# SOFTWARE CONTRACT LITIGATION

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## SOFTWARE CONTRACT LITIGATION

### A. Expectations in litigation

1. **Fees and costs—**Many contracts contain fee shifting provisions. These provisions allow the winner in any litigation or arbitration to recover the attorney's fees expended from the other side.

    a. Courts almost always uphold these provisions (often citing the Federal Arbitration Act, 9 U.S.C.A. §§ 1-14). Arbitrators nearly universally do.

    b. Such provisions change the dynamic of litigation immensely. They should always be considered before pursuing a dispute.

        (1) Example: Consider a purchase of software that costs the purchasing company $250,000 in product and consulting costs. A lawsuit, carried through trial or arbitration, could easily exceed $100,000 in legal fees. The purchaser must understand that it could recover $250,000, plus get back the $100,000 it expended in fees. ***Or*** it could lose the lawsuit, in doing so pay its lawyers $100,000, and pay out $100,000 to the other side (negative $200,000)—a swing of $450,000.

    c. In addition to contractual fee shifting provisions, several states have statutory provisions that allow the victor in contract litigation to recover its legal fees. Examples include Arizona, Texas and Oklahoma.

        (1) Cites: A.R.S. § 12-341.01 (Arizona; applies to cases arising from contracts); Tex. Civ. Prac. & Rem. Code Ann. § 38.001 (Texas; applies to cases arising from contracts, among other things); Idaho Code Ann. § 12-120 (1) (Idaho; applies only to cases involving $35,000 or less); 12 Okla. Stat. Ann. Tit. 12, § 936 (Oklahoma; applies to cases involving "labor or services" or "or on an open account, a statement of account, account stated, note, bill, negotiable instrument, or contract relating to the purchase or sale of goods, wares, or merchandise"); Nev. Rev. Stat. Ann. § 18.010 (Nevada; plaintiff may recover fees if total recovery is under $20,000, if written instrument or agreement entitles the prevailing party to an award of fees, or if authorized by specific statute); Alaska R. Civ. P. 82 (Alaska; awards attorneys' fees to prevailing party).

(2) These provisions tend to be enforced less rigidly than contractual fee shifting provisions, but typically have the same effect on litigation strategy.

2. **Litigation Discovery—**"Discovery" describes the process wherein the parties in a lawsuit or arbitration ask the other parties (or third parties) for information or documents about the events in dispute.

a. Discovery tools include written interrogatories (written questions), depositions (oral questions), and subpoenas (among other legal procedures).

b. Perhaps the most important dynamic of software and technology litigation is that it is ***fact-intensive***. There is a significant "he-said-she-said" among the salesmen, project managers and engineers of the various parties.

c. Discovery is generally time-consuming and therefore expensive. In highly-technical cases, like software and intellectual property cases, it is exponentially so.

(1) This is often because the lawyers themselves must become familiar with the software and/or technology to intelligently pursue discovery of the other parties' positions.

d. Parties often believe that lawyers conduct the litigation on their own. But the employees are heavily involved too. The employees must educate the lawyers about the software and technology, as well as the facts of the dispute in question. Employees must also attend certain procedures, like depositions and mediations.

e. **Electronic discovery obligations/litigation holds**—Much of the information in any software sale is electronic. All of that information must be made available to other parties upon proper demand. Therefore, the information must be preserved.

(1) At the outset of a dispute—not necessarily the filing of a lawsuit—all documents (electronic or otherwise) must be saved, even if the normal procedure of the party would be to destroy or delete the information on a periodic basis. This is called a "litigation hold." [SEE APPENDIX C & D FOR SAMPLE LETTERS TO AN OPPOSING PARTY AND TO CLIENTS]

(a) Cite: *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216-18 (S.D.N.Y. 2003) ("*Zubulake IV*")("The scope of a party's preservation obligation can be described as follows: Once 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. As a general rule, that litigation hold does not apply to inaccessible backup tapes (*e.g.,* those typically maintained solely for the purpose of disaster recovery), which may continue to be recycled on the schedule set forth in the company's policy. On the other hand, if backup tapes are accessible (*i.e.,* actively used for information retrieval), then such tapes *would* likely be subject to the litigation hold.")

**(b) Guidance from *Zubulake:***

(i) **When does the duty to preserve attach?** "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." In the case of a corporation, the duty to preserve triggers when "the relevant people" reasonably anticipated litigation.

(ii) **What is the scope of the duty to preserve?** "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."

(iii) **Whose documents must be retained?** Documents made by, or made for "individuals 'likely to have discoverable information that the disclosing party may use to support its claims or defenses.'"

(iv) **What must be retained?** A single copy of all relevant documents existing at the time the duty is trigger and any relevant documents created thereafter. The method of preservation is up to the party: "In recognition of the fact that there are many ways to manage electronic data, litigants are free to choose how this task is accomplished."

(v) **What are the possible penalties that can be imposed for failing to satisfy this duty?** A party faces sanctions including, but not limited to (1) reconsideration of court orders, including cost-shifting orders, (2) an adverse inference instruction to the jury, explaining that they can infer that evidence would have been favorable to the opposing party, and (3) paying the costs incurred by the opposing party as a result of the loss of evidence.

(2) Other Cases: *Automated Solutions Corp. v. Paragon Data Sys., Inc.,* 756 F.3d 504, 513-14 (6th Cir. 2014) (no duty to preserve daily back-up tapes in a copyright infringement action where the backup tapes were re-written daily and used for disaster recovery instead of an archive in the normal course of business); *AAB Joint Venture v. United States,* 75 Fed. Cl. 432, 443 (2007) (court ordered a "phased approach" where portions of back-up tapes were produced for evaluation to determine if additional restoration was warranted and whether cost-shifting or cost-sharing should be imposed); *Micron Tech., Inc. v. Rambus Inc.,* 645 F.3d 1311, 1320 (Fed. Cir. 2011) (the duty to begin preserving evidence is based on an objective standard; the point at which litigation is 'reasonably foreseeable' is a flexible, fact-specific standard).The sanctions for destroying this information despite knowledge of a dispute range from a warning from the court to losing the case entirely. In between, courts may impose a "negative inference," assess a monetary fine, or decide certain issues in favor of the other parties.

(a) Cites: *Fujitsu Ltd. V. Fed. Ex. Corp.,* 247 F.3d 423, 436, (2d. Cir. 2001) (sanction for spoliation are decided on a case-by-case basis); *W. v. Goodyear Tire & Rubber Co.,* 167 F.3d 776, 779 (2d Cir. 1999); *Konstantopoulos v. Westvaco Corp.,* 112 F.3d 710, 719-21 (3d Cir. 1997)( expert witness testimony excluded as a sanction for destruction of evidence).

f. Electronic documents are often contained in massive databases. The sifting of relevant documents from irrelevant documents (like e-mails) is a huge undertaking. Outside technology consultants are often hired to sift electronic documents—at a premium rate.

3. **Expert witnesses** are often necessary in technology litigation to explain to the judge and jury how the technology works. Again, expert fees can be exorbitant, as a great deal of time is needed to fully understand the facts in dispute. But, if a trial may result, the side with the more effective may prevail—making the cost worthwhile.

4. **Dispositive motions** (such as motions to dismiss and motions for summary judgment) are rarely successful in this type of litigation. The disputes are so fact-dependent, neither party can meet the applicable standards.

5. **Trials** of these cases almost never happen. If they do, you can expect a very costly battle that will take many witnesses. If you have to try a technology case, come prepared and focus your resources—especially the decision-makers' time and attention.

## B. Effective strategies

1. **Manage expectations of parties**—As an attorney, the client's expectations must be managed. There is rarely a clear-cut victory possible.

a. 92.5% of all civil litigation settles, according to the American Bar Association. In software and technology disputes, the figure is likely higher due to the complexity and litigation costs involved.

b. Typically, the plaintiff's strategy is to "share the pain": cost-overruns and disappointing initial returns from the technology result in "buyer's remorse."

(1) Often, the sponsor of the purchase was not the decision-maker. The sponsor is often held responsible for cost over-runs or inefficiency by the decision-makers, and will seek a substitute responsible party. That substitute is typically the seller or implementer of the technology.

2. **Front-load discovery**—Software and technology litigation is fact-intensive. There are entire teams of engineers that must be interviewed by both sides. Many documents—paper and electronic—must be reviewed by both sides. The best strategy is to allow the attorneys to sift through this information to get the clearest picture of the dispute that is possible.

(1) This strategy is **expensive**—but far less expensive than discovering just before trial that the other side is going to win. Lawyers cannot advise clients unless the lawyers fully understand the events that led to the litigation.

3. **Seek mediation**—Mediation, when the parties understand the fact and what is at stake, and participate in good faith, is an amazing tool.

(1) **There is no reason to wait until a lawsuit is filed or arbitration is demanded—mediation is just as useful before a lawsuit as after one is filed.**

(2) The only requirement is that the parties have exchanged enough information to understand the facts and risks involved.