News & Publications

From the Experts: No Party? No Cry

By Scott L. Vernick and Matthew S. Olesh

June 29, 2011

The CEO was livid, and justifiably so after being informed that his company's supplier intended to breach its supply agreement. It was evident that the path going forward would lead to litigation, and lawyers were summoned to begin immediate work on a complaint.

Recent case law has clarified a party's preservation obligations in this situation. As detailed in *The Pension Committee of the University of Montreal Pension Plan et al. v. Banc of America Securities, LLC* (2010), the duty to preserve attaches whenever a party reasonably anticipates litigation.

However, what about the following scenario: The CEO of Company X sits down for a morning cup of coffee, reads her online newspaper and finds that a former business partner is a party to a major lawsuit. Even worse, the subject matter of the lawsuit may well involve the former partner's relationship with Company X, raising a real possibility that its documents and electronic data may be of interest.

In such a situation, what, if any, is the obligation of Company X to preserve documents and electronic data? Must Company X undertake the potentially expensive and burdensome task of immediately suspending its normal document

retention policies, like parties to a lawsuit, thereby ensuring any and all potentially relevant evidence is preserved?

A review of relevant state and federal case law in Pennsylvania, New Jersey, New York, and California reveals that mere awareness of a court proceeding with respect to which a non-party may have relevant documents and electronic data is generally not sufficient to invoke a duty to preserve. The question of duty is critical because many courts rely on general negligence principles when examining a claim of spoliation against a non-party.

In the Pennsylvania state court case of *Elias v. Lancaster General Hospital* (1998), the court addressed what it classified as the "key question" of whether a party not involved in an underlying litigation owes a duty to preserve relevant evidence. Deciding this was an issue of general fairness, the court held that such a duty would not be imposed "absent the existence of some special relationship" that would warrant the imposition of general negligence principles. The court specifically cited statutory and contractual relationships as the types of special relationships that might give rise to such a duty, as well as other circumstances "where one voluntarily assumes a duty by affirmative conduct" or where a duty might otherwise arise by law.

New Jersey courts have also addressed when, if at all, a non-party has a duty to preserve evidence, and have found that mere awareness of litigation is not enough. In *Saksa-Mydlowski v. Ford Motor Company* (2006), the district court refused to permit a tort defendant to bring a claim for negligent destruction of evidence against a non-party. The district court cited the Superior Court of New Jersey Appellate Division's holding in *Gilleski v. Community Medical Center* (2001) and confirmed that the duty to preserve is "stringently limited" to four circumstances: (1) when a non-party has knowledge of a potential lawsuit and proceeds to accept responsibility for evidence that would be used in that lawsuit; (2) when a plaintiff relies on a non-party's voluntary undertaking to preserve

evidence; (3) when a party and non-party enter into an agreement to preserve; and (4) when a specific request is made to a non-party.

The courts in *Saksa-Mydlowski* and *Gilleski* held that constructive notice of a pending or potential action was insufficient to impose a duty to preserve on a non-party. The *Gilleski* court also emphasized the need to balance the competing interests between an injured plaintiff's right to pursue a lawsuit with adequate supporting evidence and a non-party's right to "dispose of its own property in a reasonable fashion."

In New York, the Court of Appeals agreed that awareness of litigation is not sufficient for the duty to preserve to attach. In *MetLife Auto & Home v. Joe Basil Chevrolet Inc.* (2004), the court held that a non-party's duty to preserve evidence did not attach even after an oral agreement with a party to preserve. There existed no relationship giving rise to such a duty, and no written agreement or court order directed preservation.

California courts, such as the Eastern District of California in the case of *Lewis v. J.C. Penney, Inc.* (1998) and the California Supreme Court in *Temple Community Hospital v. Superior Court* (1999), also find that, absent a special relationship (for example, a statutory or contractual one), there can be no violation of a non-party's duty to preserve evidence unless there is a specific request from a party litigant before the evidence's destruction.

If just being aware of a lawsuit is not enough, then when does a duty to preserve relevant documents and electronic data attach to non-parties? Being served with a subpoena provides the clearest example of when a duty does attach. The cases discussed here warrant the general conclusion that, absent a subpoena, receipt of a written request or directive to preserve data also triggers a duty to preserve. Such a written directive or request presumably puts a non-party on notice that (1) litigation has commenced or will commence; (2) a non-party may have relevant information; and (3) the party issuing the notice anticipates a reasonable likelihood of using that information.

At least one New Jersey court has agreed with this principle. In *Swick v. The New York Times Co.* (2003), the Superior Court of New Jersey Appellate Division affirmed a lower court ruling that receipt of a written notice created a non-party's duty to preserve the requested evidence (after neither party to the lawsuit challenged that the duty existed).

While this standard seems reasonable, abuse by overly ambitious counsel remains a concern. One can envision a scenario where a party's attorneys send out many preservation letters to any non-party that could conceivably be in possession of documents and electronic data that may be relevant. Under the umbrella of "zealous representation," counsel may think, "What's the harm? We can always go back and decide later it is unnecessary to secure documents and electronic data from certain non-parties."

The harm, of course, is that preserving documents can be (and oftentimes is) expensive and time-consuming, especially for large companies with complex data systems. Plus, unlike a subpoena, which will typically provide a party with an opportunity to modify or quash, there are no formal procedural safeguards in place to respond to a written directive to preserve data. Short of independently seeking court intervention, a non-party is seemingly left with two options: (1) comply with the directive (and assume the expense and distraction); or (2) ignore the directive (and risk liability down the road).

There is, however, a third option: negotiation. A non-party can (and should) attempt to negotiate what documents and electronic data it will, and will not, preserve, clearly stating its position in writing in the process. If negotiation is not successful, a non-party should strongly consider being proactive and seek protection from a court. For example, Federal Rule of Civil Procedure 45 and its state analogues protect non-parties from burdensome and expensive discovery.

In the absence of further guidance from the courts, non-parties are well advised to proceed in a reasonable, yet cautious, fashion. Constructive notice of a lawsuit with respect to which a non-party may have relevant evidence should not trigger

a "fire drill" to preserve documents and electronic data. A written directive from a party to preserve documents and electronic data should be viewed with equal amounts of prudence and skepticism. Such directives should not be ignored; rather, they should be met with a response aimed at negotiating a resolution that minimizes both the resources and costs associated with preserving documents and electronic data.

Scott L. Vernick *is a partner in the Litigation Department of Fox Rothschild. He has a diverse national practice focused on commercial, technology, and intellectual property litigation for Fortune 1000. Scott has increasingly focused on litigation arising from data security issues. He is the immediate past managing partner of the firm's Philadelphia office.*

Matthew S. Olesh *is an attorney in the firm's Litigation Department and represents clients in federal and state court, focusing on business and commercial litigation matters. Matthew has experience with cases involving antitrust, bankruptcy, corporate, employment, product liability, and real estate issues, as well as government investigations.*