert. TEX. R. CIV. P. 192.3(e). An expert is required to preserve his work product and the party who retained the expert may be sanctioned if the expert destroys his work product. *See Walton v. City of Midland,* 24 S.W.3d 853, 861-62 (Tex.App.-El Paso 2000, no pet.), *abrogated on other grounds,* 130 S.W.3d 144 (Tex.App.-El Paso 2003, no pet.) (affirming sanctions against party whose retained expert destroyed his work product, including computer data, when he was not paid).

***Vela v. Wagner & Brown, Ltd*., 203 S.W.3d 37, 58 (Tex.App.-San Antonio 2006, n.w.h.).**

Federal Legal Hold Trigger Events

FEDERAL LEGAL HOLD TRIGGER: PARTY REASONABLY ANTICIPATES LITIGATION. PLAINTIFFS EARLIER THAN DEFENDANTS

The common law duty to preserve evidence relevant to litigation is well recognized.FN23 The case law makes crystal clear that the breach of the duty to preserve, and the resulting spoliation of evidence, may result in the imposition of sanctions by a court because the court has the obligation to ensure that the judicial process is not abused.FN24

FN23.SeeFed.R.Civ.P. 37(f) Advisory Committee Note **("A preservation obligation may arise from many sources, including common law, statutes, regulations, or a court order in the case."). See also Kronisch v. United States, 150 F.3d 112, 126-27 (2d Cir.1998)).**

FN24.See generally Chambers, 501 U.S. 32.

It is well established that the duty to preserve evidence arises when a party reasonably anticipates litigation.FN25 " '[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.' " FN26 A plaintiff's duty is more often triggered before litigation commences, in large part because plaintiffs control the timing of litigation.FN27

FN25.See Fujitsu Ltd. v. Federal Express Corp., 247 F.3d 433, 436 (2d Cir.2001).

FN26.Treppel, 249 F.R.D. at 118 (quoting Zubulake IV, 220 F .R.D. at 218).

FN27.See Innis Arden Golf Club v. Pitney Bowes, Inc., 257 F.R.D. 334, 340 (D.Conn.2009) (concluding that a duty to preserve arose when plaintiff retained counsel in connection with potential legal action but had not yet identified responsible parties); Cyntegra, Inc. v. Idexx Labs., Inc., No. 06 Civ. 4170, 2007 WL 5193736, at *3 (C.D.Cal. Sept. 21, 2007) (stating that because plaintiffs control when litigation begins, they "must necessarily anticipate litigation before the complaint is filed"); Indemnity Ins. Co. of N. Am. v. Liberty Corp., No. 96 Civ. 6675, 1998 WL 363834, at *4 n .3 (S.D.N.Y. June 29, 1998) (holding that "the following factors demonstrate that plaintiff was on notice that a lawsuit was likely so as to trigger a duty to preserve the evidence: (1) the sheer magnitude of the losses; (2) that plaintiff attempted to document the damage through photographs and reports; and (3) that it immediately brought in counsel as well as experts to assess the damage and attempt to ascertain its likely causes in anticipation of litigation").

Superseding & Amended Opinion and Order; Zubulake Revisited: Six Years Later, *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities*, LLC, 685 F.Supp.2d 456, 466-67 (S.D.N.Y. January 15, 2010) (Scheindlin, J.) (emphasis added)

RESPONSIBILITIES

THREE-LEGGED STOOL: (1) LEGAL, (2) TECHNICAL, (3) OPERATIONAL

- DOCUMENT MANAGEMENT – MANAGEMENT & TECH
- HOLD INITIATION - LEGAL
- IDENTIFY PERSONS WITH KNOWLEDGE – OPERATIONS & LEGAL
- E-DOCUMENT STOP DELETIONS, *IMAGE[??]*, COLLECT – ALL THREE
- PAPER DOCUMENT STOP DESTRUCTION, IDENTIFY, HOLD, COLLECT – ALL THREE
- E-SEARCH TERMS &/OR CONCEPTS LEGAL & OPERATIONAL WITH HELP FROM TECH
- NEGOTIATE WITH ADVERSE PARTY – LEGAL WITH HELP FROM TECH
- ENFORCE LEGAL HOLD RESPONSIBILITIES – MANAGEMENT WITH ASSIST FROM ALL THREE

PROCEDURES

- THEORETICAL STAGES OF LEGAL HOLD –
  - **EDRM Identification Guide** « The Electronic Discovery Reference Model, http://www.edrm.net/resources/guides/edrm-framework-guides/identification (last visited Aug. 30, 2011).
  - **EDRM Preservation Guide** « The Electronic Discovery Reference Model, http://www.edrm.net/resources/guides/edrm-framework-guides/preservation (last visited Aug. 30, 2011).
  - **EDRM Collection Guide** « The Electronic Discovery Reference Model, http://www.edrm.net/resources/guides/edrm-framework-guides/collection (last visited Aug. 30, 2011).

- PRACTICAL STEPS
  - THE WRITTEN MEMO (DON'T LET IT END THERE)
  - UPDATE MEMO AS NEEDED THROUGHOUT, BUT MEMO NO SUBSTITUTE FOR ATTORNEY INVOLVEMENT
  - IN-HOUSE OR OUTHOUSE? CONSULTANTS?
  - DESIGNATION OF RESPONSIBLE PERSONS
    - LEGAL
    - TECH
    - OPERATIONAL (CLIENT)
  - DESIGNATIONS OF PERSONS WITH KNOWLEDGE
  - MEETINGS ←==========→ START CONFERRING WITH OPPOSING COUNSEL AT LEAST BY NOW. DO YOU NEED EXPERT HELP? EXTRA PERSONNEL?
    - IDENTIFY PLAYERS (INSIDE ORGANIZATION & OUTSIDE)
    - IDENTIFY PAPER DOCS (TYPE, LOCATION)
    - IDENTIFY E-DOCS (TYPE, LOCATION, MEDIA, HARDWARE, BACKUPS, ETC.)
    - IDENTIFY SEARCH TERMS & CONCEPTS: JARGON, SPELLING VARIANTS, ACRONYMS
  - COLLECT & TEST [LEGAL HOLD STARTS TO MERGE WITH ANALYSIS & PRODUCTION]
  - CONTINUE LEGAL HOLD DEFINITION/SEARCH TERM UPDATES & COLLECTION UNTIL LITIGATION ENDS OR AT LEAST UNTIL RECORD CLOSED

CONFERING WITH OPPOSING COUNSEL & THE COURT'S PRETRIAL ORDERS

- **FRCP 26(f)(2) Pretrial Conference**
- ". . . In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan. …" (emphasis added)

- RELEVANT DATES & RELEVANT FACTS & PERSONS WITH KNOWLEDGE
- ESI LOCATIONS & FORMATS (BRING A TECHIE!!!)
- RETRIEVAL & REVIEW PROBLEMS [BACKUP TAPES – PRESERVE BUT DON'T TRY TO RESTORE UNLESS REALLY NEEDED — identification problem!!!
- METADATA
- DYNAMIC DATA BASES
- SEARCH TERMS (predictive analytics not yet ready for prime time??)
- PERSONS WITH KNOWLEDGE
- TESTING FOR SUFFICIENCY OF SEARCH TERMS
- SHARED TECH EXPERTS?
- OUTSOURCE DOC REVIEW/REPRODUCTION?
- PROPRIETARY/LEGACY APPLICATIONS (IP & ACCESS ISSUES)

- (THIS IS TOO LATE FOR FIRST DISCUSSION OF LEGAL HOLD ISSUES)

SANCTIONS

- GRADUATED ≈ DISCOVERY SANCTIONS (sufficient to undo harm caused by misconduct)
  - ADVERSE PERMISSIVE INFERENCE
  - ADVERSE MANDATORY INFERENCE
  - EVIDENCE PRECLUSION
  - PLEADING PRECLUSION
  - DEATH PENALTY
  - MONETARY SANCTIONS V. ATTY &/OR CLIENT
  - ADDITIONAL SANCTIONS
    - BAR GRIEVANCE
    - CONTEMPT (IF CONTRA ORDER)
- MENS RE, EVIDENCE & SANCTIONS: Superseding & Amended Opinion and Order; Zubulake Revisited: Six Years Later, *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities*, LLC, No. 05 CIV. 9016(SAS), 685 F.Supp.2d 456 (S.D.N.Y. 2010) (Scheindlin, J.)

PROBLEM AREAS

- ATTORNEY SUPERVISION******
- UNCOOPERATIVE CLIENT!!!!!
- OUTSIDE AGENTS WITH CUSTODY OF GOV'T DOCUMENTS
- PERSONAL MOBILE E-DEVICES (GOV'T ACCESS – 4TH AMENDMENT ISSUES)
- DYNAMIC DATA BASES
- METADATA & "IMAGING" — WHAT A WASTE IN MOST CASES!!
- PERSONAL DEVICES/DATA
- DOCUMENTATION OF STEPS
- THE NON-IDENTIC "COPY"
- SIMULTANEOUS APPLICATION OF POTENTIALLY INCONSISTENT ETHICAL OBLIGATIONS (McDade Amendment 28 USC 530B) – particularly metadata mining
- DUTIES OF NON-PARTY CUSTODIANS?
- THE UNCOOPERATIVE OPPOSING COUNSEL
- THE SELF-PURPETUATING LEGAL HOLD (PARTICULARLY SUCCESSIVE SOMETIMES OVERLAPPING HOLDS) INTERFERING WITH OPERATIONS
- STORAGE COSTS

TAKE AWAYS - RECAP

- CLEAR & IMMEDIATE WRITTEN LEGAL HOLD DIRECTIVE FOLLOWED UP MEANINGFULLY WITH CONTINUOUS ATTORNEY OVERSIGHT MANDATORY
- IF NECESSARY, START OVERLY BROAD & NARROW LATER
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ADDITIONAL READING ON OTHER HOLDS:

- IMAGES WRESTLING HOLDS - Google Search, http://alturl.com/grzz8 (last visited Aug. 31, 2011).
- WrestlingUSA Magazine, http://www.wrestlingusa.com/
- Pro Wrestling Moves, http://prowrestling.about.com/od/wrestlingmoves/Moves_Used_in_Professional_Wrestling.htm (last visited Aug. 31, 2011).