A Cautionary E-Discovery Tale For In-House Counsel

Law360, New York (February 19, 2013, 6:12 PM ET) -- A recent decision from the U.S. District Court for Arizona represents a cautionary tale for in-house counsel attempting to address the complexities associated with document preservation and production in the era of e-discovery.

In Day v. LSI Corp. (D. Ariz. Dec. 20, 2012), the court determined that in-house counsel's efforts in supervising LSI Corp.'s discovery responses were so inadequate that he was found to have a "culpable mind" and to have acted "willfully." Obviously, these are words no attorney wishes to see in a court opinion for all to read. Based on these findings, the court handed down the ultimate sanction against defendant LSI Corp. — partial default judgment. For good measure, the court also included some adverse inferences to be imposed at trial, as well as monetary sanctions.

When considered in light of the facts of the case, the court's decision seems extremely harsh. Consider the following.

Plaintiff Day, a former employee of LSI, brought suit alleging in the main that he had faced racial/ethnic discrimination, which led to him being constructively discharged. During the course of his employment, Day interacted with several other LSI employees concerning his employment status and bonus awards, each of whom presumably had records of his or her contacts and communications with or about Day. Although in-house counsel was made aware of Day's complaints and allegations at the time of Day's departure, counsel took no steps at that time to preserve any company records — and the court did not fault this decision.

However, after the company received a letter from Day's counsel outlining Day's allegations, LSI's in-house counsel issued litigation hold notices to three LSI Corp. employees. Several days later, in-house counsel received and reviewed Day's entire personnel file, and based on that review, he issued litigation hold notices to yet two more employees. He did not, however, include Day's original supervisor — Skelton — among those receiving a document hold notice.

According to the opinion, LSI Corp. maintained that Skelton was no longer Day's supervisor at the time of the events on which Day based his claims. This fact may well have influenced in-house counsel's decision not to include Skelton in the list of employees to receive the hold notice. In short, counsel made a judgment call — just as many attorneys do when deciding how to balance a company's preservation obligations against the costs and burdens of preservation and the subsequent review of documents.

Once the hold notices were issued, LSI's in-house counsel then instructed the company's IT personnel to isolate and recover pertinent documents for review and production. This was hardly an unusual or careless step. Rather, it is one that is undoubtedly repeated often by numerous in-house counsel when litigation arises.

The problem here is that counsel testified at deposition that he instructed the IT personnel to collect all documents relating to Day wherever they may have been located in the company's electronic records, while the IT representative testified that counsel only told him to look for electronic records in limited places. Evidently, no record of the instructions from counsel to the IT department exist — and, thus, the two offered contradictory deposition testimony. Unfortunately, the court chose to believe the IT department deponent and not in-house counsel.

Seven months after the company first issued its litigation hold notices, plaintiff Day served his initial disclosures listing people whom he believed had information relevant to the claims or defenses in the action — including his first supervisor Skelton. Having received notice that Day regarded Skelton as a possible witness, the company at that point could have issued a document hold notice to Skelton and told the IT department to gather his electronic documentation.

However, this option was not available because Skelton's business unit had been sold off two months earlier and despite the fact that the company's document retention policy said that it retains employee

communications for three years, Skelton's electronic records were purged 30 days after his departure. In short, there were no Skelton records for the company to retain and collect, other than one backup tape for a small period of time that was recovered from the company which had purchased the business unit where Skelton worked.

Thus, according to the court, in-house counsel (and, therefore the company itself) "sinned" in three ways:

1) by exercising a judgment — albeit perhaps a flawed one — as to which employees were to receive a litigation hold notice;

2) by failing to maintain a reliable record of what instructions were given to the IT department about what documents were to be collected and from which sources, or to supervise and understand the collection process; and

3) by allowing the company's document retention practice to be ignored or forgotten.

These "errors" — which the court very unforgivingly declared showed that in-house counsel "at least acted willfully" and with a "culpable mind" — led to the ultimate and very serious sanctions described above. Was this fair? The court itself recognized that there is currently no precedent for defining the level of culpability that must be present before finding sanctions appropriate in cases of spoliation. Nonetheless, the court took a very stringent approach and apparently had no sympathy for, or understanding of, the practical realities that all counsel face in developing an e-discovery plan for a given case.

Are their valid judgment calls to be made in selecting employees to include in a litigation hold or to consider a likely "custodian" of relevant and responsive documents? Absolutely.

Do many in-house counsel really have an understanding of the intricacies of their company's electronic document systems and the myriad of places potentially responsive documents may be found? Or, do they tend to do what LSI's in-house counsel did and simply contact the IT department and give general instructions to collect documents without any true understanding of what that instruction may mean — and without maintaining a written record of the instructions given?

And how often are document retention policies developed, only to be observed in the breach — and is anyone auditing application of the policy to ensure compliance? Who is responsible for doing so?

While one can hope that most judges would have, at worst, viewed LSI Corp.'s counsel as acting negligently, as opposed to willfully engaging in culpable conduct, there are important lessons to be learned from this decision.

First, counsel should take a generally expansive view of the universe of employees to receive a litigation hold and should think critically before excluding employees who have at least a potential link to the claims alleged. Likewise, counsel should speak with key employees involved in the matter to determine if others should be included.

Second, counsel should maintain a meaningful record of what instructions were given for preserving and collecting potentially responsive electronic documents. This step will help eliminate the risk of relying on spotty memories or having embarrassing and damning contradictory testimony offered about what actually occurred.

Third, if in-house counsel is not working with experienced outside counsel and/or an electronic document vendor, then in-house counsel needs to have much more than a superficial understanding about the company's electronic systems and how they operate, as well as develop a clear sense of potential data sources and the IT department's capabilities.

Fourth, counsel should be familiar with the company's document retention policies and ensure that the need for compliance is taken seriously by both employees and the IT department personnel. As demonstrated in the Day case, sloppy oversight and failure to implement existing policies can lead to very serious allegations of spoliation and severe consequences.

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