Document Retention Policies, Litigation Holds and the Duty to Preserve Electronic Data
By Paul S. Holscher

Hypothetical: *Your phone rings and on the other line is Mrs. Simons. Simons is the vice president for ABC Company. She informs you that a former employee of ABC Company filed a lawsuit against ABC two weeks ago. The complaint contains several claims, including one of gender discrimination. Along with the complaint, there were more than 30 requests for production of documents. Mrs. Simons indicates that the plaintiff had made several complaints to the human resources department during the course of the past year. Mrs. Simons can't recall the company's policy regarding deletion of e-mails, but thinks they are routinely deleted by the IT department. Mrs. Simons then asks you if the company should institute "some kind of a hold" on the deletion of documents and wants to know if there are any potential problems with how ABC Company has handled the lawsuit so far.*

The above scenario brings to light many of the challenges faced by businesses in today's evolving legal landscape of electronic discovery. A little advanced planning can help your clients not only survive, but thrive in this era of electronically-stored data.

Document Retention Policies

First, make sure your clients have a document retention policy which is preferably set out in writing and adhered to by all employees. When a company faces litigation and the inevitable discovery request for electronically-stored data, the importance of a document retention policy, uniformly adhered to by everyone in the organization becomes apparent. A document retention policy is a company policy for the preservation of and the orderly purging/destruction of records. Document retention policies specify how long paper and electronic documents will be retained, how and where they will be stored and when they will be destroyed. When implementing such policies, companies should be mindful of numerous federal and state laws which require the retention of various records for specified periods. For example, the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq*., requires that reasonable accommodation requests be retained for two years.

The newly-promulgated Rule 37(f) of the Federal Rules of Civil Procedure has enhanced the importance of having a document retention policy, creating a safe-harbor provision for companies that appropriately administer such policies. Specifically, Rule 37(f) states: "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 system." Fed. R. Civ. 37(f).

Duty to Preserve Evidence

Second, make sure your clients are aware that when litigation is pending or threatened, they may have a duty to preserve certain documents and electronic data that would otherwise be destroyed under their record retention policy. The prevailing rule of law as to the trigger date for the duty to preserve evidence is that the duty to preserve "'arises when a party has notice that the evidence is relevant to litigation or *should have known that the evidence might be relevant to future litigation.'" Zubulake v. UBS Warburg LLC, et al*., 220 F.R.D. 212, 216 (S.D.NY 2003) (emphasis added) (*quoting Fujitsu Ltd. v. Federal Exp. Corp.,* 247 F.3d 423, 436 (2d Cir. 2001)); *see also Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir.1998) (stating, "The obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation - most commonly when suit has already been filed, ...but also on occasion in other circumstances, as, for example, when a party should have known that the evidence may be relevant to future litigation."); *Benton v. Dlorah, Inc*., No. 06-CV-2488-KHV (D.Kan. October 30, 2007) (holding that duty to preserve arose when plaintiff filed first set of charges with the EEOC).

The commencement of the duty to preserve evidence prior to the institution of litigation can place a defendant in a precarious situation. If a timely litigation hold is not implemented when a company discovers the potential for litigation, then sanctions may be warranted. Severe sanctions for discovery violations, such as the elimination of a party's ability to use certain defenses, may be imposed for intentional conduct. Lesser sanctions, such as the payment of costs, may be imposed where a party has breached a discovery obligation through ordinary negligence. As the *Zubulake* court noted, "[o]nce 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." *Zubulake*, 229 F.R.D. at 431. At least one court has held that the sole act of failure to implement a timely litigation hold constituted ordinary negligence and thus warranted sanctions against the offending party. *Reino DE ESPANA v. American Bureau of Shipping, et al*., 2007 WL 1676327 (S.D.N.Y. June 6, 2007) (stating, "This court finds that Spain acted negligently by failing to implement a timely litigation hold.").

Given the *Reino* decision, Mrs. Simons in the above hypothetical may have placed ABC Company at risk for sanctions by not putting a halt to ABC Company's document retention policy when she became aware that the plaintiff was

contemplating suit (*e.g.*, at the EEOC Charge stage or perhaps when the plaintiff's complaints were brought to the attention of Human Resources).

A third way in which attorneys can fight off problems caused by electronic discovery is to help clients develop a plan for notifying the appropriate persons within the organization when their document retention policy must be put on hold because of litigation - *i.e.*, a litigation hold. The purpose of a litigation hold is to avoid the routine deletion of electronic information that may be discoverable and to preserve relevant data if a lawsuit were to arise.

Mrs. Simons in the above hypothetical should have implemented a litigation hold when she learned that there was a good chance a suit may be filed.

You can help avoid this scenario by maintaining constant communication with your clients and closely monitoring employee complaints. When a company "reasonably anticipates" that a suit may be filed, the organization should respond accordingly. A plan should be in place to deal with these situations before they occur, so that discovery sanctions can be avoided. Keep in mind that a litigation hold should last for an appropriate time period, perhaps even beyond the conclusion of the litigation itself.

The continued reliance on electronic data will only increase the importance of internal corporate policies which relate to the retention of such information. Attorneys and businesses alike should take the necessary steps to avoid being stuck in the same predicament as Mrs. Simons in the above-referenced hypothetical. Such steps include, but are not limited to, implementing effective document retention policies and maintaining open lines of communication to ensure that potentially relevant documents and data are preserved in the event that litigation arises.

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