Electronic Data Preservation, Litigation Hold Letters and Sharks

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In the 1975 thriller "Jaws", Matt Hooper criticized Mayor Vaughn's denial that Amity had a shark problem: ***"I think that I am familiar with the fact that you are going to ignore this particular problem until it swims up and bites you on the [behind.]"*** Given the finding of at least one judge that the unintentional destruction of certain emails constituted, at a minimum, "gross negligence" that warranted spoliation sanctions, the concept that "ignorance is bliss" has no place when electronic evidence preservation is involved.

Prevalence Of Electronic Data

There is no question that there has been a proliferation in the use of electronic communication over the past fifteen years. Electronic mail is ubiquitous. Computer spreadsheets are used across the globe with the same universality as pen and paper. Cellular telephones and "smartphones" permit communication via text messages at any time to anyplace in the world.

Electronic communication is convenient and instantaneous. It is a common feature of intra-corporate communication and typically is used by persons ranging from the highest level executive to the rank and file employees. Any user of such technology may, from his or her desktop or telephone, send or receive electronic messages, forward messages to persons inside or outside the company, and take it upon him or herself to delete messages at will.

The fact is, however, that the same easily-manipulated, seemingly-benign communications at executives' and employees' fingertips may, at some unforeseen time in the future, constitute potential evidence and be subject to discovery in a civil litigation involving the company. Yet, employees may have deleted or destroyed emails in the ordinary course of business, without preserving those communications. Given this easy-to-imagine scenario, it is absolutely essential for corporate counsel to develop sensitivities for when it is necessary to preserve electronic communications, what must be preserved, and who must engage in such preservation.

What May Trigger A Litigation Hold Requirement

In this emerging area of the law, one of the leading cases is from the U.S. District Court for the Southern District of New York, *Zubalake v. UBS Warburg, LLC,* 220 FRD 212, 216-17 (SDNY 2003) ("*Zubulake IV*"). In *Zubalake IV*, the court succinctly described the triggering event for preservation of electronic potential discovery as follows:

> The obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation . . . .'While a litigant is under no duty to keep or retain every document in its possession. . . . it is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request.' (citation omitted).

The analysis will always be made on a case-by-case basis. While the court observed that "[m]erely because one or two employees contemplate the possibility that a fellow employee might sue does not generally impose a firm-wide duty to preserve", *id.* at 217, depending on the "relevance" of the one or two employees, a duty might attach. For example, if the one or two employees that suspect a former employee might sue are the president and/or human resources director, the probability is much higher that a court will find that the duty to preserve potential evidence has arisen.

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A Litigation Hold Memorandum Can Be A Useful Tool

In-house counsel may find it beneficial to develop a policy for the handling of potential electronic discovery that is implemented in the event of potential litigation (either by the company or against the company, given that discovery obligations attach in either role).

One way in which to disseminate to company employees the necessity of preserving electronic data would be to create a "litigation hold memorandum" from the President, CEO, or other high-ranking member of the company that is sent to likely "custodians" of possibly discoverable information. These custodians would be those employees or executives who had direct communications concerning the matters in issue, or who are most likely to have been recipients of such communications. The memo should be in easy-to-understand language, define what data must be preserved, and give direction on how the data should be preserved. The memorandum would also explain why it is important to preserve such data and identify the risks to the company (and, for that matter, the employee) of non-compliance. There should also be a follow up memorandum to remind employees of the duty to preserve and express availability to handle any questions.

What Can Happen If Data Is Not Preserved

As Amity Mayor Vaughn discovered in "Jaws," refusing to recognize a readily-evident hazard can be disastrous. The same may be said of refusing to recognize the need for a litigation hold memorandum to deal with potential electronic discovery. Where electronic evidence has not been preserved because counsel was not diligent in sending and following up on a litigation hold letter, the Court may impose monetary sanctions on the delinquent party, shift discovery and/or expert costs, strike claims or defenses, or permit adverse inferences against the wrongdoer. Counsel is well advised to get out ahead of this issue and develop appropriate policies concerning the preservation of electronic discovery before this develops into a potentially unpleasant situation.

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