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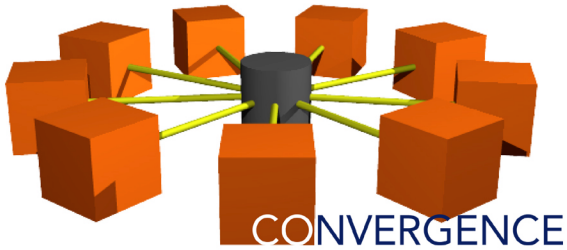

THE DUTY OF REASONABLE INVESTIGATION IN E-DISCOVERY

Participation in litigation involving electronic discovery issues requires litigants to take steps to locate, secure and produce evidence that are unique to electronically stored information (ESI). Recent decisions following the landmark case of *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003) are shaping the contours of the "obligation to conduct a reasonable inquiry when presented with discovery requests during litigation" that seek ESI.

Failure to conduct that reasonable inquiry, which includes implementing a litigation hold to preserve relevant ESI, and interviewing employees to locate and secure ESI for production and to inform the witness who will testify about the company's ESI, can have drastic consequences. For example, in *3M Innovative Properties Co. v. Tomar Electronics*, 2006 WL 2670038 (D. Minn. Sept. 18, 2006), a patent infringement case, the court penalized defendant Tomar Electronics with a broad range of sanctions, including adverse inference instructions to the jury regarding Tomar's destruction and withholding of email. The sanctions were imposed largely as a consequence of Tomar's failure to retain, collect and produce relevant ESI, and its mischaracterizations during discovery regarding what relevant ESI existed.

The court noted that after discovery demands were served, Tomar had a duty to contact those employees "that may reasonably be in possession of information or documents" relevant to plaintiff 3M's claims. "A company need not question all employees, but must question those that would reasonably have relevant information."

However, Tomar made no effort to search for potentially relevant ESI in the possession of any of its employees other than its president, Scott Sikora. (The evidence also showed that Tomar failed to implement the essential first step of e-discovery compliance – a company-wide litigation hold on all ESI and other evidence that might be relevant to the litigation.) Tomar argued that these steps were unnecessary because all of the evidence relevant to the case was in Sikora's possession. But the record showed that there were other employees, including salespeople and research and development personnel, who possessed or may have possessed relevant ESI and other evidence.

Sikora's testimony as Tomar's designated witness under Federal Rule of Civil Procedure 30(b)(6) did not help matters. For example, he testified that he had no

knowledge of the day to day activities of Tomar's sales force. The court observed that as a consequence, Sikora would "have had no idea whether they had relevant information or documentation." On the other hand, Sikora knew that his sales force had direct contact with distributors and end users of Tomar's products, the identities of whom were the subject of discovery. This made Tomar's failure to secure and search for discoverable information in the possession of employees other than Sikora an even more glaring omission.

To make matters worse, Sikora, the person most knowledgeable about Tomar's email system, testified in deposition that once deleted, the company's emails could not be recovered. Given the non-production of emails and the fact that no litigation hold had been implemented, the court presumed that relevant emails had been deleted, and ordered that the jury be instructed that they were unfavorable to Tomar. Tomar attempted to rectify its error via the late production of thousands of emails from the computer of one of its key sales personnel. However, the court found that 3M had already been prejudiced, and was not convinced that other relevant emails had not been deleted.

The court also faulted Tomar's failure to properly prepare Sikora to testify as its Rule 30(b)(6) witness. Tomar had a duty to prepare Sikora to be capable of providing information relevant to the deposition topics designated by 3M, but Sikora admitted that he did not confer with anyone in the company before appearing for deposition.

Every business and its counsel must have a plan for securing, searching for and producing ESI even before litigation is contemplated. Once litigation is on the horizon, employees who may reasonably be expected to possess relevant ESI must be informed of their obligation to preserve that information. The business must then identify, secure and prepare that ESI for production on a timely basis. As *Tomar* shows, relying on a single witness to perform the organization's preservation and production obligations may not meet the duty of reasonable investigation.

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