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Virginia Local Government Law

Evolution in eDiscovery Case Law

By: Andrew McRoberts. ***This was posted Tuesday, June 8th, 2010***

Local governments, like all litigants, are facing a brave new world of electronic documents and discovery. When the 21st century ease of creating, sharing and destoying information meets the long-standing law of spoliation, there is a volatile mix.

Local government attorneys should take note of the evolving law on e-discovery and the importance of litigation holds of electronic information.

Attorney Erin R. McNeill has published on the Sands Anderson Risk Management blog an article addressing an important development in the case law dealing with electronic discovery, provided by Kelly A. Davidson (Sands Anderson PC Practice Group Support). Her article highlights the importance of litigation holds. While not Virginia law, this case illuminates some of the issues in e-discovery and may assist you in examining your litigation hold policies.

2010 Scheindlin Opinion on Sanctions, Spoliation, Collection and Litigation Holds

On January 11th, Judge Shira A. Scheindlin entered an eighty-eight page decision in The Pension Committee of the University of Montreal Pension Plan, et al. v. Banc of America Securities, LLC, et al., 2010 U.S. Dist. LEXIS 1839 (S.D.N.Y. Jan. 11, 2010), subtitled "Zubulake Revisited: Six Years Later," addressing the preservation, collection, litigation holds and sanctions relating to ediscovery. The genesis of the decision stems from a series of prior decisions in Zubulake v. UBS Warburg, referred to as Zubulake I-V. The Zubulake decisions gave rise to eventual sweeping changes in the Federal Rules of Civil Procedure regarding electronically stored information ("ESI") and ediscovery in December of 2006 and many state court rules, including the Rules of the Supreme Court of Virginia as of January 1, 2009. See, e.g., Rule 4.1.

What is offered here are highlights of some of Judge Scheindlin's comments in this decision. This is neither offered as a complete analysis of the opinion, nor is it postured to be a legal analysis of the opinion with respect to the rules of discovery or other case law.

Continuum of Fault

In the court's opinion, Judge Scheindlin addresses the definitions of negligence, gross negligence, and willfulness in the discovery context. She offers a continuum of fault particularly as it relates to the adequacy of the remedy – from additional/further discovery to dismissal or default judgment. While Judge Scheindlin states that the activities described are not meant to be a complete list, what follows is a sampling of conduct she does address, many of which are triggered by the duty to preserve.

Willful or Grossly Negligent Actions/Activities:

- "Failure to collect records… from key players"
- "Intentional destruction of relevant records, either paper or electronic"
- "Destruction of email or certain backup tapes"

Grossly Negligent Actions/Activities:

- "Failure to issue a written litigation hold"
- Failure to collect from former, as well as current, employees when in possession, care, and control of the party

Negligent or Grossly Negligent Actions/Activities:

- Failure to cease the deletion of email or other routine destruction of business records
- Failure to complete a comprehensive search and to supervise/monitor the search for evidence

Negligent Actions/Activities:

- Failure to collect from all employees, in addition to the key employees identified, even "some of whom may have only have had a passing encounter with the issues in the litigation"
- "Failure to assess the accuracy and validity of selected search terms"

Lessons to be Learned

While many lessons and procedure modifications can be taken from this opinion, three important topics concern: (1) litigation hold standards (including triggers of the duty to preserve), (2) the preparation of witnesses, and (3) the retention of backup tapes.

Litigation Holds (Including Triggers and Collection)

Litigation holds are the primary tool in the preservation of evidence. This consists of three types of litigation hold letters; letters from a company representative (quite often, in-house counsel) to the employees of a company, letters from outside counsel to the client, and letters from a party to the opposing party. Judge Scheindlin addresses litigation holds by a party, setting forth the standard that a duty to preserve starts when a

party "reasonably anticipates litigation." When discussing first two types of hold letters, language should address the following:

- Notification "to preserve all relevant records – both paper and electronic"
- Instruction not to destroy relevant information
- Information on the collection process
- Timing of the hold
- Stopping the routine destruction of potentially relevant information

Triggers to the litigation hold process differ on a case by case basis. For the plaintiff, it is quite often the case that the duty to preserve starts prior to the filing of a litigation as "plaintiffs control the timing of the litigation." For the defense, it is often the case that the duty to preserve starts no later than the moment that the defendant is served, potentially sooner. It is imperative that litigation holds are written and are sent to all personal that may have a role in the litigation, every those that may have a cursory role or a support function to personnel involved. Litigation hold letters should also have some instruction as to the preservation of the electronically stored information and a direction to avoid trying to perform a self collection.

Any discussion of a litigation hold should also be backed by a collection process, addressed in part in the Continuum of Fault section above. Many times, it is during the collection process that relevant materials and evidence can be missed, damaged, or modified resulting in spoliation. Collection of evidence should be performed by a person that is trained to do so, and that person should be prepared to testify as to the means and methods. Do not fall victim to the adage that there is "no harm in trying." Spoliation of electronic evidence is prone to occur (even if innocently) when performed by someone not knowledgeable about, for example, metadata, how to properly mine for data and how to properly process said materials to conform with the applicable discovery rules, including the form of production.

Witness Preparation

After the collection, knowledge of the collection by a witnesses who is able to discuss the collection process is important to the case when it pertains to the burden of proof of proper preservation, collection, and production of evidence, as Judge Scheindlin discusses, as well as authentication as witnessed by myself in practice. A witness should be prepared to testify as to:

- from where files were collected,
- how the files were searched to find relevant information, including the key terms used and the tools or software employed to conduct the search,
- who conducted the search,
- what the collecting party was told about the search and what was to be (and not to be) searched and excluded, and
- what supervision was in place to monitor the search.

The more complete this information, the more empowered a witness will be during a deposition or at trial and the better prepared a party will be to address issues of spoliation.

Backup Tapes (and Other Forms of Backups)

Backups, including tapes, have been a long standing issue of contention between parties with regard to their preservation and the costs associated with that preservation and the restoration of the data contained. Backups were initially developed and are still seen by many today as disaster recovery and not as a mode of preservation. Preservation and collection from backups, while potentially costly, may be crucial to avoid spoliation sanctions. This is particularly the case when retention policies routinely overwrite or destroy backups and when a backup is the only source for evidence in a case.

Conclusion

It is important to protect interests in matters of spoliation of evidence and the associated sanctions. It is crucial for client and attorney to work in concert with each other during the entire discovery process. Cases have been won and lost on matters of electronic information. Clients need to provide all the information possible to their attorneys and attorneys have to work closely with clients so that they understand the process and need for the collection of electronic information.