An Indispensable Tool

The Effective Internal Litigation Hold Letter

By Mark S. Sidoti and Renée L. Monteyne

In the age of e-discovery, with significant amendments to the Federal Rules of Civil Procedure and court opinions being reported almost daily imposing sanctions on both parties and counsel for e-discovery transgressions, all attorneys must be familiar with and ready to advise their clients on the "litigation hold" letter. A litigation hold letter has become the shorthand reference to a letter directing a party to segregate and protect from destruction certain documents and data that are, or arguably may be, relevant to a threatened or pending litigation, regulatory investigation or audit. Litigation hold letters can be directed to any person or entity that is obligated to provide materials in the discovery or investigatory process. They most typically arise in the litigation context and, in that context, can be sent by a company or its attorneys to its own employees, its adversary or third parties who are suspected to possess or control relevant information. These are sometimes called "internal litigation hold letters." This article will discuss the essential elements of the effective and well-timed internal litigation hold letter.

The explosive developments in electronic discovery over the past several years, including the adoption of local rules in numerous jurisdictions, the exponential increase in e-discovery opinions from state and federal courts and the now imminent Federal Rules, might lead some to conclude that preservation obligations are a recent concern and new burden for the practitioner. Of course, they are not. The Federal Rules and many regulatory bodies have long required that parties and their employees in possession of relevant evidence in any form take care to preserve that evidence. Fed. R. Civ. P. 26(a)(1), 33, 34, 45; *The Sedona Principles: Best Practices, Recommendations & Principles for Addressing Electronic Document Discovery* 1 (Sedona Conference Working Group Series 2004); Sedona Conference, *The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age*, *available at* www.thesedonaconference.org.

In fact, the issues of the effective litigation hold in the electronic age were brought to the forefront almost 10 years ago with the seminal decision in the Prudential Sales Practices case. *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 169 F.R.D. 598 (D.N.J. 1997). In that case, which arose out of a policyholder class action, Judge Alfred Wolin entered an order early in the case requiring all parties to preserve all documents and other "records" relevant to the litigation. Despite this order, documents were destroyed at four Prudential offices, largely because the litigation hold order issued by Prudential management was mishandled. While Prudential management had distributed document retention instructions to agents and employees via e-mail, some employees lacked access to e-mail and others routinely ignored it. Senior Prudential executives never directed distribution of the court's order to all employees. As a result, outdated sales practices records—among the key documents in the case—were destroyed in at least four Prudential offices. In a holding that now seems far ahead of its time, the court found that Prudential lacked a "clear and unequivocal document preservation policy," inferred that the lost materials were relevant and would have reflected negatively on Pru-

■ Mark S. Sidoti is a director in the New York City office of Gibbons, Del Deo, Dolan, Griffinger & Vecchione where he chairs the firm's internal Electronic Discovery Task Force and its Information Management and E-Discovery practice team. Mr. Sidoti frequently advises clients on document retention and E-Discovery matters, lectures to organizations and participates in seminars and symposia on these issues. He is the membership chair of DRI's Electronic Discovery Committee. Renée L. Monteyne is an associate at Gibbons in the firm's Newark, New Jersey, office and a member of the firm's internal Electronic Discovery Task Force and its Information management and E-Discovery practice team. Both authors are certified in E-Discovery Best Practices.

dential and, imposed a one million dollar sanction. The effects on Prudential were far more onerous, as this ruling ultimately lead to a revamping of the company's document retention and litigation hold policies that cost the company millions. (One could argue, however, that this restructuring has *saved* the company untold millions in litigations costs and potential sanctions over the years).

Perhaps the most important lesson learned from *Prudential*—aside from the obligation to preserve—is that senior management cannot treat this obligation lightly or delegate it to lower level management and wash their hands of the issue. As Judge Wolin held, once the court entered its order to preserve relevant documents, "it became the obligation of senior management to initiate a comprehensive document preservation plan and to distribute it to all employees." Since *Prudential*, numerous courts, including the oft-cited *Zubulake* opinions, have repeatedly driven this point home. *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. May 23, 2003) ("*Zubulake I*"); *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280 (S.D.N.Y. July 24, 2003) ("*Zubulake III*"); *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. Oct. 22, 2003) ("*Zubulake IV*"); *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. July 20, 2004) ("*Zubulake V*"); *Rowe Entertainment, Inc. v. The William Morris Agency, Inc.*, 205 F.R.D. 421 (S.D.N.Y. 2002); *Mosaid Techs. Inc. v. Samsung Elecs. Co.*, 348 F. Supp 2d 332 (D.N.J. 2004).

The Sedona Principles, which have become respected guidance for attorneys and courts in the area, have confirmed that "[t]he obligation to preserve electronic data and documents requires reasonable and good faith efforts to retain information that may be relevant to pending or threatened litigation." *The Sedona Principles*, Principle 5.

If well timed, carefully crafted and properly enforced, the litigation hold letter becomes the cornerstone of these required good faith efforts. Its importance, therefore, cannot be overstated.

Timing of the Litigation Hold Letter

Before discussing the format of an effective litigation hold letter, proper timing of the letter should be addressed. Again, while the Federal Rules have always implicitly, if not explicitly, embodied this principle, the obligation to preserve relevant documents and data when litigation is either contemplated or a reality has taken on new meaning of late, particularly since the detailed guidance provided by the *Zubulake* decisions. In *Zubulake*, Judge Shira Scheindlin restated the general obligation in the context of a case involving significant amounts of electronic data—much of which predated the filing of the complaint in that wrongful termination case by several years.

> The trigger event for issuing an effective litigation hold letter often occurs prior to the filing of the lawsuit.

In sum, Judge Scheindlin reiterated that

> The obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation. …. While a litigant is under no duty to keep or retain every document in its possession ... it is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request.

Zubulake IV at 216–217 (internal citations omitted).

The court emphasized that this obligation does not mean that "merely because one or two employees contemplate the possibility that a fellow employee might sue does not generally impose a firm-wide duty to preserve." *Zubulake IV*, at 217. The analysis, however, will always be made on a case by case basis, with a focus not only on the quality and quantity of the evidence establishing notice of potential litigation, but the relevance of the company employees who are on notice. *Id.* (holding that the relevant people anticipated litigation almost one year before the litigation was filed, and several months before plaintiff filed her EEOC complaint). Thus, if the "one or two employees" who express documented concern regarding the potential for a terminated employee to sue (or an intent to sue that employee, such as in a restrictive covenant case) are the company chairman and its head of human resources, it is clear that the obligation to preserve would arise at a date preceding the filing of the lawsuit. Similarly, if lower level personnel exchange e-mails documenting a competing business' express and specific intent to sue their company, the obligation may arise at that time. In *Zubulake*, the court held that existing e-mails and testimony clearly established that relevant UBS personnel were acutely aware of the potential for Ms. Zubulake to bring an employment-related claim very shortly after her termination, and long before her claim was filed. This determination formed the foundation for the court's holding that key evidence was willfully spoliated, leading to an adverse inference finding and other sanctions.

The key lesson is that the trigger event for issuing an effective litigation hold letter often occurs prior to the filing of the lawsuit or the initiation of a formal investigation. Important company personnel, including department heads, should be more vigilant than ever in alerting in-house attorneys or outside counsel to threats of legal action, or the anticipated need to pursue a remedy through legal action, so that the critical trigger dates are recognized and hold procedures initiated. Similarly, company officers should be aware that documents that discuss the potential for defending against or bringing a claim will often trigger the obligation to initiate the preservation process through an internal litigation hold letter.

Essential Elements of the Effective Internal Litigation Hold Letter

One commentator has defined the litigation hold letter as:

> …a written directive to all potentially relevant personnel of a company advising them that there is a specific subject mater which has resulted or is likely to

result in litigation, to describe that subject matter, and the people involved in it, in sufficient degree to inform the recipients of this communication of the true nature of the actual or anticipated dispute, and then to specifically advise them to both locate and save all relevant paper documents, e-mails, and any other items that may be contained in the company's computer system.

Timothy J. Hogan, *The International and Domestic Implications of Electronic Discovery on Litigation and Business Practices*, International Legal News, vol. 2, at 7 (June 10, 2005). While this is an effective working definition, internal litigation hold letters certainly can—and should—vary with the circumstances of the presenting trigger event. Companies should resist the temptation to craft a "form" letter to be used in all circumstances with a mere modification of the "Re:" line. The letters must be read and understood not only by employees but perhaps adversaries and the court when the matter evolves into litigation. (The litigation hold letter itself, while arguably a privileged document, may itself be discoverable. *Cf. Rambus Inc. v. Infineon Technologies AG*, 220 F.R.D. 264, 270–71, 280–91 (E.D. Va. March 17, 2004) (supported on the grounds of spoliation and the subject matter privilege waiver rule, defendant moved to compel production of documents related to the plaintiff's "document retention, collection, and production of documents"); *Kingsway Financial Services Inc. v. Pricewaterhouse-Coopers LLP*, 2006 WL 1295409 (S.D.N.Y. May 10, 2006)). The key is to craft a letter that maximizes compliance and thereby reduces the risk of evidence destruction. The following essential elements, reflected in the sample letter (Exhibit A on page 12), should be included in every internal litigation hold letter.

Send It from the Top

Particularly in the corporate environment, the sender of the message is often as important as the message itself. Litigation hold letters should be sent by high level corporate officers—such as the company Chairman, Chief Operating Officer or General Counsel. The primary sender should carbon copy other high level offices (*e.g.*, General Counsel should carbon copy the Chief Executive Officer). This inclusion sends an important message to the addressees and other future recipients, like adversaries and the court, that this obligation is recognized as important by the highest levels of the company and that the company management has "bought in" to the process and endorses it. Of course, employees naturally give greater attention to directives from company officers and will thus be inclined to take the process more seriously and understand their roles. As *Prudential* made clear, this obligation cannot be delegated in any event. The litigation hold letter provides company leaders the opportunity to recognize and accept that obligation. *The Sedona Principles*, Comment 5.c.; *Cf. In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 169 F.R.D. 598, 615 (D.N.J. 1997); *see also Danis v. USN Communications, Inc.*, No. 98 C 7482, 2000 WL 1694325, at *38–41 (N.D. Ill. Oct. 20, 2002) (circumstances of the case indicated insufficient involvement of management in proper oversight and delegation of preservation responsibilities).

Define the Corporate Audience

While the court in *Prudential* pointed out the risk of insufficient dissemination of litigation hold directives, it is important to recognize, particularly when larger corporations are involved, that litigation hold letters need not necessarily be directed to all employees. In many instances, with input from various well placed leaders, a thorough understanding of the scope of the threat or intended legal action and a detailed knowledge of the company's computer infrastructure and data retentions policies, companies can safely limit the hold directives to those employees and departments that could possibly have access to relevant information. Limiting the number of recipients reduces significant waste of corporate resources, prevents the company-wide release of often very sensitive information, and quells the panic of rumor mongering that might otherwise spread throughout the company in these situations.

The key in limiting the directive recipients, however, is careful advanced investigation and planning. For example, if a former employee who is threatening to sue spent time while employed in various departments, the failure to include even one of those departments in the decision making process could lead to the inadvertent failure to locate, and ultimate loss of, relevant evidence. Similarly, incomplete knowledge of where relevant back-up tapes may be stored at various company offices may lead to a failure to advise a particular branch office or storage facility of the hold directive. It is from scenarios like these that the disastrous *Coleman* cases of the litigation world arise. *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.*, 2005 WL 679071 (Fla.Cir.Ct. Mar. 1, 2005); 2005 WL 674885 (Fla.Cir.Ct. Mar. 23, 2005).

Given this significant downside risk, it is advisable to take great care in limiting the hold letter recipient pool and err on the side of broader dissemination, particularly when the preliminary investigation leaves too many open questions regarding the scope and location of potentially discoverable information and data.

In every instance, however, the notice should be sent to the persons directly involved in the events relevant to the litigation or investigation and those responsible for maintaining the companies computer systems (including archiving both hard copy and electronic records). *See Wiginton v. CB Richard Ellis, Inc.*, No. 02 C 6832, 2003 WL 22439865, at *5 (N.D. Ill. Oct. 27, 2003) (among other problems with the preservation notice sent to employees was the defendant's failure "to inform its director of network services that any electronic information should be retained").

Keep It Simple

The typical litigation hold letter is ultimately intended to reach and be understood by a broad corporate audience, from the mailroom to the board room. It is also completely ineffective if it is so long and dense that many decide not to read it at all. Therefore, except in exceptional circumstances, an internal hold letter should not exceed five or six brief, plainly worded, and easily understood, paragraphs.

Detailed explanations of the litigation, investigation or other official inquiry typically do more harm than good for several reasons. First, in most cases, the crux of the inquiry and the relevant issues can be described more effectively in simple language that most employees will take the time to read and understand. Detailed

Exhibit A

DEF CORPORATION

Office of The General Counsel

March 28, 2006

PRIVILEGED AND CONFIDENTIAL—ATTORNEY WORK PRODUCT AND ATTORNEY CLIENT COMMUNICATION

VIA CERTIFIED MAIL

Employee
Employee Address

Re: ABC vs. DEF
Civil Case No.: 06-CV-1026

Dear Employee:

This is a matter of utmost importance. Please be advised that DEF's Office of General Counsel requires your assistance with respect to preserving corporate information in the above-referenced matter.

In connection with the litigation referred to above, we write to advise you of DEF's legal obligation to preserve relevant documents and data in this matter and enlist your assistance in this regard. The lawsuit requires preservation of all documents and data relating to [**description of event, transaction, business unit, product,; optional: brief description of litigation issue or claim**] from all sources.

"Documents and data" as used here means not only hard copy documents, but audio recordings, videotape, e-mail, instant messages, word processing documents, spreadsheets, databases, calendars, telephone logs, contact manager information, Internet usage files, and all other electronic information maintained created, received, and/or maintained by DEF on computer systems. "Sources" include all hard copy files, computer hard drives, removable media (*e.g.*, CDs and DVDs), laptop computers, PDAs, Blackberry devices, and any other locations where hard copy and electronic data is stored. Keep in mind that any of the above mentioned sources of relevant information may include personal computers you use or have access to at home, or other locations. It also includes inaccessible storage media, such as back-up tapes which may contain relevant electronic information that does not exist in any other form.

In order to comply with its legal obligations, DEF must immediately preserve all existing documents and data relevant to the claim/investigation described above and suspend deletion, overwriting, or any other possible destruction of relevant documents and data. Guidance on how to preserve relevant documents and information has been posted on the DEF intranet site under "ABC v. DEF preservation guidance." If you have any questions on how to comply with this directive, please contact DEF's IT Department at extension 7777.

Electronically stored data is an important and irreplaceable source of discovery and/or evidence in this matter. You must take every reasonable step to preserve this information until further notice from the Office of General Counsel. *Failure to do so could result in extreme penalties against DEF.*

You will be contacted by DEF's IT Department and the Office of General counsel in the near future for an update on your preservation efforts and to answer any questions you may have. In the interim, if this correspondence is in any respect unclear, please contact Mary Smith, Esq. in the DEF Legal Department at extension 6666 or Jack Johnson in the DEF IT Department at extension 7777. They will assist you in any way necessary.

Sincerely,

John Q. Jones
General Counsel

cc: Chief Executive Officer
Chief Information Officer

descriptions of the litigation or investigation may also lead to statements or admissions regarding the company's position on the matter that find their way into an adversary's hands through the discovery process. Finally, detailed descriptions of sensitive proceedings tend to violate "need to know" protocols, exposing rank and file employees to information about which they simply do not need to be aware and fostering water cooler discussion that detracts from employee productively, poisons the corporate atmosphere and creates problematic potential witnesses.

Additionally, in most cases, mention of the possible trigger date of the corporate obligation to preserve also should be avoided. In some cases, however, it may be appropriate to identify the relevant date range that should be applied to the gathering and retention process, such as when it can be safely assumed that documents and data created prior to a certain date will not be discoverable. Absent the consent of your adversary or a court order defining the relevant date range, however, date restriction in litigation hold letters can pose significant risk. In many instances, the hold letter should simply reflect that any documents or data relating to the issue that presently exist should be preserved, as should all such materials obtained or created subsequent to the date of the letter. Because retention obligation trigger dates are among the most hotly contested and difficult to determine issues in e-discovery litigation, a corporate document mentioning a specific trigger date or event can later become an admission from which the company (and its counsel) may wish it could distance itself. *Zubulake IV*; *Renda Marine, Inc. v. United States*, 58 Fed.Cl. 57 (2003) (defendant ordered to produce back-up tapes that were created on and after the date the duty to preserve was triggered).

In sum, the first or second paragraph of the hold letter should simply and clearly tell the target employee what the subject matter at issue is, the nature of the litigation or investigation and that all documents and data—electronic or otherwise—relating to that issue, should be carefully preserved.

Define What Needs to Be Preserved and Where It Might Be Located

To have its intended effect, the letter must command the reader's attention from the outset. Hold letters should begin with a clear statement of the importance of the matter to the company, followed by language that stresses that the employee plays an important role in assisting the company with the matter. The letter should explain simply that the company has a legal obligation to preserve "documents and data" relevant to a particular event, transaction, business unit, product, and/or employee, as the case may be, from all "sources," and that the employees' help is needed to comply with this obligation.

It is then critically important to define the term "documents and data" and the potential "sources" so that the employee understands the broad scope of the obligation and is reminded that today most documents are not simply pieces of paper. No definition can capture every type of document or data, or every possible source. The goal should be to encourage the employees to think outside of the box when they undertake their efforts to preserve *The Sedona Principles*, Comment 5.d.; *see Wiginton v. CB Richard Ellis, Inc.*, No. 02 C 6832, 2003 WL 22439865, at *5 (N.D. Ill. Oct. 27, 2003) (defendant was faulted for being too narrow when preservation communication to employees only instructed employees to save documents that "pertain to" the named plaintiff in a putative class action although various other employees and offices were identified in the complaint."). One possible definition paragraph is:

> "Documents and data" as used herein means not only hard copy documents, but audio recordings, videotape, e-mail, instant messages, word processing documents, spreadsheets, databases, calendars, telephone logs, contact manager information, Internet usage files, and all other electronic information maintained created, received, and/or maintained by DEF on computer systems. "Sources" include all hard copy files, computer hard drives, removable media (*e.g.*, CDs and DVDs), laptop computers, PDAs, Blackberry devices, and any other locations where hard copy and electronic data is stored. Keep in mind that any of the above mentioned sources of relevant information may include personal computers you use or have access to at home, or other locations.

It may also be advisable, depending on the circumstances, to alert employees that back-up tapes are a possible source of relevant electronic data that must be preserved. While hundreds of pages of legal opinions have already been published on the need to preserve and ultimately restore and produce electronic data preserved on back-up tapes, both case law and commentators have made clear that when a party knows or should know that storage media, such as back-up tapes, may contain relevant and potentially discoverable data, that that data does not exist in any other location, and that those tapes exist at the time the hold obligation is triggered, there may be a duty to preserve those tapes. *Zubulake IV*, 220 F.R.D. at 218; *E*Trade Secs. LLC v. Deutsche Bank AG*, 230 F.R.D. 582 (D. Minn. 2005) (holding, "[b]ecause NSI relied on its backup tapes to preserve evidence that was not preserved through a litigation hold, NSI should have retained a copy of relevant backup tapes because it was the sole source of relevant evidence"); *The Sedona Principles*, Principle 7; Moore's Federal Practice; §37A.12[5][e] (Matthew Bender 3d ed.) ("The routine recycling of magnetic tapes that may contain relevant evidence should be immediately halted on commencement of litigation."). Here, companies should be careful to understand the differences between "disaster recovery" and "archival" back-up tapes and systems. While this article will not permit a detailed discussion of these issues, the critical point is that companies that use back-up tapes to archive information that has been removed from the active computer systems, or keep back-up tapes intended for disaster recovery past their useful life such that they, in effect, become an archive system, may have obligations to preserve these tapes if there is a possibility that they contain relevant evidence. *The Sedona Principles*, Comment 5.h. Companies should look carefully at this issue before crafting litigation hold letters so that this source is, if necessary, identified to the target employees, including their IT personnel.

Give Clear Direction

The effective hold letter should give simple and clear direction to the target audience. The key message is that (1) existing relevant documents and data should be iden-

tified, segregated and preserved and, (2) future relevant data created in the normal course of business should be maintained. Attempts to define "relevance" with specificity should be avoided and the typical recipient should not be transformed into a decision maker on this issue. It should offer general guidance on how to comply with the obligation and a resource for assistance, which is typically the company's IT department or specialist. It may also makes sense to have the company's IT department set up an online resource, such as a secure intranet site, to assist in the process. This paragraph might read:

> In order to comply with its legal obligations, DEF must immediately preserve all existing documents and data relevant to the claim/investigation described above, and suspend deletion, overwriting, or any other possible destruction of relevant documents and data. Guidance on how to preserve relevant documents and information has been posted on the DEF intranet site under "ABC v. DEF preservation guidance." If you have any questions on how to comply with this directive, please contact DEF's IT Department at extension 7777.

Identify the Risks of Non-Compliance

All internal litigation hold letters should contain a simple statement of the importance of preserving electronic data, and the risks or serious consequences to the company if the data is intentionally, or unintentionally, lost or compromised. A statement to this effect serves at least two ends—it reinforces to the employee the importance of the obligation and his/her cooperation and it establishes that the company understands its obligations and the implications of non-compliance for any future audience (if, for example, the letter is produced as the cornerstone for a future defense of the corporate preservation efforts). Again, it is not necessary to detail the types of sanctions that might be imposed or threaten the recipient with personal consequences for non-compliance. The former is premature and speculative and the latter is likely counterproductive. This paragraph might read:

> Electronically stored data is an important and irreplaceable source of discovery and/or evidence in this matter. You must take every reasonable step to preserve this information until further notice from the Office of General Counsel. *Failure to do so could result in extreme penalties against DEF.*

Promise Follow Up and Keep Your Promise

Finally, the effective litigation hold letter should always promise that the company and its counsel (in-house and/or outside) will be following up for an update on their preservation efforts and to answer any questions that may arise.

> Attempts to define "relevance" with specificity should be avoided.

The duty on both the company and its counsel to ensure compliance with preservation efforts cannot be overstated. As Judge Sheindlin noted in *Zubulake V*:

> A party's discovery obligations do not end with the implementation of a "litigation hold"—to the contrary, that's only the beginning. Counsel must oversee compliance with the litigation hold, monitoring the party's efforts to retain and produce the relevant documents.... Once a "litigation hold" is in place, a party and her counsel must make certain that all sources of potentially relevant information are identified and placed "on hold," to the extent required in *Zubulake IV*. To do this, counsel must become fully familiar with her client's document retention policies, as well as the client's data retention architecture. This will invariably involve speaking with information technology personnel, who can explain system-wide backup procedures and the actual (as opposed to theoretical) implementation of the firm's recycling policy. It will also involve communicating with the "key players" in the litigation, in order to understand how they stored information. relevant e-mails and retained them in hard copy only. Unless counsel interviews each employee, it is impossible to determine whether all potential sources of information have been inspected. ...*In short, 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. Counsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched.* This is not to say that counsel will necessarily succeed in locating all such sources, or that the later discovery of new sources is evidence of a lack of effort. But counsel and client must take some reasonable steps to see that sources of relevant information are located.

Zubulake V, 229 F.R.D. at 432.

Aside from the clear obligation imposed on a corporation and its counsel, an established follow up protocol makes practical sense. No matter how urgently a letter is worded, many employees will simply not make such a request a priority item on their everyday agendas, particularly if they have not been personally involved in the underlying events. Moreover, given the many locations of electronic data and the complexity of segregating and preserving this information (including suspension of normal course data deletion protocols), there is simply no way to monitor whether employees are taking the steps needed to preserve data short of personal contact on a regular basis. In short, e-data cannot be treated like hard copy data when it comes to ensuring preservation efforts if, for no other reason, than how much more quickly huge quantities of potentially relevant electronically stored data can be altered or completely lost if appropriate measures are not established and enforced.

The litigation hold letter is now an indispensable tool in the changing landscape of modern day litigation. It is a critical element in satisfying a party's obligation to preserve evidence and demonstrate that a litigant understands these obligations and the consequences of non-compliance. As such, the hold letter will often become "Exhibit A" to any defense of the litigant's preservation efforts and proof of its good faith in taking all reasonable steps to meet these obligations. Thus, attention to these few key elements of the internal litigation hold letter can lead to huge dividends down the road.