E-Discovery Issues in Litigation

by George Bellas

As all of us are aware, the use of electronically stored information ("ESI") has increasingly garnered the attention of practitioners and judges. The simple fact is that practically all information is now generated electronically and has dramatically changed thenature of litigants' discovery obligations. It is increasingly important that practitioners be aware of potential problems that exist in dealing with ESI and attempt to address discovery issues before they arise and reduce the costs of electronic discovery.

A recent case has drawn particular attention to the problems facing practitioners. In the case of *Pension Committee of the University of Montreal Pension Plan v. Bank of America Securities, LLC*, 685 F. Supp.2d 456 (S.D.N.Y. 2010), a judge who has taken the forefront in ESI issues issued an opinion which highlights the problems. In that case the defendants filed motions seeking sanctions, including dismissal of the complaint, based on the plaintiff's failure to provide specific evidence which should have been produced. The essence of the motion was that the plaintiffs had failed to preserve and produce documents, particularly ESI, and submitted false declarations regarding the preservation efforts of the plaintiffs.

The Court went onto sanction the plaintiffs and indicated there were two examples of discovery misconduct. First, the intentional destruction of relevant records, whether in paper or electronic form, can be considered willful if it occurs after the duty to preserve evidence arises for a litigant.

Secondly, the plaintiffs failure to issue a written litigation hold constituted gross negligence because that failure is likely to result in destruction of relevant information.

The court concluded that it is gross negligence for a party that is on notice of a potential claim to: (1) issue a written litigation hold; (2) identify all key players and ensure preservation of electronic and paper records; (3) preserve and discontinue the deletion of records of former employees that are in a party's possession, custody, or control; or (4) preserve back-up tapes that are the sole source of relevant information or relate to key players, if not otherwise obtainable from readily accessible sources. Using this standard, the court in the *Pension Committee* case did not meet the standard necessary to satisfy the litigation hold. Although plaintiff's counsel asked the client to begin collecting documents as part of the complaint drafting process, plaintiff's counsel did not explicitly direct the plaintiffs to preserve all relevant documents or create a mechanism for collecting the documents. The court stated that the plaintiffs were obligated to issue a written litigation hold. The judge did not dismiss the complaint, but did impose an adverse inference instruction and awarded fees and costs for the motion.

This case should serve as a lesson for all practitioners. When you are aware that your client will be involved in litigation, it is imperative that a preservation letter be issued directing the client to take all necessary steps to preserve all relevant evidence that is associated with the litigation. Failure to take this step could result in sanctions and a malpractice claim against
you.

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