Document (mis)Management

e-Discovery Lessons Learned The First Half of This Year

By Linda Kish

Cases with corporate spoliation sanctions have drenched the legal marketplace in the first half of 2005. Organizations that have failed to locate, preserve and produce electronic documents have found themselves the subject of unwelcome headlines and subject to adverse-inference jury instructions, default judgments and huge damage awards.

In a recent study of cases involving e-spoliation sanctions, the most frequently sanctioned behavior involved the non-production of documents, *ie*, destruction of electronic documents (84%), rather than a delay in production (16%). *See,* Shira A. Scheindlin and Kanchana Wangkeo, "Electronic Discovery Sanctions in the Twenty-First Century," 11 Mich. Telecomm. Tech. L. Rev. 71 (2004).

2005 E-DISCOVERY SANCTIONS

The first half of this year demonstrates that courts are not afraid to hold companies and their budgets accountable for deficient discovery practices. Several notable cases illustrate the range of sanctions levied against parties for spoliation of electronic evidence. In one of the year's earliest cases — *Nartron Corp. v. General Motors Corp.*, 2005 WL 26991 (Mich. Ct. App. Jan. 6, 2005) — an appellate court affirmed a finding that Nartron's failure to produce a database in response to GM's discovery request "tainted, corrupted, or permeated all of the discovery in the case." As a result of Nartron's discovery practices, the appellate court awarded GM attorney fees, costs and expert witness fees.

Several weeks later, a Pennsylvania court cautioned Medco in *United States v. Merck-Medco Managed Care, L.L.C.,* 2005 WL 273030 (E.D. Pa. Feb. 2, 2005). A month after the discovery deadline, Medco completed its electronic-document production with the exception of 13 boxes worth of documents withheld as potentially privileged and corrupted electronic data that was being restored. As a result, the government sent a letter to Medco stating that the "completed" document production was incomplete because several major technical defects existed, including hard drive errors and files containing questionable or missing data. Although Medco denied knowledge of the defective document production, the court found Medco "dilatory in their disclosure of these defective files, costing [the government] unnecessary time and expense." The court admonished Medco for its discovery practices and reminded Medco of its obligation to alert the court when discovery issues arise. The court determined Medco's conduct had prejudiced the government and noted that further violations may result in sanctions.

Another early 2005 discovery mistake involved a charge by the SEC, NASD and New York Stock Exchange in *In re J.P. Morgan Securities Inc.,* SEC, Admin. Proc. File No. 3-11828, 2/14/05. The charge alleged that J.P. Morgan had failed to preserve e-mail for the required three-year period and lacked adequate e-mail preservation systems or procedures. J.P. Morgan settled the charges without admitting or denying wrongdoing, agreed to pay a total of $2.1 million and consented to establishing procedures for complying with e-mail preservation laws, regulations and rules.

One of 2005's most recent and costly e-discovery sanctions cases was *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.,* 2005 WL 679071 (Fla. Cir. Ct. Mar. 1, 2005). *See,* also *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.,* 2005 WL 674885 (Fla. Cir. Ct. Mar. 23, 2005). During the discovery phase, Morgan Stanley overwrote e-mails, failed to process in a timely fashion hundreds of DLT and 8mm tapes, and failed to produce relevant e-mails and their attachments. The court noted that "[t]he conclusion is inescapable that [Morgan Stanley] sought to thwart discovery." The court further stated that Morgan Stanley "gave no thought to using an outside contractor to expedite the process of completing the discovery, though it had certified completion months earlier; it lacked the technological capacity to upload and search the data at that time, and would not attain that capacity for months." The court issued an adverse-inference instruction, directing the jury to accept that Morgan Stanley helped defraud investors. Relying on that instruction, on May 16 the jury awarded the plaintiffs over $600 million in compensatory damages. The court indicated the instruction would apply to punitive damages as well, which could potentially end up costing Morgan Stanley as much as $2.7 billion in total damages relating to the suit.

In the now renowned *Zubulake v. UBS Warburg* case, Judge Shira A. Scheindlin issued a series of precedent-setting e-discovery decisions. Ultimately, the court concluded UBS willfully deleted relevant e-mails despite contrary court orders. The court granted an adverse-inference instruction, ordering the jurors to assume e-mails — discarded by UBS after Zubulake, a female employee, filed a complaint with the EEOC — would have had a negative impact on UBS' case. The court noted defense counsel was partly to blame for the document destruction because it had failed in its duty to locate, preserve and produce in a timely fashion all relevant information. After 3 years of litigation, the trial culminated in April, with the jury finding that the company discriminated

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Linda Kish is a Houston-based legal consultant for Kroll Ontrack. The author gratefully acknowledges the assistance of **Charity Delich**, a Kroll Ontrack law clerk.

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against Zubulake and awarding more than $29 million in total damages.

DOCUMENT RETENTION & PRESERVATION: AVOIDING SPOLIATION ACCUSATIONS

These cases demonstrate the significance of proper retention and preservation. In an era where more than 90% of all communication takes place electronically, a corporation must implement procedures for effectively managing and controlling its electronic documents — or risk putting its business, stock value and reputation at stake.

Many attorneys shudder at the mention of technology. Now, courts and lawmakers are forcing practitioners to educate themselves and their clients about electronic data. The days of simply sending out a standard "preservation letter" instructing the IT department and other employees to preserve all relevant data, and then leaving it up to them to decide what is relevant and the manner in which it is to be preserved are over.

In *Zubulake V*, the court set forth the duty federal courts and many state courts now impose on in-house and outside counsel. In addressing the role of counsel in litigation generally, the court stated "[c]ounsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched." *See, Zubulake v. UBS Warburg*, 2004 WL 1620866 (S.D.N.Y. July 20, 2004). The court concluded that attorneys are obligated to ensure that all relevant documents are located, preserved and produced according to the specifics of the request. Additionally, the court declared that litigators must guarantee that relevant documents are preserved by placing a "litigation hold" on the documents, communicating the need to preserve them and arranging for safeguarding of relevant archival media.

The multitude of challenges presented by electronic evidence can overwhelm practitioners faced with a litigation hold. Those familiar with the relevant legal and technical issues understand that electronic discovery requires careful planning at each step. Organizations cannot begin planning too early in the process. In fact, a corporation's most beneficial preparation comes long before litigation commences or is even anticipated. By developing and following a solid document-retention program for their electronic data, litigants can save themselves a tremendous amount of time and money.

Too often, today's corporations keep multiple years worth of backup tapes from e-mail and file servers that serve no legitimate business purpose. When faced with litigation or a regulatory investigation, they are forced to collect, organize, restore, search, review and produce electronic documents from that media. To defensively limit the challenges of discovery, an organization should have an aggressive, but appropriate, document-retention policy. But a policy that is right for one organization or one industry isn't necessarily the best fit for another organization or industry (*ie,* specific regulations by the SEC, NASD and other agencies differ from one industry to the next). Additionally, the time at which a policy is put in place is crucial. Corporations must take the time to implement a document-retention policy long before litigation or an investigation is imminent.

Rigorously following a solid document-retention policy will prove its worth once litigation is pending. The following are some of the best practices corporations and attorneys should consider when faced with litigation.

- **Suspend automated document destruction policies**. An organization will typically "recycle" backup tapes containing e-mail and other files created by employees. The data on those tapes, once overwritten (*ie*, recycled), can be recovered for use in litigation only under limited circumstances. This makes it critical to act quickly to suspend the destruction of that data. By suspending document destruction broadly across the organization, counsel can determine what geographic locations, servers, networks, databases and removable media (*eg*, backup tapes, CDs, DVDs) contain potentially responsive information. Once you determine where relevant data lies, you can continue with normal document-retention policies for the non-responsive data.
- **Formulate a "preservation response team."** Counsel should have ongoing communication with the company's IT department regarding where company records reside, how they are maintained, when they are destroyed and how to best preserve selected records that may be relevant to a prospective or extant lawsuit.
- **Notify employees, third parties, and opposing counsel of the obligation to preserve data.** Counsel has met its discovery obligations when it issues a litigation hold, communicates and reiterates the need to preserve and produce relevant documents to key players (people in the company who are likely to possess relevant data) and produces all potentially relevant documents to opposing counsel. This includes ensuring ongoing compliance with preservation duties.
- **Devise a plan for responding to the new litigation.** Working together, counsel and IT staff should determine what data needs to be preserved, how to implement that preservation and how to monitor compliance with preservation protocols.

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