

# Records Management

## BEST PRACTICES

### The New FRCP and the Duty to Preserve: Pitfalls for the Unwary and Wary Alike

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**T**he duty to preserve documents in the face of litigation or a litigation threat is a long-standing common law duty. It applies equally to the preservation of hard copy documents and electronically stored information (“ESI”). While the recent amendments to the Federal Rules of Civil Procedure do not codify this duty, they firmly endorse it. For example, the Advisory Committee Notes to new Rule 26(b)(2) admonish against trying to avoid the duty to preserve based on claims that ESI is “inaccessible.” New Rule 26(f), which sets forth the topics that parties and their counsel are to discuss with the court at the first case management conference, now expressly includes “issues relating to preserving discoverable information.”

Pinpointing precisely when the duty to preserve arises turns on the unique facts and circumstances of each matter. Unfortunately, the “reasonable anticipation of litigation” standard provides no specific guidance. To make matters worse, the determination must be made in real time, i.e., at the moment when litigation is anticipated. A court will later scrutinize that decision and the next steps taken, however, with the benefit of knowing the full scope of the developed claims. So, what was, arguably, a reasonable judgment not to preserve documents at a particular point in time may be harder to defend at a later date against accusations of “spoliation” (deletion or modification) of data. In essence, companies increasingly will need to fend off “spoliation by hindsight” claims or face penalties that can range from dismissal of their case,<sup>1</sup> to imposition of

monetary penalties,<sup>2</sup> to adverse inference jury instructions.<sup>3</sup>

ESI complicates the situation because corporate data systems and retention practices may routinely and properly alter or destroy documents, unless affirmative action is taken to prevent it.<sup>4</sup>

E-mail storage limits that force users to delete e-mails, database programs that automatically update and overwrite records and backup tapes that are recycled can all cause breach of the duty to preserve unless closely monitored. Indeed, the Advisory Committee Notes to Rule 37(f) explicitly warn: “Good faith in the routine operation of an information system may involve a party’s intervention to modify or suspend certain features of that routine operation to prevent the loss of information, if that information is subject to a preservation obligation.”

In short, even the best-prepared company can find itself having to defend its preservation decisions, post facto. Worse, that same company could think it has met its initial obligations, by timely flagging the duty, distributing a comprehensive “litigation hold” memo to appropriate employees, and ensuring that all potentially relevant data is safeguarded, and still fall into a trap that could lead to discovery sanctions.

Here are a few more ways that disaster could strike—and ways to avoid it.

#### 1. Demand/Cease and Desist Letters

The transmittal or receipt of a demand or cease and desist letter, regardless of whether it expressly calls for the preservation of data, can unwittingly trigger the duty to preserve. If an ordinary business dispute escalates to a point where a company is asked to take certain curative steps and litigation then follows, a court

<sup>1</sup> See, e.g., *Leon v. IDX Systems*, Nos. 04-35983, 05-35426, 2006 WL 2684512 (9th Cir. Sept. 20, 2006) (Case dismissed for intentional destruction of computer hard drive).

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<sup>2</sup> See, e.g., *U.S. v. Philip Morris*, 327 F. Supp. 2d 21 (D. D.C. 2004) (\$2.7 million fine for deleting e-mails after issuance of preservation order).

<sup>3</sup> See, e.g., *Adams v. Gateway, Inc.*, Sealed Memorandum Decision and Order on De Novo Review of Magistrate Judge’s Reports and Recommendations Imposing Sanctions, 2:02-CV-106-TS, (D.Utah March 6, 2006), unsealed March 22, 2006 (Adverse instruction issued against defendant for failure to preserve and produce e-mail crucial to plaintiff’s case).

<sup>4</sup> There is no obligation to preserve data unless required by the common law duty, statutory or regulatory duties (e.g. SEC regulation 17a-4). See, *Telecom Intern. America v. AT & T*, 189 F.R.D.76 (S.D. N.Y. 1999) (citing *Kronisch v. U.S.*, 150 F.3d 112, 126 (2d Cir. 1998)).

may mark the trigger date of the duty to no later than the date of the letter.<sup>5</sup>

**Practice pointer:** An author should carefully craft a demand letter and consider whether it might trigger the duty to preserve. The more onerous the demands, the greater the chance a court will find the author anticipated litigation. Letters sent by outside legal counsel, or even in-house counsel, create more of a litigation threat than letters written by non-lawyers. Even unsent drafts that contain more aggressive language, which are saved and later discovered on a computer, could support the trigger argument.

A recipient should similarly weigh the letter's language and consider if there is an obligation to preserve documents—whether stated expressly or implied. A simple guidepost: if the creation or receipt of a letter provokes the question, “Has the duty to preserve now arisen,” it probably has.

## 2. Overuse of “Privilege” and “Work Product” Stamps

Another seemingly routine action, affixing an “attorney-client privilege” or “work product” label on internal company documents at the first sign of potential trouble could also come back to haunt a company. The duty to preserve and work product standards are identical—they are both invoked upon “reasonable anticipation of litigation.” In a recent patent case, *Samsung Electronics v. Rambus* the plaintiff argued that documents Rambus had labeled “work product” at the start of its licensing campaign revealed that the duty had triggered.<sup>6</sup> Rambus managed to escape sanctions, but only upon procedural patent law grounds.<sup>7</sup> Even use of the “attorney-client privilege” label—although a different standard altogether from the reasonable anticipation standard—can give rise to the duty to preserve. In the notorious *Zubulake v. UBS Warburg* case, the court considered e-mails that non-legal personnel had marked “attorney client privilege” long before any

<sup>5</sup> See *Consolidated Aluminum v. Alcoa*, No. 03-1055-C-M2, 2006 WL 2583308 at \*3, (M.D. La. July 19, 2006) (Court found defendant reasonably anticipated litigation when it sent demand letter).

<sup>6</sup> 2006 WL 2038417, \*16 (E.D. Va. July 18, 2006).

<sup>7</sup> *Id.*, at \*45-46. Rambus had voluntarily dismissed its declaratory judgment patent infringement counterclaims and signed covenants not to sue. Thus, the court found no causal nexus between Rambus' spoliation of data and Samsung's costs incurred in continuing to pursue the matter.

suit was filed in pegging an early trigger date for the duty to preserve.<sup>8</sup>

**Practice Pointer:** Counsel should instruct employees on the proper use—both substantively and temporally—of privilege and work product labels. In most instances, there is little to be gained by a non-lawyer employee affixing a label to a document; whether a document is privileged or protected by the work product doctrine will rise or fall on its own merits, regardless of labeling. An astute opponent, however, will look for these labels and argue that such treatment, even if misguided, concedes that litigation was anticipated earlier than it really was.

## 3. Overzealous Use of “Work Product” Claims on Privilege Logs

A law firm associate who overuses the “work product” claim on a privilege log to “maximize” a withheld document's protection may inadvertently do more harm than good. Because the work product and duty to preserve standards are synonymous, liberal assertion of “work product” protection on a privilege log can cause the earlier invocation of the preservation date. A disciplined litigation foe will scrutinize a privilege log for the earliest dated work product document and then argue that the assertion is tantamount to an admission of the duty to preserve date. The client then may be held accountable for the well-intentioned, but haphazard, actions of its counsel.

**Practice Pointer:** Senior attorneys should instruct junior attorneys on proper use of the “work product” label. Privilege logs should be examined before being submitted to find the date of the first use of any work product label, and that date should be compared and squared with the date on which the client, in fact, first anticipated litigation.

**Bottom Line** The headline-grabbing electronic discovery disaster cases, such as *Zubulake* are, at bottom, about the fundamental failure to preserve documents. In their wake, companies and their counsel should have procedures in place to assess if and when the duty to preserve has arisen and be prepared to implement comprehensive and defensible litigation holds. Additional measures of care also must be taken to avoid seemingly minor actions that could undo even the most careful preparation. An ounce of prevention is still worth a pound of cure—or perhaps better stated, a gigabyte of planning is worth a terabyte of protection.

<sup>8</sup> 220 F.R.D. 212, 216-17 (S.D. N.Y. 2003).