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FOIL, Spoliation and Litigation Holds, Oh My

By Cory Morris and Victor Yannacone, Jr.

Modern litigation today begins with requests for information from government “Agencies” under FOIL or FOIA and a Litigation Hold letter followed by a Litigation Hold Notice.

Attorney’s duty

As soon as you, as an attorney, become aware — even through a newspaper article or news broadcast — that a client may become involved in litigation, whether as a plaintiff, defendant or some kind of third-party, you have an immediate, nondelegable duty and legal obligation to send your clients a “Litigation Hold” letter advising them of their obligation to protect and preserve any and all information relevant and material to that possible litigation in whatever form it may exist.

Your letter must explain that if they fail to



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VICTOR YANNAZONE, JR.

protect and preserve that information they may be liable to sanctions including an adverse inference charge on the trial, economic damages, and financial penalties imposed by the court. You, as the attorney, may also be liable for economic penalties and financial sanctions imposed by the court.

Situations triggering an obligation to preserve evidence include receipt of a demand letter, formal complaint, records subpoena or occurrence of an event that typically results in litigation. A media report suggesting

impending government investigation and possible litigation may also trigger litigation hold obligations.

In the event that federal or state regulatory agencies may be involved, your client, you, as an attorney, and your law firm may also see criminal sanctions imposed and even face criminal prosecution.

FOIL

New York’s *Freedom of Information Law* (“FOIL”)¹ establishes a mechanism for the public to hold the government accountable for providing information to its citizens.² The Committee on Open Government (“COOG”) is responsible for overseeing implementation of FOIL as well as the Open Meetings Law (“OML”) and the Personal Privacy Protection Law (PPPL). COOG’s website provides information one needs to understand FOIL and how to make and respond to a FOIL request.

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PRESIDENT’S MESSAGE

Giving Recognition Where Recognition is Due — Our Staff at the SCBA Takes Care of Business

By Hon. Derrick J. Robinson

The employees at the Suffolk County Bar Association are a vital part of the success of the SCBA. An essential aspect of this organization is customer service and how our members perceive the benefit of the SCBA and how it engages people. We talk about systems, surveys, and insights, all of which are valuable and worthwhile. However, none of these means anything if they do not include people. Our staff at the SCBA has performed magnificently during the unprecedented COVID-19 pandemic.



HON. DERRICK J. ROBINSON

Disputes, Membership, operation of the Suffolk Academy of Law, and our Technology Director. The influence of the staff is significant because they are the public face of the SCBA. They are the ones that interact with the members.

There are SCBA priorities and objectives that impact how our members choose to engage with us. Member satisfaction occurs due to the motivation and hard work of the staff of the SCBA. We have member assistance and services that staff guides our members to use. But at the end of the day, our staff employees, our people, contribute to the SCBA’s successful member services. The SCBA must build a strong foundation; however, nothing will remain standing without the staff at its cornerstone. If we do not have highly engaged people, we’ve most likely lost our key to continued success.

Sometimes, very little is said about our staff employees’ influence, while, at its core, they are an essential aspect of the organization’s success. An excellent association

(Continued on page 19)



There are necessary processes at the SCBA that have continued to operate during the unprecedented COVID-19 protocols. As a result, the SCBA works in a meaningful way to keep our Association responsive and service oriented. The member services include the Lawyer Referral and Information Service, which refers people who call the SCBA looking for an attorney. The SCBA makes it easier for prospective clients to find you. These services also include Grievances and Fee

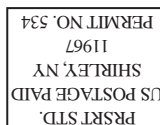
Upcoming Robing Ceremony

The outbreak of the coronavirus, COVID-19 and the global response to the pandemic, has had a significant impact on our important life events. As of this date, we will be holding a Hybrid Robing Ceremony in the SCBA Great Hall with a certain number of participants, observing all of the proper protocols dictated by the governor’s office.

We will be holding the Robing Ceremony in three different sessions: the Supreme Court Justices in the first session – Justices Elect: **Hon. Derrick J. Robinson; Kathy G. Bergmann; Valerie M. Cartwright and Timothy P. Mazzei** – the second session will be for the County Court and Family Court Judges: County Court Judges Elect: **Hon. Stephen L. Braslow and Hon. James C. Hudson; Family Court Judges Elect: Hon. Caren L. Loguercio and Hon. James W. Malone** and the third session will be District Court Judges Elect: **Hon. Pierce F. Cohalan; Hon. Patrica Grant-Flynn; Hon. C. Stephen Hackeling; Hon. Jennifer A. Henry; Hon. Alonzo G. Jacobs and Hon. James F. Matthews.**

Please look for the forthcoming Zoom invitation to the first ever Hybrid SCBA Robing Ceremony on **Monday, January 11, 2020, commencing at 9:00 a.m.**

—LaCova



FOIL (continued from page 1)

As soon as you have reason to believe that a New York State “Agency” may have information which is relevant to the litigation you are considering and evaluating, FOIL for the information.

Every department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity in the State of New York performing a governmental or proprietary function is subject to FOIL. Local municipalities, school districts (120+ on Long Island), fire and police departments, are all subject to FOIL.

If you are Plaintiff or claimant, make sure that you detail with specificity all of the elements of the cause of action upon which you expect to obtain information, not necessarily evidence, just information from the defendants. The more specific the litigation hold notice the better your case for sanctions should it be ignored or should spoliation occur.

If you are a defendant in an action of any kind immediately serve a Litigation Hold Notice upon the Attorney of Record for the Plaintiff and every party named in the complaint regardless of their legal status in the action. Make sure that you specifically refer to information you expect to use in developing your client’s defense(s).

Unless an exception applies, all “records” of an “agency” are available.³ A “record” is defined as “any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever...”⁴ Physical evidence, “articles of clothing and alleged weapons,” does not fall within the statutory definition of a “record” that must be disclosed under FOIL.⁵

Records requested under FOIL must be “reasonably described” to enable an agency to locate and identify the records in question.⁶ However, the burden is on the Agency

to establish that “the descriptions were insufficient for purposes of locating and identifying the document sought.”⁷

The statute lists exemptions and you must consider all of them in drafting a FOIL request. The COOG website provides details as to what records are available pursuant to the FOIL. Nevertheless, “The exemptions from disclosure are to be ‘narrowly construed’ so as to ensure maximum public access to government documents.”⁸

There is often a greater opportunity to obtain records through FOIL than under the CPLR.⁹ A FOIL request can be made for the same or similar records as have been requested through discovery.¹⁰ It is also easier to obtain an award of attorney’s fees under FOIL for a delay in production than it is under the CPLR for delays in discovery. “[J]udicial review of a FOIL determination is obtained through the commencement of a CPLR Article 78 proceeding, not a motion in a pending action,”¹¹ and an Article 78 final judgment in the Supreme Court may be appealed of right to the Appellate Division.

The Litigation Hold

Once your client has decided to file suit and you prepared the complaint for verification, you must also prepare a formal Litigation Hold Notice.

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Spoliation

“Spoliation is the destruction or significant alteration of evidence, or the failure to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation.” “Documents create a paper reality we call proof.”¹²

With respect to spoliation — damage or

loss of relevant, material information with respect to litigation — the courts are interested in whether you, as an attorney, your law firm, and/or your client were negligent or grossly negligent and whether the spoliation was deliberate. Attorneys probably should not have to worry about whether the spoliation was deliberate since attorneys never deliberately violate the law or disobey an order of the court.

Once the duty to preserve has attached, the following facts can support a finding of gross negligence:

The failure to issue a written litigation hold.

The failure to preserve and collect information from former employees when the information remains in a party’s possession, custody, or control.

The failure to halt the deletion of business records, emails and social media; and

The failure to preserve backup tapes.

Warning and admonition

FOIL and Litigation Holds are complicated and the parties to whom they are directed tend to make them more complicated.

Comment 8 of the American Bar Association Model Rules of Professional Conduct provides that, “To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology...” which has been interpreted to mandate that attorney competence in litigation requires, “at a minimum, a basic understanding of, and facility with, issues related to e-discovery, including the discovery of electronically stored information (ESI).”

Failure to understand FOIL and Litigation Holds creates a genuine risk of legal malpractice and professional liability. There are really only three options for attorneys “lacking the required competence:” Acquire sufficient learning and skill before performance is required; associate with or consult technical consultants or competent counsel; decline to represent the client.¹³

Note: Named a SuperLawyer, Cory Morris is admitted to practice in N.Y., EDNY, SDNY, Florida and the SDNY. Mr. Morris holds an advanced degree in psychology, is an adjunct professor at Adelphi University and is a CASAC-T. The Law Offices of Cory H.

Morris focuses on helping individuals facing addiction and criminal issues, accidents and injuries, and, lastly, accountability issues.

Note: Victor John Yannacone Jr. is an advocate, trial lawyer, and litigator practicing today in the manner of a British barrister by serving of counsel to attorneys and law firms locally and throughout the United States in complex matters. He has been continuously involved in computer science since the days of the first transistors in 1955 and actively involved in design, development, and management of relational databases. He pioneered in the development of environmental systems science and was a cofounder of the Environmental Defense Fund. He can be reached at (631) 475-0231, or vyannacone@yannalaw.com, and through his website <https://yannalaw.com>.

1 Public Officers Law, Article 6.

2 Public Officers Law § 84.

3 Public Officers Law § 89.

4 Public Officers Law § 86(4).

5 Sideri v. Off. of Dist. Atty., New York County, 243 AD2d 423, 423 (1st Dep’t 1997).

6 Pflaum v. Grattan, 116 AD3d 1103, 1104 (3d Dep’t 2014).

7 Konigsberg v. Coughlin, 68 NY2d 245,249 (1986); see Bader v. Bove, 273 A.D.2d 466, 467, 710 N.Y.S.2d 379, 379 (2000); cf. Stein v. New York State Dep’t of Transp., 25 A.D.3d 846, 848, 807 N.Y.S.2d 208, 210 (3d Dep’t. 2006) (“the administrative burden of reviewing this correspondence for relevance fails to establish that the request is insufficiently descriptive.”).

8 Livson v. Town of Greenburgh, 141 A.D.3d 658, 660, 34 N.Y.S.3d 612, 615 (2nd Dep’t. 2016).

9 FOIL-AO-18056 (2010).

10 M. Farbman & Sons, Inc. v. N.Y.C. Health & Hosp. Corp., 62 NY2d 75, 78 (1984). (“Nowhere in FOIL, enacted 11 years after the CPLR, is there specific reference to records already subject to production under article 31, and no provision of FOIL bars simultaneous use of both statutes.”).

11 Doe v. Riback, 7 Misc. 3d 341, 343, 788 N.Y.S.2d 590, 594 (Albany Sup. Ct. 2005) (citing Public Officers Law § 89 (4)(b)).

12 Zubulake v. UBS Warburg, 220 F.R.D. 212, 214 (S.D.N.Y. 2003) (Zubulake IV)

13 State Bar of California in its Formal Opinion No. 2015-193, <http://ethics.calbar.ca.gov/Portals/9/documents/Opinions/CAL%202015-193%20%5B11-0004%5D%20%2806-30-15%29%20-%20FINAL.pdf>

President’s Message (continued from page 1)

distinguishes itself from a good one by understanding that people are at the heart of everything. The president of the SCBA is in a unique position to appreciate the staff’s work and the importance they play in moving forward towards the Association’s goal and the members’ experience. The team has played a significant role in the progress of the Association during the unprecedented COVID-19 pandemic. The SCBA is still functioning and providing essential information and services to the membership. But they are often overlooked, neglected or not viewed as valuable assets — either in terms of the work that they do, providing insights into the member experience or as ambassadors of the SCBA. That stops now.

When the staff is fully engaged, they build an understanding of SCBA services but also of members. This knowledge cre-

The success of the SCBA comes from the dedication, loyalty and commitment of the Executive Director Jane LaCova. She is a valuable asset of the SCBA and a key to our success. She creates a positive work environment because she cares about the employees as a whole person. With the Covid-19 pandemic, Jane has increased employee motivation and commitment.

ates a much richer and complete process around members’ experience. Staff can follow a process or explain a service or a procedure to a member. They also know what the SCBA aims to achieve through each of these interactions. They have a clear idea of their place in the larger picture, and they understand how it ultimately impacts the goals of the Association. We must ensure that our staff knows that their work and efforts are an essential contribution to our Association’s overall goals, direction and success.

The success of the SCBA comes from the dedication, loyalty and commitment of the Executive Director Jane LaCova. She is a valuable asset of the SCBA and a key to our

success. She creates a positive work environment because she cares about the employees as a whole person. With the Covid-19 pandemic, Jane has increased employee motivation and commitment.

To Jane LaCova, Executive Director of the Suffolk County Bar Association; Mary Shannon, Membership Services; Edith Dixon, Lawyer Referral & Informational Service; Tina O’Connor-Santiago, Grievance & Fee Disputes; Nicolette Ghiglieri, Academy of Law Assistant; Andrea Hallock, Academy of Law Assistant; Barry M. Smolowitz, Esq., Director of Technology; Joseph Benedetto, Director of Communication; and Cynthia Doerler, Academy of Law Executive Director, thank you all for doing a good job.