Ethical Responsibility and Legal Liability of Lawyers for Failure to Institute or Monitor Litigation Holds

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Two Ways to Win in Court

The traditional way

- Gather facts through investigation and discovery
- Persuade the judge and trier of fact of the merits of your case

The modern way

- By discovery abuse

Winning by Discovery Abuse

I don’t mean winning by illegally or improperly preventing the other side from obtaining information it is entitled to receive.

Winning by Discovery Abuse

I mean winning by obtaining sanctions against the other side for its discovery abuse.

Winning by Discovery Abuse

The range of sanctions for discovery abuse is broad and potentially devastating:

- Entry of default judgment
- Adverse inference instruction to jury
- Preclusion of witnesses from testifying
- Monetary award

In re Kmart Corp., 371 B.R. 823 (N.D. Ill. 2007) (discussing various types of sanctions).

Significance of Electronic Discovery

Availability of discovery of electronically stored information (ESI) increases the possibility that a party will be guilty of discovery abuse, leading to claims for sanctions.

Significance of Electronic Discovery

The quantities of information subject to electronic discovery are vast and are held throughout the organization, multiplying the possibilities of errors in preserving and producing such information.

Significance of Electronic Discovery

An article in the December 17, 2008, issue of the National Law Journal reports that in the first ten months of 2008 there were 138 reported opinions dealing with electronic discovery, 25% of which involved sanctions issues.

Lawyer Involvement

Both inside and outside counsel are directly involved in dealing with discovery of ESI.

Increased client exposure for litigation sanctions also increases the exposure of lawyers for improper handling of ESI.

What is a "Litigation Hold"?

A litigation hold is a suspension of a party's normal document retention/destruction procedures in order to preserve evidence for litigation. *Zubulake v. UBS Warburg LLC,* 220 F.R.D. 212, 218 (S.D.N.Y.2003) (*"Zubulake IV")*

When Does a Duty to Institute a Litigation Hold Attach?

"[O]nce a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a litigation hold to ensure the preservation of relevant documents." (emphasis added). Id. at 217.

When Does a Duty to Institute a Litigation Hold Attach?

The duty is "limited to what [a party] 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.“ Id. at 217.

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Duty does not apply to data the access to which would be an undue burden, such as inaccessible backup tapes. Id. at 218.

When Does a Duty to Institute a Litigation Hold Attach?

In 2007 the Sedona Conference, a nonprofit organization devoted to study of law and policy in antitrust, intellectual property, and complex litigation, issued a *Commentary on Legal Holds: The Trigger and the Process.*

When Does a Duty to Institute a Litigation Hold Attach?

Guideline 1 states: “Reasonable anticipation of litigation arises when an organization is on notice of a credible threat that it will become involved in litigation or anticipates taking action to initiate litigation.” (emphasis added).

When Does a Duty to Institute a Litigation Hold Attach?

Guideline 4 indicates that the determination is based on all the facts and circumstances and specifies factors to be considered. Because the moment that a preservation obligation attaches may be unclear, the Guidelines provide that process is important in determining whether an organization has acted reasonably and in good faith.

When Does a Duty to Institute a Litigation Hold Attach?

Process involves identification of a responsible person to determine if a litigation hold should be issued (Guideline 3) and adoption of a policy to guide the decision maker (Guideline 2).

When Does a Duty to Institute a Litigation Hold Attach?

The ABA Section of Litigation Civil Discovery Standard 10 provides as follows: "When a lawyer who has been retained to handle a matter learns that litigation is probable or has been commenced, the lawyer should inform the client of its duty to preserve potentially relevant documents in the client's custody or control and of the possible consequences of failing to do so." (emphasis added).

What are counsel's obligations with regard to litigation holds?

In *Zubulake* Judge Scheindlin held that obligations regarding litigation holds apply to counsel as well as to parties:

> "Counsel must oversee compliance with the litigation hold, monitoring the party's efforts to retain and produce the relevant documents." *Zubulake v. UBS Warburg, LLC*, 229 F.R.D. 422, 432 (S.D.N.Y. 2004) *("Zubulake V").*

Judge Scheindlin identified three obligations of counsel:

What are counsel's obligations with regard to litigation holds?

"First, counsel must issue a ''litigation hold'' at the outset of litigation or whenever litigation is reasonably anticipated. The litigation hold should be periodically re-issued so that new employees are aware of it, and so that it is fresh in the minds of all employees."

What are counsel's obligations with regard to litigation holds?

"*Second,* counsel should communicate directly with the ''key players'' in the litigation, *i.e.,* the people identified in a party's initial disclosure and any subsequent supplementation thereto. . . As with the litigation hold, the key players should be periodically reminded that the preservation duty is still in place."

What are counsel's obligations with regard to litigation holds?

"Finally, counsel should instruct all employees to produce electronic copies of their relevant active files. Counsel must also make sure that all backup media which the party is required to retain is identified and stored in a safe place." In some cases counsel may have an obligation to take possession of backup tapes.

What Ethical and Legal Risks do Counsel Face it Dealing with ESI?

1. Ethical Violation for Counsel's Failure to Institute a Litigation Hold

ABA Model Rule 3.4(a)

A lawyer shall not:

(a) unlawfully obstruct another party' s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

1. Ethical Violation

Comment 2 to Rule 3.4:

Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right.
>>>

1. Ethical Violation

Comment 2 to Rule 3.4:

> The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen.

1. Ethical Violation

"In order to comply with Rule 3.4, lawyers will not only need extensive knowledge of their clients' electronic records, but will also have to be actively involved in the maintenance of records and the preservation of evidence that could be discoverable at litigation." Zachary Wang, *Ethics and Electronic Discovery: New Medium, Same Problems*, 75 Def. Counsel J. 328, 330 (2008).

1. Ethical Violation

Model Rule 8.4 provides for various grounds of misconduct, including conduct that is "prejudicial to the administration of justice."

1. Ethical Violation

See *Downen v. Redd*, 242 S.W.3d 273 (Ark. 2006) (refusing to recognize cause of action for third party spoliation, but noting that attorneys who engage in spoliation may be subject to disciplinary action under Rule 8.4);

Roach v. Lee, 369 F. Supp.2d 1194 (C.D. Cal. 2005) (while California does not recognize the tort of spoliation, attorneys are subject to professional discipline for such conduct).

2. Liability to Client for Malpractice

Lawyers have a duty to counsel clients about the need for instituting a litigation hold.

2. Liability to Client for Malpractice

ABA Civil Discovery Standard 10, Preservation of Documents, provides:

When a lawyer who has been retained to handle a matter learns that litigation is probable or has been commenced, the lawyer should inform the client of its duty to preserve potentially relevant documents in the client's custody or control and of the possible consequences of failing to do so. . . . This Standard is . . . an admonition to counsel that it is counsel's responsibility to advise the client as to whatever duty exists, to avoid spoliation issues.

2. Liability to Client for Malpractice

Federal Rule of Civil Procedure 37(e) protects a party against sanctions for failing to provide ESI in some circumstances, but the rule requires the party to act in good faith.

2. Liability to Client for Malpractice

The comments to the rule indicate that an element of good faith is whether the party complied with a preservation obligation.

Thus, a lawyer's failure to advise a client about a preservation obligation or the lawyer's failure to act competently to implement a preservation obligations, could subject the client to sanctions, for which the client could in turn seek to recover from counsel.

3. Liability to Third Party for Spoliation

Spoliation occurs when evidence is altered, destroyed, or by a person who has a duty to preserve the evidence. Courts are divided on whether to recognize a tort of spoliation.

3. Liability to Third Party for Spoliation

Compare *Downen v. Redd*, 242 S.W.3d 273 (Ark. 2006) (refusing to recognize either first party or third party spoliation claims because of availability of other remedies) and Ortega v. City of New York, 876 N.E.2d 1189 (N.Y. 2007) (rejecting cause of action for third party spoliation).

With *Hannah v. Heeter*, 584 S.E.2d 560 (W. Va. 2003) (recognizing tort of negligent spoliation by third party and intention spoliation by first party).

4. Aiding and Abetting Spoliation

Counsel who knowingly fails to advise or fails to implement a litigation hold could be responsible for aiding and abetting spoliation of evidence.

4. Aiding and Abetting Spoliation

Restatement (Third) of Torts §876(b) providing that a person is responsible for harm caused to a third party by another's conduct if the person "(b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself,"

5. Sanctions

As discussed above, counsel have the obligation to institute litigation holds and to monitor compliance with those holds. See *Green v. McClendon*, 2009 WL 2496275 at *5 (S.D.N.Y. 2009).

5. Sanctions

"There is no question that Mrs. McClendon's counsel failed to meet these discovery obligations. Unless Mrs. McClendon brazenly ignored her attorney's instructions, counsel apparently neglected to explain to her what types of information would be relevant and failed to institute a litigation hold to protect relevant information from destruction. >>>

5. Sanctions

"Moreover, despite numerous representations to the contrary, it is highly unlikely that counsel actually conducted a thorough search for relevant documents in Mrs. McClendon's possession in connection with their initial disclosure duties or in response to the plaintiff's first document request. If that had been done, counsel certainly would have found the spreadsheet from Mrs. McClendon's personal computer files." Id. (emphasis added)

5. Sanctions

Courts have power to award sanctions for discovery abuse under Rule 37 of the Federal Rules or pursuant to their inherent power to manage their own affairs. Sanctions can be awarded against both parties and their counsel. See, e.g. *Phoenix Four, Inc. v. Strategic Resources, Corp.,* 2006 WL 1409413 at *3 (S.D.N.Y. 2006) (imposing monetary sanction equally on party and its counsel).

Conclusion

The ethical and legal basis for subjecting counsel to discipline or liability for failing to initiate or implement litigation holds in connection with ESI exists.

While counsel have been subject to sanctions for discovery abuse with regard to ESI, I am unaware of any cases in which lawyers have been subject to discipline or liability either to clients or third party.

But such cases cannot be far away as the new approach to winning litigation through discovery abuse develops.