

## Firm's Alleged Failure to Properly Advise Client about Preserving Electronic Evidence Leads to Malpractice Claim

By Jeff Kraus, Vice President—Senior Loss Prevention Counsel, ALAS | August 23, 2018



When a client fails to preserve electronic data, the penalties imposed on both the client and its lawyer can be severe. From a public reprimand of the lawyer to a default judgment against the client, a panoply of sanctions may await. See *ALAS Loss Prevention Manual*, Tab IV.B, Section 2.3. We are not surprised when a disgruntled client blames its lawyer and sues for malpractice after the imposition of the harshest spoliation sanctions. *Indus. Quick Search, Inc. v. Miller, Rosado & Algois, LLP*, 2018 U.S. Dist. LEXIS 391, 2018 WL 264111 (S.D.N.Y. Jan. 2, 2018), illustrates this point.

*Miller* involves a client who suffered a default judgment on liability in a copyright infringement case as punishment for, among other things, destroying electronic (and hard-copy) documents that would have helped

determine the scope of the infringement. After the default judgment forced the client to settle the underlying action, the client brought a malpractice suit against their lawyers for failing “to issue a litigation hold, inform them that destroying relevant documents was improper, or otherwise monitor [their] compliance with the discovery requests.”

The court determined that the client and its principal had plagiarized the competitor’s copyrighted materials and “deliberately destroyed documents central to determining the scope of their violation.” Against this egregious conduct, one of the client’s lawyers “testified that he issued an ‘oral litigation hold’ at the parties’ initial meeting,” while the other declared that “he had discussions with [the client’s owner] regarding what documents he had that were responsive to [the plaintiff’s] document demands.” The client’s principal countered that testimony by asserting that “no advice was ever given to [him]’ with respect to these topics.”

Setting out the legal standards at issue, the court first noted that “the obligation to preserve evidence runs first to counsel, who then has a duty to advise and explain to the client its obligations to retain pertinent documents that may be relevant to the litigation.” Then, the court reminded counsel that this obligation “include[s] both the ‘implementation of a litigation hold’ as well as ‘oversee[ing] compliance with the litigation hold, [and] monitoring [the client’s] efforts to retain and produce relevant documents.’” Finally, the court concluded that “an attorney’s failure to fulfill that ‘obligation’ falls below the ordinary and reasonable skill possessed by members of the legal bar.” *Id.* at \*27-28, \*9-10.

The lawyer’s purported “oral litigation hold” did not suffice. Instead, the court found that “there are genuine disputes of material fact as to whether [the lawyers] ever issued a litigation hold or properly oversaw [the client’s] compliance with discovery demands.” Accordingly, the malpractice claim survived a motion for summary judgment.

ALAS lawyers can avoid this fate by following a few basic steps to ensure the preservation of potentially relevant evidence.

1. At the outset of the matter, advise the client in writing of its obligations to preserve documents either in the engagement letter, the litigation hold memo to all key employees, or both;



2. As soon as feasible, determine the scope of preservation;
3. Locate all sources of relevant information in electronic and paper form;
4. Consider retaining an outside consultant or vendor;
5. Contact key employees;
6. Designate responsible persons;
7. Monitor the preservation procedure; and
8. Record the preservation efforts.

Create a checklist to ensure that each step is followed. Update that checklist as experience dictates. And, above all, do not rely solely on oral advice regarding the client's duty to preserve potential evidence. That will likely ruin your chances for a quick end to any claim blaming you for your client's discovery failures, as the lawyers in *Miller* learned the hard way.

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