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Civil LITIGATION

Lessons learned from Deflategate

“When you’re thrust into litigation, you obviously have to make sure you’re prepared to deal with that.”

— Roger Goodell

The U.S. Court of Appeals for the Second Circuit recently issued decisions in the “Deflategate” matter, which involved spoliation of relevant evidence – specifically, destruction of a three-time Super Bowl MVP’s cell phone.

The case offers a good reminder to civil litigation counsel about the importance of litigation holds and preservation notices. A litigation hold is a process that an organization follows to preserve all forms of relevant information in anticipation of future litigation.

Hold notices are typically directed to in-house counsel, executives or custodians of certain documents or electronically stored information (ESI). They provide a description of the pending or anticipated proceeding and instructions to suspend normal document retention or destruction policies and institute a hold on all material which may be relevant evidence.

Spoliation of ESI was a significant issue for NFL Commissioner Roger Goodell in the proceeding and internal appeal that led to the four-game suspension of NFL Quarterback Tom Brady stemming from allegations that Brady’s team, the New England Patriots, tampered with game balls used in the 2015 AFC Championship Game.

In May 2015, the NFL announced the suspension of Brady. The Commissioner, presiding as arbitrator in the internal appeal – pursuant to the League and Players Association’s collective bargaining agreement – later upheld the suspension. In September 2015, the U.S. District Court denied the NFL’s motion to confirm the arbitrator’s decision and vacated the sus-



By **DAVID M. TANG**

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Columnist

pension of Brady, citing legal deficiencies such as inadequate notice to Brady, denial of the opportunity for Brady to examine a lead investigator, and denial of equal access to investigative files.

In April 2016, the Second Circuit reversed the district court and reinstated the arbitrator’s decision and, on July 13, the Second Circuit denied a request filed by Brady’s lawyers for a rehearing of the case by the full court.

In its April 2016 decision, *National Football League Management Council v. NFL Players Association (on its own behalf and on behalf of Tom Brady)*, the Second Circuit confirmed that a federal court’s review of an arbitration decision is highly deferential to the arbitrator’s decision. The court wrote that the NFL Commissioner has broad authority to impose discipline in matters involving players and the case was not one where the arbitration award should be disturbed.

With respect to the destruction of the cell phone, the Commissioner cited Brady’s failure to cooperate with the investigation and his deliberate effort to ensure that the requesting party would never have access to the requested information as bases for drawing an adverse inference that the cell phone would have revealed incriminating evidence. The Second Circuit, in a 2-1 decision, found no fault with the Commissioner’s determination.

To secure an adverse inference instruction based on destruction of evidence, a

party must establish that: (a) the party having control over the evidence had an obligation to preserve it; (b) the records were destroyed with a “culpable state of mind;” and (c) the destroyed evidence was “relevant” to the moving party’s claim or defense, such that a reasonable trier of fact could find that it would support that claim or defense. *Chin v. Port Authority*, 685 F.3d 135 (2d Cir 2012).

Under NY Civil Practice Law and Rules section 3126, a party’s willful failure to disclose information, which the Court finds ought to have been disclosed, can result in harsh penalties. A court can order that: (1) the issues to which the information is relevant are deemed resolved in accordance with the claims of the party obtaining the order; (2) the disobedient party is prohibited from opposing a claim or supporting a defense; or (3) a pleading be struck and judgment by default be entered against the disobedient party. *See e.g. Voom HD Holdings v. EchoStar Satellite*, 93 AD3d 33 (affirming adverse inference against company that implemented a hold but failed to suspend automatic deletion of emails until four months after suit was filed).

Tips for Implementing a Litigation Hold

Courts have consistently held that the obligation to preserve begins when a party knows or should have known that the evidence is relevant to future or current litigation. At a minimum, that means counsel must direct the client to ensure documents are preserved, not deleted from an ESI system or otherwise destroyed or made unavailable. Failure to do so has been found to be grossly negligent. The following practices will help the practitioner

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execute a litigation hold.

1. Put the hold notice in writing. Clearly identify the reason for the hold and issue instructions for locating material to be preserved. The hold notice should state clearly the prohibition on destruction of relevant documents and ESI and should be shared with all key personnel, not just the official custodian of records. Be prepared to modify the hold notice if new locations of information are discovered or new issues arise in the course of the litigation.

2. Talk with your client. Discuss who will oversee the hold (see 5. below) and develop a plan with client input to assess the types of ESI they have, where and how it is stored and who are the employees and individuals with access. Are sources of data with relevant information stored on laptops, mobile devices, thumb drives, or home computers that access the company's network? Consult with your client's IT manager to identify whether text and voice messages are included in the uni-

verse of data sources so the preservation obligation can be fully explained and monitored. Establishing clear channels of communication early will make it easy for custodians to ask questions.

3. Provide guidance on what is relevant. Take a moment to specify what material is, in fact, relevant to the facts most likely to be at issue in the litigation. Is the scope of the hold covering information "reasonably calculated to lead to the discovery of admissible evidence"?

4. Plan ahead. It is not too early to review or refresh your client's litigation readiness plan so that, if necessary, a litigation hold can be effectively implemented. This can include suspending document/data destruction policies, implementing ESI collection procedures and locating and preserving backup tapes. Create a checklist for identifying who will be contacted for timely preservation of data so that documents and ESI are properly stored.

5. Have a point person. To ensure proper implementation and compliance, identify an individual who will be re-

sponsible for sending periodic reminders about the litigation hold to keep key individuals updated and in the loop in the event the scope of the hold should change. That individual can also be the go-to person for answering questions, advising key employees once a litigation hold release is authorized, and notifying the relevant individuals of a return to normal document retention and destruction practices.

The courts have made clear that negligence is not an acceptable excuse to spoliation of relevant evidence. To that end, preparation is the key for executing a successful hold process. Whether your client owns Super Bowl rings or not, the above strategies should help guide those who find themselves thrust into litigation avoid the potentially severe consequences of disregarding a litigation hold notice.

David M. Tang is an Associate in Underberg & Kessler's Litigation, Health Care and Creditors' Rights Practice Groups. He concentrates his practice in litigation, commercial restructuring and corporate collections.