

Costly Failure to Preserve Electronic Evidence

Historically, the parties to litigation have been obligated to preserve paper documents which are discoverable (*i.e.*, must be turned over to the other party during the course of litigation) under the Federal Rules of Civil Procedure (the “Rules”). In recent years, electronic document storage and use of e-mail has raised questions regarding the application of those obligations to electronically stored information. Spurred by a series of high-profile cases, recent amendments to those Rules have made it clear that parties to on-going litigation and those who reasonably anticipate litigation are obligated to take steps to preserve discoverable electronically stored information. A party that fails to meet its obligations to preserve discoverable information is subject to having the judge in the case impose sanctions. These sanctions may include orders to pay sums of money, payment of the other side’s attorney and expert witness fees, and jury instructions supporting adverse inferences to be drawn from the absence of the information that was not preserved.

In *Doe v. Norwalk Community College*, No. 3:04-CV-1976 (D. Conn. Jul. 16, 2007), Doe, a student of the College, sued it alleging violations of Title IX of the Education Amendments of 1972 and making state law claims of negligent retention and supervision, as well as negligent infliction of emotional distress. Both sets of allegations were based on claims of sexual harassment of Doe by Masi, a professor at the College. In pursuing its motion for sanctions in the case, Doe hired a forensic computer expert who inspected the College’s computers and discovered that the hard drive of a key witness had been scrubbed and that electronic mailboxes of some faculty members had been altered, destroyed, or filtered. It was Doe’s contention that the missing evidence detected by this inspection would likely have been favorable to her because it would have shown that the College did nothing when it became aware of earlier acts of sexual harassment by Masi.

The court concluded that the College was guilty of, as a minimum, gross neglect in failing to implement a “litigation hold” that would have resulted in preservation of the missing e-mail. The “hold” would also have prevented the scrubbing of the hard drive of a key witness incident to the issuance of new computers to all the members of that witness’s academic department. As a result, the court granted the motion for sanctions by making an award of the costs incurred in pursuing the motion for sanctions (to include the costs of the forensic investigation) and by allowing an adverse inference based on the loss of the e-mail and data on the scrubbed hard drive.

To avoid the imposition of sanctions, it is essential that supervisors contact the Office of Counsel immediately when they have reason to believe that a suit may be brought against the University. Where appropriate, the Office of Counsel will coordinate with Computer and Network Services to ensure that steps necessary to preserve electronic evidence are taken as required by the Rules.