

Preservation and E-Discovery from a Litigation and Risk Management Perspective

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The ubiquitous use of electronic media as a means of communications has had a powerful impact on all aspects of daily life.

Corporations and organizations throughout the world have come to rely on electronic media in all facets of their operations. With the globalization of industry, the ability to instantly communicate is a tool that organizations worldwide find indispensable. Notwithstanding its ease of use, electronic communication is not without controversy, particularly where litigation is involved. Indeed, in recent years, we have seen an increasing number of cases wherein courts in the United States have addressed the vast use of electronic data and its impact on litigation in the United States.

United States Courts are continuously carving out and redefining the boundaries of electronic document preservation and production requirements. As a result of the drastic consequences now being sought from and often granted by courts in electronic discovery, organizations and its lawyers must keep a watchful eye on this evolving landscape. In perhaps the most infamous e-discovery sanctions case to date, a Florida jury awarded financier Ronald Perelman \$1.45 billion in damages after the trial judge entered a default judgment against Morgan Stanley as a sanction for various e-discovery missteps.^[1] The trial judge found that Morgan Stanley initially certified that all relevant electronic records had been produced, but then repeatedly uncovered new backup tapes months after the discovery deadline had passed. The trial judge ruled that Morgan Stanley had deliberately failed to comply with discovery and instructed the jury to assume that Morgan Stanley had helped to defraud Mr. Perelman. As a result of this instruction, Mr. Perelman had to prove only that he relied on Morgan Stanley's representations to his financial detriment. While the judgment, including the award of punitive damages, was later reversed on grounds unrelated to the electronic discovery issues (which were not discussed by the appellate court), the trial court's rulings and the jury's findings are a cautionary tale of the potential impact of electronic discovery abuses.

The rulings surrounding e-discovery can also be a trap for the unwary or unformed — severe sanctions are not confined to egregious or intentional conduct but can also be assessed for mere ordinary negligence in complying with electronic discovery obligations. The standard for the award of such sanctions was most prominently articulated in the seminal case of Zubulake v. UBS Warburg LLC.^[2] In this employment discrimination case, defendant UBS had taken steps to impose a "litigation hold" to ensure the retention of e-mails and other documents relevant to the litigation. Despite these steps, UBS employees deleted potentially relevant e-mails from their computers. In addition, UBS failed to produce many potentially relevant e-mails that had been retained, and delayed the production of the e-mails that it did produce. The Zubulake court held that the defendant had willfully destroyed potentially relevant e-mails and deserved the sanction of an adverse spoliation inference — an instruction to the jury that the lost e-mails were presumably relevant and damaging to defendant's case — which ultimately led to a \$29.3 million judgment against UBS.

Other recent cases illustrate how courts do not hesitate to impose a variety of sanctions against litigants who fail to abide by their discovery obligations. In 2006, the Federal District Court for the Southern District of California imposed sanctions against a defendant, an investor in Napster, Inc., in a copyright infringement action regarding musical compositions.^[3] After learning that the defendant's employees routinely deleted e-mails pursuant to its "long-standing" document policy, without regard to whether the deleted e-mails were relevant to the litigation, the court issued a preclusion of evidence order, an adverse inference instruction, and an award of attorneys' fees. The court found these sanctions appropriate despite the fact that the defendant's conduct did not constitute a "pattern of deliberately deceptive litigation practices," and notwithstanding evidence that the number of e-mails actually lost was small.

A New Jersey federal court imposed significant sanctions against an ERISA class action defendant for repeated e-discovery abuses, including failing to search e-mails and permanently losing others due to standard e-mail retention practices.^[4] While reserving its decision as to the propriety of a default judgment until certain class action issues had been resolved, the court, notwithstanding its proclaimed reluctance to sanction parties, issued a variety of sanctions, including: (1) deeming certain facts admitted by defendant for all purposes; (2) precluding evidence that was not produced by the defendant in discovery; (3) striking various privilege assertions by the defendant; (4) directing the payment of substantial costs and attorneys' fees related to defendant's misconduct; (5) imposing fines in an amount to be determined after the court considered defendant's financial condition; and (6) appointing a discovery monitor at the defendant's expense to review defendant's compliance with the court's discovery orders.

Notwithstanding the imposition of severe civil and judicial sanctions, organizations should also be aware of the criminal liability which may be imposed upon an organization for failure to preserve documents in light of a pending litigation. The most notorious case emerged out of the fall of Enron. In Arthur Andersen LLP v. United States, the United States Supreme Court addressed the document retention practices of Arthur Andersen during the Enron investigation.^[5] The accounting firm's policy, even after the recognition of an impending investigation and litigation, allowed for the destruction of documents which could be relevant.^[6] In that case, the continued destruction of documents in the face of knowledge of an impending investigation and litigation led to the criminal indictment of Arthur Andersen.^[7]

These cases provide examples of how electronic discovery issues can lead to extraordinary and unforeseen adverse results to litigants. Lawyers have long struggled in the paper world with the question of whether they preserved and produced everything in discovery. In the era of electronic discovery this struggle is much more challenging. Electronically stored information is easily created, however, it is also easily destroyed and/or misplaced. Locating and accounting for all your electronic data is no easy task and a source of common mistakes. Preservation orders and common law preservation obligations can be difficult to comply with when dealing with electronic data and emerging technologies.

In response to the increasing number of cases, and escalating number of sanctions and judgments involving the exchange of electronic data during litigation, the Federal Rules of Civil Procedure ("Rules") were amended to specifically address litigant's rights and responsibilities with regard to electronically stored information ("ESI").^[8] Although litigants were previously obligated to preserve and produce electronic documents, the Rules now explicitly outline concerns and issues that are specific to ESI, which were necessarily not at issue when individuals were strictly confined to paper documents. The task of ESI preservation, and its impact on the litigation process, is daunting in that it includes a wide-range of

information which previously did not exist or was unavailable.

This paper provides an overview of the recent amendments to the Rules with regard to the discoverability of ESI and the impact the changes have on litigants and potential litigants. The paper addresses when the obligations to preserve ESI arises in the context of litigation or potential litigation, the obligations that a party has with regard to preserving ESI and the legal consequences of non-compliance. Finally, we present a guide for organizations to consider in response to the newly revised Rules with regard to their individual corporate document retention policies.

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[1] CPH (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc., 2005 WL 679071 (Fla. Cir.Ct., Mar. 1, 2005), *rev'd on other grounds*, 955 So. 2d 1124 (Fla. Dist. Ct. App., 2007).

[2] Zubulake v. UBS Warburg LLC, 229 F.R.D. 422 (S.D.N.Y. 2004).

[3] UMG Recordings, Inc. v. Hummer Winblad Venture Partners (In re Napster, Inc. Copyright Litig.), 462 F. Supp. 2d 1060 (D. Cal. 2006)

[4] Wachtel v. Health Net, Inc., 239 F.R.D. 81, 90-91 (D.N.J. 2006).

[5] Arthur Andersen LLP v. United States, 544 U.S. at 696, 699-700 (2005).

[6] Id. at 700-01.

[7] Id. at 702.

[8] The Rules were amended on December 1, 2006, and will be amended again effective December 1, 2007. Though the 2007 amendments make no substantive changes to the Rules, the organization and format of the Rules will change. Any citations to the Rules in this paper will be first to those currently in effect, and then to the form of the Rule in effect as of December 1, 2007.