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Expiration of litigation holds may not be obvious

By John Delionado and Corey Lee

Much has been written about the consequences of failing to establish a reasonable plan to preserve documents once there is a duty to preserve. However, surprisingly little has been written about when a party can resume its normal document retention and destruction policy.

The good news is that eventually the litigation hold can be lifted; the bad news is that you may not be able to life the hold as soon as you would hope or like.

The obvious answer as to when a party can life a litigation hold is, of course, when the litigation is "over." When litigation is over, however, may not be as apparent as you might think.

Imagine you're retained to represent a client against threatened claims. Having learned the lessons of Zubulake v. UBS Warburg, 220 F.R.D 212 (S.D.N.Y. 2003), you begin helping your client implement a plan to preserve potentially relevant documents as soon as litigation appears probable.

Then the lawsuit is filed, and your client is served. In response, you move to dismiss for failure to state a claim. Your motion is granted with prejudice before the costly discovery phase has commenced.

Your client, understandably, wants to resume business as usual, since the case is over from the client's perspective.

Not so fast. The plaintiff may appeal, and until the appellate process is complete, you should still be reasonably anticipating litigation and preserving documents. After all, the order granting the motion to dismiss could be reversed, requiring the case to proceed. That's the straightforward scenario.

LITIGATION THREAT

But what if litigation has been threatened but a long period of time passes and no suit is filed? The case of UMG Recordings. v. Hummer Winblad Venture Partners, 462 F. Supp. 2d 1060 (N.D. Cal. 2006), provides helpful analysis.

UMG Recordings is one of a series of cases related to litigation concerning Napster, the file-sharing company. The litigation started Dec. 6, 1999, when the recording industry sued Napster for copyright infringement. In May 2000, Hummer, which was not a party to the litigation,

invested in Napster. In July 2000, a second Napster suit (the Katz litigation) was filed, naming Hummer as a defendant.

After Napster ceased operations, the Katz lawsuit was voluntarily dismissed in July 2001. Finally, in April 2003, UMG Recordings was filed and Hummer was served in August 2003.

In UMG Recordings, Hummer argued that it did not have a duty to preserve documents for the period between dismissal of the Katz litigation in July 2001 through August 2003 when it was served in UMG Recordings.

The district court disagreed, noting that the duty to preserve arises as soon as a reasonably anticipated potential claim is identified. Thus Hummer had a duty to preserve between July 2001 and August 2003.

ON NOTICE

The court concluded that litigation was reasonably anticipated because counsel for the UMG plaintiffs sent Hummer a letter threatening litigation in August 2001, the month after the Katz suit was dismissed. In April 2002, Hummer sent an email speculating that it would be sued and requesting indemnification as a condition of its sale of Napster shares.

Moreover, the court noted Hummer already had been sued once and knew that plaintiffs were pursuing solvent parties after Napster ceased operations.

The message from the court in UMG Recordings, which was not appealed, is that resolving one litigation may not be definitive when there are additional threats to sue, particularly when similarly situated parties have been sued already.

Florida courts may not be far behind the federal courts. The Third District Court of Appeal held in Figgie International v. Alderman, 698 So. 2d 563, 567 (Fla. 3d DCA 1997), "Document-production requests put the parties on notice that documents should be preserved, regardless of the spoliator's subjective intent."

However, that case was decided before Florida Rule of Civil Procedure 1.200 was amended to create a mechanism for a case management conference at which the parties should discuss the preservation of electronically stored information.

While the Florida courts have not yet commented on how the amendment of Rule 1.200 affects the duty to preserve, neither you nor your clients want to be parties to the first case imposing discovery sanctions after a finding that Rule 1.200 supersedes Figgie International.

Finally, remember that documents relevant for one litigation may also be relevant for others. Therefore, after considering the landscape of any particular dispute, you should confirm that the documents in question should not be held for another case.

[Quote in middle of page] – Your motion to dismiss is granted with prejudice before the costly discovery phase has commenced. Your client wants to resume business as usual, since the case is over from the client's perspective. Not so fast. The plaintiff may appeal, and until the

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