Electronic Discovery and the Environmental Litigator

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The proposed amendments to the Federal Rules of Civil Procedure are expected to become effective in December 2006. *See* www.uscourts.gov/rules. At the heart of those amendments is the more clearly defined duty of counsel to address the preservation and collection of electronic documents and information early in the litigation process and the consequent burden on counsel to work closely with his or her client's Information Technology (IT) and legal departments to have a plan for this process as soon as she is on notice of, or reasonably anticipates, litigation. Part of this duty includes making sure that clients have proactively developed an electronic document retention policy that is rigorously enforced and that allows the IT department to halt the routine destruction of electronic documents in a timely fashion and to collect them in a legally defensible way when necessary. While all federal practitioners are subject to the new rules, environmental practitioners who represent corporate clients in regulatory compliance or environmental litigation matters may have particular regulatory or statutory triggers that signal the duty to preserve electronic evidence.

By way of background, it is helpful to understand the reasons that the preservation and production of electronic documents do not fall neatly into practices under the current Federal Rules. First is the sheer volume of electronic information currently created and destroyed. Up to 92 percent of new information, and up to 60 percent of a business's critical information, is stored electronically and most of that data is stored *only* electronically. Less than one-third of data is ever printed. Second, unlike paper documents, electronic documents are usually subject to some type of automatic deletion schedule. Most companies have systems that delete electronic mail after a certain period and routinely overwrite back-up tapes where information is stored. This can mean that, without even taking specific action, important documents may nevertheless be lost if these automatic processes are not halted. This could lead to serious consequences if those documents would have been relevant to the litigation and should have been preserved. Third is the nature of information available in electronic documents and the persistence of electronic data. Electronic documents contain metadata that reveal the history of the document over time, including what changes were made and when, when it was authored, who has opened it, and to whom it was sent. Electronic documents are also persistent and may never really be gone. Although space is made available for overwriting when a document or file is deleted, many documents continue to exist even after they have been deleted. Finally, electronic documents are dynamic and designed to have content that is changeable over time. Thus, if not properly preserved, a document could potentially be altered after the duty to preserve it attached. *See generally* the *Zubulake* line of decisions. *Zubulake v. UBS Warburg LLC*, No. 02-Civ. 1234, 2004 WL 1620866 (S.D.N.Y. July 20, 2004); *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 217 (S.D.N.Y. Oct. 22, 2003); *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003); and *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280 (S.D.N.Y. 2003). *See also The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production*, *available at* www.thesedonaconference.org.

Of particular concern is the duty to preserve electronic documents at the appropriate time, because a violation of this duty can give rise to a finding of spoliation, or the wrongful destruction of evidence. The consequences of failing to preserve and produce electronic data can be very serious and include sanctions, *see, e.g., Applied Telematics, Inc. v. Sprint Communications Co.*, 1996 U.S. Dist. LEXIS 14053 (E.D. Pa. 1996); adverse inference instructions, *see, e.g., Linnen v. A.H. Robbins Co.*, 1999 Mass. Super. LEXIS 240, at * 11 (Mass. Super. June 16, 1999); admonitions to attorneys and payment of production costs, *see, e.g., In re Bristol –Myers Squibb Sec. Litig.*, 205 F.R.D. 437, 2002 U.S. Dist. LEXIS 13808 (D.N.J. 2002); and even default judgments, *see, e.g., Telectron, Inc. v. Overhead Door Corp.*, 116 F.R.D. 107 (S.D. Fla. 1987). Courts are placing outside counsel's actions under ever-increasing scrutiny.

The key to determining whether a duty to preserve exists is whether the party had "notice" that the evidence in question was relevant to pending or anticipated litigation. This notice can take the form of prior lawsuits, prelitigation communication, the filing of a complaint, discovery requests, or discovery orders. "Once on notice, the obligation to preserve evidence runs first to counsel, who then has a duty to advise and explain to the client its obligations to retain pertinent documents that may be relevant to the litigation." *Telecom Int'l America, Ltd. v. AT&T Corp.*, 189 F.R.D. 76, 81 (S.D.N.Y. 1999).

In the context of litigation under the major environmental statutes there are certain occurrences that may signify that a company and its counsel are on "notice" of anticipated litigation. For example, the citizen suit provisions of several statutes requires that, prior to bringing suit, the plaintiff must give sixty days' notice to the person who is alleged to have committed the violation. *See, e.g.,* Toxic Substance Control Act, 15 U.S.C. § 2619 (b) (1)(A); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9659 (d)(1)(C); Air Pollution Prevention and Control Act, 42 U.S.C. § 7604 (b)(1)(A). Given this sixty-day window in which e-mails may be automatically deleted and back-up tapes with relevant information may be automatically overwritten, environmental counsel may want to advise his or her client to halt these automatic processes for key custodians or departments upon receipt of such notice. In addition, counsel may want to consider whether a Notice of Violation of permit conditions triggers such a duty. Of

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course, this is a case-by-case analysis, but it is one that should be undertaken seriously. Unlike situations in which prelitigation communications may be subject to reasonable arguments that litigation was not anticipated, a Notice of Violation or Notice letters pursuant to a statute can ultimately provide the court and opposing counsel with a bright-line date and relevant information that could arguably have put a party on notice of potential litigation and could define the types of information that would be relevant to a resolution of the issues in the litigation and should have been preserved.

It is a new kind of team that will work on document retention and production issues for environmental litigation. In-house counsel, the client's IT department, and outside counsel must be able to demonstrate to the court a reasonable, legally defensible plan for managing electronic discovery. Information management systems or document retention policies must address electronic documents and must be consistently enforced. Once on notice of litigation, the legal and technical teams must work together to prepare a plan for data gathering and must document this process. Courts will judge a document retention policy and production practices by a reasonableness standard that will change over time. What was reasonable in 2002 might not be reasonable in 2006, so constant updates will be needed as technological tools evolve.

Electronic discovery will become a key concern for the environmental litigator. It is incumbent on outside counsel to see that electronic documents that are potentially subject to production are properly preserved when he or she is on notice of litigation. Procedural provisions in many environmental statutes and regulations may provide a guide as to when that duty begins. At that point, counsel may need to advise clients to stop auto-deletion of e-mails and files and halt the recirculation of back-up tapes. Environmental litigators must understand how electronic document retention policies function and must work with in-house counsel and IT departments to make sure that the preservation of electronic documents is a process that is thought out well before litigation begins.