

PENNSYLVANIA UPDATE

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Electronic Discovery—A Pennsylvania Perspective

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On December 1, 2006, the Federal Rules of Civil Procedure will be amended to require litigants to discuss electronic discovery matters at the inception of litigation. This change in the rules acknowledges the seismic shift in how we communicate, recognizing that it is now largely a digital world. While the changes to the federal rules only apply to cases pending in federal courts, undoubtedly state courts will look to the federal system for guidance in handling electronic discovery matters.

Preparation Begins With Preservation

In Pennsylvania, our discovery rules not only allow for the discovery of written materials through document requests, but Pennsylvania Rules of Civil Procedure 4009.31-33 also allow for the entry upon property for inspection, which would include inspection of computers. As such, even before litigation is initiated, efforts should be made to preserve relevant evidence. These efforts should include not only preserving your evidence, but also putting the opposing party on notice that it should preserve all potentially relevant information, i.e., the "litigation hold." As set forth in the attached article, the changes to the federal rules include a "safe harbor" for documents destroyed pursuant to routine computer practices. When it is apparent that litigation may ensue, a litigation hold letter should be sent to the

opposing side to reduce the chance that relevant information may be destroyed.

In addition, every organization should have a plan in place to ensure that relevant internal computer-stored information is not inadvertently, or deliberately, deleted. While it goes without saying that you want to preserve evidence to assist in either the prosecution or defense of a case, you also need to protect against potential employee misconduct. This is particularly the case in employment-related matters where e-mails have increasingly been the center of attention. By way of example, an employee who has a discrimination charge made against him may mistakenly believe that when he hits delete, an e-mail is actually deleted. While this attempt at destruction of evidence is, in and of itself, a serious problem, the attempt may also give the employee a false sense of security leading the employee to be less than truthful when confronted about the underlying charge. For those of us who practice employment law, the production of a damaging e-mail from the opposing side, coupled with evidence that the management employee attempted to destroy that same e-mail, can be disastrous. In employment law, as in most areas of the law, to properly defend

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a case, all of the facts, good and bad, must be known. The destruction of evidence can lead not only to surprises, but also shows intent to cover up the facts, which can be critically damaging in front of a jury.

A "Select" Lesson on the Importance of Preservation

One interesting recent case dealt with the potential ramifications that can result if computer information is destroyed. In *Select Medical Corp. v. Hardaway*, 2006 WL 859741 (E.D.Pa., 2006), the plaintiff, Select Medical Corporation (Select) filed suit against defendant, William Hardaway, a former Select regional vice-president, for violation of a confidentiality and non-compete agreement. Select moved for a temporary restraining order (TRO) and the court granted the TRO in part, and gave the parties 45 days to complete expedited discovery. Prior to the preliminary injunction hearing, Select filed a motion for spoliation. The spoliation motion was based upon Select's assertion that Hardaway "intentionally destroyed records of [its] confidential and proprietary information on the hard drive of his home computer." Select claimed that it had been prejudiced by Hardaway's actions because his home computer was the "best evidence" of the scope of proprietary information in Hardaway's possession. Hardaway contended that a spoliation inference was improper because his conduct was not fraudulent or done for the purposes of avoiding discovery. In his response, Hardaway claimed to have deleted the files to ensure that he no longer had access to Select's information after he resigned his employment. Spoliation is generally the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation. Evidence of spoliation may give rise to sanctions, such as an adverse inference against the party found to have destroyed or altered evidence, commonly referred to as the spoliation inference. The evidentiary rationale for the spoliation inference is the recognition that a party who proceeds to destroy evidence relevant to litigation, is more likely

“ Spoliation is generally the destruction or significant alteration of evidence ... [which] may give rise to sanctions ... ”

to have been threatened by that evidence. In *Select*, the court found that the record did not support a spoliation inference because the court concluded that Hardaway intended to comply with his non-disclosure agreement, not violate it. However, what actually was deleted is not clear, and the outcome may have been different had a litigation hold letter been sent at the commencement of the litigation.

Electronic discovery issues will increasingly be the focus of discovery disputes and, as such, litigants need to be knowledgeable about not only the information available from opponents, but also how their own information is stored and maintained. The storage and preservation of such information can have a dramatic impact not only on pretrial discovery but also, in the case of a spoliation inference, on the merits of a claim. ▲



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