

OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management

MEMORANDUM OM 18-02

October 30, 2017

TO: All Regional Directors, Officers-in-Charge,
and Resident Officers

FROM: Beth Tursell, Associate to the General Counsel

SUBJECT: Changes to ULP Charge/Docket Letters -- Preservation of Evidence and
Electronically Stored Information/Prohibition on Recording the Affidavit
Interview

Two changes are being made to the Agency's standard charge/docket letter. The first concerns Electronically Stored Information (ESI), and the necessity of ensuring that ESI provided to Regional offices during unfair labor practice (ULP) investigations is complete and in a format that optimizes its value. In furtherance of that objective, it is critical that parties to ULP cases be advised as early as possible of the necessity that they preserve ESI, and that they are put on notice of specified formats in which production of ESI is acceptable. The second change concerns the Agency's policy of prohibiting audio recording while Board agents take witness affidavits.

The Duty to Preserve ESI and All Other Relevant Information

The duty to preserve information stems from the Federal Rules of Civil Procedure¹ (FRCP) and subsequent case law. The Board "frequently seeks guidance" from the FRCP in the adjudication of Board trials and specifically applies the FRCP² in matters of ESI. *See* National Labor Relations Board, Division of Judges, Bench Book (November 2016), i, Foreword (Giannasi, R.); *see also id. at* 66, § 8–340. In addition, while the FRCP may not play an otherwise direct role in proceedings before an ALJ, it does when our cases are litigated in District Court or the Courts of Appeal. Referencing the FRCP, federal courts have interpreted a firm duty of all litigants to preserve information relevant to the claims and defenses of a matter once litigation is known or reasonably should be known.³ This duty extends to both ESI and non-ESI

¹ *See Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003), stating "[t]he broad contours of the duty to preserve are relatively clear. That duty should certainly extend to any documents or tangible things (as defined by Rule 34(a)) made by individuals 'likely to have discoverable information that the disclosing party may use to support its claims or defenses.' [citing to Fed. R. Civ. P. 26]." (footnote omitted).

² Application of the FRCP in Board trials involving ESI includes analysis of judicial opinions discussing the FRCP and ESI in federal courts (as found in the Sedona Principles). *See* National Labor Relations Board, Division of Judges, Bench Book (2016) at pp. 66-67, § 8–340 ("The Board indicated that, in performing the analysis, the judge should apply the Federal Rules of Civil Procedure and the factors set forth in *The Sedona Principles: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, Second Edition (June 2007), available at <https://thesedonaconference.org/publications>," citing to *CNN America*, 352 NLRB 675, 676 (2008).

³ *See, e.g., Zubulake*, 220 F.R.D. at 216 (duty arises "when the party should have known that the evidence [may] be relevant to future litigation"); *Waters v. Kohl's Dep't Stores, Inc.*, No. 14-cv-00043-KAW, 2015 WL 1519657 at *3 (N.D. Cal. April 2, 2015) ("[as] soon as a potential claim is identified, a litigant is under a duty to preserve evidence which it knows or reasonably should know is relevant to

“stored in any medium from which information can be obtained” as well as tangible things that may have evidentiary value. *See* Fed. R. Civ. P. 26. Ignorance or dereliction of this duty invites court scrutiny, including sanctions from the court for the spoliation of evidence. *See Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001).

The Agency has adopted standards that conform to this guidance, including the implementation of litigation holds when litigation involving the Agency is known or reasonably anticipated. However, producing parties – especially those with limited legal representation – may be unaware of this duty, putting Regional offices at a disadvantage where they may only learn of a spoliation event at the production date (often the first day of the hearing), if at all. Moreover, records management practices in many organizations routinely destroy information at pre-set time intervals. If these data destruction practices are not suspended at the beginning of the administrative process, it is possible that information sought by the Board agent may be permanently removed from the producing party’s system before collection begins.⁴

Selected Forms of Production

Presently, the form of production of ESI in ULP investigations is at the discretion of producing parties, yielding productions that are optimized for their convenience and tactical benefit. Producing parties may defensibly engage in this practice so long as the Agency does not specify a preferred production format. The FRCP informs litigants that producing parties must “produce documents [including ESI] as they are kept in the usual course of business.” *See* Fed. R. Civ. P. 34(b)(2)(E)(i). However, Rule 34 also allows producing parties to select how they produce ESI *if a request does not specify a form of production* – productions of ESI may be “made as the records are ordinarily maintained” *or* in a “reasonably usable form or forms.” *See* Fed. R. Civ. P. 34(b)(2)(E)(ii). This Rule empowers producing parties to select ESI formats that are “reasonably usable” but not ideal for efficient use by the Agency.

The frequent outcome of ambiguous ESI requests that do not identify suitable production formats is unacceptable productions to the Agency. A compelling, if common, example is the production of e-mail records (which are by definition maintained electronically) from a producing party to a Board agent in printed paper format. While the committee notes to FRCP Rule 34 make clear that a party may not down-convert information to a format “more difficult or burdensome for the requesting

the action”).

⁴ Electronic documents in enterprise settings are often governed by “retention policies,” or rules that set the service life of electronic records before deletion. Retention policies can vary by ESI platform (e.g., e-mail, instant messages, mobile text messages) and by user role (e.g., executives, managers, employees, contractors). For example, e-mails for employees may be retained for 60 days (and then deleted) in the normal course of business by a producing party. Alerting the producing party of their duty to preserve at the onset of litigation reminds the party to immediately suspend the deletion all ESI (including e-mail) related to the charge/docket letter. The E-Litigation Branch can provide further instruction on this topic.

party to use the information efficiently in the litigation,” by the time the Board agent receives an improper production it may be too late to object. *See* Fed. R. Civ. P. 34 (2006 Committee Notes).

Prohibition on Recording the Affidavit Interview

Face-to-face confidential witness affidavits continue to be the keystone of Regional unfair labor practice investigations. Consistent with Agency policy, all witnesses from whom Board Agents subscribe affidavits are given assurances that their affidavits will be considered confidential law enforcement records and will not be disclosed unless it becomes necessary to do so in connection with a formal proceeding. *See generally* ULP CASE HANDLING MANUAL, SECTION 10060. Recording the affidavit interview may impede the Agency’s ability to safeguard the confidentiality of the affidavit, protect the affiant’s privacy, and compromise the integrity of the investigation where disclosure of the recording could taint other witnesses’ recollections of key events. In addition, the questions asked by the Board agent during the interview are subject to the work product privilege and thus are not discloseable. Consistent with its role as a law enforcement agency, it is the policy of the General Counsel to prohibit witnesses from recording the affidavit interview conducted by the Board agent during any Agency investigation.

Changes to the Charge/Docket Letters⁵

In order to place parties on early notice of their obligations to preserve evidence, including ESI, as well as the proper format in which it may be produced, and of the General Counsel’s policy prohibiting recording the affidavit interview, the charge/docket letters issued to Charging and Charged Parties shall be modified.

The attached sample letters reflect the modifications.

/s/
B. T.

Attachments
cc: NLRBU
Release to the Public

MEMORANDUM OM 18-02

⁵ The changes described in this memo will be made to NxGen templates shortly.



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD



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Re:

Dear _____:

Enclosed is a copy of a charge that has been filed in this case. This letter tells you how to contact the Board agent who will be investigating the charge, explains your right to be represented, discusses presenting your evidence, and provides a brief explanation of our procedures, including how to submit documents to the NLRB.

Investigator: This charge is being investigated by _____ whose telephone number is _____. If this Board agent is not available, you may contact Supervisory Attorney _____ whose telephone number is _____.

Right to Representation: You have the right to be represented by an attorney or other representative in any proceeding before us. If you choose to be represented, your representative must notify us in writing of this fact as soon as possible by completing Form NLRB-4701, Notice of Appearance. This form is available on our website, www.nlr.gov, or from an NLRB office upon your request.

If you are contacted by someone about representing you in this case, please be assured that no organization or person seeking your business has any "inside knowledge" or favored relationship with the National Labor Relations Board. Their knowledge regarding this proceeding was only obtained through access to information that must be made available to any member of the public under the Freedom of Information Act.

Presentation of Your Evidence: We seek prompt resolutions of labor disputes. Therefore, I urge you or your representative to submit a complete written account of the facts and a statement of your position with respect to the allegations set forth in the charge as soon as possible. If the Board agent later asks for more evidence, I strongly urge you or your representative to cooperate fully by promptly presenting all evidence relevant to the investigation. In this way, the case can be fully investigated more quickly.

Full and complete cooperation includes providing witnesses to give sworn affidavits to a Board agent, and providing all relevant documentary evidence requested by the Board agent. Sending us your written account of the facts and a statement of your position is not enough to be considered full and complete cooperation. A refusal to fully cooperate during the investigation might cause a case to be litigated unnecessarily.

In addition, either you or your representative must complete the enclosed Commerce Questionnaire to enable us to determine whether the NLRB has jurisdiction over this dispute. If you recently submitted this information in another case, or if you need assistance completing the form, please contact the Board agent.

We will not honor any request to place limitations on our use of position statements or evidence beyond those prescribed by the Freedom of Information Act and the Federal Records Act. Thus, we will not honor any claim of confidentiality except as provided by Exemption 4 of FOIA, 5 U.S.C. Sec. 552(b)(4), and any material you submit may be introduced as evidence at any hearing before an administrative law judge. We are also required by the Federal Records Act to keep copies of documents gathered in our investigation for some years after a case closes. Further, the Freedom of Information Act may require that we disclose such records in closed cases upon request, unless there is an applicable exemption. Examples of those exemptions are those that protect confidential financial information or personal privacy interests.

Preservation of all Potential Evidence: Please be mindful of your obligation to preserve all relevant documents and electronically stored information (ESI) in this case, and to take all steps necessary to avoid the inadvertent loss of information in your possession, custody or control. Relevant information includes, but is not limited to, paper documents and all ESI (e.g. SMS text messages, electronic documents, emails, and any data created by proprietary software tools) related to the above-captioned case.

Prohibition on Recording Affidavit Interviews: It is the policy of the General Counsel to prohibit affiants from recording the interview conducted by Board agents when subscribing Agency affidavits. Such recordings may impede the Agency's ability to safeguard the confidentiality of the affidavit itself, protect the privacy of the affiant and potentially compromise the integrity of the Region's investigation.

Procedures: We strongly urge everyone to submit all documents and other materials by E-Filing (not e-mailing) through our website, www.nlr.gov. However, the Agency will continue to accept timely filed paper documents. Please include the case name and number indicated above on all your correspondence regarding the charge. The Agency requests all evidence submitted electronically to be in the form it is normally used and maintained in the course of business (i.e., native format). Where evidence submitted electronically is not in native format, it should be submitted in a manner that retains the essential functionality of the native format (i.e., in a machine-readable and searchable electronic format). If you have questions about the submission of evidence or expect to deliver a large quantity of electronic records, please promptly contact the Board agent investigating the charge.

Information about the Agency, the procedures we follow in unfair labor practice cases and our customer service standards is available on our website, www.nlr.gov or from an NLRB office upon your request. NLRB Form 4541 offers information that is helpful to parties involved in an investigation of an unfair labor practice charge.

We can provide assistance for persons with limited English proficiency or disability. Please let us know if you or any of your witnesses would like such assistance.

Very truly yours,

Regional Director



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD



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Dear:

The charge that you filed in this case on _____, 2017 has been docketed as case number _____. This letter tells you how to contact the Board agent who will be investigating the charge, explains your right to be represented, discusses presenting your evidence, and provides a brief explanation of our procedures, including how to submit documents to the NLRB.

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Presentation of Your Evidence: As the party who filed the charge in this case, it is your responsibility to meet with the Board agent to provide a sworn affidavit, or provide other witnesses to provide sworn affidavits, and to provide relevant documents within your possession. Because we seek to resolve labor disputes promptly, you should be ready to promptly present your affidavit(s) and other evidence. If you have not yet scheduled a date and time for the Board agent to take your affidavit, please contact the Board agent to schedule the affidavit(s). If you fail to cooperate in promptly presenting your evidence, your charge may be dismissed without investigation.

Preservation of all Potential Evidence: Please be mindful of your obligation to preserve all relevant documents and electronically stored information (ESI) in this case, and to take all steps necessary to avoid the inadvertent loss of information in your possession, custody or control. Relevant information includes, but is not limited to, paper documents and all ESI (e.g. SMS text messages, electronic documents, emails, and any data created by proprietary software tools) related to the above-captioned case.

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We can provide assistance for persons with limited English proficiency or disability. Please let us know if you or any of your witnesses would like such assistance.

Very truly yours,

Regional Director