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Issuing Timely Litigation Holds in Auto-Delete Environments

The Case Law and F.R.C.P. 37(e)(2)

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Statement of the Issue

It is important for organizations to routinely dispose of unneeded documents and data – keeping useless data is expensive and increases the risks and costs associated with currently unknown legal matters that may arise in the future. However, engaging in routine deletion runs the risk that a litigation preservation obligation is present but unknown by those responsible for the routine deletion, thereby raising the question as to the likelihood of sanctions for spoliation. This risk was mitigated considerably by an amendment to Federal Rule of Civil Procedure (F.R.C.P.) 37, effective December 1, 2015, regarding the imposition of sanctions for spoliation. As set forth below, under the new F.R.C.P. 37, a showing of willfulness and prejudice will be required before the most severe sanctions can be imposed, and then only if the prejudice shown cannot be mitigated through other remedies, such as additional discovery. The issue discussed herein is the likelihood that an adversary could convince a federal court that an auto-delete policy was intended "to deprive another party of the information's use in the litigation." See F.R.C.P. Rule 37(e)(2). Under the case law analysis set forth below, an organization would need to have extremely aggressive auto-delete policies and an extremely lax litigation hold[1] process, combined with a history of predictable litigations, for an adversary to have a colorable argument that the organization's auto-delete policy included an intent to deprive the adversary of unique information relevant to the litigation.

Duty to Preserve

The "scope of [the duty to preserve] is not limitless." *AMC Technology, LLC, v. Cisco Systems, Inc.*, 2013 U.S. Dist. LEXIS 101372, *8-9 (N.D. Cal. July 15, 2013). It does *not* require a litigant to preserve *all* documents, as this "would cripple parties who are often involved in litigation or are under the threat of litigation." *AMC Tech., LLC*, 2013 U.S. Dist. LEXIS

[1] A litigation hold is a process that an organization uses to preserve all forms of relevant information, both electronic and hard copy alike as well as tangible things, when litigation is reasonably anticipated.

101372, *8-9. However, the duty does require litigants to "identify, locate, and maintain, information that is *relevant* to specific, predictable, and identifiable litigation, which includes identifying key players who may have relevant information, and taking steps to ensure that they preserve their *relevant* documents." *Id.* (emphasis added) (internal citations omitted).

In determining whether a party's preservation efforts meet this duty, the touchstone is the party's good faith and reasonableness. *In re Delta/Airtran Baggage Fee Antitrust Litig.*, 770 F. Supp. 2d 1299, 1312 (N.D. Ga. Feb. 22, 2011). *See also, Miller v. Holzmann*, 2007 U.S. Dist. LEXIS 2987, *6 (D.D.C. Jan. 17, 2007) (adopting the Sedona conference principle of "reasonable and good faith efforts to retain information") and *Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010) ("Whether preservation or discovery conduct is acceptable in a case depends on what is *reasonable*, and that in turn depends on whether what was done—or not done—was *proportional* to that case and consistent with clearly established applicable standards.").

The good faith and reasonableness standard does not require litigants to execute document productions with "absolute precision." P*ension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456, 497 (S.D.N.Y. Jan. 15, 2010). In fact, "courts cannot and do not expect that any party can meet a standard of perfection." P*ension Comm. of the Univ. of Montreal Pension Plan*, 685 F. Supp. 2d at 461. Nor does "[a] party . . . have to go to 'extraordinary measures' to preserve all potential evidence . . . [i]t does not have to preserve every single scrap of paper in its business." *Wigington v. CB Richard Ellis, Inc.*, 2003 U.S. Dist. LEXIS 19128, *12-13 (N.D. Ill. 2003). But courts do expect that litigants and their counsel will "act diligently" to "take the necessary steps to ensure that relevant records are preserved when litigation is reasonably anticipated, and that such records are collected, reviewed, and produced to the opposing party." *Pension Comm. of the Univ. of Montreal Pension Plan*, 685 F. Supp. 2d at 461 and 497.

Preservation in Auto-Delete Environments

"It is well settled that a party must suspend its automatic-deletion function or otherwise preserve emails as part of a litigation hold." *Voom HD Holdings LLC*, 2012 N.Y. App. Div. LEXIS, ***16. It is also established law that retention policies serve a legitimate business

purpose and destruction of data in line with those policies are unlikely to result in sanctions. *Micron Technology, Inc. v. Rambus, Inc.*, 645 F. 3d 1311, 1322(2011). When anticipation of litigation arises, the goal should be to suspend the auto deletion of data relevant to the litigation. A companywide halt of an auto deletion policy is not necessary. *Bringham Young University v. Pfizer*, 2012 WL 1302288 (D. Utah 2012) (holding that the destruction of documents not relevant to the duty to preserve was not sanctionable). Removing an auto deletion policy prior to anticipation of litigation to prevent spoliation is also not necessary. A court will not penalize a party for purging data if litigation is not anticipated. In *Hixson v. City of Las Vegas*, 2013 U.S. (D. Nevada Jul. 11, 2013), the defendant's auto deletion of relevant email and subsequent failure to produce did not support sanctions because the defendant was not on notice of potential litigation to trigger a duty to suspend its then existing practice of purging emails after 45 days.

Notably, suspending or interrupting automatic features of electronic information systems can be prohibitively expensive and burdensome. *Cache La Poudre Feeds, LLC v. Land O'Lakes Farmland Feed, LLC*, 244 F.R.D. 614, 624 (D. Colo. Mar. 2, 2007). Therefore, although the duty to preserve, which includes the duty to suspend routine document retention/deletion policies, attaches "when a party reasonably anticipates litigation**" it may be "unrealistic" and "undesirable" to expect parties to stop routine operations of their systems as soon as they anticipate litigation.** *Pension Comm. of the Univ. of Montreal Pension Plan*, 685 F. Supp. 2d at 466 and *Cache La Poudre Feeds*, 244 F.R.D. at 624 (emphasis added). *See also Jones*, 2010 Dist. LEXIS 51312, *17 (Stating that "[i]t may be reasonable for a party to *not stop* or alter automatic electronic document management routines when the party is first notified of the possibility of a suit."). "The result would be an even greater accumulation of duplicative and irrelevant data that must be reviewed making discovery more expensive and time consuming." *Cache La Poudre Feeds*, 244 F.R.D. at 624 (emphasis added).

In theory, the suspension of an automatic deletion policy is seemingly simple. However, there is a tremendous amount of coordination that needs to take place. This coordination usually begins with an in-house counsel who directly notifies employees, in charge of relevant data, of a litigation hold when anticipation of litigation arises. It is the responsibility of a company to

ensure their employees understand the importance of a litigation hold and that they are in compliance with the litigation hold. *915 Broadway Assoc. LLC v. Paul, Hastings, Janofsky & Walker LLP*, 950 N.Y.S. 2d 724 (2012).[2]

The New Threshold for Sanctions for Failure to Preserve

The new F.R.C.P. Rule 37(e) applies when "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." See Committee Notes F.R.C.P. 37(e). F.R.C.P. 37(e)(1) now requires "upon finding prejudice to another party from loss of the information, [the court] may order measures no greater than necessary to cure the prejudice." Under F.R.C.P. 37(e)(2) the court may impose the most severe sanctions, an adverse inference jury instruction or dismissal of the case, "only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation." As stated in the Committee Notes to the new Rule 37:

> New Rule 37(e) replaces the 2006 rule. It authorizes and specifies measures a court may employ if information that should have been preserved is lost, and specifies the findings necessary to justify these measures. It therefore forecloses reliance on inherent authority or state law to determine when certain measures should be used. The rule does not affect the validity of an independent tort claim for spoliation if state law applies in a case and authorizes the claim.

Further, the Committee Notes to the new F.R.C.P. 37(e)(1) state:

> Once a finding of prejudice is made, the court is authorized to employ measures "no greater than necessary to cure the prejudice." The range of such measures is quite broad if they are necessary for this purpose. There is no all-purpose hierarchy of the severity of various measures; the severity of given measures must be calibrated in terms of their effect on the particular case.

And the Committee Notes to the new F.R.C.P. 37(e)(2) also provide (emphasis added):

> This subdivision authorizes courts to use specified and very severe measures to address or deter failures to preserve electronically stored information, but only on

[2] *915 Broadway Assoc. LLC v. Paul, Hastings, Janofsky & Walker LLP*, 950 N.Y.S.2d 724 (2012): Despite receipt of a litigation hold, 6 custodians failed to suspend the 14 -day auto deletion process. The defendant (a law firm) did not make any effort to ensure that electronic documents destroyed through auto deletion were recoverable. The defendant also allowed an integral email server to be discarded and replaced 6 months after the plaintiff conveyed its spoliation concerns to the court. The court found the defendant's conduct to be intentional and reckless.

> finding that the party that lost the information acted with the intent to deprive another party of the information's use in the litigation. **It is designed to provide a uniform standard in federal court for use of these serious measures when addressing failure to preserve electronically stored information. It rejects cases such as *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d Cir. 2002), that authorize the giving of adverse-inference instructions on a finding of negligence or gross negligence.**

Accordingly, as of December 1, 2015, cases that imposed sanctions for spoliation based on a negligence or grossly negligent standard no longer serve as precedent.[3]As set forth in *Sekisui American Corp. v. Hart*, 945 F. Supp. 2d 494 (S.D.N.Y. June 10, 2013), a party seeking a sanction for spoliation must establish: 1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed 2) that the records were destroyed with a culpable state of mind; and 3) that the destroyed evidence was relevant to the party's claim or defense such that a reasonable trier of fact could find that it would support the claim or defense. Id. at 503. Under the new F.R.C.P. 37(e)(2), the required culpable state of mind for the imposition of severe sanctions will be that the spoliator did so with the intent to deprive its adversary of relevant information. In addition, where there is no showing of an intent to deprive, there must be a finding of prejudice to another party from the loss of the information before any remedy may be imposed. Accordingly, understanding the thresholds in the case law as to what constitutes negligent or grossly negligent spoliation behavior, as opposed to bad-faith or willful spoliation behavior, is instructive for determining how aggressive, or not, an auto-delete environment should be within an organization that is subject to active litigation holds.

[3] See e.g., *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456, 477, 2010 U.S. Dist. LEXIS 1839, 48 (S.D.N.Y. 2010) (finding Plaintiffs both negligent and grossly negligent because they failed to execute a comprehensive search for documents and/or failed to sufficiently supervise or monitor their employees' document collection); *Pinstripe, Inc. v. Manpower, Inc.* 2009 U.S. Dist. LEXIS 66422 (N.D. Okla. July 28, 2009) (Defendant's counsel drafted a litigation hold but did not issue it until 14 months later. Defendant failed to monitor compliance with oral instructions given to managers regarding document retention resulted in mere negligence warranting monetary sanctions but not an adverse inference instruction); *Merck Eprova AG v. Gnosis S.P.A.*, 2010 U.S. Dist. LEXIS 38867 (S.D.N.Y. 2010) (Find gross negligence and imposing a $25,000 fine for failure to issue explicit oral/written litigation hold for over 2 years after service of process, routinely deleting emails more than 15 days old and failing to supervise search for responsive documents; *Crown Castle USA v. Fred A. Nudd*, 2010 U.S. Dist. LEXIS 32982 (W.D.N.Y. Ms. 31, 2010) (Finding gross negligence for Plaintiff's failure to implement a litigation hold for twenty months after initial trigger event, allowing emails of key employee who left the company to be deleted under policy that retained departing employees' documents for 90 days. Costs and fees were ordered but no adverse inference instruction was given since no prejudice was shown).

The Case Law

While it *may* be reasonable not to suspend auto-delete systems as soon as litigation is anticipated, case law suggests litigants should act quickly to suspend the function and preserve relevant documents, especially when the existing auto-delete system is set to delete at more frequent intervals. However, there is no case finding that an aggressive auto-delete constituted a willful intent to delete the data – the closest any case has come to such a holding was *Broccoli v.Echostar Communs. Corp.*, 229 F.R.D. 506, 512(D. Md. Aug 4, 2005), where the court found that the defendant acted in bad faith when it failed completely to suspend its 21-day email and data destruction policy or preserve essential personnel documents. Sanctions and adverse inference instructions were granted. In all other cases, the issue was a delay in suspending the auto-delete, rather than a complete failure to do so, and in those cases awarding sanctions, the court did so under a finding of gross negligence, not willfulness or bad faith. In addition, while actions inconsistent with a party's internal retention policy have been used to successfully prove bad faith, there are no cases holding that failure to follow a retention policy constitutes willfulness or bad faith. In *Dataflow, Inc. v. Peerless Ins. Co.*, 2013 U.S. Dist. LEXIS 183398 (June 6, 2013), the defendant destroyed potentially relevant information eighteen weeks after the triggering event during a system upgrade, which violated their internal policy. *See also, Jones v. Bremen High Sch. Dist.*, 228, 2010 U.S. Dist. LEXIS 51312 (May 25, 2010).

For example, a litigant that fails to suspend its 14-day auto-delete function for more than two years after the duty to preserve attaches is likely at least grossly negligent and, prior to the new F.R.C.P. 37, faced an adverse inference instruction, substantial financial sanctions (beyond cost and fees), or possible dismissal. *See infra Apple Inc. v. Samsung*, 888 F. Supp. 2d at 982, 1000; *see also infra Voom HD Holdings LLC*, 2012 N.Y. App. Div. LEXIS 559, ***20, *Broccoli v. Echostar Communs. Corp.*, 229 F.R.D. 506, 512 (D. Md. Aug. 4, 2005), *915 Broadway Assoc. LLC v. Paul, Hastings, Janofsky & Walker, LLP*, 2012 N.Y. Misc. LEXIS 708, ***21-28 (N.Y. App. Div. Feb. 16, 2012) and *Merck Eprova AG v. Gnosis S.P.A.*, 2010 U.S. Dist. LEXIS 38867 (S.D.N.Y. Apr. 20, 2010). Under the new F.R.C.P. 37, the party seeking spoliation sanctions will need to show prejudice as a result of the loss of the information and if shown, the court may impose a remedy sufficient to mediate the prejudice shown and nothing more. Consideration of severe sanctions under F.R.C.P. 37(e)(2) does not even come into play in cases such as *Apple*

Inc. v. Samsung because there was no showing of the necessary "intent to deprive" requirement.

In one case, no sanctions were imposed where a plaintiff (the FTC) failed to suspend its 45-day auto-delete policy for 13 months because the plaintiff's internal auto-delete guidelines were consistent with its duty to preserve relevant material and the defendant failed to demonstrate spoliation due to the policy. *FTC v. Lights of Am. Inc.*, 2012 U.S. Dist. LEXIS 17212 (C.D. Cal. Jan. 20, 2012). The court continued that even if "the auto-delete policy caused the inadvertent loss of any relevant email correspondence that is not a sanctionable offense." *FTC v. Lights of Am. Inc.*, 2012 U.S. Dist. LEXIS 17212, 18-19, *citing to* Fed. R. Civ. Proc. 37(e). Nor was inadvertent deletion of some emails due to the good-faith operation of an electronic information system a ground for sanctions under the court's inherent power to sanction, *Id.*, which inherent power has now been replaced with the new F.R.C.P. 37.

Meanwhile, courts have found litigants breached their preservation duty for failing to suspend routine document destruction for as little as two months and up to 12-20 months after the preservation duty attached. *See Scalera v. Electrograph Sys.*, 262 F.R.D. 162, 177-178 (E.D.N.Y. Sept. 29, 2009), *ACORN v. County of Nassau*, 2009 U.S. Dist. LEXIS 19459, *7-12 (E.D.N.Y. Mar. 9, 2009), *Crown Castle USA v. Fred A. Nudd*, 2010 U.S. Dist. LEXIS 32982, **32-36 (W.D.N.Y. Mar. 31, 2010). However, in these cases, costs and fees were awarded but no adverse inference instructions were granted because the moving parties failed to demonstrate that the destroyed or lost material would have been in their favor. *See Scalera*, 262 F.R.D. at 177-178, *ACORN*, 2009 U.S. Dist. LEXIS 19459, *7-12, *Crown Castle USA*, 2010 U.S. Dist. LEXIS 32982, **32-36. In other words, there was no showing of prejudice, which is a requirement before any remedy can be imposed under the new F.R.C.P. 37.

In the case *In re Delta/ Airtran Baggage Fee Antitrust Litig.*, 770 F. Supp. 2d 1299 (N.D. Ga. Feb.22, 2011), Delta had a policy that permanently deleted employee emails after 120 days of being read. Delta did not suspend their email destruction policy until 3 months after receiving a Civil Investigation Demand. The court denied a motion for sanctions holding that the Plaintiff's had not shown prejudice, i.e. that critical evidence was destroyed, or that Delta acted in bad faith. Id. Destroying documents not reasonably known to be relevant to litigation will not result in sanctions. *AMC Technology, LLC v. Cisco Systems, Inc.*, 2013.

Conclusion

Reviewing the facts of the foregoing case law, it is hard to imagine what sort of data loss from an auto-delete, if any, could trigger the imposition of severe sanctions under F.R.C.P. 37 (e)(1). Assuming sensible auto-delete intervals, together with diligent litigation hold processes, the possible repercussions from the loss of relevant information through auto-deletion will range from nothing to the production of additional information, the restoration of backups or the payment of costs, and then only if the adversary has shown prejudice from the loss. Sufficiently long auto-delete intervals, together with the proliferation of electronic data generally, render it extremely difficult for any adversary to show prejudice from a data loss in most cases. Moreover, it is highly unlikely that any organization with a legal hold process will fail to timely suspend auto-deletions as needed.

Under current case law, an organization would need to have extremely aggressive auto-delete policies and an extremely lax litigation hold process, combined with a history of predictable litigations, for an adversary to have a colorable argument that the organization's auto-delete policy amounts to an "intent to deprive" an adversary of unique information relevant to the litigation, sufficient for the case-dispositive sanctions permitted under F.R.C.P. 37 (e)(2).

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