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# The Duty to Preserve In an Uncertain World

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**May 2011**

Recent case law has clarified a party's preservation obligations when it believes that litigation is on the horizon. As detailed in The Pension Committee of the University of Montreal Pension Plan et al. v. Banc of America Securities, LLC (S.D.N.Y. 2010), the duty to preserve attaches henever a party reasonably anticipates litigation.

However, there are other scenarios that have less clear-cut answers. If a CEO happens to find out (either through colleagues, the local newspaper or perhaps even Facebook) that a former business partner is a party to a major lawsuit, then there is a real possibility that her company's documents and electronic data may be of interest. This is especially true if the subject matter of the lawsuit involves the former partner's relationship with the company.

In such a situation, what obligation, if any, does the CEO and the company have to preserve documents and electronic data? Must the company undertake the potentially expensive and burdensome task of immediately suspending its normal

document retention policies, like parties to a lawsuit, thereby ensuring any and all potentially relevant evidence is preserved?

### When Does the Duty to Preserve Arise?

Applicable state and federal case law in California, New Jersey, New York and Pennsylvania reveals that mere awareness of a court proceeding with respect to which a non-party may have relevant documents and electronic data is generally not sufficient to trigger a duty to preserve. The question of when a duty to preserve arises is critical because many courts rely on general negligence principles when examining a claim of spoliation against a non-party.

In California, the Eastern District of California in the case of Lewis v. J.C. Penney, Inc. (E.D. Cal. 1998) and the California Supreme Court in Temple Community Hospital v. Superior Court (Cal. 1999) found that, absent a special relationship (for example, statutory or contractual), there can be no violation of a non-party's duty to preserve evidence unless a party litigant makes a specific request before the evidence's destruction.

New Jersey courts have also addressed when, if at all, a non-party has a duty to preserve evidence, and have found that mere awareness of litigation is not enough. In Saksa- Mydlowski v. Ford Motor Company (D.N.J. 2006), the federal district court refused to permit a tort defendant to bring a claim for negligent destruction of evidence against a non-party. The district court cited the Superior Court of New Jersey Appellate Division's holding in Gilleski v. Community Medical Center (N.J. Super. App. Div. 2001) and confirmed the duty to preserve is "stringently limited" to four circumstances: 1. when a non-party has knowledge of a potential lawsuit and proceeds to accept responsibility for evidence that would be used in that lawsuit; 2. when a plaintiff relies on a non-party's voluntary undertaking to preserve evidence; 3. when a party and non-party enter into an agreement to preserve; and 4. when a specific request is made to a non-party.

The courts in Saksa-Mydlowski and Gilleski held that constructive notice of a pending or potential action was insufficient to impose a duty to preserve on a non-party. The Gilleski court also emphasized the need to balance the competing interests between an injured plaintiff's right to pursue a lawsuit with adequate supporting evidence and a non-party's right to "dispose of its own property in a reasonable fashion."

In New York, the Court of Appeals agreed that awareness of litigation is not sufficient for the duty to preserve to attach. In MetLife Auto & Home v. Joe Basil Chevrolet Inc. (N.Y. Ct. App. 2004), the court held a non-party's duty to preserve evidence did not attach even after an oral agreement with a party to preserve. There existed no relationship giving rise to such a duty, and no written agreement or court order directed preservation.

The Pennsylvania state court case of Elias v. Lancaster General Hospital (Pa. Super. 1998) addressed what it classified as the "key question" of whether a party not involved in an underlying litigation owes a duty to preserve relevant evidence. Deciding that this was an issue of general fairness, the court held such a duty would not be imposed "absent the existence of some special relationship" that would warrant the imposition of general negligence principles. The court specifically cited statutory and contractual relationships as the types of special relationships that might give rise to such a duty, as well as other circumstances "where one voluntarily assumes a duty by affirmative conduct" or where a duty might otherwise arise by law.

## Duty for Non-Parties

If simply being aware of a lawsuit is not enough to trigger a duty to preserve relevant documents and electronic data, then when does it become necessary for non-parties? Being served with a subpoena provides the clearest example of when a duty to preserve does attach. Absent a subpoena, the cases discussed here generally counsel that the receipt of a written request or directive to

preserve data also triggers a duty to preserve. Such a written directive or request presumably puts a non-party on notice that: 1) litigation has commenced or will commence; 2) a non-party may have relevant information; and 3) the party issuing the notice anticipates a reasonable likelihood of using that information.

At least one New Jersey court confirms this general guidance. In Swick v. The New York Times Co. (N.J. Super. App. Div. 2003), the Superior Court of New Jersey Appellate Division affirmed a lower court ruling that receipt of a written notice created a non-party's duty to preserve the requested evidence (after neither party to the lawsuit challenged that the duty existed).

But while this standard may seem reasonable, abuse by overly ambitious counsel remains a concern. It is not far-fetched to imagine a party's attorneys sending out preservation letters to any non-party that could possibly be in possession of relevant documents and electronic data. Under the umbrella of "zealous representation," counsel may not see the harm in proceeding this way. Counsel might be thinking that they can always go back and decide later that it is unnecessary to secure documents and electronic data from certain non-parties.

The harm, of course, comes in person- hours and cost. Preserving documents can be (and often is) expensive and time-consuming, especially for large companies with complex data systems. Plus, unlike a subpoena, which will typically provide a party with an opportunity to modify or quash, there are no formal procedural safeguards in place to respond to a written directive to preserve data. Short of independently seeking court intervention, a non-party is seemingly left with two options: either comply with the directive (and assume the expense and distraction), or take the risk and liability of ignoring the directive, with potential repercussions down the road.

## Negotiation

There is, however, a third option: negotiation. A non-party can (and should) attempt to negotiate what documents and electronic data it will, and will not,

preserve, clearly stating its position in writing in the process. If negotiation is not successful, a nonparty should strongly consider being proactive and seek protection from a court. For example, Federal Rule of Civil Procedure 45 and its state analogues protect non-parties from burdensome and expensive discovery.

## Remedies

Finally, what sort of remedies, if any, will a court impose on a nonparty that undertook, but then violated, a duty to preserve documents and electronic data? As noted above, many courts have typically relied upon negligence principles when reviewing a claim against a non-party for spoliation of evidence. In California, New Jersey, New York and Pennsylvania, a claim against a non-party for spoliation of evidence should be brought as a tort for negligence because courts are hesitant to recognize an independent tort against non-parties for spoliation.

Seeking to avoid an “endless spiral of lawsuits of litigation-related misconduct,” the California Supreme Court declined to recognize a separate tort claim for intentional spoliation against a non-party in Temple Community Hospital. The court reasoned that such a tort was not necessary because myriad alternative remedies were available. Under California law, these remedies may include discovery sanctions or, more significantly, criminal penalties. In addition, attorneys who participate in the spoliation of evidence by a nonparty may face disciplinary sanctions. The court recognized that, while these remedies may appear limited, “that may well be because third party spoliation has not appeared to be a significant problem for our courts.”

In New Jersey, the Saksa-Mydlowski court acknowledged that “[a]lthough New Jersey appellate courts have not recognized a distinct tort of negligent spoliation of evidence, they have permitted claims of negligent destruction of evidence to be brought by tort plaintiffs against third-parties under traditional negligence principles.” In New York, the Court of Appeals agreed and declined to recognize

spoliation of evidence as an independent tort claim against non-parties in Ortega v. City of New York (N.Y. Ct. App. 2007).

Similarly, in Pennsylvania, the Elias court held it was not necessary "to create an entirely new and separate cause of action for a third party's negligent spoliation of evidence because traditional negligence principles are available and adequate remedies exist under those principles to redress the negligent destruction of potential evidence."

## Conclusion

While the remedies for spoliation may be limited to general negligence principles, non-parties are still well advised to proceed in a reasonable, yet cautious, fashion in the absence of further guidance from the courts. Constructive notice of a lawsuit with respect to which a non-party may have relevant evidence will likely not trigger a "fire drill" to preserve documents and electronic data.

A written directive from a party to preserve documents and electronic data, however, should be taken seriously and addressed appropriately. These directives should be met with a response aimed at negotiating an amicable resolution that minimizes both the resources and costs associated with preserving documents and electronic data.

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