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Duty to Preserve: Third Parties

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The duty to preserve potentially relevant evidence arises in every lawsuit or government investigation. The scope of the duty, especially in e-discovery, has given rise to myriad opinions. Most litigants are familiar enough to know that when litigation arises or becomes reasonably foreseeable, the duty to preserve commences and they must identify and preserve sources of potentially relevant data in their possession. This is fine as far as it goes. However, litigants must also preserve data within their custody or control. Sometimes, the duty extends to data being held by third parties as discussed in a recent case.

In *GenOn Mid-Atlantic v Stone & Webster, Inc.*, GenOn and Shaw entered into an agreement requiring Shaw to design and build air quality control systems at three GenOn power plants. The agreement did not specify a fixed price, but rather provided a formula based on a comparison of Shaw's actual costs to a target cost. The agreement also gave GenOn the right to audit Shaw's requests for payment under the agreement. In 2009 GenOn hired FTI, a third-party consultant, to conduct the audit. Based on the results of the FTI audit, GenOn filed for a declaratory judgment against Shaw that GenOn owed no additional payments to Shaw under their agreement. At the time it decided to file suit, GenOn made no request to FTI to preserve any audit-related data. Shaw subpoenaed FTI for its audit-related papers and made similar requests for production to GenOn. Shaw received productions from both GenOn and FTI.

Shaw examined the productions and discovered that GenOn had produced email communications with FTI going back to 2009. In contrast, FTI did not produce any email communications with GenOn earlier than March 2010. Shaw's counsel inquired about the discrepancy and was informed by FTI's counsel that it had produced all email communications which it retained in the regular course of business. During subsequent depositions, Shaw learned that FTI had an email retention policy. On a monthly basis, FTI did a complete backup of the entire contents of each employee's mailbox, including deleted folders and other user-created folders. However, these backup tapes were not searched when responding to Shaw's subpoena. At the close of discovery, Shaw filed a motion for sanctions seeking to, in the alternative, dismiss GenOn's complaint, preclude FTI from offering expert testimony at trial and/or give an adverse inference jury instruction.

After Shaw filed its motion, FTI sought to restore 20 monthly backup tapes in order to retrieve any relevant email communications. FTI successfully restored 14 backup tapes, but was unable to restore six backup tapes. FTI produced to Shaw 46 additional emails from the 14 backup tapes it restored that were not included in its prior production. The court examined the circumstances surrounding these missing emails and determined that sanctions against FTI were unwarranted.

The first question before the court was whether GenOn had breached its duty to preserve evidence. Shaw contended that the data held by FTI was within GenOn's "possession, custody or control." The court determined that FTI had a duty to preserve evidence that pre-dated the issuance of the subpoena. The court examined both GenOn's legal and practical control of FTI's audit-related data.

With respect to a legal right to FTI's audit-related data, the court could find no provision in the parties' retention agreement establishing that FTI had an affirmative duty to produce on demand its audit materials to GenOn. However, based on the relationship between GenOn and FTI, the court determined that GenOn had the practical ability to control audit-related data within FTI's possession. The court found, "[i]n light of FTI's continuing relationship with GenOn, and

its role as a litigation consultant, there seems to be little doubt that FTI would have complied with a timely request by GenOn to preserve its information." Based on that determination, the court held that once GenOn determined that there was a reasonable likelihood of litigation with Shaw, GenOn had a duty to ensure that FTI preserved its audit-related data. The court next had to consider whether the missing emails pulled from the backup tapes suggested that Shaw was prejudiced by FTI's inability to pull data from the other six backup tapes.

With respect to the backup tapes as a whole, the court noted, "[w]hile the automated backup process consequently is not perfect, the primary purpose of backing up FTI's data is, of course, to facilitate business continuity and disaster recovery, not to ensure that the data is preserved for litigation. Given these business purposes, FTI did not require that its backup process have zero defects." In looking at the nature of the missing emails that were recovered from 14 of the 20 backup tapes, the court concluded that it was unlikely that any substantive discussions concerning the audit were lost due to FTI's inability to restore the data from those six backup tapes. Shaw's motion for sanctions was denied.

The *GenOn* case illustrates an important e-discovery principle. When a litigant determines that its duty to preserve has been triggered, it must consider whether potentially relevant electronic data is in the hands of any third parties. If so, the litigant needs to assess its legal ability to obtain that data from those third parties. The legal ability may arise by reason of agreement or statute. In some jurisdictions, including the Sixth Circuit, practical ability to control third party data must also be considered. Practical ability, as *GenOn* points out, will depend largely on the nature of the relationship between the litigant and the third party. Where the nature of the relationship evidences an ability to influence the third party to comply with requests for data, practical control is established. If legal or practical control over the data exists, the litigant then needs to include the third party in its litigation hold process. Had GenOn complied with its duty to preserve, FTI's faulty backup system probably would never have been exposed, and GenOn could have avoided the expense and risk associated with defending against Shaw's motion for sanctions.

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