Do Not Press Delete: A Primer on Document Preservation Obligations

BY GARY SHELDON, FRANK SHERER AND WENDY KENNEDY VENOIT

The explosion of e-discovery in litigation and arbitration unpleasantly introduced many companies to the concept of spoliation of evidence and the need to preserve documents once litigation is pending or even reasonably anticipated. At first, the "adverse inference instruction" penalty (i.e., a judge informs the jury that someone concealed evidence or information, or spoiled evidence so it could not be brought to court) did not seem too severe. The greater concern was for dismissal of claims or defenses, a sanction thought to be so severe that no judge would order it except in the most egregious of circumstances.

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Of course, everything changed with Judge Shira Scheindlin's series of decisions in *Zubulake v. UBS Warburg, LLC*, both in terms of the adverse inference instruction sanction and the monetary sanctions. Now, sanctions for spoliation are no longer viewed as just a slap on the wrist.

Document Retention Policies

Document retention policies ideally define the types of documents (including e-mails and other electronic information) to be preserved and the duration of such preservation. Most companies have document retention policies in place to ensure the timely destruction, rather than the preservation, of documents. Nonetheless, these policies serve a very useful purpose if facing a charge of spoliation of evidence.

Many companies take the extreme approach and automatically delete e-mails after 30 days. Employees usually find ways around automatic e-mail destruction policies, often saving e-mails into archives or to local media. Companies cannot destroy everything, as they typically cannot function without easy access to electronic information. A company must establish and implement a document retention policy that is practical and realistic, while at the same time take into account the adverse consequences of destruction of documents and electronic information potentially relevant to a future lawsuit or arbitration.

A company also must train employees regarding the retention policy and the importance of consistently applying it without regard for potential litigation. Indeed, once litigation is reasonably contemplated, document retention policies no longer apply. All potentially relevant documents (hard copies and electronic) must be preserved. However, a document retention policy offers safe harbor for anything that was destroyed prior to the point when litigation became reasonably contemplated, so long as a company can show that such documents were destroyed in accordance with an established document retention policy.

Legal Holds

Once litigation or arbitration is reasonably contemplated or has commenced, the duty to preserve is absolute. All document destruction protocols must cease immediately. The safe harbor previously referenced will not preclude sanctions if documents continue to be destroyed after litigation is reasonably contemplated or has commenced.

Too often, companies do not implement adequate legal holds. Sending a one-time letter or e-mail to employees does not represent an effective legal hold. A written procedure for implementing legal holds is essential. Information technology personnel need to be involved to prevent the automatic destruction of electronic documents potentially relevant to the dispute. (Once the litigation ends, remember to let IT staff know they can resume normal destruction procedures and processes.)

A legal hold letter must adequately identify the dispute and the documents that should be retained pending a resolution of that dispute. A leader within the organization (such as the general counsel, president or CEO) should send the legal hold letter so employees abide by it. All individuals who might reasonably possess documents

relating to the matter, not just managers and supervisors, must receive the letter.

Most importantly, a company must follow up to ensure that everyone has received, read and understood the letter. When litigation is only contemplated, it may not be necessary to start collecting relevant documents at the time the legal hold letter is sent. In that case, the letter simply functions as a way to preserve relevant material. If litigation is pending, the collection process may commence at the same time the legal hold letter is sent. In that case, following up with employees can include the identification of relevant documents, their location and the transmittal of the material counsel. A company should have a mechanism in place to track the employees receiving the letter, the date they acknowledged receipt, the documents identified by employees and their location, and the collection of those documents. Companies must regularly follow up with employees to ensure the legal hold is being followed.

Failure to Preserve Evidence

A company's failure to implement a litigation hold can result in severe penalties. Monetary sanctions are most common, but more extreme circumstances can lead to an adverse inference jury instruction regarding a critical fact or even a dismissal of claims or defenses. Monetary sanctions have been imposed on parties and their law firms, depending on when the failure occurred and who was deemed responsible.

As for an adverse inference instruction, some courts do not require direct evidence that the missing documents contained damaging evidence. Rather, a finder of fact can infer that the documents contained adverse evidence no matter what information the destroyed documents actually contained.

Although overly simplistic, an example might be that a project manager's missing e-mails are presumed to contain evidence that contradicts the contractor's claim for extra work. Therefore, the adverse inference instruction effectively results in dismissal of the contractor's claim for such extra work.

Gary F. Sheldon and Wendy Kennedy Venoit are partners with McElroy, Deutsch, Mulvaney & Carpenter LLP. Frank A. Sherer III is an associate with the firm. For more information, email gfsheldon@mdmc-law.com, wvenoit@mdmc-law.com *or* fsherer@mdmc-law.com.