ARTICLES >>

The First Step: The Duty to Preserve Evidence.
By: Miguel M. Cordano and Jaimee Braverman Kanarek*  

Picture that you have been hired to represent a client on three separate litigation matters. In the first matter, your client retained you to respond to a threat of litigation that may end up in federal court. The second matter involves a case where you must defend against a tort action and the third matter requires you to institute a lawsuit against your client’s competitor for breach of contract. With the excitement of three new matters landing on your desk, you jump immediately into a plan of attack. Each of these cases requires an entirely different course of representation, but one of your first steps should be, if not the first one, advising your client about their duty to preserve evidence.

When Does the Duty to Preserve Begin?

As a general rule, the duty to preserve evidence begins once a party reasonably anticipates litigation. Often the duty to preserve attaches upon service of a summons and complaint. However, the duty can also attach before the inception of the lawsuit where a
credible threat of litigation exists. For instance your client may have received a demand to preserve documents or a demand for payment. Similarly, the receipt of a records subpoena may also triggered the duty to preserve evidence. The question is whether your client can reasonably anticipate litigation based on the scope of the subpoena request.

What are the Consequences for Failing to Comply with the Duty to Preserve?

A party’s failure to preserve documents and information in a timely manner may have serious consequences for the litigant. Failure to preserve records may result in a party receiving sanctions for spoliation of evidence. Specifically, 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. Spoliation sanctions are likely to be awarded where (1) a party has a duty to preserve evidence because it knew, or should have known, that litigation was imminent, and (2) the adverse party was prejudiced by the destruction of the evidence. Spoliation sanctions include evidence preclusion, monetary sanctions, the striking of pleadings, etc.

What are Preservation Efforts?

Meeting preservation obligations requires the adoption of a defensible legal hold process. First, as soon as your client retains you, it is important to immediately identify potential custodians/employees who may have information relevant to the matter. You should then determine where the custodians store their documents and information. While some information may be stored in a file cabinet, electronically stored information (ESI) is often stored on multiple information technology (IT) systems and devices (i.e., personal computers, servers, smartphones and tablets). It is critical that you speak with your client’s IT managers who oversee the subject IT systems to make certain that the managers implement protocols to retain information on the IT systems. In order to prioritize preservation efforts, it may also make
sense to quickly identify the retention policy for each IT system to ensure that reasonable steps are taken to safeguard the preservation of data.

Once you have identified the potential custodians and learn the location of the information, the next step is drafting a legal hold letter —otherwise known as preservation notice. As part of the preservation duty, your client must issue and distribute the legal hold letter to the appropriate custodians, demanding that they take reasonable steps to retain all documents and information that potentially relate to the claims or defenses in the matter. To that end, you should include a summary of the matter in the legal hold letter and provide examples of the types of information to preserve (i.e., emails, documents, text messages, spreadsheets, pictures, audio recordings, etc.).

**When the Duty to Preserve Ends—When to Lift the Legal Preservation Hold**

Unfortunately, there is no bright-line rule which specifies when an organization is no longer under a duty to preserve evidence. Often, the circumstances of the case dictate when the preservation duty terminates. For example, in circumstances where the appellate court issues a final mandate without challenge to the decision or where the applicable statute of limitations and repose has run its course, the duty to preserve to documents may no longer be required. However, many times the question of lifting a legal hold is unclear. Factors to consider may be the passage of time, judicial resolution, or the parties’ activity are contrary to the reasonable anticipation of litigation. Ultimately, risk assessment must guide the scope, content, costs and anticipated results of any preservation policy. In the end, preservation efforts are costly endeavors, but as this article prefaces, a duty that cannot be overlooked.

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Please note that this article contains the best practices in federal court. If you are involved in litigation in state court, it is always best to review the state law governing preservation issues and comply with all statutory regulations and rules governing discovery to ensure that you are taking all reasonable steps to preserve evidence.

**Happy Practice: From the Office to the Mat**

By: Arthur J. R. Baker *

As an attorney, you have likely been counseled on the importance of developing and growing “your practice.” Understandably, you might interpret “your practice” as your legal practice and believe the way to properly develop your practice is through honing basic drafting skills, building a book of business, and learning the many technical skills necessary to practice law. But have you ever been counseled on a yoga practice?

In today’s legal profession, it is exceedingly difficult to disconnect from our many obligations—billable hours, volunteering commitments, networking events, etc. The ability to email from our cell phones, sign contracts remotely with DocuSign®, and utilize other technologies to increase efficiency and our ability to communicate allows us to address these obligations on a constant basis, which can be a source of overwhelming stress to some. A few Google searches and you will find a plethora of articles and books on mindfulness and “work-life balance” aimed at young attorneys and those in the corporate world. They often attempt to provide some guidance on how you appropriately disconnect from your obligations while simultaneously reconnect with yourself. To be clear, I do not have a five-step success plan for obtaining “work-life balance” nor do I proclaim to be any sort of authority on the subject;
however, what I do have is my story of how yoga helped strengthen qualities in me that help me be happy and thrive from the office to the mat—my “happy practice.”

When I moved to Orlando to begin my legal career at Baker & Hostetler LLP, I was determined to work hard and make the most out of any opportunity. Like many young attorneys, I was competitive, a bit of a perfectionist, and driven to exceed goals. As a result, I compulsively tracked my billable hours, embraced every volunteering opportunity in the community, went to every networking event, and generally did not know how to say “no” to anything—whether it be professional or personal. That was until a few of my new friends asked me if I wanted to go to yoga with them. “Me?” I thought. “No, I don’t do yoga. I’m an attorney. I lift weights. I pay taxes.” Nevertheless, I eventually changed my “no” to a “yes” and went to my first yoga class thinking it would at least be a good physical workout.

Flash-forward to today, I owe my “happy practice” to the years of developing my legal practice and my yoga practice simultaneously. The numerous physical benefits of yoga aside, I am truly grateful for the mental, emotional, and spiritual benefits of a dedicated yoga practice. Each time I step onto my yoga mat, I set an intention for my practice—or a “sankalpa.” An intention is a positive affirmation for something you are trying to cultivate or nourish in any given moment. For example, “I am patient,” “I am enough,” “I am understanding,” etc. While I struggle through the different postures and transitions in my practice, I ease the struggle by refocusing on my intention and believing in myself. For the approximately seventy-five minutes (or the equivalent of 1.25 billable hours) I am on my mat, I connect with my breath and become fully present while temporarily disconnecting from any personal or professional obligations stressing my mind. The true beauty and gift of the practice is that when step off of my mat and return to the world of personal and professional obligations, I return more present and more focused and better able to succeed and be happy. For example, my heightened ability to be present helps
me rationally assess and address conflict with opposing counsel in the office or a loved one at home. I find myself being more mindfully responsive rather than immediately reactive. Additionally, while the practice of law often emphasizes being hypercritical and finding “flaws,” yoga emphasizes accepting that which does not serve you. I am still able to remain hypercritical when it serves me in my legal practice by catching a mistake in a key provision of a complicated commercial transaction, yet better able to understand that being hypercritical on a materially irrelevant provision in hopes of making it “perfect” could ruin the transaction—just as one “flawed” pose in your yoga practice does not ruin the experience.

You will be developing “your practice” for many years to come. By incorporating lessons learned through my yoga practice into my legal practice, I have mitigated stress in a positive way and found a sustainable and happy practice. I hope sharing my story helps you develop your practice into a happy practice, too.

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