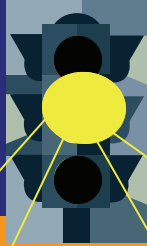


Risk



Alert

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Electronic Discovery Court Case

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Defendant and Counsel Ordered to Pay Sanctions for e-Discovery Failure

Green v. McClendon, 2009 WL 2496275 (S.D.N.Y. Aug. 13, 2009)

Upon one of the defendant's revelation that she had lost all *original* versions of electronic files when she transferred those files to CD and then reinstalled her operating system, plaintiff filed a motion for sanctions. Finding that the defendant and counsel violated their duty to preserve evidence, the court authorized additional discovery and awarded plaintiff his costs, including attorney's fees, to be paid by the defendant and her counsel.

Despite repeated representations by the defendant and her counsel that they had conducted thorough searches for responsive documents and had produced everything in the defendant's possession, upon plaintiff's successful motion to compel, a relevant spreadsheet was produced in hard copy for the first time. Thereafter three additional electronic versions of the spreadsheet were also produced, but with "clear differences" from the hard copy. Counsel was in possession of the electronic spreadsheets for several weeks prior to their production. Additionally, despite being asked, minimal information was provided about the author(s) of the spreadsheet.

Plaintiff filed a motion to compel forensic examination of the defendant's computer. In response, the defendant revealed that she had transferred her files to CD and reinstalled the operating system on her computer. Thus, the original version of any information stored thereon was lost. Plaintiff then filed a motion for sanctions, including an adverse inference.

Beginning its analysis, the court first established that a party seeking an adverse inference must establish: 1) the obligation to preserve, 2) that the records were destroyed with "a culpable state of mind," and 3) that the destroyed evidence was relevant to the party's claim.

The court found that the defendant had an obligation to preserve the original files. Regarding the scope of the obligation to both a litigant and counsel, the court stated:

"Once a 'litigation hold' is in place, a party and her counsel must make certain that all sources of potentially relevant information are identified and placed 'on hold'" *Id.* Then, "[c]ounsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched." *Id.*

Next addressing culpability, the court found that the defendant *and her counsel* had been "at least negligent" in failing to implement a litigation hold, properly search for documents, and supplement discovery responses. The court reasoned:

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"The preservation obligation runs first to counsel, who has 'a duty to advise his client of the type of information potentially relevant to the lawsuit and of the necessity of preventing its destruction.'" *In re NTL, Inc. Securities Litigation*, 244 F.R.D. 179, 197-98 (S.D.N.Y.2007) (quoting Chan, 2005 WL 1925579, at *6); see also *Fayemi v. Hambrecht and Ouist, Inc.*, 174 F.R.D. 319, 326 (S.D.N.Y.1997). Moreover, this responsibility is "heightened in this age of electronic discovery." *Qualcomm Inc. v. Broadcom Corp.*, 05 Civ.1958-B, 2008 WL 66932, at *9 (S.D.Cal. Jan. 7, 2008), *vacated in part on other grounds*, 2008 WL 638108 (S.D.Cal. March 5, 2008).

Indeed, for the current 'good faith' discovery system to function in the electronic age, attorneys and clients must work together to ensure that both understand how and where electronic documents, records and emails are maintained and to determine how best to locate, review, and produce responsive documents. Attorneys must take responsibility for ensuring that their clients conduct a comprehensive and appropriate document search.

Id. [Citations omitted.]

There is no question that Mrs. McClendon's counsel failed to meet these discovery obligations. Unless Mrs. McClendon brazenly ignored her attorney's instructions, counsel apparently neglected to explain to her what types of information would be relevant and failed to institute a litigation hold to protect relevant information from destruction. Moreover, despite numerous representations to the contrary, it is highly unlikely that counsel actually conducted a thorough search for relevant documents in Mrs. McClendon's possession in connection with their initial disclosure duties or in response to the plaintiff's first document request. If that had been done, counsel certainly would have found the spreadsheet from Mrs. McClendon's personal computer files. As one court has aptly stated,

The client is charged with knowledge of what documents it possesses.... [The defendant's counsel cannot] simply react to plaintiff's fortuitous discovery of the existence of relevant documents by making disjointed searches, each time coming up with a few more documents, and each time representing that was all they had. Under the federal rules, the burden does not fall on plaintiff to learn whether, how and where defendant keeps relevant documents.

Tarlton v. Cumberland County Correctional Facility, 192 F.R.D. 165, 170 (D.N.J.2000); see also *Metropolitan Opera*, 212 F.R.D. at 221 (quoting *Tarlton*).

The court also expressed its displeasure at the delay in production of the electronic spreadsheets. The court determined an adverse inference was not appropriate, however, where it was uncertain that the plaintiff had been deprived of any information in light of the transfer of the files at issue to CD before the reinstallation of the operating system.

Finding some sanctions were warranted, the court authorized further discovery regarding the spreadsheet, including further deposition of the defendant, and awarded the plaintiff costs and attorney's fees, in an amount to be determined, to be allocated between the defendant and her counsel. Interestingly, the court offered the defendant and counsel the opportunity to work out the allocation between them, and to involve the court only if necessary.

A copy of the full opinion is [available here](#).

For questions about information presented in this publication, please contact your agency Attorney General.