e-Discovery: Not Just for Litigators
by Susan M. Usatine, Esq.

What is the duty to preserve evidence?

Technologically savvy jurists agree that the duty to preserve should not be analyzed in absolute terms because the duty cannot be defined with precision. Generally speaking, the common law duty of preservation imposes the obligation to identify, locate and maintain information and tangible evidence that potentially relates to an active litigation, a litigation that is reasonably anticipated and/or a government investigation or proceeding. Key and critical to the understanding of the duty to preserve evidence is that the duty is owed to the Court, not to an adversary. It is important to note that motions for sanctions for destruction of evidence often do not involve a litigant purposefully destroying evidence. Instead, motions for sanctions for destruction of evidence usually allege that a party failed to institute the required legal hold and/or that counsel failed to adequately oversee the hold/discovery process.

Does the duty to preserve apply to all attorneys?

It is a common misconception that only commercial litigators need to understand e-Discovery. This is untrue and especially so with regard to the duty of preservation. Consider the following scenarios:

> Scenario #1 – Corporate Lawyer: Ms. Entrepreneur seeks your assistance in formation of a limited liability company. You establish the LLC and prepare an operating agreement. Ms. Entrepreneur returns several months later and asks that you review one of the LLC's supplier contracts and provide advice related to the LLC's exposure if she elects to terminate the contract. Ms. Entrepreneur informs you that she intends to terminate the contract the following week. You both agree that it is likely that the supplier will sue for substantial damages that will result from the early termination of the contract.
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> Scenario #2 – Matrimonial Lawyer: Mrs. Smith retains you to provide advice regarding her separation from Mr. Smith, who is a co-owner of a local pub. Your client informs you that the historical records from the business are stored in her garage and the more recent records are on her laptop. Mrs. Smith engages you to prepare the divorce complaint.
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> Scenario #3 – Employment Lawyer: Mr. Employer engages you to prepare an employee manual and handbook. Not long after, Mr. Employer informs you that an employee has sent a letter that threatens to sue the business and Mr. Employer for alleged discrimination.
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> Scenario #4 – Tax, Trusts & Estate Lawyer: You receive a notice from a former client threatening to sue for malpractice.

In these Scenarios, there is no active litigation. However, the duty to preserve "arise[s] not only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation."[1] The key

question is what constitutes reasonable anticipation of litigation. Clearly, a vague rumor or indefinite threat of litigation does not trigger the duty nor does a threat of litigation that is not credible or not made in good faith.[2] Determining whether litigation is or should be reasonably anticipated is based on many factors including a good faith and reasonable evaluation of relevant facts and circumstances including the strength, scope and value of a known or reasonably anticipated claim and the relationship between the accused and the specificity of the known or reasonably anticipated claim.[3]

What must I do if I determine that litigation is reasonably anticipated?

It is necessary to act as soon as reasonably practicable once the duty to preserve information arises. As counsel in the scenarios set forth above, the best practice would be to advise your client that the duty to preserve information has arisen and provide a written legal hold notice that advises the client to preserve potentially relevant information in the client's custody or control and of the consequences of failing to do so. Some courts have gone so far as to say that counsel also owes an independent duty to actively supervise a party's compliance with the duty to preserve.[4] The typical steps of implementing a legal hold include: (1) verbal notice to the client; (2) written legal hold notice to the client that specifies the preservation action to be taken; (3) periodic review/re-issue of the legal hold; and (4) acknowledgement in writing by the client.

I'm not sure I know enough about technology to advise my clients how to preserve potentially relevant evidence.

It is critical that counsel have a dialog with the client regarding the types of potentially relevant information that may exist including paper documents, e-mails, Word documents, spreadsheets, databases, presentations, Outlook calendar appointments, notes, tasks, voicemail messages, text messages, instant messages, digital images (i.e. faxes, e-newsletters), social media posts, audio/video files, web pages, blog posts and metadata. Counsel should also advise clients where to look for potentially relevant evidence including business and/or personal smartphones, tablets, laptops, desktops, servers, vehicle computer systems, back-up tapes, on-line repositories, "the Cloud," fax machines, personal email accounts and removable media such as zip drives and flash drives. After reviewing the "what" and the "where" of the potentially relevant information, counsel should discuss with the client the suspension of routine destruction of information, the preservation of electronic and paper records in their original form and the preservation of new records generated after the triggering event.

How do courts evaluate if a party has taken reasonable steps to satisfy the duty of preservation?

Commentators generally agree that it is unreasonable to expect parties to take every conceivable step to preserve potentially relevant data.[5] Courts generally focus the review of preservation efforts on two factors: were the steps reasonable and were they done in good faith. Counsel should:

(1) issue a written legal hold notice that advises all data custodians to preserve information and suspend automatic deletion of electronic information and back-up recycling;

(2) require written acknowledgement of the duty to preserve and confirmation of hold implementation from the client; and

(3) follow-up and speak to the key information custodians.

The duty of preservation is shared by all lawyers, not only those lawyers who regularly handle trials and evidence. Widespread understanding of this duty throughout the bar will reduce the likelihood that clients who eventually litigate claims will face the detour of sanctions for destruction of evidence. Understanding and active involvement in the hold process also will prevent clients from blaming their counsel for failing to advise them of their legal duty to preserve.

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[1] *Silvestri v. General Motors*, 271 F. 3d 583, 591 (4th Cir. 2001).

[2] *The Sedona Conference Commentary on Legal Holds*, 272 (2010).

[3] *Id.* at 276.

[4] *Phoenix Four, Inc. v. Strategic Resources Corp.,* 2006 WL 1409413 (S.D.N.Y. May 23, 2006).

[5] *The Sedona Conference Commentary on Legal Holds*, 269 (2010).

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