White Paper

Understanding The Duty to Preserve Electronically Stored Information

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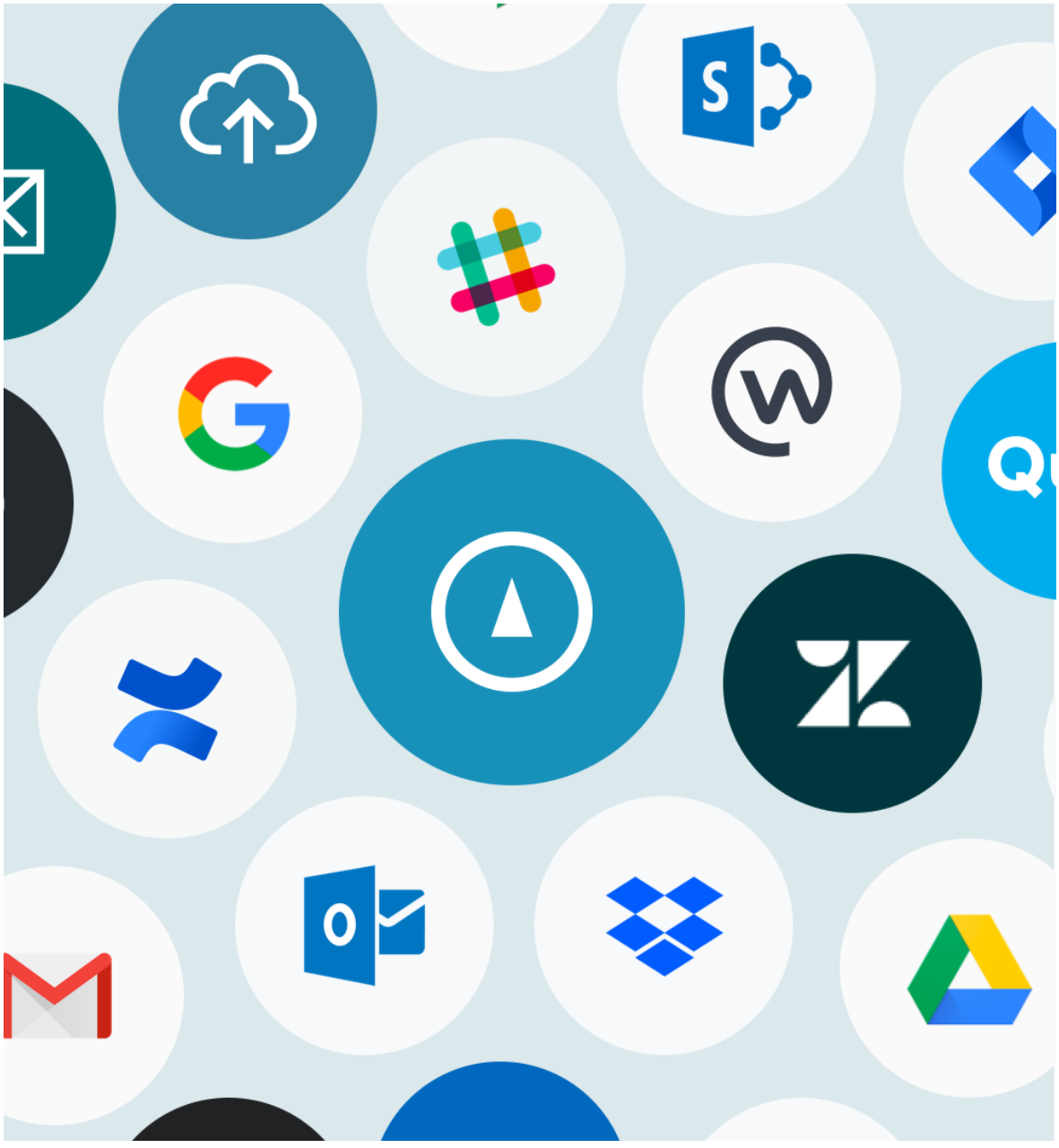

Understanding The Duty to Preserve Electronically Stored Information

The duty to preserve electronically stored information has been one of the central issues in pre-trial litigation for over 15 years. This has provided a robust body of case law with detailed factual analysis of triggering events, how to issue litigation holds, determining the scope of preservation, and sanctions for lost ESI. From the days of moving parties racing to the courthouse demanding terminating sanctions for the failure to issue a litigation hold, we now live in an era of reasonableness thanks to the 2015 Amendments to Federal Rule of Civil Procedure Rule 37(e).

This white paper will review the duty to preserve, summarize the responsibilities in issuing a litigation hold, best practices for preservation, and how 37(e) has provided consistency for courts in the event ESI has been lost.

The Duty to Preserve

The common-law duty to preserve continues to apply under Federal Rule of Civil Procedure Rule 37(e).[1] Parties have a duty to preserve when they know or show know that evidence is relevant to pending or future litigation.[2] This included the time before a lawsuit when a party either knew or should have known that litigation was imminent.[3] As such, courts apply objective fact specific analysis into whether litigation was reasonably foreseeable to determine if there has been a triggering event for the duty to preserve.[4]

Attorneys have an ethical duty to advise clients on the type of information that is potentially relevant to a lawsuit and the necessity of preventing the destruction of relevant information.[5] This means that attorneys have a duty to oversee litigation hold compliance by taking reasonable steps to ensure the preservation of relevant information.[6] The failure to issue and monitor a litigation hold has been found to fall "below the ordinary and reasonable skill" of attorney competency.[7]

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[1] *See* Rule 37(e) Committee Note.
[2] *Dotson v. Edmonson*, 2018 U.S. Dist. LEXIS 9924, at *3-4 (E.D. La. Jan. 22, 2018).
[3] *Id.*
[4] *Spencer v. Lunada Bay Boys*, 2017 U.S. Dist. LEXIS 217424, at *16-17 (C.D. Cal. Dec. 13, 2017).
[5] *Heng Chan v. Triple 8 Palace*, 2005 U.S. Dist. LEXIS 16520, at *16-17 (S.D.N.Y. Aug. 11, 2005).
[6] *Indus. Quick Search, Inc. v. Miller, Rosado & Algois, LLP*, 2018 U.S. Dist. LEXIS 391, at *29-31 (S.D.N.Y. Jan. 2, 2018), citations omitted.
[7] *Id.*

Spoliation of Evidence

> *The doctrine of spoliation is one of the most enduring principles of the common law. In essence, it provides that when a litigant, has destroyed, fabricated, or suppressed evidence, the trier of fact may (but need not) draw an inference that the spoliator believes its case is weak or unfounded. The inference can be either permissive or obligatory, and it is often for the jury (although not always) to determine whether the inference will be applied in the particular case before it.*
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> United States Magistrate Judge Jeffrey Cole,
> *Bankdirect Capital Fin., LLC v. Capital Premium Fin., Inc.*, 2018 U.S. Dist. LEXIS 57254, at *2-3
> (N.D. Ill. Apr. 4, 2018)

The loss of evidence is one of the most tried and proven methods to upset a judge. Spoliation happens when evidence is destroyed, significantly altered, or not preserved properly when litigation is pending or reasonably foreseeable.[8]

The advent of the new Rule 37(e) changed the legal analysis for determining when a party can be sanctioned for lost ESI. Any party seeking sanctions for spoliation must address the factors stated in Rule 37(e) for relief, opposed to a court's inherent authority or state law.[9] The Rule specifically states[10]:

> *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:*
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> *(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.*

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[8] *Watkins v. N.Y.C. Transit Auth.*, 2018 U.S. Dist. LEXIS 23519, at *26 (S.D.N.Y. Feb. 13, 2018), citing *In re Terrorist Bombings of U.S. Embassies in E. Africa*, 552 F.3d 93, 148 (2d Cir. 2008).
[9] *Tipp v. Adeptus Health Inc.*, No. CV-16-02317-PHX-DGC, 2018 U.S. Dist. LEXIS 7419, at *7 (D. Ariz. Jan. 17, 2018) and Rule 37(e) Committee Notes.
[10] USCS Fed Rules Civ Proc R 37(e).

Rule 37(e) provides a checklist for analysis on whether sanctions can be awarded. The first step is determining whether any ESI was lost. The second issue is whether the lost ESI was subject to the duty to preserve. The next question is whether the lost ESI was lost because of a failure to take reasonable steps to preserve it. The Court must then answer whether the ESI can be replaced or not.

Once those preliminary questions are answered, the Court can apply remedies under subsections (e)(1) or (e)(2). If the moving party can show they have been prejudiced by the lost ESI, then the Court can order a remedy no greater than necessary to cure that prejudice under subsection (e)(1). The harsh sanctions under subsection (e)(2) require proving a party lost ESI with an "intent to deprive" others the use of that data.

Numerous parties have proved the "intent to deprive" in seeking sanctions. There are many cases where there is arguably negligent conduct in the preservation of ESI; however, there was no intent to deprive. For example, in a trade-dress infringement, unfair competition, and false advertising case involving the silicone-beaded bracelets, the defendants were sued over a product that was similar in design and message. The saga from the triggering event to the loss of email can be described as multiple errors in judgment.[11]

The defendants had a duty to preserve beginning when they received a cease and desist letter. They did not seek representation until after they were sued several months later. The defendants' email usage included monthly deletion of messages by the users to free mailbox space. In a protracted factual discussion, the defendants did not increase the size of their email mailbox quotas, and then relied on their service provider for archiving, eight months after the duty to preserve was triggered.[12] There was no supervision by counsel in executing a litigation hold or outside expert collecting the relevant email.

The Court did not find the defendants had acted with the intent to deprive, thus terminating sanctions or adverse inference instructions were not available to the plaintiffs. However, sanctions were available pursuant to Rule 37(e)(1), as the plaintiffs were able to demonstrate they had been prejudiced by the lost email.

The defendants were ordered to pay the plaintiffs' attorneys' fees and costs covering the dispute over the lost ESI as a deterrent to future spoliation.[13] The defendants were also precluded from offering trial testimony on the content of any lost email messages. Finally, if the plaintiffs could show any records gaps in the profits of the defendants' sales because of the lost email, then the plaintiffs could request a jury instruction that

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[11] *Lokai Holdings LLC v. Twin Tiger USA LLC*, 2018 U.S. Dist. LEXIS 46578 (S.D.N.Y. Mar. 12, 2018).
[12] *Lokai,* at *37.
[13] *Lokai,* at *57-58.

the jurors could make reasonable extrapolations or interpolations from the available sales data.[14]

Judges will craft the proportional remedy for the discovery wrong. The goal is to cure the prejudice from lost ESI, not terminate lawsuits in discovery motions.

Proving the Intent to Deprive

Courts want to see affirmative actions to deprive a party of ESI in order to prove the intent to deprive. In a case involving the plaintiff's mental health against his health care provider, the plaintiff deleted his Facebook account after retaining counsel. The plaintiff claimed the account was deleted because it caused him mental distress over the suicide of his mental health therapist. The Court did not find the reason credible, because of the fact the plaintiff had a physical relationship with his mental health therapist would be relevant to the lawsuit against his health care provider. As such the Court found the Facebook account was deleted with the intent to deprive the defendant of the account.[15]

Courts have found that a jury should decide the issue of whether a party intended to deprive another of electronically stored information. The Advisory Committee Notes to Rule 37(e) states that the jury instructions should make clear[16]:

> *[T]hat the jury may infer from the loss of the information that it was unfavorable to the party that lost it* ***only if the jury first finds that the party acted with the intent to deprive another party of the information's use in the litigation.*** *If the jury does not make this finding, it may not infer from the loss that the information was unfavorable to the party that lost it.*

Proving intent gives spoliation analysis a *scienter* requirement. Moving parties have successfully proved intent to deprive in pretrial motions or deferred as a question of fact for the jury. The central issue is whether there is evidence the offending party did an affirmative act to cause the loss of electronically stored information.

Strategies for Executing Litigation Holds

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[14] *Lokai,* at *59.
[15] *Schnider v. Providence Health & Servs.*, 2018 U.S. Dist. LEXIS 57864, at *5-7 (D. Alaska Mar. 9, 2018).
[16] *Bankdirect Capital Fin., LLC v. Capital Premium Fin., Inc.,* 2018 U.S. Dist. LEXIS 57254, at *31-32 (N.D. Ill. Apr. 4, 2018), citing the Advisory Committee Notes on Subdivision (e)(2) (emphasis supplied).

The first step for executing a litigation hold is determining when the duty to preserve was triggered. The latest it can be is when a party is served with a lawsuit. However, when litigation was reasonably foreseeable requires factual analysis. The next step is determining the scope of the duty, which can include the key individuals, time frame, any terms of art to identify relevant information. This analysis should include identify data sources, which should include webmail, social media, cloud storage, and other relevant accounts.

The rise of productivity and messaging tools, such as Slack, has made it increasingly complex to execute legal holds. Users can often chat, share and save files, and integrate with other applications, such as Dropbox and Google Drive, making it a great tool for communication, but posing considerable risks when it comes to responding to discovery requests and executing legal holds.

Onna is a data integration platform that connects to new media applications, such as Slack, JIRA, and Confluence, to help in-house legal departments with discovery, legal holds, and risk management. It can be used to execute a legal hold across disparate sources of ESI based on the scope of preservation.

Organizations can collect, preserve, search, and centralize their scattered data silos in one single repository. Data is collected in a defensible manner and can be exported in standard eDiscovery format for assessment in document review platforms. Data is automatically processed, OCRd, and indexed for real-time search and discovery. Sources can be set to sync continuously, creating an up-to-date fully searchable environment. Additionally, organizations can preserve and archive data from these emerging technology platforms in their native, unaltered format, ensuring they meet the duty to preserve.

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