

The Applied Discovery® OrangePages™

Electronic Discovery Newsletter

FEATURE STORY

In-House and Outside Counsel Working Together to Prepare for E-Discovery

What's worse than receiving an expansive electronic discovery request from your opposition in a major case? Being caught unprepared for that request.

With the establishment of a collaborative relationship between in-house and outside counsel, companies can map out a plan for electronic discovery preparedness. Taking time to understand the perspective of your counterpart in electronic discovery will help you focus your efforts where they are most needed.

"Every litigation matter or investigation I've been involved with in the past twelve to eighteen months has had an electronic discovery component," said Mitch Zamoff, a partner in the Litigation Group at Hogan & Hartson LLP in Washington, D.C. "And several of those have involved significant disputes over electronic discovery or considerable discussion about the adequacy of one or the other party's electronic dis-

covery efforts." Some practitioners saw the shift to electronic discovery even earlier. "About three years ago, we started seeing electronic discovery in our cases," said Tom Skelley, Director of Practice Information Services at Covington & Burling in Washington, D.C. "At that time, electronic discovery played a part in about three or four cases each year. Now it's almost impossible to count—it seems that we get one or two cases every week involving electronic discovery."

"About three years ago... electronic discovery played a part in about three or four cases each year. Not it's almost impossible to count..."

**- Tom Skelley,
Covington & Burling**

As law firms notice this sharp increase in the prevalence of electronic discovery in their practice, many corporate clients wrestle with the implications. "Some companies have been quick to recognize the changing climate of discovery, but

others seem to be coming along a bit more reluctantly," added Zamoff. "The danger here is that the failure to pay adequate attention to electronic discovery issues early in a case may unknowingly expose a company to serious risk."

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CASE LAW UPDATES

Court examines extent of efforts required to preserve electronic discovery materials.

Kier v. UnumProvident Corp., 2003 U.S. Dist. LEXIS 14522 (S.D.N.Y. Aug. 22, 2003).

Through a letter of June 20, 2003, plaintiff's counsel in this ERISA action advised the court that electronic records which had been ordered preserved had been erased. This began a two month process of discovery, an evidentiary hearing, briefing, and oral argument to address whether defendant had violated a portion of a December 2002 Order which required defendant to take steps to preserve six days of email from October and November 2002. The court outlined the various shortcomings in defendant's efforts to ensure preservation of the materials in question, but found the extent of the loss or the degree of prejudice suffered by plaintiff could not be determined at the time of hearing. The court recommended appointment of an independent expert to determine whether sufficient steps were being taken to retrieve the lost emails.

"Middle test" approach prohibits use of inadvertently disclosed email.

Turner v. Brave River Solutions, Inc. 2003 DNH 104, 2003 U.S. Dist. LEXIS 10298 (D. N.H. Jun. 18, 2003).

Defendant had an opportunity to review discovery materials through a courtesy extended by plaintiff's attorney after the close of discovery. The second review was allowed for the benefit of the owner of the corporate defendant. During the second review, the owner reviewed materials including email messages printed and stored in a file clearly marked "work product w/held from opposing counsel." The owner hand-copied provisions of a privileged email, and defendant's counsel subsequently included a portion of the hand-copied text in a motion for summary judgment.

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GUEST ARTICLE

Pre-Litigation Duty to Preserve Electronic Information

by Adam I. Cohen and David J. Lender, Weil, Gotshal & Manges LLP

One of the most murky e-discovery issues facing in-house counsel is determining their company's obligation to preserve electronic information in connection with actual or potential litigation. While there is nothing unclear about the existence of such a duty, determining the timing of when it arises as well as its scope—especially with regards to far-flung and evanescent electronic data—is a challenge. The consequences of a misstep can be severe, as the violation of the preservation duty can give rise to various forms of sanctions for spoliation, or the wrongful destruction of evidence.

The key issue with respect to timing is notice of the relevance of the information in question to pending or anticipated litigation. Some courts have found such notice to have arisen even prior to the filing of a complaint. Electronic documents are particularly sensitive to the timing issue, as they can be modified in ways that may not be readily apparent later or deleted by routine, automated processes.

Notice Arising From Prior Litigation

In *U.S. ex rel Koch v. Koch Indus.*,¹ plaintiffs alleged that defendants had mis-measured crude oil. Defendants previously were the subject of other suits and investigations arising from the same core allegations, but made no attempt to preserve documents related to these prior claims. Although defendants' "Standards of Corporate Conduct" stated that employees should not destroy documents, defendants' president instructed employees to shred documents helpful to competitors.

After suing in September 1991, plaintiffs sought substantially the same documents as plaintiffs in the earlier suits. But after staying discovery in March 1992, the court dismissed the case in December 1992. The Tenth Circuit reversed and remanded in August 1994.

Plaintiffs requested the documents again in October 1994, and the court entered a preservation order months later. Only then did defendants circulate instructions to preserve relevant data.

¹ 197 F.R.D. 463 (N.D. Ok. 1998).

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For more information, visit www.applieddiscovery.com and www.lexisnexis.com.

Managing Multi-Firm Review with Electronic Discovery Tools

Dear Miranda,

Our firm is one of ten representing a large company in what has become a nationwide product liability class action. We want to avoid duplicating efforts among all the different attorneys assigned to document review. What is the best way to handle a review process with this many firms?

Sophie L.
Dallas, TX

Dear Sophie,

In cases such as yours, review can quickly turn into a logistical nightmare. For firms that still counsel their clients to print documents for review, it can also be a very costly undertaking as in-house counsel contends with printing all potentially relevant documents and shipping hundreds, if not thousands, of boxes around the country for review. Printing and shipping a million documents alone will cost your client an additional \$160,000 in printing and delivery fees,¹ and that's before any overhead associated with trying to track and manage all these documents for chain of custody purposes.

Web-based review, on the other hand, lets in-house counsel leverage all the strengths of multi-law firm review while minimizing its complexity. Outside counsel will also benefit from a more efficient process that cuts down on needless replication and overhead associated with coordinating review with the other law firms.

Specifically, there are four major benefits associated with keeping documents electronic for review purposes:

1. Review Management

One of the most difficult issues associated with any multi-law firm review process is getting a quick update on the status of the case. In paper-based review, this means multiple calls just to get the most basic understanding of the status of the case ("How many boxes have you reviewed?" or "Are you almost finished with review of the CEO's documents?"). There is almost no way for in-house counsel to get a quick update of the status of the whole case, much less an update on review of documents associated with a particular custodian.

A good Web-based review application, however, should always offer both outside counsel

and in-house counsel "case at a glance" functionality. Summary screens are critical elements to these applications, allowing both the reviewers and the in-house legal team to see not only the overall case status, but to also drill down on the status of a single custodian or document collection if necessary.

Equally as important is the fact that Web-based applications cut down dramatically on the duplication of efforts by allowing lead counsel to assign owners to custodians or specially created "custom collections." Attorneys can review what was assigned to them in a timely and efficient manner, and lead counsel and in-house counsel can track the status of the case by simply glancing at summary screens that cross-reference "reviewed", "not reviewed", "privileged", "responsive", or "hot" documents by custodian, or by custom collection.



Major benefits of keeping documents electronic for review

- ✓ **Review Management**
- ✓ **Productivity**
- ✓ **Control**
- ✓ **Cost Savings**

Finally, the consistent coding of documents can be very difficult when multiple law firms are involved. A good Web-based review application allows lead counsel to create and manage a common set of terms for coding documents, and programmatically enforce the use of those codes throughout the review process.

Such review management functionality is more than just technical bells and whistles; it also dramatically lowers the cost of review while ensuring consistency, accuracy, and an informed client.

2. Productivity

Another typical problem with multi-law firm review is the inability for lead counsel to quickly reassign parts of the review based on relative workloads. In cases where time is of the essence (and when isn't it these days?), managing workloads among so many attorneys is complicated. There is no practical way to ship boxes back and forth between law firms to take advantage of one firm's available attorneys while another firm

bottlenecks the whole process because they have too many documents to review.

Web-based review, however, lets you take advantage of relative workloads, shifting entire collections to other users with a few mouse clicks, providing for a more efficient review process by maximizing the resources across all parties involved in the review.

3. Control

As if managing the review process isn't difficult enough, managing the production process can be even worse for clients who rely on paper-based review processes. Not only do participating law firms need to ship back responsive and "hot" documents, but "rolling productions" require sorting and organizing documents by custodial sources and/or parent child relationships (for emails and attachments), which can be difficult to say the least. Web-based review applications, however, allow a single outside law firm tasked with the job of managing productions to do so via the application itself. The lead law firm can manage Bates formats, assign Bates numbers, and create and

manage "production templates" with consistent brands, ensuring that production to opposing counsel goes smoothly while overall costs are contained. In-house counsel can also access these productions to see what has been produced and to ensure the company is prepared if the case goes to trial.

4. Cost Savings

Given that about ninety-eight percent of cases never make it to trial, discovery often makes up the bulk of the cost for most litigations. Not only is paper-based review typically triple the cost of electronic review, but it is also dramatically slower with more time devoted to managing the process rather than in actual document review. Simply put, the overhead associated

¹ This example uses an average of 4 pages per document, 2500 pages per box and costs of \$.14/per page to print on a laser printer plus \$15 per box to ship via regular ground delivery.

See *Miranda Writes* on Page 7



Miranda Glass is Educational Programs Manager at Applied Discovery. She answers questions from readers in each issue of the Orange Pages. You can submit a question to her at miranda.glass@applieddiscovery.com. ■

PRACTICE TIPS

Five Tips for In-House Counsel to Prepare for E-Discovery

By Christopher Garcia, Clifford Chance LLP

If you haven't already faced an electronic discovery request, you likely will soon. In-house counsel can have a significant positive impact on the success of an electronic discovery project by following these practice tips.

1. Allocate sufficient resources.

Make electronic discovery planning one of your legal department's key initiatives. Your company's executive team will look to you for guidance in minimizing the company's risk in the face of electronic discovery requests. Outside counsel will need you to facilitate communications with the IT staff to understand how the company creates and stores electronic data. You won't be able to meet these needs without advance preparation.

2. Communicate with employees and IT staff.

Communicate early and often with your employees. Have a plan to notify employees of document preservation obligations when litigation is pending or imminent. Be sure your IT group understands that a delay in enacting the company's preservation plan can result in deleted data (and possible claims of spoliation if your company utilizes an auto-delete mail function and it continues to operate). Sanctions as severe as \$1 million have been issued for even negligent spoliation of electronic data.

3. Plan ahead to minimize disruption.

Collecting electronic data and imaging employees' computers often proves to be more disruptive than gathering their hard-copy business files. Work with outside counsel to map out a sensible data-gathering plan to minimize business disruptions. The data-gathering team should include company IT staff as well as outside counsel. If possible, establish an on-site disk-imaging lab so that employees are reunited with their workstations within a few hours. Plan for unexpected delays and provide employees with temporary mobile workstations that provide network access. Follow the established plan to document chain of custody issues and prevent unintentional alteration of the data.

4. Understand your obligations.

Help the company understand that outside counsel is not trying to make things difficult.

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SPOTLIGHT

Applied Discovery Becomes Part of the LexisNexis Group

Industry Innovators Join Forces to Provide Expanded Services to Clients

This issue's Spotlight column features an interview with Rich Corbett, co-founder and senior vice president of strategy & business development of Applied Discovery.

The Orange Pages (TOP): The big news at Applied Discovery this summer was the announcement of the merger with LexisNexis™. Congratulations! Can you tell us what led to this development?

Rich Corbett (RC): Thank you very much. This is a very exciting time for all of us, and an important time for our clients. As you know, Applied Discovery pioneered the field of electronic discovery as it is known today. We developed the industry's first online review application for electronic documents, and have continued to enhance our core technology with enhancements to our document processing capabilities and the functionality of our online review application since the late 1990s.

The demand for e-discovery services has grown tremendously in the past two years. In order to respond to the needs of our clients, we determined that it was time to look ahead and think about how to ensure our services and technology would continue to meet the needs of our clients. Ultimately, we determined that organic growth within our company could only take us so far. We wanted to identify a long-term partner who shared our vision for the future of legal technology and our commitment to client satisfaction. We knew that a transaction like this would be the best way to achieve our goals.

TOP: So, why LexisNexis?

RC: LexisNexis is a global leader in the legal industry, and provides a wide variety of services to the same client base we serve. In the same way Applied Discovery was the first company to introduce attorneys to online electronic document review, LexisNexis was the first company to introduce attorneys

to online legal research. As we learned about their experiences in the past 30 years, we saw many similarities in the vision of both companies.

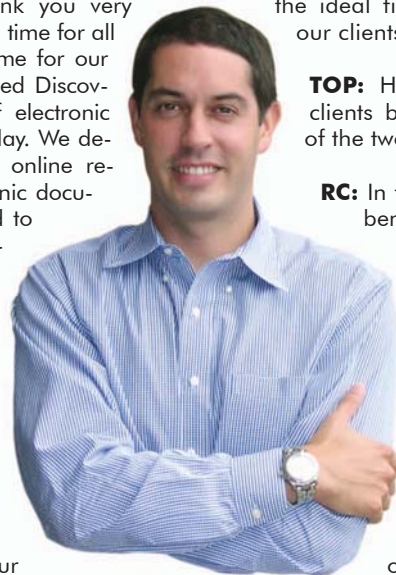
We ultimately realized that the most important consideration for us was to join forces with a company that shared our basic philosophy—to provide clients with an unequalled quality of products and first-rate client service. With that in mind, we found the ideal fit for Applied Discovery and our clients in LexisNexis.

TOP: How will Applied Discovery's clients benefit from the combination of the two companies?

RC: In the short term, our clients will benefit from the convenience of local representatives in every major city in the U.S. These additional resources will enable us to meet client needs more efficiently. In the long run, our combined resources will allow for an accelerated product development cycle with a greater emphasis on developing new services to meet client needs throughout the life of a case.

TOP: How do you expect this merger to affect new business opportunities?

RC: The legal industry is notoriously cautious about trying new things. In the aftermath of the bursting "dot com bubble," many attorneys have been particularly reluctant to trust any company with one of the most important components of the litigation process—discovery. Becoming part of an established, well-respected company like LexisNexis provides clients with a greater level of comfort that only comes from doing business with a company with many years of success behind it. This really puts Applied Discovery in a unique position as compared to other electronic discovery service providers. No other company has the legal technology history and credibility that Applied Discovery enjoys in its new role as a member of the LexisNexis Group. ■



Rich Corbett and Applied Discovery merge with LexisNexis to provide unparalleled e-discovery products and services.

E-Discovery Therapy

Technology Helps Build Strong Relationships Between In-House and Outside Counsel

It is not uncommon for relationships between in-house and outside counsel to be strained by conflicting interests in analyzing expenses and finding new ways to promote cost containment. This is not surprising, given the fact that, with respect to legal services, the profit motives of corporations and law firms are in direct conflict with one another—law firms that make money on billable hours versus corporations whose legal expenses have a direct impact on the bottom line. Many surveys of corporate counsel illustrate this dichotomy. For example, in the 2002 ACCA/Serengeti Managing Outside Counsel Survey Report, eighty-one percent of in-house counsel respondents indicated that controlling outside legal costs is the top issue of concern to in-house counsel.

Despite these sometimes-conflicting interests, it is not only possible to establish a cooperative cost-containment approach between in-house and outside counsel; it is absolutely necessary to ensure the success of their interactions. With litigation expenses on the rise nearly every year, finding a way to reduce expenses while enhancing cooperative workflow is a very appealing proposition to everyone involved.

Use of Web-based electronic discovery technology can improve the workflow between in-house and outside counsel by managing costs, facilitating communication, and improving efficiency. The following are examples of how to leverage electronic discovery tools to improve that relationship.

Manage Costs

As in-house counsel consistently cite costs as the most important concern when dealing with outside counsel, choosing to use an electronic discovery service provider (the most cost-effective per-unit method for reviewing discovery documents) is essential.

- **Save Money**

Processing electronic documents for review nearly eliminates the expenses of copying, scanning, and coding paper documents. Additionally, the document review process is streamlined to allow for more efficient and constructive review, resulting in reduced time and number of attorneys required to handle a typical discovery project. According to a report in the June/July 2003 issue of Law Office Computing, the average cost of paper discovery is \$.70 per page, while the average cost of electronic discovery is only \$.23 per page—a difference of \$.47 per page. While it

is true that electronic discovery often seems expensive simply due to the volume of information involved, these figures demonstrate that three times the number of electronic discovery documents can be processed for the price of one paper document (\$.69 for three electronic discovery documents vs. \$.70 for one paper document).

- **Monitor Costs**

In-house counsel can gain a better understanding and level of control over the costs associated with the review process through technology. An electronic discovery project bid typically includes all the anticipated costs for the project up front. What can seem like a large expenditure at first glance is actually much less expensive than traditional discovery processes on a per-page basis. An accurate assessment of the size and needs of the case will put the team in the best position to effectively manage project costs. Additionally, the case management functionality built into Web-based document review systems enables in-house counsel to monitor the volume of documents processed, the speed of outside counsel review, and anticipated timelines for production.



Attorneys can process three documents for electronic review for the same cost of processing one document for paper review.

- **Facilitate Communications**

With assistance from an electronic discovery service provider, there are many ways in-house and outside counsel can improve communications. Deadlines are typically very short during the review phase of a discovery project. Law firm attorneys may not have the time necessary to effectively communicate the status. Any lack of communication can cause serious anxiety on the part of in-house counsel who needs regular updates on the status of the project.

- **Real-Time Case Status**

An online review application should include automated reporting features. Using Applied

Discovery's application, for example, any authorized user can quickly get a real-time snapshot of the progress of the review including:

- > Number of documents for each custodian,
- > Number of documents reviewed or not yet reviewed,
- > Number of documents marked as "hot," "privileged," or placed into various user-defined collections.

- **Custom Reports**

In addition to real-time snapshots available online, most service providers offer customized reports. At the beginning of every project, customized reporting options should be discussed. Some popular custom reports include:

- > Weekly audits of review progress,
- > Production media reports.

- **Improve Efficiency**

Electronic discovery technology enables a new level of collaboration between in-house and outside counsel that dramatically increases the efficiency of the review process.

- **Collections & Annotations**

During the review process, users have the ability to sort documents into one or more standard document collections (such as hot, privileged, reviewed, etc), or an unlimited number of user-defined collections. Outside counsel can create custom collections to direct attention to selected documents that require feedback from in-house counsel and vice versa. Additionally, both in-house and outside counsel

can utilize online annotations to add comments to individual documents where necessary.

- **Conclusion**

Although electronic discovery technology may seem like an unlikely place to start, the opportunities for lower costs, enhanced communications, and increased efficiencies can go a long way to building a strong relationship between in-house and outside counsel.

- **Further Reading:**

- **White Paper: "Implementing Electronic Discovery Best Practices"**

 This issue's Tech Tips column was written by Jennifer Blue, Account Manager in the award-winning Client Solutions Group at Applied Discovery. If you have a technical issue you'd like to see addressed in this column, send a message to OrangePages@applieddiscovery.com. ■

FEATURE (continued from Page 1)

With rapidly developing case law and a seemingly insatiable thirst for electronic information from opponents, it's time for lawyers on both sides of the attorney-client relationship to take a close look at what can be done to better prepare for electronic discovery.

From the corporate perspective, there are a number of key objectives: minimizing interruption to business operations, avoiding claims of spoliation, reducing discovery costs, and finding a sensible way to manage the review of increasingly large volumes of discoverable documents.

"We started thinking about electronic discovery in 1993," said Jim Michalowicz, Manager of Legal Services for DuPont. "Our first real experience with electronic discovery came in 1995, and that helped us realize that we needed a better infrastructure to identify, preserve, collect and review electronic data." With 10 years of electronic discovery planning behind them, the DuPont legal team has a significant head start over most companies, but still shares most of the same concerns. "Figuring out how to avoid spoliation claims is definitely one of the biggest issues," added Michalowicz. "A company can quickly find itself in a defensive position when it has to determine what to preserve in the face of an electronic document request."

Helping the company move from reactive to proactive mode is critical. Prior to joining Covington & Burling, Skelley worked as a Technical Project Manager at MCI, and worked on a large patent infringement case there. With experience on both the law firm and corporate sides of the equation, Skelley empathizes with the problems clients face here. "It's difficult to map out a plan to minimize business disruptions when multiple lawyers working on multiple cases may be requesting exactly the same documents for different matters. Even relatively simple steps to implement a plan can help," Skelley added. "Just having an updated listing of all the IT systems in place at the company can provide a good head start."

Zamoff believes the first time a company faces electronic discovery is the most difficult. "Lawyers have to learn to talk to the IT people, and may not be used to doing this. In-house lawyers must remember that the company's technical department is a critical source of information for executing discovery obligations. Putting outside counsel in touch with the right technical people early in the case is critical."

Containing costs in light of the great volume of electronic documents is another area of focus on the corporate side. Michalowicz offers, "We have tracked the number of documents, both electronic and paper, that have been collected at DuPont to respond to litigation and investigative requests. The data has supported our need to develop processes for handling the large discovery requests as well as managing electronic records within the corporate records manage-

ment program. Many electronic discovery providers offer services to assist with the 'here and now' discovery demands but are not in a position to offer a client methods to reduce risk and cost for future requests by focusing on improvements at the corporate electronic records level."

On the law firm side, lawyers have the benefit of electronic discovery experience in varied settings. Working with clients on matters ranging from relatively minor contract disputes or small labor and employment claims all the way to class actions or "bet the company" litigation, most seasoned lawyers should now be well versed in the basics of electronic discovery.

Companies expect outside counsel to leverage this experience and impart that knowledge to their clients along the way. "Outside counsel can really add value to a case by coming to the situation with an understanding of records management practices as well as an electronic discovery action plan," said Michalowicz. "They need to have the confidence to help corporate clients make electronic discovery decisions and then validate the defensibility of their approach."

"The window of opportunity for giving advice to clients in an electronic discovery matter is very narrow."

- Mitch Zamoff
Hogan & Hartson LLP

"This is a great opportunity for the law firm to market its services to clients," noted Skelley. While some law firms remain rooted in the paper world of discovery, the most sophisticated firms have moved quickly to adopt electronic discovery practices in the past several years—including learning how to use technology to aid in the document gathering and review process. "Lawyers must be technologically aware of what the different options are for clients," added Zamoff. "The window of opportunity for giving advice to clients in an electronic discovery matter is very narrow. Outside counsel must be armed with the expertise to make quick, confident determinations about what is or isn't appropriate in a given situation."

The pervasiveness of electronic discovery means that all companies must have ready access to the evidence they may need to produce, with a plan in place for effective data gathering and review. Effective planning requires a new working relationship between in-house and outside counsel to make proper electronic data management the foundation for effective and complete discovery responses. ■

CASE LAW UPDATES

(continued from Page 1)

In considering whether an inadvertent disclosure made in these circumstances effects a waiver of privilege, the Magistrate Judge followed the so-called "middle test" approach, which provides that waiver is decided by considering the following factors:

1. the reasonableness of the precautions taken to prevent inadvertent disclosure;
2. the amount of time it took the producing party to recognize its error;
3. the scope of the productions;
4. the extent of the inadvertent disclosure; and
5. the overriding interests of fairness and justice.

Considering these factors, the court determined that all contents of the privileged file must be returned to plaintiff's attorney, and all references to it must be stricken from the defendant's motion for summary judgment.

For full summaries of the cases noted above and a complete listing of cases related to the law of electronic discovery, visit our online Law Library at www.applieddiscovery.com. ■

PRACTICE TIPS

(continued from Page 4)

As electronic discovery case law develops and discovery rules are interpreted in this context, the obligations of outside counsel have changed significantly. For example, it is no longer sufficient for an attorney to work only with members of the company's management team to identify discoverable electronic data. Courts now routinely require outside counsel to work directly with the company's technical department to ensure discovery obligations are met.

5. Utilize technology when working with outside counsel.

Be open to creative approaches for managing electronic discovery. Many law firms will work with you to establish an extranet site at the beginning of the case to facilitate communications, post notices, map out a discovery plan, share task lists, etc. Once electronic document review begins, online review tools can provide shared access to a secure, Web-hosted database for electronic discovery documents. As outside counsel reviews the documents, you can track progress and report significant developments to your executive team.

Christopher Garcia is an associate in the Securities Group in the San Francisco office of Clifford Chance US LLP. ■

GUEST ARTICLE (continued from Page 2)

Until then, important IT managers had not been instructed on preservation and crucial records were destroyed.²

In addressing the defendants' evident destruction of documents, the court stated:

A litigant has a duty to preserve evidence that it knows or should know is relevant to imminent or ongoing litigation. [Defendant] should have reasonably anticipated litigation regarding its measurement practices at some point in time between October 1986 (the date of William Koch's deposition in the [first] case) and February 1988 (the date the [amended complaint] in the [other prior litigation] was filed).³

The Koch court thus recognized that the duty to preserve evidence relevant to a yet-to-be-filed case can arise based on prior litigation.⁴

In contrast, in *Concord Boat Corp. v. Brunswick Corp.*⁵ the court maintained that the duty to preserve relevant email arose after the complaint was filed.⁶ The court stated that "to hold that a corporation is under a duty to preserve all email potentially relevant to any future litigation would be tantamount to holding that the corporation must preserve all email Any corporation the size of Defendant (or even much smaller) is going to be frequently involved in numerous types of litigation Arguably, most emails . . . could fall under the umbrella of 'relevant to potential future litigation.'"⁷

Notice Arising From Pre-Litigation Communications

The duty to preserve can arise from pre-litigation communications.⁸ For example, in *Wm. T. Thompson Co. v. General Nutrition Co.*,⁹ plaintiffs' counsel advised the defendant, prior to suit, that it would no longer be permitted to sell plaintiffs' products due to unfair advertising practices and inadequate inventory.

After a stay was issued, defendant destroyed certain records.¹⁰ The court appointed a Special Master, who entered a preservation order requiring defendant to preserve sale and inventory records. Nevertheless, defendant's president in-

structed employees to continue destroying documents according to the company's routine retention/destruction policy.¹¹

The court ultimately found a "strong and compelling inference that [defendant] destroyed or failed to retain [relevant] documents despite the requirements of the Special Master's . . . document preservation Orders and that [defendant] has violated said preservation Orders."¹² The court cited, *inter alia*, the pre-litigation correspondence in finding that defendant had been on notice that the records it destroyed were relevant,¹³ affirming the Special Master's imposition of monetary sanctions.¹⁴

Notice Arising from Statutes

A duty to preserve evidence may also be imposed by statute. For example, the Private Securities Litigation Reform Act ("PSLRA")¹⁵ requires parties to preserve evidence during any stay of litigation.¹⁶ In *In re Tyco International, Ltd. Sec. Litigation*,¹⁷ the court denied a request for a preservation order as unnecessary based on the PSLRA's requirements.¹⁸ Numerous other statutes and regulations require preservation of records for various industries under various circumstances.

Conclusion

The timing and scope of the duty to preserve relevant information in connection with litigation may be unclear, but consequences of violating it can be severe. In light of the uncertainty and the potential ramifications, prudence would dictate taking an expansive view of when notice arises. At the same time, perfect preservation of electronic data presents extreme practical difficulties and expenses, and judgment will have to be applied based on the limited guidance provided by the existing law.

² Plaintiffs failed to prove bad faith, yet the court found that defendants' uncoordinated approach to retention led to destruction of important computer records, thereby violating the preservation duty. *Id.* at 485-86.

³ *Id.* at 482.

⁴ *Id.* at 482. See also *Lombardo v. Broadway Stores*, 2002 WL 86810, at *9 (Cal. Ct. App. Jan. 22, 2002) (rejecting claim that discovery requests made in federal lawsuit prior to remand could not form the basis of finding that defendant was on notice of relevance of certain evidence to state court action).

⁵ No. LR-C-95-781, 1997 U.S. Dist. LEXIS 24068 (E.D. Ark. Aug. 29, 1997).

⁶ *Id.* at *16-18.

⁷ *Id.* at *16-17.

⁸ This duty also applies to potential plaintiffs who are on notice as to the substance of their claims. See *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776 (2d Cir. 1999) (finding that pre-filing destruction of evidence by plaintiffs' attorney merited sanctions); *Valentine v. Mercedes-Benz Credit Corp.*, No. 98 Civ. 1815 (MBM), 1999 U.S. Dist. LEXIS 15378, at *9 (S.D.N.Y. Sept. 30, 1999); *State Farm Fire & Casualty, Co. v. Frigidaire*, 146 F.R.D. 160 (N.D. Ill. 1992).

⁹ 593 F. Supp. 1443 (C.D. Cal. 1984).

¹⁰ The destroyed electronic evidence included "[e]lectronically-recorded computer historical records of biweekly store inventories, biweekly maximum store inventory levels, and biweekly store order demand data . . ." *Id.* at 1446.

¹¹ The defendant claimed that it did not have a formal document retention policy. Rather, it contended that the destruction of records was left up to individual departments within the corporation, and sometimes even individual employees. Nevertheless, the court found that the defendant failed to notify these departments and its employees to preserve documents pursuant to the court's preservation order.

¹² *Id.* at 1453.

¹³ *Wm. T. Thompson Co.*, 593 F. Supp. at 1446 (emphasis added).

¹⁴ *Id.* at 1456-57.

¹⁵ See 15 U.S.C. § 78u-4 (2002).

¹⁶ See 15 U.S.C. § 78u-4(b)(3)(B) (2002) ("In any private action arising under this chapter, all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss, unless the court finds upon the motion of any party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.")

¹⁷ No. 00-MD-1335-B, 2000 U.S. Dist. LEXIS 11659 (D.N.H. July 27, 2000).

¹⁸ 15 U.S.C. § 78u-4(b)(3)(C)(i) (2002). See also *In re Triton Energy Ltd., Sec. Litig.*, No. 5:98CV256, 2002 U.S. Dist. LEXIS 4326, at *16 (E.D. Tex. Mar. 7, 2002) ("During pending litigation, a party is under a duty to preserve relevant evidence. Moreover, the PSLRA provides that 'during the pendency of any stay of discovery . . . any party with actual notice of the allegations contained in the complaint shall treat all documents . . . that are relevant to the allegations as if they were the subject of a continuing request for production . . .' Therefore, Defendants had a common law duty not to spoil documents (in hard copy or electronic form) that might be discoverable in this litigation as well as a duty pursuant to the PSLRA.") (citations omitted).

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with managing work among multiple law firms, printing, shipping, tracking, and producing documents while maintaining chain of custody amongst all the participants can quickly drive the cost of discovery to prohibitive levels. The costs associated with managing a nationwide case can be tremendous. If not managed properly, involvement of multiple law firms can be a hindrance rather than a benefit for in-house counsel. Fortunately,

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October 29-30, 2003

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Chicago
November 14, 2003

Glaser LegalWorks 7th Annual Electronic Discovery and Records Retention Conference
San Francisco
December 5, 2003

IN THIS ISSUE: Special focus on electronic discovery collaboration between in-house and outside counsel.

- **Advice for in-house and outside counsel to collaborate in electronic discovery. See page 1.**
- **Examining the pre-litigation duty to preserve electronic information. Guest article by Weil Gotshal litigation partners Adam I. Cohen and David J. Lender. See page 2.**

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