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eTERA Consulting Insight Bulletin

Attorney's Failure to Understand How Email Works Results in Sanctions

In the majority of situations when there is a preservation and production failure, it seems to typically be the fault of the Defendant. In this unique situation, the Plaintiff was the party who under produced due to their Counsel's lack of knowledge of their email policies and practices. This Insight Bulletin will summarize the case and resulting sanctions and provide practical advice for how your organization may prevent a similar situation.

MATTER

GFI Acquisition, LLC v. American Federated Title Corporation. 2010 WL 1418861 (Bankr. S.D.N.Y. April 7, 2010)

BACKGROUND

This case originated as a real estate transaction where GFI Acquisition, LLC ("Plaintiff") alleged that American Federated Title Corporation ("Defendant") refinanced 3 of the 4 properties that were subject to the Purchase and Sale Agreement ("PSA"). By refinancing the properties and failing to disclose certain "lock out provisions," the Plaintiff brought action for breach of the PSA.

Defendant, in an attempt to prove that the Plaintiff was aware of the refinance and terms in advance of the finalizing of the PSA, requested the Plaintiff to produce documents related to the transaction. The Defendant was particularly interested in email messages that proved that the Plaintiff received copies of the Promissory notes that detailed the terms of the loans that they were to acquire through the PSA. When the Plaintiff did not produce the expected email messages, the Defendant became concerned that the Plaintiff was not living up to their obligations in good faith.

The litigation was transferred to Bankruptcy Court after the Plaintiff's parent company, A & M Florida Properties filed for Chapter 11, which also precipitated the replacement of Plaintiff's Counsel. The Plaintiff's new counsel called for a "company-wide" search under the direction of the Defendant's Chief Technology Officer ("CTO"). After the "company-wide" search, the Plaintiff produced a small number of additional email messages. The Defendant then filed a motion to compel the production of email messages believed to be withheld. The parties then agreed to split the costs on a third party forensic company to collect the data from the Defendant's email servers.

At the time of the initial collection, neither the Defendant's Counsel, nor the technicians from the third party forensic company, had any knowledge of the retention policies or the archiving practices of the Defendant's employees. After the forensic collection rendered a small amount of emails, the Defendant called for a status conference to discuss spoliation.

At the conference, Plaintiff's Counsel stated that he had recently learned the difference between the "live mailboxes" which were searched and collected, and email archives, which were never searched. Upon subsequent search of the archives, the Plaintiff was able to locate the "missing email messages." This discovery precipitated a second search of the Plaintiff's email archives conducted by the third party forensic company. After much back and forth, the Plaintiff finally produced the emails, some two months later.

FINDINGS BY THE COURT

The Court found that since the Defendant in the end did receive the emails, that there was no bad

faith on the part of the Plaintiff. However, the Court also found that if the Plaintiff's Counsel "had fulfilled his obligation" and familiarized himself with his client's email retention practices earlier, forensic collection and subsequent motions would not have been necessary. Thus, the Plaintiff and Plaintiff's Counsel were both ordered to reimburse the Defendant for the costs associated with the third party forensic company fees and Defendant's expenses associated with additional motions.

CONCLUSION

The old saying "ignorance of the law excuses no one" can be applied in this example as "ignorance of technology excuses no one." It would be improper to conjecture about what actually occurred during this case that led to initial productions being incomplete. Since the price of the sanction was limited to fees and no dismissal or adverse inference instructions, the ramifications were relatively minor yet surely frustrating to all parties involved and easily avoidable.

ADVICE FOR INSIDE COUNSEL

1. **Build relationships with IT.** Develop both formal and informal relationships with key IT managers and jointly work together on records management policies and discovery procedures.
2. **Educate IT about Legal.** Educate key IT managers about the legal requirements of handling computer data in the event of litigation. If litigation is not a frequent event at your organization, strongly consider retaining an expert who can provide direction and oversight to the IT staff.
3. **Understand the fundamentals of corporate computer systems, particularly email.** Work with your IT organization to understand how and where email messages are managed and stored at your organization. If necessary, consider a third-party resource that can bridge the gap between IT and legal.

ADVICE FOR CORPORATE IT

1. **Proactive Information Management.** Consider implementing an Early Information Assessment methodology in order to deliver a proactive approach to integrating the management of corporate information as it relates to risk management, regulatory compliance, electronic discovery, litigation hold, records management and IT storage.
2. **Legal Hold Planning.** Have a plan and protocols developed for implementation of litigation hold policies. This plan should include identification of data sources and locations, preserving the most recent backups and halting data destruction activity.
3. **Prepare for 30(b)(6) Depositions.** Identify and train at least two IT staff members who are prepared to advise Counsel, third-party experts and participate in 30(b)(6) depositions to the policies, procedures and actual practices of information management at your organization.

ADVICE FOR OUTSIDE COUNSEL

1. **Understand the fundamentals of corporate computer systems, particularly email.** Work with your support staff, your client's IT organization and, if necessary, third-party experts to understand how and where email messages are managed and stored at your client's organization.
2. **Obligation to Preserve.** Do not presume a litigation hold letter to your client is sufficient instruction. Even if you have worked with your client to develop a written document providing the scope and your client's obligations to preserve, hold a meeting that includes your client's counsel, IT staff and any third-party providers to review the litigation hold requirements.

3. **Intelligent Document Review.** You need to know what you are producing. In this situation, a professional experienced with document review is likely to have identified that no email messages between internal staff and the client were produced.

About eTERA Consulting

eTERA Consulting specializes in helping organizations improve information governance, compliance and discovery management. We are a technology independent consultancy with a broad range of services from strategic information consulting to project-based engagements. Because we are not locked into a particular vendor's technology, our clients benefit from flexible service delivery and pricing options.

A unique differentiator for eTERA Consulting is our Early Information Assessment[SM] (EIA) methodology which we use to help clients implement a proactive approach to integrating the management of corporate information as it relates to risk management, regulatory compliance, electronic discovery, litigation hold, records management and IT storage.

Headquartered in Washington, DC, eTERA has served the legal industry since 2004. The company also maintains additional offices across the United States. eTERA was named to The Inc. 500 list of fastest-growing private U.S. companies in 2010.

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