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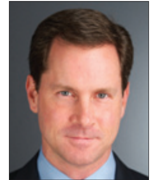
FEDERAL E-DISCOVERY

'Flawed' Legal Hold Warrants Sanctions; New Commentary Provides Guidance



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Determining how best to comply with a duty to preserve discoverable information can pose challenges for an organization. This is especially true if there is no pre-established set of procedures governing when and how to implement and manage legal holds. And, as demonstrated in many of the best-known e-discovery rulings, the failure to preserve electronically stored information (ESI) can put an organization at risk for potentially severe sanctions. A recent case provides an example of a party's "flawed" legal hold that led to a discovery sanction; a newly updated commentary from The Sedona Conference could potentially guide organizations in how to avoid such a situation.

'Franklin'

In the employment harassment and discrimination case *Franklin v. Howard Brown Health Ctr.*, 2018 WL 4784668 (N.D. Ill. Oct. 4, 2018), the plaintiff had requested discovery of all emails and text messages exchanged between certain employees of the defendant from a specific time period, later clarifying that the request included instant messages from the defendant's systems. After the defendant had produced only two instant messages, even though deposition testimony indicated that instant messaging "was the standard way employees communicated with one another," id. at *1, the plaintiff questioned the completeness of the defendant's production. This eventually led to the plaintiff moving for discovery sanctions against the defendant for its failure to preserve electronic evidence, which the district court judge referred to a magistrate judge for report and recommendation.

The magistrate judge set the tone of his report at the start, stating that "the defendant has had to concede that, at the very least, it bollixed its litigation hold—and it has done so to a staggering degree and at every turn .... [T]here can be little question that sanctions are warranted, if for no other reason that such irresponsibility with regard to discovery cannot be countenanced." Id. His review revealed that the defendant had failed to timely institute a legal hold after being made aware weeks, if not months, prior of the plaintiff's threat of litigation. And, the legal hold notice itself, once issued, failed to instruct employees how to preserve information. Moreover, even though affirmative steps were taken to remove the plaintiff's computer from the regular "wiping" process for former employees, there was little to no oversight or

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documentation as to the preservation of this computer, which went missing. In addition, the defendant had wiped a critical custodian's computer within a week of his departure, yet after the plaintiff had already stated to "'expect' a lawsuit." Id. at *2. Furthermore, the defendant's IT department never disabled the auto-delete function on instant messages. As a result of all of this "bungling," the defendant "managed to produce barely a handful of 'instant messages' in discovery." Id. at *4.

Given that the defendant "concedes that its efforts were 'flawed,'" id. at *5, and that the instant messages should have been preserved, the magistrate judge made a determination to review the curative measures available under Federal Rule of Civil Procedure 37(e), which governs sanctions for failure to preserve ESI, specifically subsection (1), which allows sanctions upon a finding of prejudice to another party from the loss of the information. Following guidance from the rule's corresponding Advisory Committee Note, the magistrate judge "recommended that parties be allowed to present evidence and argument to the jury regarding the defendant's destruction/failure to preserve electronic evidence in this case, and that the jury be instructed as the trial judge deems appropriate." Id. at *7. The district court judge subsequently adopted this recommendation.

New Edition of Commentary Offers Guidance

In *Franklin,* one argument set forth by the defendant in defense of its legal hold practices involved characterizing a letter from the plaintiff that "specifically promised a lawsuit based on 'racism, transphobia and sexism'" as a "'vague threat.'" Id. at *2. Rejecting this characterization, the court cites precedent that refers to guidance provided by The Sedona Conference in *The Sedona Conference Commentary on Legal Holds: The Trigger & The Process* (2010) that a "'reasonable anticipation of litigation arises when an organization is on notice of a credible probability that it will become involved in litigation … .'" Id. at *2 n.2. Sedona has recently updated this commentary, releasing a public comment version of a new edition, *The Sedona Conference Commentary on Legal Holds, Second Edition: The Trigger & The Process* (December 2018 Public Comment Version). This edition offers renewed guidance designed to help organizations successfully manage their preservation obligations and to guide courts in how to assess an organization's preservation-related decisions and actions.

> The failure to preserve electronically stored information (ESI) can put an organization at risk for potentially severe sanctions.

The commentary presents a framework for addressing legal holds that emphasizes the need for parties to engage in early discussions regarding preservation, to consider Rule 26(b)(1)'s proportionality requirement when defining the permissible scope of discovery, and to understand that the applicable standard is one of reasonableness and good faith efforts, not perfection. It offers twelve guidelines along with analysis and examples "to help a party meet its duty to preserve discoverable information and to provide pragmatic suggestions and a framework for creating a set of preservation procedures." Id. at 11.

Notable among the guidelines is Guideline 1, the prior version of which was referenced in *Franklin*, which looks to establish a common standard for when reasonable anticipation of litigation, and in turn, a duty to preserve, arises. It provides that "[a] reasonable anticipation of litigation arises when an organization is on notice of a credible probability that it will become involved in litigation, seriously contemplates initiating litigation, or when it takes specific actions to commence litigation." Id. Also, as organizations and courts become more sensitive to data privacy laws, new Guideline 12 helpfully provides that "organization[s] should be mindful of local data protection laws and regulations when initiating a legal hold and planning a legal hold policy outside of the United States." Id. at 13. In addition to the twelve guidelines, the commentary provides analysis on other topics relating to legal holds and preservation, including reminding counsel of their duty to advise clients of their preservation obligations and to monitor and supervise compliance.

Conclusion

Franklin illustrates that even though it has been 14 years since *Zubulake V*, eight years since *Pension Committee*, and three years since the most recent amendments to the Federal Rules of Civil Procedure, parties can still have trouble with appropriate implementation and management of legal holds—and that courts will hold them accountable. Sedona's updated commentary could serve as a helpful resource to organizations, even for those for whom the "bollixed" legal hold in *Franklin* may be an extreme example, by providing clear and comprehensive guidance on the trigger and process for legal holds that reflects the impact of the 2015 Federal Rules amendments, the evolving technological and privacy landscapes, and the growing standard to expect reasonableness and good-faith efforts in preservation rather than perfection.

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