JULY 2007

Defense Counsel Journal

Vol. 74 • No. 3 • Pages 209-294

Issued Quarterly by
IADC *International Association of Defense Counsel*

Defense Counsel Journal

July 2007
Volume 74, No. 3
Pages 209-294

International Association of Defense Counsel
One North Franklin
Suite 1205
Chicago, IL 60606 USA
Telephone: 312.368.1494
Fax: 312.368.1854
E-mail: info@iadclaw.org
Website: http://www.iadclaw.org

In this issue...

Announcements and Departments

Feature Articles

Defense Counsel Journal (ISSN: 0895-0016) is published quarterly (January, April, July, October) by the International Association of Defense Counsel, One North Franklin, Suite 1205, Chicago, IL 60606, telephone (312) 368-1494, fax (312) 368-1854, e-mail: info@iadclaw.org. Periodical postage paid at Chicago, IL and additional mailing offices.

The subscription price of $65 annually is included in the dues of the members of the IADC. POSTMASTER: Please send address changes to Defense Counsel Journal, One North Franklin, Suite 1205, Chicago, IL 60606.

Cite as: 74 DEF. COUNS. J. -- (2007).

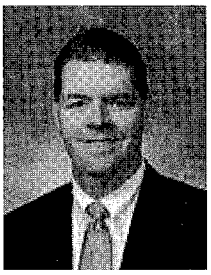
Defense Counsel Journal is a forum for the publication of topical and scholarly writings on the law, its development and reform, and on the practice of law, particularly from the viewpoint of the practitioner and litigator in the civil defense and insurance fields. The opinions and positions stated in signed material are those of the author and not by the fact of publication necessarily those of the International Association of Defense Counsel. Material accepted for publication becomes the property of the IADC and will be copyrighted as a work for hire. Contributing authors are requested and expected to disclose any financial, economic, or professional interests or affiliations that may have influenced positions taken or advocated in the efforts.

Submit manuscripts to the Managing Editor at the above address in hard copy or via e-mail. *Defense Counsel Journal* follows *The Bluebook: A Uniform System of Citation* (17th ed.), and footnotes should be placed at the end of the article's text.

Providing Competent Representation in the Digital Information Age

By Gregory D. Shelton

THE RAPID growth of electronic discovery has brought with it additional challenges for in-house and outside counsel who represent clients in litigation. Counsel must remain diligent to keep up with this rapidly expanding and often changing field of law in order to provide competent representation to their clients.[1] According to the American Bar Association, nearly half of all malpractice claims involve some sort of serious error including "failure to know or properly apply the law, failure to know or ascertain a deadline, inadequate discovery or investigation and planning, or procedural choice errors."[2] The ABA's Model Rule of Professional Conduct 1.1, which has been adopted in most states, imposes an obligation on counsel to "provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."[3] In addition to the ethical obligations imposed by the Model Rules, several recent court opinions have imposed specific duties on counsel with respect to electronic discovery. To avoid malpractice claims, judicial sanctions and ethical violations, litigation counsel can no longer avoid gaining knowledge about and competence with electronic discovery, computer terminology, and document management plans.



Gregory D. Shelton is an Of Counsel attorney in the Seattle offices of Williams Kastner. Mr. Shelton concentrates his practice on electronic information management issues, litigation preparedness, mass torts, products liability, and commercial litigation. He represents clients in the pharmaceutical, healthcare, manufacturing, technology, and education industries. Mr. Shelton has authored several articles on e-discovery and products liability issues.

Know the Rules

Comment (6) to Model Rule 1.1 advises: "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice . . ."[4] It is readily apparent that in order to provide competent representation, an attorney must know the operable rules of civil procedure. Yet, in an October, 2006 survey of corporate counsel, less than half knew that amendments to the Federal Rules of Civil Procedure were due to go into effect on December 1, 2006.[5] The amendments, which are now in effect, require parties to address electronic discovery issues early in the litigation including scope of discovery, preservation of evidence, privilege issues, and format for production.[6] Parties now must provide "a copy of, or a description by category and location of . . . electronically stored information" as part of their initial

[1] *See, e.g.*, Whiteman, The Impact of the Internet and Other Electronic Sources on an Attorney's Duty of Competence Under the Rules of Professional Conduct, 11 ALB. L.J. SCI. & TECH. 89 (2000).

[2] The Top Ten Malpractice Traps and How to Avoid Them, www.abanet.org/legalservices/lpl/downloads/ten.pdf

[3] MODEL RULES OF PROF'L CONDUCT R. 1.1 (2003).

[4] MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. (6) (2003).

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

[6] FED. R. CIV. P. 26(f).

disclosures.[7] The Rules explicitly empower courts to enter the parties' agreements into case management orders.[8] They also provide for a bifurcation of discovery; permitting a party to produce reasonably accessible data, and hold back less accessible data until the cost of production and need for the data can be assessed.[9] The Rules now contain provisions regarding the procedure for addressing inadvertent production of privileged information.[10] Finally, the new Rules provide a safe harbor from sanctions for spoliation if electronic information is lost in the regular course of business.[11]

Several states have also adopted new electronic discovery rules in all or part of their state judicial systems. Texas[12] and Mississippi[13] have had specific provisions dealing with electronic discovery for several years. Idaho[14] and New Jersey[15] have recently enacted sweeping changes that are modeled, in part, on the new Federal Rules. New York[16] and North Carolina[17] 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.[18]

Counsel should also keep in mind the various burdens that they face with respect to the admissibility of electronically stored information ("ESI"). In a recent opinion from the District of Maryland, Chief Magistrate Judge Paul Grimm denied both parties' summary judgment motions and set forth a detailed analysis of evidentiary issues as they relate to ESI.[19] The Chief Magistrate laments that it is unfortunate that "[v]ery little has been written . . . about what is required to insure that ESI obtained during discovery is admissible . . . because considering the significant costs associated with discovery of ESI, it makes little sense to go to all the bother and expense to get electronic information only to have it excluded from evidence or rejected from consideration during summary judgment because the proponent cannot lay a sufficient foundation to get it admitted."[20] Much of the opinion is devoted to issues that are not unique to electronic evidence (relevance, hearsay, probative value outweighing prejudicial effect), but it provides some helpful tips regarding authentication of e-mail, internet website postings, text messages and chat room content, computer stored records and data, computer animations and simulations, and digital photographs. Correctly collecting, preserving, and keeping a documented chain of custody are critical steps in the early stages of a litigation in order to utilize electronic information in motion practice and at trial.

---

[7] FED. R. CIV. P. 26(a).
[8] FED. R. CIV. P. 16(b)(5).
[9] FED. R. CIV. P. 26(b)(2)(B).
[10] FED. R. CIV. P. 26(b)(5)(B). The Rules do not address the substantive law of privilege waiver. The Federal Advisory Committee on Evidence Rules has recently completed public hearings on proposed Federal Rule of Evidence 502, which, if enacted as it now exists, will provide a uniform law in the federal courts regarding the inadvertent production of attorney-client communications and work product protections. *See* PROPOSED FED. R. EVID. 502, available at <http://www.uscourts.gov/rules/newrules1.html>.
[11] FED. R. CIV. P. 37(f).
[12] TEX. R. CIV. P. 196.4.
[13] MISS. R. CIV. P. 26(b)(5).
[14] 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).
[15] 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.
[16] Rules of the Commercial Division of the Supreme Court, 22 N.Y.C.R.R. 202.70(g).
[17] 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.
[18] 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.
[19] Lorraine v. Markel Am. Ins. Co., No. PWG-06-1893, 2007 WL 1300739 (D. Md. May 4, 2007).
[20] *Id.* at *4.

Inquire, Investigate, & Discover

Comment (5) to Model Rule 1.1 states that "[c]ompetent 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."[21] There are few judicial opinions dealing directly with a lawyer's duty of competence as it relates to technological issues in discovery. Courts have recognized, however, that a failure to respond to discovery is a failure of competent representation.[22] Additionally, the "failure to understand what is required by the discovery rules demonstrates incompetence."[23]

As noted above, the comments to Rule 1.1 suggest that attorneys must "keep abreast of changes in the law and its practice . . ." in order to provide competent representation.[24] Thus, as technology changes the way our clients do business and the way our peers practice law, our responsibilities change as well. For instance, the Conference of Chief Justices recently published Guidelines for State Trial Courts Regarding Discovery of Electronically-Stored Information.[25] The Guidelines are not binding, nor are they model rules, but are simply an additional tool to assist state court judges "in identifying the issues and determining the decision-making factors to be applied" in electronic discovery disputes.[26] They propose that judges should "encourage counsel to become familiar with the operation of the party's relevant information management systems, including how information is stored and retrieved."[27]

Recent case law suggests that attorneys should take such "encouragement" to heart because the duties imposed by the cases run first to counsel. In a case that ended in a $1.58 billion verdict against Morgan Stanley, the court admonished 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.[28] The company apparently found over 1,400 relevant backup tapes in a warehouse in Brooklyn, but failed to search or reveal the existence of the tapes for several months.[29] The court criticized Morgan Stanley for not informing the court and opposing counsel about the full, and expected, capabilities of its email archive searching capabilities.[30] In granting a partial default judgment, the court accused Morgan Stanley "employees, and not just counsel" to have participated in discovery abuses, including failing to locate and search email back up tapes.[31] In connection with the partial default judgment, Judge Maass revoked the pro hac vice admission of one of Morgan Stanley's outside counsel. The revocation was subsequently reversed,[32] and the verdict was

---

[21] MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. (5) (2003).

[22] *See* In re Moore, 329 S.C. 294, 494 S.E.2d 804, 807 (S.C. 1997) (finding that failure to reply to discovery requests violated South Carolina's Rule 1.1 which requires an attorney to provide competent representation to a client).

[23] In re Estrada, 143 P.3d 731, 740 (N.M. 2006) ("Respondent's failure to verify the authenticity of the forged prescription demonstrates incompetence because it shows a lack of thoroughness in preparing for trial that resulted in a mistrial in this case.").

[24] MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. (6) (2003).

[25] Conference of Chief Justices, *Guidelines for State Trial Courts Regarding Discovery of Electronically-Stored Information* (Aug. 2006) (available at http://www.ncsconline.org).

[26] *Id.* at vi.

[27] *Id.* at 1-2.

[28] 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).

[29] *Id.* at 7.

[30] Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc., No. CA 03-5045 AI, slip op. at 10 n.11, n.12 (Fla. Cir. Ct. Mar. 23, 2005) ("March 23 Order"); *see also* March 23 Order at 9-14.

[31] *Id.* at 16.

[32] Clare v. Coleman (Parent) Holdings, Inc., No. 4D05-1575, slip op. at 4 (Fla. Dist. Ct. App. May 24, 2006) (striking revocation of *pro hac vice* status

recently overturned, however, the appellate court did not address the electronic discovery sanction.[33]

In one of her oft-cited Zubulake opinions, Judge Scheindlin articulated that once it is likely that litigation will take place, counsel has a duty to ensure that "all sources of potentially relevant information are identified and placed on hold . . . . To do this, counsel must become fully familiar with her client's document retention policies, as well as the client's data retention architecture." Once identified and placed on hold, counsel has a further obligation to ensure that the information is preserved.[34] Judge Scheindlin gave an adverse inference instruction with respect to deleted emails in the Zubulake case, in part due to counsel's failure to adequately fulfill these duties. The jury verdict was over $29 million in this employment discrimination case.

Relying on Zubulake V, the court in Phoenix Four, Inc. v. Strategic Res. Corp.[35] imposed monetary sanctions on defense counsel for failing to undertake a "methodical survey" of the defendant's sources for electronic information. The court stated that "counsel's obligation is not confined to a request for documents; the duty is to search for sources of information."[36] Counsel for the defendant affirmed that they had spoken to the defendant regarding the need to locate and collect both paper and electronic documents. Counsel did not, however, inquire as to what had happened to several computers and servers that the company used before dissolving its business. One of the former partners had kept one of the servers but he was unaware that there was any pertinent information on it. The server and other information was discovered before trial, but resulted in the late production of 200-300 boxes of documents. The court reasoned that counsel's failure to inquire about the location of the old computers constituted gross negligence and warranted the imposition of over $30,000 of sanctions against counsel.[37]

Neither Zubulake nor Phoenix Four speak directly about counsel's duty of competence under the Model Rules, however, both impose a duty to make an affirmative factual inquiry into a client's electronic evidence. Courts have held that an attorney's failure to make a "substantial factual inquiry" may demonstrate the attorney's incompetence. In People v. Bess,[38] counsel did not interview eyewitnesses because he believed that if he

---

on due process grounds and lack of any finding of misconduct).

[33] Morgan Stanley & Co., Inc. v. Coleman (Parent) Holdings, Inc., No. 4D05-2606 (Fla. Dist. Ct. App. Mar. 21, 2007).

[34] Zubulake v. UBS Warburg LLC, 229 F.R.D. 422, 432 (S.D.N.Y. 2004) (Zubulake *V*); *see also* Telecom Int'l Am. Ltd. v. AT&T Corp., 189 F.R.D. 76, 81 (S.D.N.Y. 1999) ("Once on notice [that evidence is relevant], the obligation to preserve evidence runs first to counsel, who then has a duty to advise and explain to the client its obligations to retain pertinent documents that may be relevant to the litigation.") (citing Kansas-Nebraska Natural Gas Co. v. Marathon Oil Co., 109 F.R.D. 12, 18 (D. Neb. 1983)).

[35] 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).

[36] *Id.* at *17.

[37] *See also* Metropolitan Opera Assoc., Inc. v. Local 100, Hotel Employees & Restaurant Employees Int'l Union, 212 F.R.D. 178, 222 (S.D.N.Y.2003) (ordering default judgment against defendant as a discovery sanction because "counsel (1) never gave adequate instructions to their clients about the clients' overall discovery obligations, [including] what constitutes a 'document'. . . ; (2) knew the Union to have no document retention or filing systems and yet never implemented a systematic procedure for document production or for retention of documents, including electronic documents; (3) delegated document production to a layperson who . . . was not instructed by counsel that a document included a draft or other nonidentical copy, a computer file and an e-mail; . . . and (5) failed to ask important witnesses for documents until the night before their depositions and, instead, made repeated, baseless representations that all documents had been produced.").

[38] 153 Cal. App. 3d 1053, 1061 (Cal. Ct. App. 1984).

did, they would "be driven to the prosecution" and may make statements inconsistent with those recorded in the police reports.[39] The court found counsel's reasons for not investigating the witnesses unpersuasive: the prosecution already knew about the witnesses from the police reports; and counsel had no basis to believe that the witnesses would be impeached at trial since he had not interviewed them to find out whether their statements would be inconsistent. The court held that counsel's "decision not to interview witnesses, as opposed to not calling them, is precisely the type of decision made 'without benefit of substantial factual inquiry'" demonstrating incompetence.[40]

Learn to "Talk the Talk"

Counsel also has an obligation to become familiar with new terminology associated with e-discovery. The recent amendments to the Federal Rules of Civil Procedure introduce the fairly self-explanatory phrase "electronically stored information."[41] Less intuitive words are creeping into common usage in discovery requests, and courts expect counsel to know and understand them. Do you know the difference between archive and back-up tapes? Do you know what a .pst file is? Do you know the difference between system metadata and application metadata?

In *Johnson v. Kraft Foods North America, Inc.*,[42] defendants objected to the following terms as vague and ambiguous: "electronic databases," "personnel related data," "database," "methods and techniques," "record layout," "coded fields," and "data dictionaries."[43] The court overruled the objection on the grounds that various resources, including The Sedona Conference Glossary For E-Discovery and Digital Information Management,[44] a "comprehensive glossary of terms related to electronically stored information" were available to counsel.[45]

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 their information technology personnel.

Work With Your Clients to Make the Information Easier to Find

As Morgan Stanley, Zubulake, Phoenix Four, and Johnson demonstrate, any attorney, in-house or outside counsel, who is involved in litigation needs to develop a basic proficiency in e-discovery issues. Counsel must ensure that relevant data can be identified, collected, preserved, and managed as soon as litigation is anticipated. Companies, large and small, are well advised to implement a document management plan. The plan should start with an inventory of computer systems and the types of documents are stored on them. At the heart of the plan should be a document retention/destruction policy that is audited and enforced on a regular basis.

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.[46] They also reduce the amount of

---

[39] *Id.*
[40] *Id.*
[41] *See e.g.*, FED. R. CIV. P. 34.
[42] No. 05-2093-JWL-DJW, 2006 U.S. Dist. LEXIS 82990 (D. Kan. Nov. 14, 2006).
[43] *Id.* at *17-*18.
[44] 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).
[45] Johnson, 2006 U.S. Dist LEXIS 82990 at *21-*22.
[46] Arthur Andersen LLP v. United States, 544 U.S. 696, 704 (2005) ("'Document retention policies,'

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.[47]

Know When to Hold 'Em

When litigation or an investigation is "reasonably anticipated" the document retention/destruction policy must be suspended, and reasonable steps must be taken to preserve and collect relevant information.[48] Failure to timely suspend a document retention policy and implement a legal hold can result in severe sanctions on both counsel and client.[49] 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.[50] 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. The Second Circuit has observed that the duty to preserve relevant information arises "when a party should have known that the evidence may be relevant to future litigation."[51] Cases in this area are largely driven by the facts of the specific case, and the Federal Rules of Civil Procedure provide no guidance. In *Treppel v. Biovail Corp.*,[52] for instance, plaintiff contended that the duty to preserve arose when "key events giving rise to the plaintiff's claims occurred."[53] Defendants, on the other hand, contended that the duty to preserve did not arise until plaintiffs' counsel "issued a letter formally demanding preservation of evidence."[54] The court declined both of these possible triggers, and held that the duty to preserve arose when the defendant became aware that a complaint had been filed, even though it had not yet been served; or at the latest, when the amended complaint was served.[55] Counsel and management, therefore, must make a reasoned determination based on the circumstances as to whether a possible litigation or investigation is "reasonably anticipated."[56]

---

which are created in part to keep certain information from getting into the hands of others, including the Government, are common in business. . . . It is, of course, not wrongful for a manager to instruct his employees to comply with a valid document retention policy under ordinary circumstances.").

[47] *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").

[48] Silvestri v. General Motors Corp., 271 F.3d 583, 591 (4th Cir. 2001); Broccoli v. Echostar Comm. Corp., 229 F.R.D. 506 (D. Md. 2005); Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 217 (S.D.N.Y. 2003).

[49] Disability Rights Council of Greater Wash. v. Wash. Metro. Area Transit Auth., Action No. 04-498 (HHK/JMF), 2007 WL 1585452 (D.D.C. June 1, 2007) (ordering restoration of back-up tapes due to defendant's failure to suspend automatic deletion of e-mail after litigation hold was triggered); 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).

[50] Silvestri, 271 F.3d at 591 (spoliation of evidence sanctions upheld where plaintiff allowed automobile that was the subject of a products liability suit to be unavailable prior to filing suit).

[51] Kronisch v. United States, 150 F.3d 112, 126 (2d Cir. 1998).

[52] 233 F.R.D. 363 (S.D.N.Y.2006).

[53] 233 F.R.D. at 371.

[54] *Id.*

[55] *Id.*

[56] *See e.g.*, NTL, Inc. Sec. Litig. v. Blumenthal, Nos. 02 Civ. 3013 (LAK)(AJP), 7377(LAK)(AJP),

Once the obligation to preserve the information is triggered, counsel must ensure that all of the people who are likely to have relevant information are informed and instructed to suspend document destruction.[57] Instruction should come from general counsel or upper management so that recipients will understand the gravity of the instruction. The instruction should be repeated periodically so that new employees know about it and old employees are reminded of it.[58] Counsel should also secure all relevant active data, and in some instances, take control of back-up data.[59] A good document retention policy will provide written guidelines and procedures as to how the litigation hold should be implemented.

It is debatable whether an internal communication implementing a litigation hold is discoverable. A recent opinion from the Northern District of Georgia, lends support to the notion that litigation hold letters are not discoverable because they do not lead to admissible evidence and likely contain attorney work product. The court reasoned that compelling production of the litigation hold letter might "dissuade other businesses from issuing such instructions in the event of litigation. Instructions like the one that appears to have been issued here insure the availability of information during litigation. Parties should be encouraged, not discouraged, to issue such directives."[60]

Know When to 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 other attorneys who have established competence with e-discovery.[61] 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. Several of the high profile cases discussed above demonstrate that the significant risks associated with locating and handling such information without proper skill, and that mistakes can be extremely costly to both pocketbook and reputation. 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.[62] 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

---

2007 WL 241344 at *15 (S.D.N.Y. Jan. 20, 2007) (citing Henkel Corp. v. Polyglass USA, Inc., 194 F.R.D. 454, 456 (E.D.N.Y. 2000)); Hynix Semiconductor v. Rambus, No. C-00-20905 RMW, 2006 U.S. Dist. LEXIS 30690 (N.D. Ca. Jan. 4, 2006).

[57] Zubulake, 220 F.R.D. at 217; Zubulake, 229 F.R.D. at 434.

[58] Zubulake, 229 F.R.D at 434.

[59] *Id.*

[60] Gibson v. Ford Motor, Co., No. 1:06-cv-1237-WSD, 2007 WL 41954 (N.D. Ga., Jan. 4, 2007).

[61] MODEL RULES OF PROF'L CONDUCT R. 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.").

[62] 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).

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.