

Litigation Alert

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Turn Off That “Auto Delete” Switch: Sanctions for Failure to Preserve Electronic Evidence

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In *Mosaid Technologies Inc. v. Samsung Electronics Co.*, No. 01-CV-4340 (D.N.J. Sept. 1, 2004), Magistrate Judge Ronald Hedges, of the United States District Court in New Jersey, sanctioned Samsung roughly \$500,000 for failing to preserve e-mails relevant to the case, regardless of whether Samsung had done so intentionally. The judge also determined that the jury in that case would be permitted to infer that the evidence contained in those destroyed e-mails would have been unfavorable to Samsung's case.

The *Mosaid* opinion is significant because it indicates that sanctions can be warranted even when the failure to preserve e-mails results solely from a failure to turn off an automatic e-mail deletion program, which many large corporations use to save storage space on their computer systems. The Judge noted that “the fact that no technical e-mails were preserved, and that no ‘off-switch’ policy existed, demonstrates, at the least, extremely reckless behavior.” Thus, what could well have been an innocent oversight resulted in a half million dollars in sanctions and a negative jury instruction for Samsung at trial.

Mosaid is just one of several recent federal court decisions that have imposed sanctions on a party for failing to preserve electronic data. For example, in *United States v. Philip Morris USA Inc.*, 327 F. Supp. 2d 21 (D.D.C. July 21, 2004), where the defendants continued to delete e-mail more than 60 days old

for a period of at least two years even though the court had ordered all relevant documents to be preserved, the judge imposed sanctions of \$2.75 million and barred a defense witness from testifying. Similarly, in *Zubulake v. UBS Warburg, LLC*, 2004 WL 1620866 (S.D.N.Y. July 20, 2004) (*Zubulake V*), a New York judge ordered the defendant to pay a portion of the plaintiff's attorneys' fees and agreed to permit an adverse inference jury instruction because counsel failed to identify and preserve certain e-mails, and a number of key employees had deleted e-mails even though counsel had repeatedly instructed them not to do so. Other cases have stated that the duty to preserve electronic evidence may arise before litigation has even been filed, if the party is on notice that the claim may be litigated.

The message that *Mosaid* and these other recent decisions send is clear: Organizations have a duty to preserve all relevant electronic records once litigation is anticipated, threatened or initiated. The failure to do so invites the risk of significant monetary and other sanctions.

In New Jersey, a relatively new local federal court rule hopefully will minimize the risks and burdens caused to businesses that can arise from a duty to preserve electronic evidence. Local Rule 26.1(d) requires each party to investigate and in effect inventory its electronic systems at the outset of a case. It further requires any party who intends

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to seek electronic discovery to inform the other parties of that intent early in the case.

Local Rule 26.1(d) also requires that parties agree on a plan for electronic discovery, which should specifically address issues of record preservation and production, and should be used to narrow the scope of discovery and preservation obligations to those employees and parts of your organization that are relevant to the issues in the case. It is likely that as long as a party is following its obligations under the electronic discovery plan that is agreed to or is imposed by the court, it should be immune from sanctions for failing to preserve electronic records that were not required to be preserved under the plan. No court decisions have yet confirmed this reading of the local rule.

Further off on the horizon, at the national level, the Judicial Conference of the Administrative Office of the U.S. Courts has proposed new rules, similar to the New Jersey rules, which would govern the discovery of electronic information. The proposed rules, however, are not scheduled to go into effect until at least December 2006. Among these proposed rules is an amendment to Rule 37 that would limit sanctions for the loss of electronic information if a failure resulted solely from the routine operation of a party's computer systems. This "safe harbor" would not be available to a party who violated a court order that required the preservation of electronic information or if the party did not take reasonable steps to preserve electronic information if it "knew or should have known the information was discoverable" in a case.

With the prevalence of e-mail communications in today's business environment, preservation of electronic evidence can be an issue in any litigated matter. Therefore, organizations need to take steps early in a litigated matter or dispute to discuss with

legal counsel the steps that should be taken to preserve electronic records. Although the federal courts are ahead of the state courts in terms of decisions and adopting rules on electronic discovery, care also should be taken in state court litigations, as it is only a matter of time before the issues are litigated in such courts, and there are already state court judicial decisions regarding the destruction of non-electronic evidence that could easily be applied to electronic records.

Following are some guidelines that may be taken to minimize your company's risk of being subject to sanctions for failing to preserve electronic evidence, not all of which are appropriate or necessary for every organization:

Before litigation is anticipated, threatened or initiated:

- Designate an electronic discovery team responsible to:
 - maintain a current inventory of all sources of electronic documents;
 - maintain an index of all materials stored in each location.
- Establish company policies and procedures for handling the preservation, collection and review of electronic documents when litigation does arise, and educate/train relevant personnel concerning those policies and procedures.
- Adopt and enforce an electronic records/e-mail retention/destruction policy.

Once litigation is anticipated, threatened or initiated:

- Draft and disseminate a “document hold” notice.
- Turn off all routine electronic record deletion programs that pertain to any individuals or departments that may have information relevant to the dispute.
- Confer immediately with counsel to coordinate your efforts and determine the procedures that should be followed to preserve evidence, and to determine whether you will seek electronic discovery and, if so, the nature of such electronic data.
- Identify all repositories of potentially responsive electronic documents, so that you can determine which of those locations you will preserve and review.
- If necessary, with the assistance of legal counsel, employ a data management consultant to conduct the extraction of potentially relevant electronic data for attorney review and production.
- Take any other steps necessary to ensure that potentially relevant information will not be inadvertently erased or destroyed.

If you have any questions or concerns about the duty to preserve electronic evidence and how it may affect your organization, or other questions regarding electronic discovery, please contact Stephen R. Buckingham, a member of the firm, at (973) 597-2326 or sbuckingham@lowenstein.com, or Gina M. Sarracino, an associate in the firm, at (973) 597-2540 or gsarracino@lowenstein.com.