

“[T]he failure to issue a
written litigation hold
constituted gross
negligence.”

Federal Judge S. Scheindlin

Solis™

In-house Data Preservation Solution

ZUBULAKE REVISITED...

LEGAL HOLD NOTIFICATION, PRESERVATION & DATA COLLECTION AFTER *PENSION COMMITTEE v. BANC OF AMERICA*

Six years ago, Judge Scheindlin issued a series of watershed opinions in the *Zubulake v. UBS Warburg LLC* case then pending in the Southern District of New York. Those opinions provided invaluable guidance to in-house and outside counsel regarding a litigant’s duty to preserve, when backup tapes should be retained, data sampling, and cost-shifting. In “*Zubulake V*”, 229 F.R.D. 422, 433-34 (S.D.N.Y. 2004), Judge Scheindlin set forth three steps that counsel should take in order to ensure compliance with a party’s preservation obligations:

1. Counsel must issue a “litigation hold” at the outset of litigation or whenever litigation is reasonably anticipated. The litigation hold should be periodically reissued so that new employees are aware of it, and so that it is fresh in the minds of all employees.
2. Counsel should communicate directly with the “key players” in the litigation, i.e., the people identified in a party’s initial disclosure and any subsequent supplementation thereto.
3. Counsel should instruct all employees to produce electronic copies of their relevant active files. Counsel must also make sure that all backup media which the party is required to retain is identified and stored in a safe place.

In January 2010, Judge Scheindlin issued an opinion in *Pension Committee of the Univ. of Montreal Pension Plan v. Banc of America Securities, LLC*, which she titled “*Zubulake Revisited: Six Years Later.*” In *Pension Committee*, Judge Scheindlin started the opinion by stating that “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.” She also stated that “[b]y 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.” In *Pension Committee*, the judge performed a detailed assessment of various plaintiffs’ preservation efforts and found that several plaintiffs were grossly negligent in their efforts to preserve, collect, and produce relevant documents to the opposing side. The judge also made clear that, as part of any inquiry into whether relevant evidence has been destroyed, the following topics are “fair game”: “[w]hich files were searched, how the search was conducted, who was asked to search, what they were told, and the extent of any supervision.”

Judge Scheindlin held that a party is grossly negligent when:

- (1) there is a failure to issue a written litigation hold notice;**
- (2) there is a failure to suspend automatic deletion of email;**
- (3) there is an improper delegation of discovery obligations to inexperienced employees;**
- (4) there is a submission of inaccurate and inconsistent declarations regarding the document preservation and collection efforts.**

In *Pension Committee*, these shortcomings led to the imposition of an adverse inference jury instruction and monetary sanctions. The case should be viewed as a solemn reminder for all litigants: Any failures related to these important discovery obligations will likely result in spoliation of evidence – and may result in severe sanctions.

Solis™ is an in-house software application which is easy-to-install and use and which works to protect against these types of legal discovery shortcomings.

LEGAL HOLD, PRESERVATION AND DATA COLLECTION

BIA's Solis™ application seamlessly integrates critical parts of an organization's duty to preserve data (i.e., ESI) in relation to a pending or reasonably anticipated lawsuit or investigation. The legal hold notification, preservation, and collection of relevant documents and data, as well as consistent monitoring and tracking of the organization's efforts, are a few of the features that make Solis™ invaluable when complying with legal discovery obligations and regulatory data preservation requirements.

Solis™ provides legal departments with an easy-to-install, integrated, and simple-to-use solution that eases the burdens associated with these necessary components of the overall legal process by managing and tracking those processes in an automated, consistent, and defensible way, and in a manner that complies with the requirements set forth in the *Zubulake* and *Pension Committee* legal opinions.

<i>Zubulake/Pension Committee</i> Requirements	Solis™ Solution
Written Legal Hold Notices	Solis™ makes drafting, sending, and tracking legal hold notices, as well as confirming employees' receipt and understanding, a consistent, manageable, and largely automated process
Direct Communication with Key Players; Preservation and Collection of Data	Solis™ sends electronic custodial questionnaires, tracks responses, and follows up with non-responders. Solis™ also automatically collects from a recipient's identified data sources and stores original data in a secure, tamper-proof environment that preserves chain-of-custody
Regular Re-Issuance of Legal Hold Notice	Solis™ automatically sends reminder notices to those employees who may possess relevant documents or data
Suspension of Auto Deletion	Solis™ can send notices and instructions to relevant IT contacts instructing them to suspend automatic deletion of relevant email or backup tapes, and require and record confirmation that such actions have been taken (many of those tasks can also be automated by using Solis™)
Accurate Reporting on Preservation and Collection; Early Case Assessment for cost-effective legal data management	Solis™ can act as a single repository of information that consistently and accurately documents the status of and activities related to an organization's legal hold, investigation, preservation and collection efforts and retains a secure repository of relevant preserved data for defensibility and ECA purposes

BIA's Solis™ Litigation Data Management application helps protect from possible sanctions due to discovery process mistakes and incorrect data handling. Using Solis™ ensures consistent, defensible, and auditable processes for data preservation and analysis required for legal and regulatory discovery.

Solis™ is the defensible, cost-effective, easy-to-install answer to legal and compliance data management.