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E.D.N.Y. Rules on Firm's Ethical and Legal Obligations to Preserve Former Client's Emails

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FDIC. v. Malik, 2012 U.S. Dist. LEXIS 41178 (E.D.N.Y. Mar. 26, 2012)

Last month, the Eastern District of New York ruled on the ethical and legal obligations of a firm to preserve their former client's emails in *Federal Deposit Ins. Corp. v. Malik,* 2012 U.S. Dist. LEXIS 41178 (E.D.N.Y. Mar. 26, 2012).

In *FDIC v. Malik,* the Defendants' preservation obligation started in 2008 after they represented AmTrust in multiple contested loan transactions. The preservation obligation was violated when Defendants' employees were permitted to delete emails that were neither preserved in hard copy nor backed-up electronically. During discovery, the Defendants could only produce 89 emails concerning the 26 contested loans, which the Court determined "strongly suggests that additional emails related to those loans were created, but not preserved." Consequently, the Plaintiff filed moved for sanctions, including an adverse inference, against Defendants for spoliation.

According to the Court, "[a] party seeking an adverse inference instruction based on the destruction of evidence" must establish:

1. that the party having control over the evidence had an obligation to preserve it at the time it was destroyed;
2. that the records were destroyed 'with a culpable state of mind'; and
3. that the destroyed evidence was 'relevant' to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.

Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 107 (2d Cir. 2002) (*quoting Byrnie v. Town of Cromwell*, 243 F.3d 93, 107-12 (2d Cir. 2001)).

As to the first element regarding a party's "duty to preserve" the Court noted that "[a] regulation requiring retention of certain documents can establish the preservation obligation necessary for an adverse inference instruction where the party seeking the instruction is a member of the general class of persons that the regulatory agency sought to protect in promulgating the rule." *Byrnie*, 243 F.3d at 109. Relying on *Byrnie*, the Plaintiff argued that the Defendants had a duty to preserve the emails "arising from professional responsibility rules and attorney ethics opinions."[1]

The Court agreed, and noted that the Defendants did not respond to that argument and made "no attempt to explain why those rules and ethics opinions, which require lawyers to preserve electronic documents relating to a representation and seek to protect clients such as AmTrust, do not trigger an actionable duty to preserve." Therefore, the Court concluded that the Defendants' duty to preserve the evidence started in 2008 when they represented AmTrust. Thus, the Plaintiff satisfied the first element of the test.

When ruling on the second element of the test, the Court determined that the Plaintiff met the "relevance" prong of its spoliation claim because a July 2008 email found in the record provided evidence that supported Plaintiff's claim of attorney malpractice. The email supported the claim because it detailed a flip transaction that the Defendants were involved in as attorneys for AmTrust.

In regard to the second element, the Court determined that although the Defendants contended that that the "firm's emails were not preserved because the firm's technology vendor failed to install a back-up system as requested by [the Defendants] and then subsequently misrepresented to [the Defendants] that such a system had, in fact, been installed," the Plaintiff offered testimony from the Defendants suggesting that their employees "must have known about the absence of a back-up system prior to late 2009/January 2010." Therefore, the Court ordered the parties to testify at an evidentiary hearing to provide information regarding whether the "culpable state of mind" prong is met. This evidentiary hearing was deemed necessary because the record did not provide sufficient information regarding the Defendants' state of mind when deleting the emails.Thus, in order to find out if the records were destroyed with a "culpable state of mind," the Court ordered the parties to testify at an evidentiary hearing because the record did not provide enough information as to the Defendants' state of mind when deleting the emails.

1. **[1]** Pl.'s Mem. in Support of Mot. for Sanctions at 13 (*citing* Assoc. of Bar of City of N.Y. Comm. On Prof. and Judicial Ethics, Formal Opinion 2008-1, A Lawyer's Ethical Obligations to Retain and Provide a Client with Electronic Documents (July 2008)).