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Avoiding the Pitfalls of Records Retention in the ESI Era

Article By:

Seth Uphoff

With large amounts of ESI – Electronically Stored Information – currently available, and the world of technology creating new sources of ESI all the time, courts have been working to create rules to help govern how ESI will be handled in litigation. There are many cases, both "trucking" and "non-trucking" related, that provide guidance on these issues. The practical question whenever a claim occurs is determining what sources of ESI should be preserved and for how long.

The Federal Rules of Evidence, which have been influential in shaping the rules and holdings of the individual states, have addressed spoliation in the ESI context via Rule 37(e), which was amended in 2015. The amended rule essentially breaks ESI spoliation down into two categories: (1) Negligent; and (2) Intentional.

For the first category, if a party fails to take reasonable steps to preserve ESI and the lack of that evidence is harmful to the requesting party, then the court can take measures it deems appropriate to cure the harm.

One example of a company found to have been negligent in properly preserving their ESI comes from California, *ILWU-PMA Welfare Plan Bd. of Trustees v. Connecticut General Life. Ins. Co*., No. C 15-02965, 2017 U.S. Dist. LEXIS 10529 (N.D. Cal. Jan. 24, 2017). In that case, the defendant company was owned by a parent company. The parent company sold off one of its other entities. The entity that was sold possessed computer servers that stored some of the defendant's ESI. After the sale, the defendant attempted to retrieve some of its ESI from the party who had bought the servers. However, despite an agreement in the contract for sale prohibiting destruction of information on the servers, the purchasing party had deleted the ESI that defendant needed. The court in that case determined that defendant should have done more to retain its ESI before the sale. However, it did not believe the loss of the information was intentional and only imposed monetary sanctions.

On the other hand, if the court finds the loss of ESI is intentional, the court can take more drastic steps. Sanctions can include instructing the jury to assume the "lost" information was unfavorable to the party who "lost" it; or, in the most extreme circumstances, the court can dismiss the case or grant a default judgment in favor of the requesting party. However, the line between negligently failing to take reasonable steps to preserve information and intentionally depriving the opposition of the information can be a bit of a gray area.

One example of that gray area is a trucking case from Georgia, *O'Berry v. Turner*, No.

7:15-CV-00064-HL, 2016 U.S. Dist. LEXIS 55714 (M.D. Ga. Apr. 27, 2016). In that case, following a traffic accident, the plaintiff sent the defendant trucking company a preservation letter. The trucking company printed out one paper set of the electronic driver logs from its vendor. Later, it was discovered that the paper copy had been lost in an office move and the electronic records were no longer available from the vendor. The court in that case found that the trucking company's practice of simply printing one paper set of the records was not a reasonable enough step to preserve the information. So, while the trucking company did not "intentionally" destroy the records, they did "intentionally" fail to put a better system in place for preserving the records, which was enough for the court to impose a serious sanction.

The *O'Berry* case serves as a good reminder that a trucking company must not do the bare minimum, such as just printing out one paper set of electronic driver logs. How much a company should do creates a host of questions, such as: Considering that the federal regulations, 49 CFR 395, require motor carriers to retain driver logs for 6 months, should a company be retaining them longer if feasible? Should they retain them longer any time there is an accident? Or only for certain kinds of accidents? What about the many types of supporting documents that the regulations require be maintained? And if these documents should be retained longer, for how much longer? In order to answer these questions, and many others of a similar nature, the company should consult with legal counsel to create preservation plans. They should work together to ensure that they understand the current status of the legal requirements, and to ensure they're doing everything they can reasonably do to preserve the ESI. Routinely evaluating ESI preservation procedures with counsel should be part of every company's risk management operations.

Another recent spoliation example is an Alabama trucking case, *Barry v. Big M Transportation, Inc*., No. 1:16-CV-00167-JED, 2017 U.S. Dist. LEXIS 146691 (N.D. Ala. Sept. 11, 2017). In that case, one of Big M's trucks was involved in an accident with the Barrys, who were seriously injured. Following the accident, the truck was towed from the scene and within the next 48 hours was driven from the tow yard back to Big M. The law enforcement officers who wrote the accident report indicated the accident was caused by the Barrys' improper parking.

Just under a month later, Big M received a letter from the Barrys' attorney requesting that Big M preserve the black box data from the truck. However, by that point, the truck had undergone repairs from the accident. In addition, prior to the accident, Big M had already brokered a sale of vehicles that involved this particular truck. Three days after Big M received the preservation letter, the truck's buyer took possession, and Big M never downloaded the black box data before it allowed the buyer to take the truck.

Later, the Barrys requested the court enter a spoliation sanction against Big M. They argued that Big M made no effort to preserve the ESI before or after their preservation letter. That Big M should have known that after such a serious accident litigation was likely to ensue and it should have taken steps to preserve the evidence. But, even if Big M did not properly anticipate the litigation, plaintiff argued it certainly should have complied with the preservation letter it received before the truck left its possession.

For their part, Big M argued the reporting law enforcement officers indicated that the Barrys were at fault for the accident. Accordingly, litigation was not reasonably foreseeable. Further, Big M was of the understanding that once their truck was removed from the scene and driven back to its business, the black box data would have been overwritten. So, even if they had complied with the preservation letter, there would have been no usable data to retrieve. (As it turned out, even Big M's own expert did not agree with its assessment of whether the data would have been overwritten.)

Ultimately, the court found Big M guilty of spoliation. The court believed that Big M should have reasonably foreseen that litigation would ensue from such a serious accident. Further, the court believed Big M should have at least attempted to comply with the preservation letter before releasing the truck to the buyer.

However, even though the court found Big M guilt of spoliation, it did not impose the severe sanctions reserved for those who intentionally deprive their opponent of ESI. The court acknowledged that even though Big M's actions were technically intentional (it was no accident that they refused to comply with the preservation letter), the actions were not taken with the intent to deprive the Barrys of the information. Rather, the court believed that Big M's reasons for failing to preserve the evidence were at least plausible; and that while the ESI would have been helpful to the Barrys, the lack of the ESI did not cripple their ability to prove their case. In the end, the court decided that as a sanction it would allow the Barrys to point out that Big M failed to preserve the ESI and that the parties could then make arguments to the jury as to why the evidence was not maintained and what inferences should be drawn from that.

While the result was not ideal for Big M, it certainly was not the worst case scenario. The court could just have easily determined that their intentional decision not to comply with the preservation letter was sufficient to demand one of the harsher sanctions, such as a default judgment being entered against them.

The *Barry v. Big M* case illustrates several of the many issues that trucking companies will have to address when dealing with ESI. As referenced above, companies should work with their legal counsel to develop plans and procedures for when to preserve evidence, what evidence to preserve, how long to store it, and what format to store it in. Those plans will need to be continually redeveloped with the understanding that more and more sources of ESI are becoming available, that litigation can spring from many different types of occurrences, and that the courts will be looking for parties to take reasonable steps to ensure that ESI is properly collected and maintained. Further, consulting with counsel will keep a company aware of the most up-to-date court decisions and changes in what is sure to be a constantly evolving area of the law for the foreseeable future. Lastly, those policies and procedures will have to be made and updated knowing that if the court determines the company did *not* do enough to preserve the ESI, it could have catastrophic consequences on any subsequent litigation.

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