 By Michael S. Khoury and James J. Parks

E-Discovery and the Business Lawyer

Why does a business attorney need to know about electronic discovery? While the issues related to e-discovery are normally addressed in the litigation context, the business lawyer may be the first person called by the client. Consider this as a skill set you need in your arsenal. Two recent cases have highlighted the importance of effective discovery of electronic records. In the landmark case of *Zubulake v UBS Warburg LLC*,[1] deleted e-mails resulted in a $30 million judgment for the plaintiff and economic sanctions against the company. More recently, fumbled production of back-up tapes and deleted records resulted in a significant negative inference evidentiary ruling and a huge liability for Morgan Stanley.[2]

Electronic Discovery Basics

Anyone who has had even a passing experience with litigation knows that discovery and document production can be a difficult process. The growth of electronic communications, especially electronic mail, has made discovery processes much more cumbersome, expensive, and fraught with pitfalls for the parties. The changes in discovery rules have added additional complexity and another reason to leave litigation to those wonderful souls down the hall.

Every attorney must understand that there are obligations to preserve evidence once it is known that a dispute could lead to litigation. While the attorney may counsel clients about potential disputes and try to avoid litigation, sometimes the dispute cannot be resolved outside of a dispute resolution forum or process. Documents and electronic records will be subject to discovery and initial disclosures under Rule 26, Federal Rules of Civil Procedure.

Once litigation has commenced, e-discovery will become an integral part of the proceedings and counsel may need to expend significant effort and economic resources to find and produce electronic documents in response to mandatory disclosures and discovery requests. A case that previously might have required the production of a few thousand pages of documents could now entail hundreds of thousands of additional electronic records.

"Stop, Look, and Listen"

Stop. While not as eloquent as some of the advice being touted by litigation experts, this might be a good place to start. First, as soon as counsel learns about a dispute that could lead to litigation, the client should be told to stop any record destruction processes that automatically take place. The legal department or outside counsel should ensure that the client's information technology department, and anyone else with access to data or electronic records, is prevented from altering or deleting any electronic records related to the litigation until specifically authorized. Most companies have implemented record retention policies that automatically promote the destruction of nonessential information (a good policy, by the way), but the automatic destruction of information that might be related to the litigation needs to be halted.

Look. You and your client must begin reviewing what information is realistically available and what you need to do to preserve and produce the records. Electronic records may be poorly organized or archived and could be stored on a variety of electronic media (servers, hand-held devices such as PDAs and Blackberries, back-up tapes, off-site media). Being able to access and obtain the relevant information first requires you to locate what is relevant.

Listen. This may be the hardest. Business lawyers pride themselves on being able to listen carefully to clients. In the context of electronic discovery, however, it is important to seek out and consult with a new group of players. The information technology professionals working with your client will become your best friends (you hope). Also, you will meet a new breed of professionals known as electronic discovery consultants. These two groups can make the e-discovery process bearable.

Common Mistakes to Avoid

Learning from the mistakes of others is both effective and enlightening. For this topic, we turned to Mark St. Peter, the CEO of Computing Source, a Michigan provider of electronic discovery and computer forensic services. Some of his thoughts are as follows:

- Understanding the client's technology infrastructure and records retention methodology needs to happen right away, not the day before discovery is due.
- Don't save electronic records forever. Even though computer storage media is cheap, unlimited history just means more cost for a company when discovery starts.
- Don't start producing records before you think through the whole process.
- Don't agree to a discovery production protocol without understanding the costs and effort involved.
- Use an expert to preserve evidence. Just having your IT person make a copy of the hard drive is not the right way to maintain records, and could result in the spoliation of evidence.

Electronic Document Retention Policies

Discussing e-discovery often leads to an analysis of document retention policies. It is not uncommon for a company to focus on document retention only after the first experience with electronic discovery. Each company should consider establishing and implementing a policy for managing and periodically deleting electronic records that are not necessary to be retained for legal or regulatory purposes. Implementing a policy is not something that can be taken from a template and applied to each company. Every organization

will have its own specific needs and policies, and the policy for document retention and destruction should be a joint effort between legal, finance, regulatory, and information technology professionals within the organization.

NOTES

1. *Zubulake v UBS Warburg LLC*, 382 F Supp 2d 536 (2005).

2. *Morgan Stanley & Co Inc, v Coleman (Parent) Holdings Inc,* 2007 Fla App LEXIS 4167, *, 32 Fla L Weekly D 773, (Mar 21, 2007) (rehearing denied by *Stanley v Coleman*, 2007 Fla App LEXIS 9404 (Fla Dist Ct App 4th Dist, June 4, 2007).

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