

# Legal Update

## The Importance of Preserving Evidence

November 2009

A recent decision in New York State Supreme Court has emphasized the importance of preserving potentially relevant electronic and other materials in the context of litigation. In *Einstein v. 357 LLC, et al.*, No. 604199107 (N.Y. Co.), the state court joined the federal courts in stating that “the duty to preserve evidence attaches as of the date the action is initiated or when a party knows or should know that the evidence may be relevant to future litigation.”

Precisely when the duty to preserve arises will vary from case to case. Clearly, the trigger point is no later than when the summons or subpoena is served or received. It is important to realize, however, that the decision as to when the duty arose will always be made with perfect 20-20 hindsight – when it seems obvious that the evidence that may not have been preserved should have been preserved.

We therefore urge our clients to consult with counsel as soon as they contemplate bringing litigation or recognize that litigation may be brought against them. Only by consulting with counsel as soon as the client enters the “penumbra” of litigation can the clients ensure that effective steps are taken to preserve the relevant material.

Failure to preserve evidence can lead to very serious consequences. The opposing party may be entitled to have the trier of fact make an “adverse inference” that the materials that

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were not preserved would have been adverse to the client's interest. For more serious violations, the issue to which the unpreserved material was relevant may be decided against the client, or the client's pleading may be stricken (effectively ending the case). Moreover, the costs and legal fees involved in litigating the spoliation issue may be borne by the client, as well as the often very substantial charges of outside forensic experts who can attempt to recover the deleted material.

Although the discovery violations in *Einstein* were egregious, this recent decision makes clear that New York courts will consider the full panoply of sanctions when litigants fail to implement an effective plan to safeguard and preserve information that may be relevant to the action. In addition to complying with their duty, clients will avoid nasty, distracting and expensive sideshows by making sure their evidence is preserved.

We are available to assist you in determining whether and when a litigation hold should be issued, helping to implement it effectively, investigating the communications practices of the relevant personnel and taking additional measures to ensure that potentially relevant information does not fall through the cracks. We also can consult with you about when to use a litigation hold effectively, for example by sending a potential adversary a letter demanding that the adversary preserve evidence relating to a matter or issue.

For further information about the duty to preserve evidence and the practicalities of doing so, please contact any of the members of our Litigation and Risk Management Team.

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