

E-Discovery Update

March 2005

E-DISCOVERY AND RECORDS MANAGEMENT UPDATE

Several recent court decisions demonstrate the severe sanctions companies face for destroying documents during litigation and underscore the need to implement and comply with litigation holds. For example, in *Zubulake v. UBS Warburg LLC*, 2004 U.S. Dist. LEXIS 13574 (S.D.N.Y. July 20, 2004), the court ruled that a party must take affirmative steps to preserve documents, including: (1) issuing a litigation hold at the outset of the litigation or whenever litigation is reasonably anticipated such that all sources of discoverable information are identified and retained; (2) communicating the litigation hold directly to all key employees; (3) repeating the litigation hold instructions; (4) monitoring compliance with the litigation hold; and (5) instructing all employees to produce potentially relevant documents in their files. *Id.*, at *39-41. *See also United States v. Philip Morris USA Inc.*, 2004 U.S. Dist. LEXIS 13580 (D. D.C., July 21, 2004) (sanctioning defendant \$2.75 million for violating a court order to preserve potentially relevant documents where defendant routinely destroyed e-mails and other electronic records while the action was pending).

Developing, implementing and managing an effective litigation hold as part of a company's overall records management policy is therefore essential. An effective record management program minimizes the records retained to the minimum required to meet a company's legal requirements and operational needs. As a result, companies significantly reduce the inconvenience and expense in responding to discovery requests in litigation. A records management program that includes a litigation hold component also is an invaluable tool to demonstrate a company's good faith and reasonable efforts to comply with its discovery obligations.

Proactive coordination and planning among corporate counsel, outside counsel and IT personnel are necessary to design and implement a litigation hold that is ready to respond effectively when needed. An effective litigation hold should include:

- A records management program, which includes a litigation hold component to allow for immediately suspension the disposition of hardcopy and electronic records, including e-mail, that may be potentially relevant in pending or reasonably anticipated litigation;
- The identity of company employees to be notified of the litigation hold, a standard notice (such as the Record Preservation/Notice of Litigation Hold) and an acknowledgement procedure for affected employees;
- Specific steps and assignments for preserving back-up tapes, archiving e-mails, and, if necessary, notifying third-party vendors;
- A method to monitoring compliance with any litigation hold in effect;

- Periodic follow-ups with company employees to reiterate the litigation hold instructions, and procedures for notifying new employees of the litigation hold; and
- A procedure for rescinding the litigation hold, notifying necessary third-party vendors, and restoring the record retention schedule for disposition of records.

Vedder Price has developed unique expertise in advising clients regarding effective records retention and management, electronic communications policies and e-discovery. We are presenting seminars on records management and e-discovery on March 22 in Northern Virginia, March 23 in New York City and March 30 in Chicago. For more information and to register for those seminars please visit our website at www.vedderprice.com. Thank you.

Bruce A. Radke, Esq.
312/609-7689
bradke@vedderprice.com

Timothy J. Carroll, Esq.
312/609-7709
tcarroll@vedderprice.com

Memorandum

Privileged Communication/Attorney Work Product

To: [Department Head/Records Manager]

Date:

From: [General Counsel's Office]

Re: Document Preservation/Notice of Legal Hold: [Case Name, Case No., Jurisdiction]

Notice:

The purpose of this memorandum is to inform you that the Company is involved in a litigation proceeding known as [Case Name, Case No., Jurisdiction] (the "[] Case"). Consequently, the Company may be required to produce certain documents¹ relating to the [] Case. In an effort to ensure that the Company is taking all reasonable steps to preserve and safeguard evidence relating to the [] Case, the documents in the categories listed below, whether in hard copy or electronic form, *cannot be altered, destroyed or discarded* for any reason. Your failure to retain these documents or ignore the directive of this memorandum can result in severe consequences, including various forms of punishment imposed by a court of law.

Documents Covered:

Until further notice, please search for and then maintain any documents relating to the following topics:

Any and all documents relating to the [transaction/incident/audit/investigation], including, without limitation, [insert list of all potentially relevant documents].

Any and all communications relating to, or stemming from, the [transaction/incident/audit/investigation].

Instructions:

Please instruct all personnel within your department not to alter, destroy, discard, interfile, annotate, remove, rearrange or modify any documents identified for production in the [] Case. Please also inform all appropriate personnel who are responsible for handling, or who have access to, the documents of the instructions conveyed in this memorandum. Additionally, please instruct such personnel that they must segregate and label all documents that may be produced in the [].

Questions:

Any questions or concerns about this memorandum should be directed to [General Counsel's Office]. Thank you for your cooperation in this matter.

¹Documents subject to this notice may be in paper or electronic form, including e-mails, instant text messages, memos and any and all correspondence, whether in draft or final form. Documents also refer to handwritten and typewritten documents and nonidentical copies of the same documents.

VEDDER, PRICE, KAUFMAN & KAMMHOLZ, P.C.

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Vedder Price is a national full-service law firm with more than 210 attorneys in Chicago, New York and New Jersey. Please contact your Vedder Price attorney with any questions or if you need any assistance.

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Chicago

222 North LaSalle Street
Chicago, Illinois 60601
312/609-7500
Fax: 312/609-5005
Contact: Robert J. Stucker

New York

805 Third Avenue
New York, New York 10022
212/407-7700
Fax: 212/407-7799
Contact: Neal I. Korval

New Jersey

Five Becker Farm Road
Roseland, New Jersey 07068
973/597-1100
Fax: 973/597-9607
Contact: John E. Bradley

www.vedderprice.com