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BNA INSIGHT

In the Slick of It: Will BP Go Down With an Employee Who Purportedly Deleted Deepwater Horizon Oil Flow-Rate Related Text Messages?



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While the 24-hour news cycle has long left behind the Deepwater Horizon explosion on April 20, 2010 that resulted in 11 deaths and the largest oil spill in United States history, the government continues to investigate whether BP violated federal law in the days following the catastrophe by understating the amount of oil gushing from the well deep below and misleading the public and investors about the success of its well-capping efforts. Reviving notoriety of Deepwater Horizon, at least in legal circles, is a criminal complaint against a former BP engineer, Kurt Mix, charging him with two counts of obstruction of justice.

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The Allegations. The complaint, initiated by the FBI in late-March, alleges that Mix, who was involved with efforts to stop the flow of oil in the days after the explosion, may have leaked the truth about oil flow rates and the likelihood that BP's planned capping effort would fail via text message to his supervisor and a contractor working on the capping project.

The Investigations. Less than two months after the Deepwater Horizon explosion, in June 2010, the Department of Justice announced a criminal investigation into BP's response to the disaster and its reports of flow-rate estimates. In August 2010, the Securities and Exchange Commission, in coordination with the Department of Justice, submitted a subpoena to BP for all flow-rate related documents from April 20, 2010 to August 9, 2010.

BP's data collection vendor contacted Mix about collecting his relevant electronic data in late-September 2010. While the vendor collected from Mix some paper documents and his laptop in September and October 2010, his iPhone was not collected until August 2011.

According to court documents, forensic analysis conducted by BP's vendor on Mix's iPhone indicated that he had deleted at least 200 text messages to and from his supervisor in October 2010 and more than 100 text messages to and from the contractor in August 2011. The FBI believes these text messages were directly rel-

evant to the ongoing investigation against BP and that Mix intentionally deleted them when he learned they would be provided to the government.

Timing of the Legal Hold Notices. For anyone involved in modern discovery practice, this tale is the stuff of nightmares. The FBI acknowledges that only two days after the Deepwater Horizon explosion, BP sent Mix a legal hold notice that instructed him to preserve instant and text messaging documents relevant to the incident. The FBI also states that BP sent five additional legal hold notices over the two months following the incident, including one that stated on the cover in bold and underlined type that instant messages and text messages needed to be preserved.

While most corporate counsel or outside litigation counsel would like to put to bed the story of BP's culpability for Mix's destruction of the text messages, based on BP's quick and repeated issuance of legal hold notices that encompassed the very documents that Mix deleted, this may not be the end of the inquiry. While the government has not yet levied any charges against BP for Mix's destruction of the text messages, courts and commentators alike acknowledge that an organization has a duty to undertake reasonable and good faith actions to preserve relevant information and tangible evidence and may be responsible when an employee violates this obligation.

Duty to Preserve. Generally speaking, an organization's duty to preserve documents arises at the point when litigation is reasonably anticipated, regardless of whether the organization is initiating the litigation or is its target. While courts have not advanced a bright-line rule respecting what is a "reasonable anticipation of litigation," the obligation to preserve documents can be triggered long before the onset of litigation or, in BP's case, a government investigation.

In an effort to provide some clarity to this analysis, leading commentators like the Sedona Conference in its 2010 *Commentary on Legal Holds: The Trigger & The Process* have suggested that the duty to preserve is generally considered to arise when an organization:

- is on notice of a credible probability that it will become involved in litigation;
- seriously contemplates initiating litigation; or
- when it takes specific action to commence litigation.

In determining whether an organization's efforts were reasonable with respect to the triggering of its duty to preserve documents, courts generally analyze when, based on good faith and reasonable evaluation of relevant facts and circumstances, an organization should have been on notice of reasonably anticipated litigation.

To comply with its duty to preserve documents, once it comes into existence, an organization must to identify, locate, and maintain information and tangible evidence that is relevant to specific and identifiable litigation.

In the aftermath of the seminal decision in *Zubulake v. UBS Warburg*, 229 F.R.D. 422, 425 (S.D.N.Y. 2004), in which Judge Shira Scheindlin wrote "[o]nce a party reasonably anticipates litigation, it must suspend its routine document retention and destruction policy and put into place a 'litigation hold,'" legal hold notices

have largely become the judicially-accepted cornerstone of an organization's initial efforts to meet its preservation duty.

Adequacy of Hold Notices. But, were the legal hold notices that BP issued sufficient to prevent BP from being held responsible for Mix's intentional destruction of those text messages? Not necessarily.

Although issuing a legal hold notice to employees who may have relevant information is an integral component of the duty to preserve evidence, organizations also have a duty to ensure that the relevant information is actually preserved in accordance with the notice after it is issued. And, if an employee destroys potentially relevant documents contrary to the instructions of a legal hold notice, the organization can still be held responsible if the destroyed documents are ultimately relevant to the adversary's case.

Like so much in the world of modern legal discovery, the devil is in the details when determining an organization's culpability for an employee's destruction of documents. And, upon a finding of spoliation (that the evidence was actually relevant and indeed destroyed), organizations found responsible, even in part, for an employee's destruction of documents may be subject to sanctions including monetary fines, suppression of related evidence, an instruction to the jury that evidence presumed to hurt the organization's case was destroyed by the organization, and even a full judgment against the organization. The severity of the sanction will depend on the organization's action or inaction related to or resulting in the employee's destruction of evidence.

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BP's Potential Exposure. It is hard to predict what a court will do if faced with the allegation that BP should be held responsible for Mix's deletion of text messages between him, his supervisor, and the BP contractor.

On the one hand, BP sent Mix a legal hold notice requiring him to preserve all relevant documents, including text and instant messages two days after the explosion. BP also sent five subsequent legal hold notices over the following two months.

On the other hand, BP's vendor did not collect Mix's iPhone until August 2011, more than a year after the Department of Justice first asked BP for flow-rate-related documents like Mix's text messages. By then, Mix had already tried to deep-six these conversations by apparently deleting them from his iPhone.

Relevant Precedent. In cases where an employee deletes relevant documents, courts typically analyze the span of time between when the duty to preserve the materials and when the materials were purportedly destroyed, the steps taken by the organization to prevent

the destruction of the materials, and the overall relevance of the destroyed documents to the case.

In the *Zubulake* case, UBS Warburg was found responsible for the deletion of emails by its employees who had been explicitly required to preserve documents pursuant to a legal hold notice. UBS was held responsible because, in the court's view, its counsel had failed to effectively communicate the legal hold and to fully ascertain employees' document management habits and its employees ignored the legal holds issued. Because the court found UBS was at fault and some emails could not be recovered, the court imposed sanctions against UBS including paying some attorney's fees, restoring expensive back-up tapes containing some of the destroyed materials, and paying for additional depositions of its employees.

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In a slightly different case, *In re Hitachi TV Optical Block Cases*, No. 08-cv-1746, 2011 BL 334376 (S.D. Cal. Aug. 12, 2011), a Hitachi employee deleted emails on a personal computer in violation of a litigation hold notice in order to cover up a misrepresentation he made to his employer. However, because Hitachi ultimately worked with the employee and the party alleging the destruction of the emails, the court determined that the employee's actions had little effect on the case. Although Hitachi was responsible for its employee's violation of the duty to preserve evidence, the court determined that Hitachi had no actual knowledge of the relevant documents on the employee's personal computer or his decision to delete those documents. Hitachi was required to pay costs related to spoliation, but no other sanctions were imposed.

Like UBS Warburg or Hitachi, the central questions in an action seeking to hold BP liable for Mix's deletion of the text messages will be whether BP knew that Mix had conversations with his supervisor and the contractor relating to flow-rates on his iPhone, when it became aware of those conversations, and what steps it took to preserve those documents when it became aware of their existence.

Open Issues. Another question that could face BP is why, as it appears from court documents, it waited more than a year to collect Mix's iPhone. Yet another question could be to what degree the text messages that could not be recovered from the iPhone effected the government's investigation. A court's determination with respect to these questions will dictate whether and to what extent BP is punished for Mix's actions. And only time will tell whether the government will even seek such sanctions.

Best Practices. Rather than playing this up-all-night/wait-and-see game, in the face of any reasonably anticipated litigation or investigation, an organization should consider undertaking the following measures to best position itself should an employee destroy evidence:

- Issue a written legal hold notice to all employees who may have information relevant to the potential litigation setting forth with reasonable specificity the documents and locations that should be preserved.

- Have employees confirm receipt of the legal hold notice and reissue the notice periodically. Speak to employees about the duty to preserve documents relevant to the claims, including documents that might be found on their personal mobile devices.

- Communicate with your Information Technology Department about document retention policies. Consider whether to backup electronic data residing on mobile devices such as mobile phones, tablets, or laptops, onto company servers on a regular basis.

- Understand where and how important documents are stored. If electronic data residing on mobile devices is not regularly journaled, collect relevant data remotely, or by physically obtaining the mobile device, as soon as possible.

- If it is discovered that an employee deleted relevant documents in defiance of a litigation hold, admit the deletion to the opposing party and take whatever steps are available to remediate the situation.

While none of these steps is guaranteed to preclude a claim that your company should be responsible for an employee's destruction of evidence, a documented and systematic preservation effort premised on the guidelines above will best position your company to counter such a challenge with a demonstrated good faith and reasonable effort to comply with your duty to preserve relevant documents.

Hopefully BP has done the same in this case.