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E-discovery at First Byte

By Suzanne M. Glisch, Esq.

Evidence preservation - especially electronic evidence preservation - can be complicated. When should you make the first move? When do voluntary acts turn into obligations? What should you do if you screw up? Indeed, if you think about it, navigating the e-discovery preservation process is much like navigating a relationship. These two seemingly distinct concepts just may have more in common at the fundamental level than you might initially think.

Timing really is everything. Admit it - there's that one person who you had your eye on, but who got away because you waited too long to make a move. Had you acted just five minutes earlier, you'd have that person in your life. But now, that person is gallivanting around town with someone else. And you? You're left with those irritating "what ifs." Similarly, when it comes to evidence preservation, if you wait too long to "pull the trigger" on preservation - to take that step to put the brakes on any automatic erase process, contact the possible witnesses and other important role players to inform them not to delete any emails, or send out the all-important litigation hold letter - you may miss your window of opportunity to ensure that all of the potentially responsive records are preserved. After all, the last thing you want is to be caught off guard by an ex-employee producing a smoking gun email that had been deleted before the litigation hold went into effect.

The duty to preserve extends to all potentially relevant data, regardless of the form; therefore, ensuring that electronically stored information (ESI) is saved, stored, backed-up, and not otherwise deleted or destroyed is of utmost importance in today's

paperless world. See *Zublake v. UBS Warburg LLC*, 220 F.R.D. 212, 216-17 (S.D.N.Y. 2003). Unfortunately, the consequences of waiting too long to issue your litigation hold notice or otherwise putting in place a non-deletion and preservation process extend far beyond the "what ifs." In fact, they can include court-ordered monetary sanctions for spoliation or failing to preserve; adverse inference jury instructions; or, worst case scenario, a default judgment. Thus, you must be keenly aware of the "trigger date," which causes the duty to preserve all potentially responsive records to kick in.

This "trigger date" occurs when the possibility of litigation is reasonably anticipated, regardless of whether you are commencing the suit or on the receiving end. *Zublake*, 220 F.R.D. at 216-17. At least one court has held that the trigger date occurs when a company receives a demand letter from a potential plaintiff or has actual receipt of a complaint. *Cache La Poudre Feeds LLC v. Land O'Lakes, Inc.*, 244 F.R.D. 614, 621 (D. Colo. 2007). Another court held that the trigger date occurred as early as when the company received a telephone call from a potential plaintiff alleging violations of the law. See *KCH Services, Inc. v. Vanaire, Inc., et al.*, 2009 U.S. Dist. LEXIS 62993 (W.D. KY. July 22, 2009).

Getting to know the important people early on is crucial. Meeting the friends is a big step - important enough that it could set the tone for the rest of your relationship. These are the people who can provide you with the inside scoop, tell you about the likes and dislikes of your object of affection, and warn you of crazy exes. Likewise, when it comes to evidence preservation, knowing who all the important role players are is critical. While the key players here are the individuals likely to have ESI or other evidence (1) relevant to the issues in the suit; (2) relevant to the events that underlie the litigation; or (3) information that could lead to the discovery of such evidence, identifying the confines of such group can be difficult. *Goodman v. Praxair Servs., Inc.*, 632 F.Supp. 2d 494, 512 (D. Md. 2009). It is essential to cover your bases and make inquiries of the key players you know to see if there are other individuals whose electronic data should also be preserved.

Management and Human Resources personnel, as well as coworkers who had consistent contact with the opposing party, are the obvious actors. However, support staff or other employees who have access to key information should not be overlooked; nor should IT personnel who could prevent destruction of relevant data, and who have the means to uniformly adjust any electronic deletion settings. See *Scalera v. Electrograph Sys. Inc.*, 2009 WL 3126637, *15 (E.D.N.Y. Sept. 29, 2009); *Treppel v. Biovail Corp.*, 249 F.R.D. 111, 118 (S.D.N.Y. 2008). And, while delving into the realm of exes in the relationship world is commonly avoided at all costs, it is crucial not to avoid the exes when dealing with record preservation. This is so because numerous ex-employees could be in possession of relevant, responsive information that your company may be required to produce. Importantly, you are responsible for all relevant information in the possession of any non-parties or party agents who could be deemed under your "custody or control," if you have the legal authority or practical ability to ensure the preservation of the information they possess. *Goodman*, 632 F. Supp. 2d at 515-16. Therefore, in many situations, even those parties that might seem

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tangential to a lawsuit should receive the hold notice.

Narrowing down the options too early could prove problematic. When in a relationship, it is generally advisable to take things slow, especially in the beginning stages. By erring on the side of caution, you not only avoid smothering each other, but you also can reassess whether to make a serious commitment. However, when it comes to evidence preservation, the opposite is usually true - it is almost always prudent to "smother away" and preserve as much as possible, as soon as possible. This will benefit you in the long-run because, while not everything you preserve will be discoverable, there can be significant consequences for failing to capture unique relevant data. So, act fast and think big, and sort through the data later to identify what is needed.

Once you do make it official, stay committed. Relationships are only successful if there is ongoing communication and long-term commitment. Likewise, when it comes to evidence preservation, a litigation hold policy should not be disseminated once and never talked about again. Make sure to be sufficiently specific and detailed in your litigation hold policy; inform the recipients of its purpose and importance; and continually monitor and enforce compliance with the notice, in order to assure reasonable efforts are being made to meet your duty to preserve. *See Samsung Elec. Co. v. Rambus Inc.*, 439 F. Supp. 2d 524, 565 (E.D. Va. 2006); *Zublake v. UBS Warburg LLC*, 229 F.R.D. 422, 432 (S.D.N.Y. 2004). That said, there will undoubtedly come a time when you mess up. In either situation, step up the charm and mitigate. While in a relationship that may mean flowers or giving up control over the television remote, in the evidence preservation world, it means taking immediate steps to reduce the impact of the loss of data or destruction of documents - you will most likely still have to endure the court's fury, but you may avoid hefty sanctions or other dire consequences.

It would be impossible to cover every aspect of either subject here, much less cover them in a manner that would apply uniformly to every person, corporation, organization, or other entity. Thus, it is wise to log these basic principles as a starting point. Follow the relationship advice at your own risk; however, make it a point to comply with the essential, basic principles of evidence preservation, as well as check with your state laws regarding the subject. After all, as the defendants in the landmark *Zublake* case discovered, disregarding the necessity of distributing and monitoring a litigation hold notice and failing to preserve data could land you with an adverse inference jury instruction, as well as an eventual \$29.2 million verdict against you. *Zublake*, 220 F.R.D. at 218. And, my guess is that an outcome like that doesn't exactly qualify as a fun fact certain to land you a first date.

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