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Avoiding Sanctions over Duty to Preserve Evidence

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In late 2009 a federal District Court sitting in Orlando, Fla., sent shockwaves through the in-house general counsel world. The case, *Swofford v. Eslinger*,[1] is the first reported case to sanction in-house counsel for spoliation of electronic evidence.

In *Swofford*, while in pursuit of two suspects, deputies from the Seminole County Sheriff's Office (SCSO), encountered an armed Robert Swofford on his property, and shot him. Mr. Swofford's attorney served the sheriff's office with a letter requesting that all evidence relating to the shooting be preserved in its original condition. Thereafter, Mr. Swofford's attorney sent a second letter to the office directing it to preserve all evidence of the shooting, including "firearms, clips, and ammunition, training records and electronic evidence."[2]

SCSO's general counsel admitted that the office received the two letters, but also admitted that he took no action with respect to the two letters, other than having a paralegal forward the letters to approximately six senior SCSO employees. Neither the sheriff's office nor its legal department took any further action to verify compliance with its preservation obligations.[3] The two deputies involved in the shooting never received a copy of the preservation letters.

Thus, despite the two preservation letters, SCSO took no actions to preserve evidence. The guns involved in the shooting were returned to the manufacturer for disassembly, one deputy's laptop was erased by SCSO more than a year after the preservation notices were received, deleting any information on it, including a specific, and relevant, instant message thread recovered from another deputy's computer. Further, SCSO took no steps to prevent the deputies from deleting e-mail messages on their computers and took no steps to preserve the messages for production.[4]

Given these facts, Judge Mary S. Scriven of the District Court had no problem finding bad faith conduct on behalf of SCSO, and handed down sanctions against all of the defendants (the two deputies and the sheriff) as well as SCSO's general counsel.

While sanctioning outside counsel for failure to preserve evidence is nothing new, this case is remarkable in that it makes clear that in-house counsel are not immune from their obligations during the discovery process either. While groundbreaking, the outcome in *Swofford* is not out of the realm of reasonability. As stated in the Sedona Principles, "[u]pon determining that litigation or an investigation is threatened or pending and has triggered a preservation obligation, the organization should take reasonable steps to communicate the need to preserve information to appropriate persons, except when particular circumstances make hold notices unnecessary or inadvisable."[5]

As explained by Judge Shira Scheindlin for the District Court of the Southern District of New York, "anyone who anticipates being a party or is a party to a lawsuit must not destroy unique, relevant evidence that might be useful to an adversary."[6] It is not a stretch to think that if the duty to preserve arises prior to outside counsel being retained, that duty falls squarely upon in-house counsel.

Legislation

Under New York law, "[a] party has a duty to preserve evidence when it has notice of pending litigation."[7] However, proposed legislation making its way through the New York State Legislature would impose the preservation duty earlier, and could likely pose a trap to the unwary general counsel.

Proposed legislation would add a new rule to the New York Civil Practice Laws and Rules. The new rule would state:

A party must preserve evidence for purposes of litigation upon becoming aware that such evidence is likely to be material and necessary to future litigation. A party becomes aware that evidence is likely to be material and necessary to future litigation upon the earlier of:

(i) becoming aware of circumstances which would lead a reasonable person in the party's position to believe that future litigation is likely;

(ii) becoming aware of the filing of a lawsuit in which such evidence is likely to be material and necessary; or

(iii) becoming aware of a discovery request seeking information relating to and/or the production of such evidence.

Note here that the key term used by the New York State Legislature as to when the duty to preserve kicks in is "likely to be material and necessary to future litigation." The question becomes, when is evidence "likely to be material and necessary to future litigation" thereby triggering the duty to preserve. Note also that this is a deviation from the federal standard that litigation be "reasonably anticipated" as set forth in *Zubulake IV*.[8]

In order to define when litigation is "likely" and thus triggering the duty to preserve, the New York City Bar has proposed that an Advisory Note be added to the proposed new rule. Under this Advisory Note, "[l]itigation is likely when an organization is on notice of a credible threat it will become involved in litigation."[9] The Advisory Note continues to state that the organization can determine the credibility of the threat based on the threat itself or its experience with similar past threats.[10]

The threat of litigation, of course, may arise long before litigation is actually commenced. For instance, a credible threat of litigation may arise in a breach of contract case, yet the plaintiff may wait until the end of the six-year statute of limitations to commence the litigation.

In sum, while the proposed amendment to the CPLR is an attempt to fix the time when the duty to preserve electronic documents is triggered, it still leaves an open-ended start date, which can pose a hazard to general counsel and their organizations. Despite the new rule, it appears that the best method to protect oneself remains a strong written document retention policy that is diligently followed and to err on the side of caution when deciding whether to preserve documents or not.

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Notes

1. 671 F.Supp.2d 1275, 2009 U.S. Dist. Lexis 111064 (M.D. Fla.).
2. Id. at 5.
3. Id. at 6.
4. Id. at 20-29.
5. "The Sedona Principles: Second Edition Best Practices Recommendations & Principles for Addressing Electronic Document Production," Principle 5.D, June 2007.
6. *Zubulake v. UBS Warburg LLC*, 220 FRD 212, 217 (SDNY 2003) ("*Zubulake IV*").
7. *Penofsky v. Alexander's Dept. Stores of Brooklyn Inc.*, 2006 NY Slip Op 50186U, 11 Misc. 3d 1052 (A); 814 N.Y.S.2d 891 (N.Y. Sup. Ct., Kings Co. 2006). See also *Conderman v. Rochester Gas & Elec. Corp.*, 262 A.D.2d 1068, 1070 (4th Dept. 1999) ("In the absence of pending litigation or notice of a specific claim, a defendant should not be sanctioned for discarding items in good faith and pursuant to its normal business practices.").
8. 220 FRD at 218.
9. "Explosion of Electronic Discovery in All Areas of Litigation Necessitates Changes in CPLR," Report of the Association of the Bar of the City of New York Joint Committee on Electronic Discovery, August 2009, available at http://www.nycbar.org/pdf/report/uploads/20071732-ExplosionofElectronicDiscovery.pdf.
10. Id.

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