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Bad faith and a lack of document retention and destruction policy can lead to sanctions

By HARRY CENDROWSKI

Recent court cases have emphasized the importance of management assessing its company's document retention and destruction policy. Even documents destroyed in good faith may not be able to be claimed under the "Safe Harbor" provision of the Federal Rules of Civil Procedure (FRCP) if there was not a properly implemented document retention and destruction policy.

The "Safe Harbor" clause is one of the most notable amendments to the FRCP, which became law in December 2006. Specifically, the "Safe Harbor" clause is Rule 37(f) of the FRCP.



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In order to qualify for safe harbor, a document retention and destruction policy must be defined, tested and ensured; be completed routinely; and follow the normal course of business. Furthermore, once litigation is pending, a company has been notified of imminent litigation, or even if they reasonably anticipate litigation, they are obligated to preserve any

data that can serve as evidence, known as litigation hold. Production requests are then evaluated against the policy to determine what information should be available based on the organization's policies.

The FRCP 37(f) clause states that "absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system." Routine, good faith operation is defined by adherence to the organizational policies. The first two interpretations of the new

FRCP 37(f), regarding preservation of electronically stored information (ESI), have recently been heard in court.

In the first case, on June 27, 2007, the U.S. Federal Claims Court decided in *United Medical Supply Co. Inc v. United States* that "bad faith" is not required to impose spoliation sanctions. Spoliation is "the destruction, alteration, or mutilation of evidence."

In the government contract dispute, *United Medical Supply* claimed that the United States acted negligently with relevant information and failed to halt their document destruction policy until four years

after the litigation had already begun. As a result of this negligence, much evidence was destroyed.

Due to the loss of this material information, *United Medical Supply* argued for spoliation sanctions against the United States. The defendant responded by asserting that it had acted in "good faith" and therefore should be protected from any sanctions relating to the destroyed evidence.

Siding with *United Medical Supply*, the court stressed that an injured party could seek spoliation sanctions without demonstrating that bad faith resulted in the unfair loss of evidence. The court

believed that the United States failed to implement procedures to ensure evidence was preserved once litigation commenced.

The defense was prohibited from cross-examining United Medical Supply's expert dealing with the resulting gaps in the records. In addition, the United States also was ordered to pay United Medical Supply for the costs of the motion to impose spoliation sanctions and pay for any supplemental costs associated with further discovery as related to the loss of evidence.

In a separate case, *Jane Doe v. Norwalk Community College*, the U.S. District Court of Connecticut ruled the defendant was not protected by the "Safe Harbor" clause because

the defendant did not create and administer a policy regarding the destruction of ESI, and therefore could not claim a good faith exception under FRCP 37(f).

During a sexual assault suit, Jane Doe claimed that the defendants of Norwalk Community College had destroyed or altered evidence and had erased the computer hard drives of key individuals related to the suit. Norwalk admitted to "scrubbing" the hard drives while the four year lawsuit unfolded, but argued that the act was part of the college's normal course of business.

The court ruled that Norwalk had the duty of ceasing the destruction during litigation or in the event of probable litigation in order to ensure the preservation of

relevant information. Further, as the college had not previously established, tested and ensured a document retention and destruction policy, the actions were determined not to be part of the regular business practice.

As with the previous case, the plaintiff garnered reimbursement related to the spoliation sanctions motion. Additionally, the plaintiff received an adverse jury instruction regarding the destroyed evidence.

As established within these two cases, failures to adhere to these rules can result in spoliation sanctions, including adverse jury instruction, monetary awards, and in extreme cases, default judgments. The key to avoiding these situations is to enact a plan before the issues arise. As such,

it may be wise to appoint a document retention specialist. A document retention specialist can implement and administer a retention and destruction policy to keep business practices compliant with the rules of evidence.

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