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PLEASE REPLY TO
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December 13, 2011

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Re: Suggestions

Gentlemen:

Consider sharing IT services to go into various municipalities to audit computers and cell phones to find usage in violation of rules and regulations and to follow up with discipline to end practices which inevitably lead to litigation.

Also, we will ran an article on our blog which was entitled "Litigation Hold" and I suggest that we should consider developing a policy to require our members to put in place a 'litigation hold' to ensure the preservation of relevant evidence and documents when the member reasonably anticipates litigation. .

Title:

Exploring your document retention policy and the effect of a "litigation hold"

Publication:

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Publication of the Barker, Scott, Gelfand & James, P.C.
Weekly Legal Update

Author:

Jeffrey P. Sarvas, Esquire

"Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents." Major Tours, Inc. v. Colorel, 2009 U.S. Dist. LEXIS 68128, *9 (D.N.J. Aug. 4, 2009) quoting, Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 218 (S.D.N.Y. Oct. 23, 2003). As the District of New Jersey has recognized, the "reasonable anticipation" standard is rather amorphous. Sanofi-Aventis Deutschland GmbH v. Glenmark Pharms., Inc., 2010 U.S. Dist. LEXIS 65323, *14 (D.N.J. July 1, 2010) ("The exact moment of when the duty to impose a litigation hold is vague.") Nonetheless, there are situations where a litigation hold must be initiated.

For example, once an entity receives notice from an employee's legal counsel alerting the entity of alleged wrongful conduct, a litigation hold should be implemented, even if the letter expresses a desire to resolve the claim without litigation. Major Tours, Inc. v. Colorel, 2009 U.S. Dist. LEXIS 68128, *9-12 (D.N.J. Aug. 4, 2009). In Major Tours, plaintiff's counsel sent a letter to defendant, the New Jersey Department of Transportation, alleging racial profiling of African American charter bus owners by the Department of Transportation. Id. at *11. The letter requested a response from the Department of Transportation "within two weeks in order to avoid recourse to litigation." Id. at *11-12. The District Court found that the Department of Transportation should have implemented a litigation hold upon receipt of the letter from plaintiff's counsel, despite the fact that plaintiff did not initiate a lawsuit until almost 2 years later. Id. Thus, generally once an entity receives correspondence from a party's legal counsel regarding alleged wrongful conduct, a litigation hold should be implemented.

Furthermore, once legal counsel has begun to investigate the file, a litigation hold should be implemented. In Sanofi-Aventis Deutschland GmbH v. Glenmark Pharms., Inc., plaintiffs alleged that defendants failed to institute a "litigation hold" when defendants first anticipated a lawsuit leading to the destruction of relevant e-mails and documents. 2010 U.S. Dist. LEXIS 65323, *3 (D.N.J. July 1, 2010). Defendants claimed to have instituted a "litigation hold" beginning on July 24, 2007. Id. at *3. Nonetheless, the defendants asserted work product privilege regarding certain documents dated between February 23, 2006 and June 26, 2007. Id. at *3. The District Court of New Jersey found the defendants' position untenable and held that the defendants "reasonably anticipated" litigation no later than February 23, 2006. Id. at *15. Thus, generally, once legal counsel begins to investigate a file, a litigation hold should be initiated.

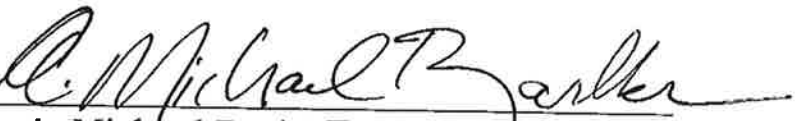
Importantly, the "litigation hold" rule extends to electronically stored information, including websites. See, Arteria Prop. Pty Ltd. v. Universal Funding V.T.O., Inc., 2008 U.S. Dist. LEXIS 77199,

*14-15 (D.N.J. 2008). In Arteria, a lawsuit was filed against the defendant, a real estate lending company, in October 2005. Sometime after October, the company deleted the website. Id. The Court found that the fact that an outside third party entity, a web design company, maintained the website had no bearing on the defendant's duty to implement a litigation hold to preserve the content of the website. Id.

Look forward to developing the ideas with you, if you are interested.

Very truly yours,

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By: 
A. Michael Barker, Esquire

AMB/gb