DOJ's Google Sanctions Motion Shows Risks Of Auto-Deletion

3/15/2023

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This article was originally published by Law360.

Google is facing a motion for sanctions from the U.S. Department of Justice for its allegedly insufficient document retention practices.

According to the motion, filed by the DOJ on Feb. 10, Google failed to preserve relevant instant-messaging communications because those chats had been set to delete automatically after 24 hours. Google gave individual employees the discretion to manually disable the auto-delete feature, but, according to the DOJ, many employees elected not to do so, even after the agency filed suit.

Though the DOJ's motion has yet to be decided, Google's predicament should be a wake-up call for in-house and outside counsel concerning the risks associated with automatic-deletion features once litigation is anticipated or underway.

In this article, we use the Google case to illustrate some potential dangers of auto-delete functions, review instructive cases from across the country, and offer tips and best practices to lawyers grappling with their own preservation obligations.

The upshot is that many courts have found that it is not enough to simply advise employees of the need to preserve documents. Courts also expect counsel to take affirmative steps to ensure that compliance with litigation holds, including — where necessary — by verifying that auto-delete functions are disabled.

Google's Auto-Delete Function

On Feb. 10, the DOJ filed a motion for sanctions, alleging that the tech giant, which faces an antitrust lawsuit from the agency, failed to preserve relevant evidence stored on its internal Google Chat — formerly Google Hangouts — instant-messaging platform.[1]

According to the DOJ, certain Google Chat messages were set to delete automatically after 24 hours, unless individual employees manually changed a setting to preserve them. The DOJ further claimed that Google had misled the agency about its preservation practices.

Though Google has not yet filed its response, a company spokesperson has said that its preservation efforts were reasonable, pointing out that the company has produced over four million documents in the litigation with the DOJ and has cooperated with regulators around the world to produce "millions more."[2]

Four Lessons From the Google Case

Failure to disable auto-delete, or to specifically direct employees to do so, may be grounds for sanctions

Federal Rule of Civil Procedure 37(e) states that a party may face sanctions "[i]f electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery."

The rule naturally raises the question of what steps are "reasonable."

One interesting issue raised by the DOJ's motion is the degree to which counsel are required to affirmatively ensure the preservation of relevant documents, as opposed to merely informing potential custodians of the need to preserve documents.

The DOJ has argued that in giving employees discretion about which chats to preserve, Google "abdicated its burden to individual custodians" and thereby failed to take required steps to preserve relevant data, saying this is tantamount to "systematically" destroying potential evidence.

Many courts have held that it is not reasonable for litigants to leave auto-delete on once litigation is anticipated.

For example, in DR Distributors LLC v. 21 Century Smoking Inc., the U.S. District Court for the Northern District of Illinois in 2021 sanctioned both the defendant and the defendant's counsel for, among other things, failing to disable the auto-deletion of emails.[3]

The court noted that the defense counsel had failed to issue a written litigation hold and instruct the defendant to disable auto-delete, saying the defense counsel had not conducted a thorough custodial interview with the client and instead relied entirely on the client's representation that it would preserve relevant documents.

DR Distributors is thus a reminder that counsel cannot rely exclusively on their client to preserve relevant documents.

Rather, counsel must specifically instruct their clients on the need to preserve documents and take steps to verify that clients comply. A good custodial interview should specifically cover whether any communication platforms delete documents automatically.

Similarly, in VOOM HD Holdings LLC v. EchoStar Satellite LLC, New York's Appellate Division in 2012 ordered an adverse inference instruction against a defendant that failed to disable auto-deletion of emails.[4]

Unlike in DR Distributors, the defendant in VOOM issued a written litigation hold, but left it to individual employees to determine which documents were relevant and mark them as exempt from auto-deletion. The court found that the defendant had relied too heavily on nonattorneys to make relevance and preservation determinations.

The DOJ cited the U.S. District Court for the Northern District of California's 2012 decision in Apple Inc. v. Samsung Electronics Co. Ltd.[5] in its motion for sanctions, arguing that many of the findings in Samsung were analogous to Google's actions.

In that case, defendant Samsung elected not to disable auto-deletion on its internal email system after it should have reasonably anticipated litigation. Samsung had issued a litigation hold to employees, stating that litigation was likely, and instructed them to preserve 10 categories of potentially relevant documents.

But Samsung did not affirmatively disable an auto-delete function that erased emails after two weeks, and the Samsung court found that the company "had a duty to verify" that employees were preserving documents, including by disabling auto-delete functions where necessary.

The lesson from these cases is that counsel cannot be complacent about preservation, especially when documents are set to auto-delete.

Counsel should ask clients about default retention periods early in the litigation, specifically advise clients about the need to exempt relevant documents from auto-deletion protocols and follow up to ensure that the client has taken appropriate steps to prevent spoliation.

Understand the risks in adopting a policy or practice of encouraging employees to use platforms with auto-delete.

Another interesting feature of the Google litigation is the DOJ's allegation that the company steered employees to its Google Chat platform precisely because it knew those messages would not be preserved for longer than 24 hours.

The DOJ has cited internal training materials in which Google allegedly encouraged employees to have sensitive discussions over chat, rather than email, saying chats were "better." According to the agency, the company encouraged employees to use chat because it did not want those communications to be preserved for later discovery.

Whatever the outcome, the DOJ's arguments are a good reminder that — assuming a party fails to preserve relevant evidence — courts will examine that party's state of mind and be more likely to award sanctions if it appears that the party intentionally failed to preserve evidence.

For example, in Sines v. Kessler, the U.S. District Court for the Western District of Virginia in 2021 allowed an adverse inference because it found that the defendant intended to deprive his adversaries of relevant documents.[6]

The Sines decision is notable — and cited by the DOJ in its motion — because the defendant there did not destroy evidence himself, but rather passively allowed a child to play with, and eventually break, a phone containing potentially relevant information. The defendant later claimed he put the broken phone — and a laptop also containing potentially relevant information — in a storage bin that was later discarded.

The court concluded that the defendant failed to take reasonable steps to preserve potentially relevant evidence, finding that his state of mind rose to intentionally depriving the other party of the information.

Thus, counsel should be diligent about investigating not only the technical aspects of auto-delete, but also the client's culture and understanding surrounding such functions.

Where a company not only has an auto-delete function — for example, to save memory and reduce the amount of data stored — but also actively encourages employees to keep things "off-the-record," such practices may be noted later in sanctions motions as evidence of willful spoliation.

Ensuring that companies and employees are not only directed to turn off auto-delete functionality but also advised specifically about the importance and gravity of doing so is a prudent step toward ensuring adequate document preservation and avoiding potential sanctions.

An insufficient or misleading representation about a litigation hold may give rise to a sanctions motion.

Another issue for Google is its responses to an electronically stored information questionnaire from the DOJ.

The agency claims that it asked Google to explain its "actual employee practices" and its policies for document retention, saying the company responded by representing that "all deletion procedures" were suspended when a litigation hold went into effect.

According to the DOJ, however, the tech giant did not specify in its response that auto-delete was disabled for email, but not for Google Chat messages.

Counsel should therefore take care that any communications with an adversary about document retention and preservation are transparent and accurate.

Ensuring that the opposing party has an accurate understanding of what information is being preserved, avoiding any ambiguity that may lead the opposing party to believe a category of documents is being preserved when it is not, allows for the earlier resolution of any disputes about what constitutes adequate document preservation practices.

Using specific communication apps for the purpose of avoiding discovery may be grounds for sanctions.

Though not at issue in the Google litigation, counsel should also be vigilant about the possibility that custodians will switch to new, unapproved methods of communication once a litigation hold is in place.

In Federal Trade Commission v. Noland, a 2021 case from the U.S. District Court for the District of Arizona, the court awarded sanctions where the defendant company complied with document preservation obligations for their existing email and chat functions, but — upon learning of an FTC subpoena — began using an encrypted messaging application, with auto-delete enabled, and an encrypted email service to exchange sensitive communications.[7]

As a result, during discovery, certain responsive information had not been preserved, and there was no other way for the FTC to access it.

The court permitted an adverse inference because the custodians' decision to start using encrypted — and disappearing — messaging platforms, after they became aware of the FTC's subpoena, suggested an intent to frustrate discovery.

Counsel should therefore remind clients that the duty to preserve relevant evidence is ongoing throughout a litigation.

Employees should communicate on approved platforms and be advised that switching to an unapproved communication platform does not exempt those communications from discovery. Failure to preserve communications, even on unapproved platforms, can result in sanctions.

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[1] U.S. et al v. Google LLC, Case 1:20-cv-03010-APM (D.D.C. Oct. 20, 2020).

[2] https://www.reuters.com/legal/us-justice-dept-accuses-google-evidence-destruction-antitrust-case-2023-02-23/.

[3] Cf. DR Distributors, LLC v. 21 Century Smoking, Inc., 513 F. Supp. 3d 839, 931-33 (N.D. Ill. 2021).

[4] VOOM HD Holdings LLC v. EchoStar Satellite LLC, 93 A.D.3d 33, 41-42 (App. Div. 1st Dep't 2012).

[5] Apple Inc. v. Samsung Elecs. Co. Ltd., 881 F. Supp. 2d 1132 (N.D. Cal. 2012).

[6] Sines v. Kessler, Civil Action No. 3:17-cv-00072, 2021 U.S. Dist. LEXIS 204142, *40-41 (W.D.V.A., Oct. 22, 2021).

[7] FTC v. Noland, No. CV-20-00047-PHX-DWL, 2021 WL 3857413 (D. Ariz. Aug. 30, 2021).

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