

## THE IMPORTANCE OF FOLLOW-THROUGH

BY A. LOUIS DORNY

 FORTY-ONE YEARS AFTER THE invention of electronic mail—and nearly 20 years after it became a part of everyone's life—problems persist due to the relative ease with which email can be irretrievably destroyed.

This year's high-stakes patent dispute between tech giants Apple and Samsung illustrates the need for extra care in implementing a litigation hold policy at the earliest stages of a case to halt the destruction of email. But a recent decision in the Second Circuit sends a subtler message: The absence of a written litigation hold notice is not negligence per se but rather only one factor to consider in awarding sanctions for the spoliation of evidence.

### WHAT SAMSUNG DID RIGHT

In the Apple-Samsung battle, federal magistrate Judge Paul S. Grewal examined Samsung's efforts to preserve email. (*Apple, Inc. v. Samsung Elecs. Co., Ltd.*, \_\_\_ F. Supp. 2d \_\_\_, 2012 WL 3042943

(N.D. Cal.)) He gave a favorable nod to litigation hold notices that Samsung issued before and after the case was filed. He also looked favorably on the related training of Samsung's employees to ensure preservation of relevant documents. Furthermore, Judge Grewal noted, Samsung's litigation hold notices were category-specific, expressly identifying electronic files and emails as a category of documents worth preserving.

### WHERE SAMSUNG WENT WRONG

But the court faulted Samsung for circulating its initial litigation hold to only 27 employees (later notices were more widely circulated—to more than 2,700 employees). Clearly most troubling for the court was Samsung's automatic email-deletion software, which was never disabled to comply with the litigation hold. That software program automatically deleted stored email every two weeks unless messages were affirmatively saved by indi-

vidual employees. Furthermore, Samsung never audited its employees to determine whether they complied with the litigation hold policy. As a result, Judge Grewal held that Samsung had breached its duty to preserve evidence; he issued an “adverse inference” jury instruction, which specifically informed jurors that Samsung had failed to preserve relevant evidence and that the destroyed items were favorable to Apple.

### HOPING FOR A DRAW

Not to be outdone, Samsung filed its own motion for an adverse inference instruction on grounds that Apple had failed to issue a timely litigation hold notice to its employees. Judge Lucy H. Koh, who presided over the federal trial in San Jose, eventually entered an order that held Apple and Samsung to the same instruction. Instead of ruling only against Samsung, the court resolved to tell the jury the same thing about both companies. But discretion proved the better part of valor: Apple and Samsung came to an agreement that neither party would use the adverse inference jury instruction at trial. (*Apple, Inc. v. Samsung Elecs. Co., Ltd.*, \_\_\_ F. Supp. 2d \_\_\_, 2012 WL 3627731 (N.D. Cal.))

### ONLY A FACTOR

In ruling last July that the absence of a written litigation hold notice is not

by itself grounds for judicial sanctions, the Second Circuit specifically abrogated prior authority that a failure to institute a litigation hold constitutes gross negligence per se. The court noted that the better approach is to consider the failure to adopt good preservation practices as one factor—albeit an important one—to consider in determining whether to issue discovery sanctions and, if so, how severe they should be. (*Chin v. Port Authority*, 685 F.3d 135, 162 (2d Cir. 2012).)

Ultimately, the issue of compliance will come down to whether a party has acted with a “culpable state of mind.” As the trial judge recognized in *Chin*, the court has discretion to impose sanctions if a party was “sluggish” in preserving or producing evidence, or if relevant documents were improperly “sanitized.” The party seeking sanctions must show “a lack of care that approaches intent.” (*Port Auth. Asian Jade Soc’y of N.Y. v. Port Auth. of N.Y.*, 601 F. Supp. 2d 566, 570 (S.D.N.Y. 2009).)

Although litigation hold notices are a vital part of the compliance equation, constant vigilance is essential. Continuous monitoring is the best assurance that both counsel and client are making a reasonable effort to preserve relevant evidence. 📌

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