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A Cautionary Tale: Affirmative Steps Can Avoid the Imposition of Sanctions When Complying with Electronic Discovery Obligations

Counsel face significant challenges in ensuring that their clients comply with electronic discovery requirements. While many of us cannot imagine conducting business without a computer, email and the like, our reliance on this technology as a primary mode of communication has created a host of legal and practical issues in litigation.

This update will focus on some crucial measures to protect against discovery violations and the imposition of sanctions when complying with electronic discovery obligations.

On December 1, 2006, amendments to the Federal Rules of Civil Procedure took effect in an effort to address the differences between the complexities of electronic discovery and the straightforwardness of traditional discovery. The amendments, which are approaching their two-year anniversary, also heightened the responsibility of federal court litigants with respect to discovery obligations.

Potentially discoverable electronic information can be found in a myriad of places, including servers, networks, backup tapes, PDA's, cell phones, laptops, hard drives and shared drives. Responding to electronic discovery requests is undoubtedly expensive. However, while cost is an important concern to every litigant, a party and its counsel must be prepared to comply with its heightened responsibility with respect to electronic discovery obligations. Without this preparedness, a party faces the imposition of harsh sanctions, which will ultimately prevent case resolution on the merits.

One of the primary steps toward compliance is devising and implementing a record retention policy for electronic documents. This step is mandatory. In order for the policy to withstand court scrutiny in the

event of a lawsuit, the policy must not only be in place and followed by employees and management at all levels, but it must comply with applicable federal and state laws regarding document retention.

Second, and equally as crucial, is implementing a "litigation hold" when an entity learns that litigation has been filed or reasonably anticipates litigation. A "litigation hold" is a written policy distributed to employees advising of the nature and extent of any existing litigation or anticipated litigation and directing them as to what relevant documents must be preserved to remain in compliance with the entity's legal duty.

As part of the electronic discovery amendments, Rule 37(f) provides the following: "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system." F.R.C.P. 37(f) (2008). This provision is commonly referred to as the "safe harbor" provision or "good faith" exception. Protection under this provision is jeopardized if an entity fails to properly enforce a litigation hold when litigation has been filed or litigation is reasonably anticipated.

The decision of *Doe v. Norwalk Community College*, 2007 WL 2066497 (D. Conn.) provides a cautionary tale for entities that fail to implement a litigation hold. In *Doe*, the Plaintiff filed suit alleging negligent retention and supervision and negligent infliction of emotional distress against Defendants. The Plaintiff sought, via Motion, to inspect certain electronic records in the possession of the Defendant-College and the Motion was granted. Plaintiff hired a computer forensic firm to perform the inspection.

Following the inspection, Plaintiff filed a Motion for Sanctions seeking an adverse evidentiary inference based upon the College's destruction of electronic files.

Plaintiff claimed that "the hard drives of key witnesses" in the case were "scrubbed or completely wiped of data" and that the Microsoft Outlook PST files, which house electronic mailboxes, of four individuals had inconsistencies that indicated that data had been altered, destroyed or filtered. *Id.* at *2. Plaintiff further contended that the College failed to follow its 2-year electronic correspondence retention policy. *Id.* With respect to the College's destruction of data, it sought protection under the good faith exception of Rule 37(f). The Court found that "in order to take advantage of the good faith exception, a party needs to act affirmatively to prevent the system from destroying or altering information, even if such destruction would occur in the regular course of business." *Id.* at *4.

Because the Defendants failed to suspend their routine document destruction policy and failed to implement a litigation hold when litigation was reasonably anticipated, the Court denied Defendants request for protection under Rule 37(f). The Court ultimately ruled that the Plaintiff was entitled to an adverse inference jury instruction with respect to the destroyed evidence and was entitled to an award of costs, including the costs associated with the retention of the computer forensics firm. *Id.* at **8-9.

While the *Doe* decision instructs that a litigation hold is mandatory, simply imposing one does not satisfy a litigant's complete obligation with respect to electronic discovery. Implementation of a litigation hold at the appropriate time will not prevent the imposition of sanctions unless there is compliance with the hold and all relevant and non-privileged information is retained and produced in discovery.

In the fifth written opinion in the now-infamous case of *Zubulake v. UBS Warburg*,

2004 U.S. Dist. LEXIS 13574 (S.D.N.Y. July 20, 2004) ("*Zubulake V*"), Judge Scheindlin imposed sanctions, including an adverse evidentiary inference and monetary sanctions, against UBS Warburg for the destruction of relevant information even though a litigation hold was in place early in the litigation by in-house and outside counsel. *Id.* *2.

The Court found that counsel failed to effectively and adequately communicate with UBS employees and [c]ounsel also failed to safeguard backup tapes that might have contained some deleted e-mails, and which would have mitigated the damage done by UBS's destruction of those e-mails." *Id.*

The Court articulated several duties of counsel with respect to electronic discovery: "counsel has a duty to effectively communicate to her client its discovery obligations so that all relevant information is discovered, retained and produced." *Id.* at *46. Counsel must "identify sources of discoverable information" and should speak "directly with key players in the litigation, as well as the client's information technology personnel." Counsel must put into effect a litigation hold when the duty to preserve arises and ensure that the hold is made known to all relevant employees by communicating with them directly. *Id.* "The litigation hold instructions must be reiterated regularly and compliance must be monitored." *Id.* at **46-47. Counsel must require that "employees produce copies of relevant electronic evidence, and must arrange for the segregation and safeguarding of any archival media (e.g., backup tapes) that the party has a duty to preserve." *Id.* at *47.

Clearly, a litigation hold must be implemented when litigation is initiated or litigation is reasonably anticipated. In addition, there must be compliance with the hold and all relevant information retained. While the *Zubulake V* opinion provides further instruction with respect to a counsel's duty to ensure that relevant

information is preserved, ultimately, the duty to preserve relevant information rests with the party to the litigation. However, there is a trend among the courts to impose harsh sanctions for noncompliance with discovery obligations and counsel should heed the duties articulated in *Zubulake V* in an abundance of caution.

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