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Harsh Sanctions for Ignoring E-Discovery Obligations

Over the past several years, attorneys and the courts have struggled with the discovery issues that arise from electronic data preservation and production. While some guidance has been provided by the courts, each case is intensely fact specific and for that reason there are simply no safe harbors to ensure against spoliation claims and sanctions. Despite the lack of clear and objective guidance, courts have increasingly been willing to impose severe sanctions for failure to properly preserve electronic data.

In the past few weeks, two courts have expressed their intolerance for counsel (in-house and outside) and companies who do not understand electronic discovery and do not take the appropriate steps to preserve electronic data. In *United States v. Philip Morris*, the court issued a **$2.75 million monetary sanction** arising from the deletion of emails. This extraordinary sanction was issued despite a finding that there was **no bad faith** on the part of Philip Morris. In *Zubulake v. UBS Warburg LLC*, the court identified specific steps that counsel (in-house and outside) must comply with in order to discharge their obligations to the court and opposing counsel in discovery. The failure to follow these steps could result in sanctions.

***United States v. Philip Morris USA Inc*., 2004 U.S. Dist. LEXIS 13580 (D. D.C., July 21, 2004)**
On July 21, 2004 the District Court for the District of Columbia sanctioned Philip Morris $2.75 million for failing to prevent employees, with knowledge relevant to pending litigation, from deleting their emails. The court found this inaction by Phillip Morris to violate the preservation order requiring Philip Morris to keep all potentially relevant records.

This case is significant for two reasons. First, the massive sanction signifies the financial consequences that may attach if a corporation fails to fully comply with a preservation order. Second, the fact that the court imposed the sanction absent a finding of bad faith, underscores the seriousness with which courts view electronic discovery.

Click here for a more detailed case summary.

***Zubulake v. UBS Warburg LLC*, 02 Civ. 1243 (S.D. N.Y. July 20, 2004) (aka "Zubulake V")**

Zubulake V identifies specific duties that attorneys must assume related to the discovery process. Foremost, attorneys must affirmatively monitor compliance with discovery orders as well as general obligations to preserve relevant evidence. This entails explaining to "key players" in the litigation the importance of the preservation order as well as periodically re-issuing a litigation hold to ensure that new employees are aware of it. In addition, attorneys must become intimately familiar not only with their client's document retention policies but also with their client's data architecture to ensure that otherwise relevant information is not being purged. This necessitates speaking with the company's information technology staff to thoroughly understand the procedures related to data backup and data purging. At the same time, companies must cooperate fully with and heed the advice of attorneys throughout the discovery process. Failure to comply with the guidelines set forth in *Zubulake* will likely result in the imposition of harsh sanctions.

Click here for a more detailed case summary.

Conclusion

Regardless of whether a preservation order is in effect or not, common law obligations to preserve evidence can still present a trap for the unwary. Accordingly, we strongly recommend that you carefully review your policies and procedures regarding potential electronic data preservation issues. Should you require assistance or advice on electronic discovery issues, Seyfarth Shaw is able to help. We have attorneys with technical backgrounds who understand the issues and dangers that arise from electronic discovery. Please do not hesitate to contact your Seyfarth Shaw attorney for assistance.

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