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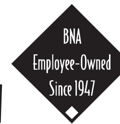

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GUEST COMMENTARY

The Honorable Paul W. Grimm, whose string of influential e-discovery decisions began with *Thompson v. U.S. Dept. of HUD*, 219 F.R.D. 93 (D. Md. 2003) and *Hopson v. The Mayor and City Council of Baltimore*, 232 F.R.D. 228 (D. Md. 2005), reviewed several facets of electronically stored information practice in a July opinion arising from a matter with relatively low stakes. Maryland attorney and adjunct law professor Michael D. Berman provides guest analysis.

Magistrate Judge Recommends General Adverse Inference Instruction for Intentional Breach of Duty to Preserve

BY MICHAEL D. BERMAN

Prior to concluding that a pro se plaintiff was entitled to an adverse inference instruction, the court in *Goodman v. Praxair Services, Inc.* (D. Md., Case No. MJG-04-391, 7/7/09) comprehensively reviewed many of the central issues involved in electronically stored information (ESI) litigation, including:

- the facts required to trigger the duty to preserve and a ''litigation hold'' in the context of escalating tension in a commercial dispute;
- when information in possession of a non-party, third person is within the ''control'' of a preserving entity for preservation purposes;
- the distinction between the duty to preserve and the duty to produce, including whether backup tapes must be searched;
- the timing, necessary factual predicates, and resolution of a spoliation motion; and,
- recovery of expenses for a partially-successful spoliation motion.

Chief Magistrate Judge Paul W. Grimm issued the memorandum opinion.

Michael D. Berman, Esq., is Counsel to the Maryland firm of Rifkin, Livingston, Levitan & Silver LLC. Mr. Berman has published widely in the area of electronically stored information and is an Adjunct Professor at the University of Maryland and University of Baltimore Schools of Law, where he teaches e-discovery. Mr. Berman has been involved in national and local ESI seminars, presentations, and webcasts.

The Facts

The underlying dispute involved a claim for breach of a contract providing for additional payment upon plaintiff's ''success'' in negotiations with the federal government. Essentially, the defendant retained plaintiff to assist in circumnavigating a costly regulatory requirement. The plaintiff was contractually entitled to additional funds if he obtained certain, specified results.

When the defendant retained other consultants to assist in obtaining the regulatory exemption, assertedly froze plaintiff out of the discussions, and later alleged that plaintiff was not the proximate cause of the positive outcome, the parties commenced negotiations.

When the discussions failed, plaintiff became dissatisfied, and, approximately three years later, filed suit.

Time Line. The commercial marriage unraveled slowly over the course of time. In 1998, the plaintiff began submitting work to the government on defendant's behalf. In April 1999, after some contacts with the government, the defendant told plaintiff to have no further discussions until there was a ''complete strategy.''

Due to the delay, in late 1999, plaintiff requested an advance of funds, and defendant noted it was ''amenable to modifying'' the contract. Because the defendant had brought in a second consultant, defendant also suggested, in a November 19, 1999 e-mail, that there was a need to re-work the contract if the second consultant was primarily responsible for success in negotiations with the government.

Plaintiff responded that the second consultant was merely an ''additional asset.'' Defendant subsequently advanced funds to the plaintiff, and, in a November 24, e-mail, noted a need to modify the contract; however, no modification was ever realized.

In January 2000, at the second consultant's request, the defendant retained another consulting firm (the ''third consultant''). Then, in a March 6, 2000 e-mail, the defendant told plaintiff that it and the third consultant had met with the government. When plaintiff asked why he was not included, the defendant responded that plaintiff's knowledge would be critical at a later point.

Plaintiff replied in a March e-mail that he assumed there would be no contractual problem in the event of a success; however, a failure to succeed while he was ''on the sidelines'' would ''create some real problems for us to resolve.''

After additional meetings with the government were conducted without plaintiff's participation, the government approved the regulatory exemption, and defendant told plaintiff that he was not ultimately responsible for the project's success, and would not be paid the ''success'' fee. Although factually disputed, during a December 2000 telephone call, defendant allegedly offered a release in return for permitting plaintiff to retain the advanced funds.

On January 5, 2001, plaintiff sent an e-mail to the defendant stating that he had consulted counsel, and that if he were ''forced to litigate'' he was likely to recover a substantial sum.

On February 19, 2001, plaintiff increased his demand and noted that he might be forced to turn the matter over to attorneys. Because of plaintiff's ''escalating letters,'' defendant sought counsel and, after February 19, instituted a ''litigation hold.'' On February 27, 2001, defense counsel wrote to plaintiff asserting that plaintiff had no valid claim. Plaintiff did nothing until filling suit nearly three years later, on February 13, 2004.

System Upgrade. Sometime between the February 2001 exchange and the February 2004 lawsuit, probably in early 2003, the defendant migrated to a new computer system. Older computers were replaced and some were reimaged. Absent specific request by a user, data were not transferred from the old system to the replacement, and the company converted from Outlook® to Lotus Notes®.

Spoliation Motion

After plaintiff served a request for production of documents and ESI, defendant found one electronic document and 2,530 pages of other documents that were responsive to plaintiff's requests. Five months after the close of discovery and two months after filing of dispositive motions, plaintiff filed a spoliation motion.

Timeliness. Defendant contended, inter alia, that the spoliation motion was untimely. After a comprehensive review of the governing authorities, the court wrote that, although the rules do not specify a time for filing a spoliation motion, one ''lesson to be learned'' from the decisional authority, is that spoliation motions should ''be filed as soon as reasonably possible after discovery of the facts that underlie the motion,'' and suggested filing such a motion during, or soon after the close of, the discovery period. Applying a multi-factor test, the court noted that dilatory spoliation motions can interfere with milestone dates, and may be denied on that basis; however, it concluded that, on the facts presented, plaintiff's motion was not untimely.

Trigger Date. The court then analyzed the trigger date for the duty to preserve in an unfolding commercial matter. Although defendant had severed all ties with plaintiff in April 1999, an act that may have given rise to the dispute, the parties continued to negotiate, and litigation was not then reasonably foreseeable.

The November 1999 e-mail exchange, where plaintiff complained of potential loss of opportunity, was also deemed insufficient to trigger the duty, based on deposition testimony that did not exclude payment of the ''success'' fee at that time. The court further held that the March 2000 e-mail, in which plaintiff pointed to ''real questions'' that may arise in the future, did not objectively put defendant on notice of reasonably foreseeable litigation. A factual dispute over whether the December 2000 telephone conversation included a reference to a release, in exchange for keeping the advanced funds, meant that plaintiff could not show that that discussion was a trigger.

What Was The Triggering Event?

- April 1999: Ties severed
- November 1999: Potential lost opportunity
- March 2000: ''Real questions''
- December 2000: Disputed phone call
- January 2001: ''May be forced to litigate''
- February 2001: Increased demand

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Instead, the court held that the duty to preserve was triggered by plaintiff's January 5, 2001 e-mail stating that he had contacted counsel and would recover substantial sums if ''forced to litigate.'' Even though the message included an effort to suggest settlement, which might not be a trigger, it ''openly'' threatened litigation.

In short, the escalating tension did not serve as a trigger until it reached a point of reasonable clarity; the court also rejected defendant's assertion that the duty had not been triggered until the February 19, 2001 letter, which increased the plaintiff's demand.

Key Players. Once triggered, the court explained how to identify ''key players,'' and turned to the application of that concept, and the scope of the duty, vis-à-vis employees and third-party consultants.

The majority of plaintiff's contact was with one of defendant's employees. He also had some limited contacts with two others, and was aware of the role of the third-party consultants.

One of those third-party consultants had not saved his files over the eight-year period, and testified to memory lapses that could have been refreshed by those missing documents. The court noted that ''[a] party may be held responsible for the spoliation of relevant evidence done by its agents,'' and that agency law is directly applicable to a spoliation motion; however, after reviewing the letter agreement with the third consultant, it held that defendant did not have ''sufficient legal authority or practical ability to ensure the preservation'' of the consultant's file and therefore it had no obligation to preserve documents the consultant prepared.

Duty to Preserve and Employees. On the other hand, the court decided that the duty applied to all three of defendant's employees. Because defendant had not issued a litigation hold, the three employees' computers had been discarded or re-imaged, in violation of the duty to preserve. The court rejected the responsive arguments that: selective printing of e-mail was sufficient to satisfy the duty to preserve; the defendant was a ''mom and pop'' company and should therefore be excused; and, the duty to preserve was only recently coined and therefore not applicable. In short, the employees were deemed key players, and the defendant had breached the duty to preserve.

Duty to Preserve Versus Duty to Produce. The court also rejected plaintiff's contention that defendant's failure to search 280 disaster recovery backup tapes and compact discs was spoliation. The court noted that defendant had preserved that data and plaintiff had not moved to compel a search of it. Thus, defendant fulfilled its duty to preserve the information and had no duty to produce it.

State of Mind Inquiry. Having held that there was a breach of the duty to preserve the computers, the court inquired whether there was a culpable state of mind. Because no court order had been violated, the court analyzed this issue under its inherent powers, not Federal Rule of Civil Procedure 37.

Noting that willful and deliberate acts might not necessarily also be performed in bad faith, the court found that the computers were intentionally destroyed. As to two of the destroyed computers, the movant failed to provide a factual predicate showing that they were used in connection with the project at issue and that they contained relevant information.

The third computer, however, was heavily used in the project. Furthermore, the user generally stored information on the laptop's hard drive, and not the company's networked ''i-drive.'' This willful destruction supported an inference that facts unfavorable to defendant had been destroyed and that defendant had intentionally destroyed evidence, within its control, that it knew to be relevant, and that the destruction occurred after the duty to preserve had been triggered.

Absent a milestone deadline . . . spoliation motions should be filed during, or soon after, the close of the discovery period.

Sanctions

Adverse Inference Instruction. Next, the court evaluated the sanction to be imposed. It rejected plaintiff's requests for summary judgment and for fact-specific instructions, noting the absence of authority supporting the latter request and that it would be tantamount to directing a verdict for plaintiff. The request was, therefore, ''excessively punitive.'' Instead, the court determined that an adverse jury instruction would best serve the purpose of ''leveling the evidentiary playing field. . . .''

Costs. Finally, the court addressed costs and attorney's fees where a sanctions motion was granted in part and denied in part. First, analogizing to Fed.R.Civ.P. 37(a)(5(C), the court determined that in such a circumstance an award of expenses is discretionary and may be apportioned.

Then, after noting that a pro se litigant could not recover attorney's fees, the court directed filing of an itemized list of expenses, with the goal of compensating plaintiff for costs incurred to obtain the equivalent of the destroyed evidence, i.e., an adverse jury instruction, after considering any response and reply to the itemization.

Practical Applications

Request Deadlines. One of many ''take away'' points from the opinion is that counsel should consider whether to request a deadline for filing spoliation motions as part of a Rule 26(f) conference of the parties and a proposed Rule 16(b) scheduling order. As the court noted, there is a multi-factor, common-law test to determine the timeliness of such motions. This may leave the matter open to reasonable dispute and introduce a lack of predictability. Absent a milestone deadline, however, spoliation motions should be filed during, or soon after, the close of the discovery period.

Third Party Preservation. Another important lesson relates to preservation of ESI in the possession of third parties. The defendant escaped sanction for the consultant's failure to preserve because defendant ''did not

have the sufficient legal authority or practical ability to ensure the preservation'' of those documents. The court also noted that the plaintiff knew of the third-party consultants and, in fact, contacted them.

Clarify Intention to File Suit. Additionally, if a disputant intends to rely on a pre-litigation ''preservation letter'' to trigger an opponent's duty to preserve, it is well-advised to make clear in the letter that it intends to litigate, rather than relying on a court to subsequently determine ''constructive notice'' and when litigation was ''reasonably foreseeable.'' The opinion also demonstrates that the duty to preserve is often broader than the duty to produce. And, it shows the necessity for providing a factual predicate in connection with a spoliation motion.

When a spoliation motion arises out of a period of escalating tension, the party seeking sanctions will attempt to advance the trigger date, while the alleged spoliator will argue that litigation was not reasonably foreseeable until late in the process, that the information was not in possession of a key player or within the alleged spoliator's control, that the spoliation motion was untimely, and that there is no prejudice. *Goodman* provides an analytical structure for resolving those issues.

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