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LITIGATION REVIEW

Dodging an E-Bullet Sanction

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While the courts are becoming more familiar with the legal and technical issues arising from electronic discovery, there is still no shortage of perplexing "e-issues" confronting judges. In a recent decision rendered by Eastern District Magistrate Judge Arlene R. Lindsay in *Toussie v. County of Suffolk*, 2007 WL 4565160, the court was admittedly "challenged to reconcile a party's obligation to preserve relevant evidence with the unique nuances of electronically stored information."

More specifically, Magistrate Judge Lindsay had to determine whether Suffolk County "should be penalized for losing and/or destroying its e-mails" as requested in discovery and as otherwise relevant to the case.

The e-mail discovery dispute in *Toussie* was first brought to the court's attention in August 2006, when plaintiffs moved to compel the county to supplement its response to plaintiffs' document requests, arguing that "the County had failed to perform a diligent search for responsive documents, evidenced by the fact that it had only produced two e-mails." Thereafter, several court conferences were held regarding this issue and a total of five discovery-related motions were brought by plaintiffs, culminating in the motion that resulted in the court's decision as discussed below.

During one of the early court conferences, the court found that the county "had failed to conduct a system wide search for responsive e-mails," so it directed the county "to have its Information Technology Department search the County's servers for responsive e-mails."

The county's director of management information services responded that "the County lacked the resources to perform the court ordered search for additional e-mails." Among other things, this individual advised the court that the county had no system to archive its data, which would have preserved it in a searchable format, and only had a bare backup system, which would have required the purchase of hardware and software to restore and access.

The first estimate he gave was approximately $32,000 for the equipment necessary to access the data. At a subsequent court conference, the court noted its own "exasperation" with the county's position, admonishing: "You can't just throw up your hands and say we don't store [e-mails] in an accessible form and then expect everybody to walk away. The question is, how can a plan be implemented to provide for some production."

The court then ordered the county to prepare a search plan, after settling on the e-mail search terminology.

In response to the court's directive, the county advised that it had identified 470 backup tapes that would have to be restored at an equipment cost of approximately $934,000. The county also estimated that the search would take 960 man hours or between $617,000 and $672,000 for an outside consultant to perform the search.

After further motions to compel and court conferences, the county revised the information it provided to the court regarding the cost of searching for and producing responsive e-mails. It advised that in 2004, certain of the backup tapes were damaged in a flood, that there were 420 backup tapes in total, and that an outside electronic evidence consultant estimated that the cost of retrieval would be between $418,000 and $963,500.

At subsequent court hearings, the county admitted that a "formal litigation hold was not circulated to key departments [of the county] to insure the preservation of relevant electronic data." Indeed, at one conference, the court expressed its own concern that "notwithstanding the County's clear obligation to preserve relevant e-mails, the County had taken no steps to preserve its e-mails or to store them in a manner which would permit ready access and review."

After several court conferences and further directions from the court, the county ultimately had its forensic consultant recover e-mails from approximately 90 percent of the existing backup tapes, yielding 2,403 pages of e-mails and attachments, which the court characterized as "a far cry from the two e-mails originally produced by the County."

In September 2007, plaintiffs argued in their fifth discovery motion "that had the County implemented a litigation hold and discontinued its practice of overwriting tapes, more relevant e-mails would have been preserved." The plaintiffs therefore requested that the court enter a default judgment against the defendants or, alternatively, issue an adverse inference instruction to the jury.

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'DeGeorge' Factors

In *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d Cir. 2002), the U.S. Court of Appeals for the Second Circuit analyzed whether and in what respect sanctions should be imposed for failing and/or delaying the production of discovery materials and, in particular, searching and retrieving e-mails. Among other things, the court found that even where counsel hires an experienced outside forensic electronic evidence consultant, sanctions could be imposed, noting that sanctions would be appropriate where the discovery violation was "not only through bad faith or gross negligence, but also through ordinary negligence."

The *DeGeorge* court outlined the elements to justify imposing sanctions: "(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 that claim or defense."

In determining whether to sanction the county and, if so, in what respect, Magistrate Judge Lindsay analyzed the three factors referenced in *DeGeorge*.

Concerning the first factor - the duty to preserve evidence - she quoted *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216 (SDNY 2003), noting: "In general, 'the obligation to preserve evidence arises when [a] party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation.'" She further found that where the defendant is a firm or, as there, a municipality, an enterprise-wide duty to preserve "is not imposed simply because one or two employees contemplate the possibility of litigation."

Thus, the court found that while a handful of county employees anticipated plaintiffs might sue after they were denied the right to purchase certain real estate at a 2001 auction, the county's duty to preserve only arose "when the complaint was first filed." At that point, the court found, any documents prepared by or for county employees in four key departments involving the Toussie transactions should have been preserved. At a minimum, that required the county to suspend its routine document and retention/destruction policy and put in place a litigation hold.

The court observed, however, "the County did nothing to alter its document retention policy to insure the availability of relevant discovery." In this regard, the court found that "even after the County had received a document request, key personnel remained free to delete documents from the system because the County failed to put in place a litigation hold." Thus, the court found that Suffolk County did in fact breach its duty to preserve relevant discovery.

State of Mind

In analyzing the second factor - "culpable state of mind" - Magistrate Judge Lindsay noted that this prong could be satisfied not only with a knowing destruction but by mere negligence as well. She observed that while "the law is now clear that any back up tapes containing the documents of a key player must be preserved and accessible . . . the law with respect to back up tapes was not clear in 2001" when the lawsuit started. The court therefore found that the county's failure to implement a litigation hold did amount to "gross negligence," but its failure to preserve all potentially relevant back up tapes was "merely negligent." In either case, the court found that the second element had been satisfied.

It was the third element - "relevance" of the targeted e-mails - that saved the county from the substantive sanctions demanded by plaintiffs.

The court noted that the term "relevance" as considered for purposes of imposing substantive sanctions was different and more demanding than the standard for relevance under Rule 401 of the Federal Rules of Evidence, which merely requires the evidence to be probative of a fact in issue. For imposing sanctions, the court held that "the plaintiffs here must present extrinsic evidence tending to show that the destroyed e-mails would have been favorable to their case."

The Second Circuit in *DeGeorge* cautioned that in applying this "relevance" factor, "[c]ourts must take care not to 'hold [ ] the prejudiced party to too strict a standard of proof regarding the likely contents of the destroyed [or unavailable] evidence,' because doing so 'would subvert the . . . purposes of the adverse inference, and would allow parties who have . . . destroyed evidence to profit from that destruction.'" The *DeGeorge* court also noted that when a party destroys evidence in bad faith, that alone could satisfy the "relevance" factor.

Analyzing the evidence the parties had presented to the court in *Toussie*, Magistrate Judge Lindsay found that plaintiffs had not sustained their burden of proving that "the destroyed e-mails would have been favorable to their case." In reviewing the e-mails that plaintiffs relied upon, the court determined that "if anything, the e-mails were more favorable to the defendants' case."

The court concluded, therefore, that "[w]hile the evidence is clear that at least 9% of the back up tapes were destroyed and the plaintiffs may be correct that e-mails have been deleted by users, there is no reason to believe that any of those e-mails would have provided any additional support of plaintiffs' claims."

The magistrate judge ultimately decided to impose monetary sanctions upon Suffolk County instead of entering a default judgment or issuing an adverse inference charge.

Conclusion

Notwithstanding certain other leading cases,[1] *Toussie* shows that the party requesting discovery must still be vigilant in amassing satisfactory evidence that the missing or destroyed e-mails would have been supportive of that party's case.

Counsel should consider, among other things, developing these issues in depositions to bolster the independent or extrinsic evidence before moving for substantive sanctions based upon documented e-mail abuses.

Endnotes:

1. For example, *Metropolitan Opera Assoc. Inc. v. Local 100*, 212 F.R.D. 178, 222 (SDNY 2003) (ordering default judgment against defendant as a discovery sanction because counsel had not given adequate instructions to clients regarding discovery obligations and no litigation hold was implemented) and *Zubulake*, 229 F.R.D. at 339-40 (imposing monetary sanctions and adverse jury instruction for failure to preserve e-mails).