

**TECHNOLOGY & LEGISLATIVE, JUDICIAL AND  
GOVERNMENT AFFAIRS**

*May 2007 ~ No.4*

*In this issue...*

**Are You Competent?: Providing Representation in the Digital Age**

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*Mr. Shelton discusses the dynamic and growing body of electronic discovery law creating challenging issues for civil litigators and in-house attorneys.*

*About the author...*

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The American Bar Association's Model Rules of Professional Conduct 1.1 imposes an obligation upon counsel to "provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonable necessary for the representation." In addition, numerous recent court opinions impose upon counsel specific obligations relating to electronic discovery. Less than competent representation may lead to malpractice claims, monetary sanctions, adverse inference instructions and ethical violations. Following are several important considerations to help litigation counsel avoid these consequences.

***Know the Rules.*** Perhaps one of the most obvious steps to providing competent representation are knowing the rules for civil procedure and local rules for the jurisdiction in which you are litigating. Indeed, the comments to Model Rule 1.1 state that in order to provide competent representation attorneys must "keep abreast of changes in the law and its practice." Yet, an October 2006 survey of corporate counsel indicated that less than half of the respondents knew that the Federal Rules of Civil Procedure were to be amended in December 2006 to address electronic discovery issues.<sup>1</sup> Those rules are now in effect in every federal court in the country. In addition, several states have also adopted electronic discovery rules in all or in part of their judicial systems. For instance, Texas<sup>2</sup> and Mississippi<sup>3</sup> have had specific provisions dealing with electronic discovery for several years; Idaho<sup>4</sup> and New Jersey<sup>5</sup> have recently adopted sweeping changes modeled in large part on the amendments to the Federal Rules; and New York<sup>6</sup> and North Carolina<sup>7</sup> have adopted electronic discovery rules in their specialty commercial and business courts. Other states around the country have either proposed amendments, or are contemplating changes.<sup>8</sup>

***Inquire, Investigate and Discover.*** "Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation."<sup>9</sup> Although there are few judicial opinions dealing with this duty of competence as it relates to technological issues in discovery, several recent

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<sup>1</sup> LexisNexis, *Survey: Only 7% of Corporate Counsel Attorneys Rate Their Companies Prepared for New Federal Rules on Electronic Discovery* (Nov. 28, 2006) <<http://www.lexisnexis.com/about/releases/0940.asp>>

<sup>2</sup> Tex. R. Civ. P. 196.4.

<sup>3</sup> Miss. R. Civ. P. 26(b)(5).

<sup>4</sup> Idaho R. Civ. P. 16(b); 26(b)(4); 26(b)(5)(A); 26(b)(5)(B); 33(a)(2); 33(c); 34(a); 34(b); 35(a); 36(a); 37(a); 45(a); 45(b); 45(c); 45(d); 45(e); 45(f); 45(g); 45(h).

<sup>5</sup> N.J. Court Rules 1:9-2; 4:5B-2; 4:10-2(c); 10-2(e)(2); 10-2(f); 4:17-4(d); 4:18-1(a); 4:18-1(b); 4:23-6.

<sup>6</sup> Rules of the Commercial Division of the Supreme Court, 22 N.Y.C.R.R. 202.70(g).

<sup>7</sup> General Rules of Practice and Procedure for the N.C. Business Court 17.1(i); 17.1(r); 17.1(s); 17.1(t); 17.1(u); 18.6(b); Form 2.

<sup>8</sup> Arizona, Florida, New Hampshire, Maryland, South Carolina and Washington are all currently contemplating the addition of rules relating specifically to electronic discovery. California and Delaware have recently rejected changes.

<sup>9</sup> MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 cmt. (5) (2003).

opinions have articulated that counsel must become familiar with clients' information management systems, make an affirmative factual inquiry into all potential sources of information, institute litigation holds and preserve all relevant electronic evidence.

Failure to meet these obligations may result in severe adverse consequences:

- In *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.*, the court entered a partial default judgment against Morgan Stanley admonishing both in-house and outside counsel for failing to conduct adequate investigations of Morgan Stanley's email archive systems and the location of email back-up tapes.<sup>10</sup> The jury returned a verdict of \$1.58 billion. The verdict was recently overturned, however the appellate court did not address the electronic discovery sanction.<sup>11</sup>
- The court in *Zubulake v. UBS Warburg LLC* gave an adverse inference instruction, in part, due to counsel's failure to adequately ensure that relevant documents were identified and preserved.<sup>12</sup> The jury returned a verdict of over \$29 million in this employment discrimination case.
- In *Phoenix Four, Inc. v. Strategic Res. Corp.*, imposed monetary sanctions of over \$30,000 on defense counsel for failing to undertake a "methodical survey" of the defendant's sources for electronic information.<sup>13</sup> The court stated that "counsel's obligation is not confined to a request for documents; the duty is to search for sources of information."<sup>14</sup>

The recent amendments to the Federal Rules of Civil Procedure mandate parties address electronic discovery issues early in the litigation including scope of discovery, preservation of evidence, privilege issues, and format for production.<sup>15</sup> Parties now must provide "a copy of, or a description by category and location of . . . electronically stored information" as part of their initial disclosures.<sup>16</sup> Adequate preparation for a 26(f) conference requires counsel to understand their clients' hardware, software, retention policies, back-up and archiving protocols, and data management processes. In this way, you will avoid making representations to the court and opposing counsel that are false, unattainable, and/or not technologically feasible.

***Learn to Talk like a "Techie."*** In order for practitioners to effectively communicate with their clients regarding storage, identification and retrieval of electronic information, it is important to know some basic computer terminology. Knowledge of basic computer terminology and concepts is also necessary to understand your opponent's computer systems and to competently gather electronic information from them, including deposing

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<sup>10</sup> *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.*, No. CA 03-5045 AI, slip op. at 9-11 (Fla. Cir. Ct. Mar. 1, 2005).

<sup>11</sup> *Morgan Stanley & Co., Inc. v. Coleman (Parent) Holdings, Inc.*, No. 4D05-2606 (Fla. Dist. Ct. App. Mar. 21, 2007).

<sup>12</sup> *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 432 (S.D.N.Y. 2004).

<sup>13</sup> *Phoenix Four, Inc. v. Strategic Res. Corp.*, No. 05 Civ. 4837 (HB), 2006 U.S. Dist. LEXIS 32211 (S.D.N.Y. May 23, 2006).

<sup>14</sup> *Id.* at \*17.

<sup>15</sup> Fed. R. Civ. P. 26(f).

<sup>16</sup> Fed. R. Civ. P. 26(a).

their information technology personnel. *The Sedona Conference Glossary For E-Discovery and Digital Information Management*,<sup>17</sup> is an invaluable resource for understanding the language.

***Implement a Document Retention Policy.*** Document retention policies are legitimate business tools that create business efficiencies by reducing the amount of documents and data that no longer have a useful business or regulatory purpose. They also reduce the amount of information that lawyers must sift through when the eventual document collection occurs. Companies should consider using document management software that requires employees to save data with certain indexing criteria including title, date, author, document type and retention schedule. If feasible, it is advisable to centralize storage on network servers rather than on work station hard drives. Document retention policies, of course, cannot be implemented in order to destroy evidence relevant to a pending or reasonably anticipated litigation or investigation.<sup>18</sup>

***Know When the Duty to Preserve Attaches.*** When litigation or an investigation is “reasonably anticipated” the document retention/destruction policy must be suspended, and reasonable steps must be taken ensure that all of the people who are likely to have relevant information are informed of the suspension. Failure to timely suspend a document retention policy and implement a legal hold can result in severe sanctions on both counsel and client.<sup>19</sup> Obviously once a complaint is filed or formal notice of an investigation is communicated to the company, the duty to preserve attaches. Likewise, once the decision is made to initiate a lawsuit, the duty to preserve attaches. Unfortunately, there are no hard and fast rules that practitioners can look to in order to determine when the duty to preserve arises prior to actual notice. Once a litigation hold has been implemented, the preservation instructions should be repeated periodically so that new employees know about them and old employees are reminded of them.<sup>20</sup> Counsel should ensure that all relevant active data, and in some instances, back-up data is captured and securely stored.

***Ask for Help.*** In order to provide competent representation, very small firms, or lawyers who have no experience with electronic discovery issues may need to associate with

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<sup>17</sup> The Sedona Conference, *The Sedona Conference Glossary For E-Discovery and Digital Information Management* (May 2005) (available at [http://www.thesedonaconference.org/content/miscFiles/publications\\_html?grp=wgs110](http://www.thesedonaconference.org/content/miscFiles/publications_html?grp=wgs110)).

<sup>18</sup> *See, e.g.,* Carlucci v. Piper Aircraft Corp., 102 F.R.D. 472, 486 (D.C. Fla. 1984) (entering default against defendant who deliberately destroyed documents to prevent discovery, finding that the defendant “utterly failed to provide credible evidence that a [bona fide, consistent and reasonable document retention policy] existed”).

<sup>19</sup> Testa v. Wal-Mart, 144 F.3d 173, 177 (1st Cir. 1998) (affirming adverse inference instruction where defendant destroyed documents pursuant to retention policy after being put on notice of lawsuit).

<sup>20</sup> Zubulake, 229 F.R.D at 434.

other attorneys who have established competence with e-discovery.<sup>21</sup> While law firms have traditionally handled all aspects of paper discovery, collection and production of electronic information is often a highly technical process that can require special expertise, software, and computer infrastructure that law firms typically do not possess. Associating with experienced attorneys or hiring an outside consultant or e-discovery vendor allows counsel provide competent legal representation, without focusing their attention on highly technical computer issues.<sup>22</sup> It also protects employees from the firm from having to testify regarding retrieval and collection issues in the event that data is lost or corrupted.

**Conclusion.** Electronic discovery is a dynamic area of the law that presents new challenges to in-house and outside counsel alike. The duties imposed on counsel by ethics rules, civil procedure rules and the judiciary are developing constantly and attorneys must keep abreast of these changes. The standard of care for providing competent representation rises as the legal community becomes more educated about these issues. Web sites, continuing legal education seminars, books, and articles are readily available and provide numerous opportunities for counsel to become educated about electronic discovery. In order to avoid malpractice claims, judicial sanctions and ethical violations, attorneys are well advised to take advantage of these educational opportunities, and engage in open dialogue with on-going clients regarding their obligations with respect to electronic discovery.

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<sup>21</sup> MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 cmt. (2) (2003) (“Competent representation can also be provided through the association of a lawyer of established competence in the field in question.”).

<sup>22</sup> Judge Maass criticized Morgan Stanley, for instance, for giving “no thought to using an outside contractor to expedite the process of completing the discovery, . . . it lacked the technological capacity to upload and search data at that time, and would not attain that capacity for months. . . .” Coleman (Parent) Holdings, Inc., slip op. at 4 (Mar. 1, 2005).