

Good Intentions are Not Enough to Avoid Sanctions for Inadequate Preservation of Electronic Files in Litigation

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Good faith is not sufficient to protect a litigant from severe sanctions for failure to preserve electronically stored information (ESI), according to a decision recently issued by a respected U.S. District Court judge in the Southern District of New York. The judge noted that the plaintiffs' conduct in the case before her was not egregious. Nevertheless, she imposed severe sanctions for their failure to take adequate steps to preserve ESI, including a jury instruction that the litigant had engaged in spoliation of evidence and that the jury could presume that the lost evidence would have been favorable to the other party.

The judge also made clear that outside and in-house counsel must do more than merely issue instructions for the preservation and collection of evidence; they must take steps to ensure that the instructions are actually followed and that all relevant paper and ESI materials are properly preserved and collected.

The 87-page decision is essentially a handbook of required practices and a detailed analysis of litigant actions that fall short. It also emphasizes that a litigant cannot wait until a law suit is actually filed; it may be *gross* negligence to fail to take any of the following steps as soon as litigation is "reasonably anticipated":

- Issue a *written* litigation hold on ESI and paper evidence that might be relevant to the matter;
- Identify all the litigant's "key players" in the matter, and ensure that all their papers and ESI are preserved;
- Suspend routine document and ESI retention/destruction practices, and cease deletion of emails;
- Preserve the relevant records of former employees that are still in the litigant's possession, custody or control; and
- Preserve back-up tapes when they are the sole source of any relevant information, or when they relate to relevant information of "key players" that may not be readily available from other sources.

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In addition to issuing *timely* written instructions to all appropriate persons for the preservation of evidence, a litigant is also required to instruct them on methods to be used for the collection of paper and ESI materials so that the person's collected materials can be searched by someone else. Moreover, if any employees are inexperienced and not adequately equipped to handle the preservation and collection of evidence, they must be taught proper search methods, they must remain in "constant" contact with counsel, and they must be closely monitored in their work.

The case is *The Pension Committee of The University of Montreal v. Banc of America Securities, LLC*. Although the decision was issued by a trial level judge, it will be widely cited and followed around the country because the same judge wrote the seminal decision on ESI discovery (*Zubulake v. UBS Warburg*).

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