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IN-HOUSE COUNSEL

An Update on Preservation of Electronically Stored Information

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Special to the Legal

As e-discovery matures, it is typically no longer a surprise when outside counsel raises the issue of spoliation and the need to draft and issue a legal hold when a company gets sued. But what counsel may not always appreciate is that it is not just the filing of a complaint that can trigger the need to issue a legal hold—instead, it is whenever litigation is reasonably anticipated. So what does this mean in practice? And are there best practices in-house counsel can implement to ensure that potentially relevant evidence is preserved and to avoid the risk of spoliation claims down the road? This article aims to answer these questions.

WHEN DOES THE DUTY TO PRESERVE ARISE?

Many practitioners use the term "litigation hold," but the term "legal hold" may be a better choice because it helps drive home the point that the duty to preserve potentially relevant evidence sometimes arises much earlier than the date that a complaint and summons are served.

If you read enough e-discovery opinions, you will see that courts articulate the trigger for preservation in a number of different ways, but the standard almost always comes down to when litigation is "reasonably anticipated," rather than merely possible, as in *Zubulake v. UBS Warburg*, 229 F.R.D. 422, 431 (S.D.N.Y. 2004). But, of course, the devil is in the details, and determining exactly when a party should reasonably anticipate litigation is often highly fact-intensive.

With that said, there are several situations when the duty to preserve is almost certainly triggered, such as:

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- Service of a judicial complaint (filed or not).
- Initiation of an agency enforcement action (even if quasi-judicial).
- A complaint filed with a regulatory body.

And there are other, grayer situations that could, depending on the facts, trigger the need for a legal hold, such as:

- An agency request for information.
- A demand letter or other evidence of an intent to commence litigation.
- An event that often triggers litigation (for example, a major incident at a facility that causes personal injury or property damage).
- A third-party subpoena.

In each of these situations, it would be prudent to carefully evaluate whether there is a reasonable probability of future litigation. For example, in the context of a demand letter, questions you may want to consider include who authored the letter, whether there is an express threat to initiate litigation, and whether or not the threat (explicit or implicit) is credible. Likewise, in the context of a subpoena, consider whether the company is truly just a third-party witness or source of information, or whether there is a reasonable prospect that the company itself may have exposure in the case.

Two other points are worth noting here. First, keep in mind that it is not just a defendant or would-be defendant that needs to think about legal holds; if your company is considering initiating litigation against others, it is critical to take the time to think about when a hold should be implemented. Depending on the circumstances, this could be as early as when legal counsel is consulted about bringing a claim, and in any event no later than when the company has taken concrete steps toward filing suit.

Second, be thoughtful about labeling documents as work product, and instruct your employees, consultants and outside counsel to do the same. In federal court, the work-product doctrine protects "documents and tangible things that are prepared in anticipation of litigation," per Federal Rule of Civil Procedure 26(b)(3)(A). Because this standard is very similar to the standard for when the duty to preserve arises, at least a few courts have concluded that the preservation obligation is triggered as of the date of any documents for which the party claims work-product protection in the litigation. For example, in *Siani v. State University of New York*, 2010 U.S. Dist. LEXIS 82562 (E.D.N.Y. Aug. 10, 2010), the court arrived at the "common-sense conclusion" that if litigation was reasonably foreseeable for purposes of asserting attorney work-product protection, "it was reasonably foreseeable for all purposes." These cases are a good reminder not to mechanically label every document as "attorney work product," and to save this designation for when litigation is actually anticipated or has already commenced.

WHAT SHOULD I DO TO SATISFY THE DUTY?

Let's assume that you have concluded that the duty to preserve has been triggered in a particular matter. The next step is to develop and implement a defensible legal hold process,

which will put your company in the best position to defend against any potential spoliation claims that could arise down the road.

The term "process" is an important one here, because a simple email instructing employees to preserve potentially relevant information may not be enough in every case. But determining what exactly this process needs to entail has historically been just as elusive, if not more so, than some of the triggers for the duty to preserve, with different courts adopting significantly different standards for imposing sanctions for spoliation, especially when dealing with electronically stored information.

Enter the Federal Civil Rules Advisory Committee. On April 29, the U.S. Supreme Court adopted a package of amendments to the Federal Rules of Civil Procedure developed by the rules committee. These amendments are set to take effect Dec. 1, and include several important amendments to the discovery rules, including a revised version of Rule 37(e), which governs sanctions for failure to preserve electronically stored information.

The amended Rule 37(e) is notable in that it is intended to provide for the first time a genuine "safe harbor" from the most severe spoliation sanctions for parties that take timely, reasonable steps to preserve electronically stored information. The amendment says that "if electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court: (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may: (a) presume that the lost information was unfavorable to the party; (b) instruct the jury that it may or must presume the information was unfavorable to the party; or (c) dismiss the action or enter a default judgment."

The advisory committee notes to the amendment are somewhat long, but a worthwhile read. With regard to the need for the amendment, the committee explains that the existing Rule 37(e), which was adopted almost 10 years ago now, "has not adequately addressed the serious problems resulting from the continued exponential growth in the volume of [electronically stored] information," and has caused litigants to expend "excessive effort and money on preservation in order to avoid the risk of severe sanctions if a court finds they did not do enough." In light of this history, the notes specifically provide that the amended Rule 37(e) "does not call for perfection," and "recognizes that 'reasonable steps' to preserve suffice."

The committee notes also provide litigants and their counsel with some insight on factors to consider in evaluating a party's preservation efforts, including the party's sophistication with regard to litigation, as well as the concept of proportionality—that is, whether the steps that the party took to preserve potentially relevant information are proportional to the potential value and uniqueness of the information. On this latter point, the committee explains by way of example that "a party may act reasonably by choosing a less costly form of information preservation, if it is substantially as effective as more costly forms." Likewise, "substantial measures should not be employed to restore or replace" information that is lost if such information is only "marginally relevant or duplicative."

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Once adopted, the new Rule 37(e) should give litigants and their counsel added incentive to develop and execute a strong legal hold process, which they can then use to demonstrate both that reasonable steps were taken to preserve potentially relevant information and that, even if information was lost, there was no "intent to deprive," and thus no basis to impose the most serious sanctions.

General suggestions to consider when developing this process are as follows:

• Draft a written legal hold that clearly and concisely: (1) summarizes the nature of the claims and defenses in the case; (2) describes categories and types of potentially relevant information; (3) provides clear instructions on what recipients must do to ensure that such information is preserved; (4) outlines the ramifications of failure to preserve; and (5) provides a point of contact, preferably within the law department, for any questions concerning the hold.

• Issue the hold to employees who may have potentially relevant information, and copy information technology if appropriate. Consider whether the notice should also be sent to any outside consultants, contractors or other third parties.

• Re-evaluate the hold as discovery proceeds and new facts develop, and update it as necessary. Also consider issuing periodic reminders of the ongoing need to preserve.

• Release the hold when the litigation ends, or when threatened litigation is no longer reasonably anticipated. Doing so will allow custodians to resume compliance with standard document retention and destruction policies, and ensure that your company is not keeping documents any longer than it needs to.

Of course, this process takes time and effort, and may not be necessary in every single case. But when a hold is implemented along these lines and carefully documented, it increases the defensibility of the process, and provides a good record to advocate, if challenged, that reasonable steps to preserve potentially relevant information were in fact taken in a particular case, as amended Rule 37(e) contemplates. •