Case Law Update and E-Discovery News

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RECENT E-DISCOVERY & COMPUTER FORENSICS COURT DECISIONS

A current and comprehensive archive of case law summaries pertaining to electronic discovery and computer forensics is available at http://www.krollontrack.com/LawLibrary/CaseLawList/.

Attorney's License Suspended for Deletion of Client Files from Law Firm Computer
Attorney Grievance Comm'n of Maryland v. Potter, 2004 WL 422548 (Md. Mar. 9, 2004). The court considered a Petition for a Disciplinary Action filed by the Attorney Grievance Commission against the Defendant, an attorney, for violating the Maryland Rules of Professional Conduct. Upon resigning from a law firm, the Defendant took paper files pertaining to two clients of the firm stating he believed the clients would choose to have the Defendant continue to represent them. Additionally, the Defendant deleted the client files from the firm's computer without authorization from the firm. The computer records included all documents prepared by the Defendant and the firm's secretaries relating to matters involving the clients. The Commission sought suspension of the attorney's license alleging that the Defendant committed "a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." The judge appointed to hear the initial action held that the Defendant did not violate the Code. However, the court of appeals reversed, finding by "clear and convincing evidence" that the Defendant's conduct in deleting the files violated the Rules of Professional Conduct. The court further noted, "[n]otwithstanding the attorney's motive, lawyers in this State may not delete computer records or take client files...without authorization." The court concluded the Defendant's misconduct warranted a 90 day suspension from the practice of law.

Court Awards Sanctions Relating to Production of Email Evidence
Invision Media Communications, Inc. v. Federal Ins. Co., 2004 WL 396037 (S.D.N.Y. Mar. 2, 2004). In an action for breach of an insurance contract, the Defendant moved to compel production of documents and requested monetary sanctions, contending the Plaintiff made false statements regarding the location and existence of its documents and destroyed evidence relevant to the lawsuit. Among the documents requested by the Defendant were email communications sent by the Plaintiff. Specifically, the Defendant sought "All electronic mail communications sent or received by the Plaintiffs during August 2001, September 2001 and October 2001." The Plaintiff represented to the Defendant that the emails could not be produced because the Plaintiff archived email on its servers for only a two week period. The court found these statements false because the Plaintiff eventually disclosed the requested emails after further investigation. Accordingly, the court awarded the Defendant costs and attorneys fees, noting that "[a] reasonable inquiry by the plaintiff's counsel...would have alerted counsel that the plaintiff possessed electronic mail that fell within the scope of Federal's document request...the plaintiff has disregarded its discovery obligations, made misleading statements regarding the existence and location of relevant evidence, and/or failed to make reasonable inquiries into matters pertinent to the pretrial discovery phase of this litigation."

Document Retention Policy Does Not Protect Plaintiff from Consequences of Document Purge
Rambus, Inc. v. Infineon Techs. AG, 2004 WL 383590 (E.D.Va. Feb. 26, 2004), amended by, 2004 WL 547536 (E.D.Va. Mar. 17, 2004). The Defendant moved to compel the production of documents including those relating to the Plaintiff's document retention policy. The Defendant alleged that the Plaintiff instituted a document-purging program despite being on notice of impending litigation for the patents at issue. In support of its allegations, the Defendant pointed to internal emails that reflected the Plaintiff's "Shred Day," an event in which the Plaintiff's employees shredded about two million documents as part of its document retention and destruction policy. At trial, the Plaintiff did not dispute it "destroyed some documents because of their 'discoverability'." Additionally, the trial court found the Plaintiff's creation of its document retention policy clearly demonstrated that the Plaintiff was on notice that the Defendant might be bringing patent infringement lawsuits. The Plaintiff argued that its true motive was not to destroy potentially discoverable information and that the Plaintiff was legitimately trying to reduce search and review costs. The court concluded that even if the Plaintiff "did not institute its document retention policy in bad faith, if it reasonably anticipated litigation when it did so, it is guilty of spoliation." The court further noted that "even if it was merely instituting a valid purging program, even valid purging programs need to be put on hold when litigation is 'reasonably foreseeable'." As such, the court granted the Defendant's motion and ordered the Plaintiff to immediately produce documents containing information about or relating to the creation, preparation, or scope of the Plaintiff's document retention policy.

Plaintiff Ordered to Produce Electronic Documents in Its Control
Super Film of Am., Inc. v. UCB Films, Inc., 219 F.R.D. 649 (D. Kan. 2004). In a collection action, the Defendant moved to compel the Plaintiff to produce electronic data including email, spreadsheets, and databases. The Plaintiff argued it could not be compelled to produce the documents because it did not have control of the documents as required by FRCP Rule 34(a). The court determined that under Rule 34(a), the Plaintiff possessed the requisite control because the Plaintiff had "the right, authority, or ability to obtain the requested document." The Plaintiff further contended it had produced all electronic documents from its two computer systems that were within its "knowledge and expertise" and offered to allow the Defendant's technicians to inspect the computers. The Defendant rejected this offer stating it would unreasonably shift the discovery burden and expense to the Defendant. The court agreed with the Defendant, noting that "the court cannot relieve a party of its discovery obligations based simply on that party's unsupported assertion that such obligations are unduly burdensome." The court further found the Plaintiff did not show that complying with the Defendant's request would unduly burden the Plaintiff in terms of time, money, and procedure. Thus, the court ordered the Plaintiff to produce the electronic documents within 30 days.

Request for Lift of Discovery Stay Denied Where Plaintiff Unable to Show Exceptional Circumstances
In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig., 2004 WL 305601 (S.D.N.Y Feb. 18, 2004). Pursuant to a section of the Securities Exchange Act of 1934, the Plaintiff sought an order lifting the automatic stay of discovery during the pendency of a motion to dismiss. The Plaintiff contended that discovery was necessary to preserve and restore emails deleted by the Defendant. The court cited U.S. Code provisions permitting discovery when the legal sufficiency of the complaint has not been decided "only if exceptional circumstances, such as the necessity 'to preserve evidence or to prevent undue prejudice to [a] party,' exist." The Defendant declared it was aware of the preservation obligations and was taking all necessary steps to preserve all potentially relevant electronic documents. Therefore, the court denied the Plaintiff's motion because the Plaintiff failed to establish an "imminent risk" of data being deleted and rendered irretrievable.

Court Protects Privileged Portions of an Email Containing Legal Advice
Baptiste v. Cushman & Wakefield, Inc., 2004 WL 330235 (S.D.N.Y. Feb. 20, 2004). In an employment discrimination lawsuit, the court addressed the issue of whether an email was protected by the attorney-client privilege. The email contained advice from the Defendant's counsel regarding legal matters concerning the Plaintiff, one of the Defendant's employees at the time. The Plaintiff, who claimed a printed copy of the email was left anonymously on her desk, argued that the email was not protected by the attorney-client privilege because it was not labeled as protected, was not authored or circulated to attorneys, and did not refer to or contain legal advice. The Plaintiff further argued that in the event the email was privileged, it was inadvertently produced, thus waiving any of the Defendant's attorney-client privilege claims. The court determined the first four paragraphs of the email were protected by the attorney-client privilege because "the email was clearly

conveying information and advice given ...by...outside counsel." However, the court concluded the final paragraph of the email was not protected because it contained the Defendant's own impressions and frustrations about the Plaintiff's job performance. Finally, the court decided the Defendant did not waive the attorney-client privilege with respect to the first four paragraphs of the email. In response to the Plaintiff's requests, the Defendant did not produce the email and the Defendant further identified the email as privileged attorney-client information in the privilege log submitted to the Plaintiff's counsel. As such, the court ordered that the original email should be returned to the Defendant and reproduced in a redacted form to the Plaintiff.

Judge Orders Plaintiff to Stop Using Her Laptop and Turn it Over to the Court
Ranta v. Ranta, 2004 WL 504588 (Conn. Super. Feb. 25, 2004). In a recent divorce proceeding, a superior court judge ordered the Plaintiff "to stop using, accessing, turning on, powering, copying, deleting, removing or uninstalling any programs, files and or folders, or booting up her lap top computer..." The order also directed the Plaintiff to hand over all floppy disks, CDs, Zip files or other similar types of computer storage devices. The judge further required the Plaintiff to turn in her laptop to the court clerk's office. Both the Plaintiff and the Defendant were instructed to share equally all costs associated with hiring a computer forensics expert to inspect the laptop. Additionally, the Defendant was required to buy a new laptop for the Plaintiff.

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PRACTICE POINTS: U.S. JUDICIAL CONFERENCE MEETS TO CONSIDER CHANGES TO THE FRCP

On February 20-21, 2004, approximately 190 legal experts met at the U.S. Judicial Conference at Fordham Law School to discuss whether the Federal Rules of Civil Procedure need to be revised to accommodate electronic discovery issues. Some of the key issues discussed included:

- *Formal Rule Revisions* - Amending the Fed.R.Civ.P. to have national uniformity about electronic data issues
- *Safe Harbor Provision* - Including a "safe harbor" provision that would allow a company to dispose of inaccessible electronic data (such as that stored on a backup tape) unless a court has ordered otherwise
- *Privileged Waiver Issues* - Deciding how to handle inadvertent releases of privileged information
- *Definition of a "Document"* - Establishing if the rules should expressly mention electronic information in the definition of "document"
- *Document Production* - Agreeing on whether the rules should specify the form in which electronic data can be produced
- *Metadata* - Settling on whether metadata (described as "data about data" such as who created a file or when a file was created) should routinely be produced
- *Cost-Shifting* - Ascertaining who should pay for the production of electronic data

Administrators supporting the Rules Committee indicated that if any changes in the rules are to be made, they would become available for comment in August 2004 at the earliest. Following public comment, the rules would need approval by the standing committee on rules, the Judicial Conference, the U.S. Supreme Court, and Congress. Accordingly, any new rules would not go into effect until at least December 2006. Keep reading future Kroll Ontrack Case Law Updates for further developments.

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NEWS & EVENTS

Kroll Ontrack Announces Recipients of 2004 Electronic Evidence Thought Leadership Awards

At the end of March, Kroll Ontrack announced the recipients of its annual Electronic Evidence Thought

Leadership Awards. These awards were presented to law firms, corporations, government entities, and individuals based on their recent and significant contributions to the development of the body of law, practice and procedure in the area of electronic evidence. The recipients of the 2004 Electronic Evidence Thought Leadership Awards were:

- **The E-Evidence Thought Leading Law Firm Award** - Kirkland & Ellis LLP
- **The E-Evidence Thought Leading Litigator Award** - William D. Hagedorn, Esq., a Partner in the Washington, D.C. office of McDermott, Will & Emery
- **The E-Evidence Thought Leading Antitrust Practitioner Award** - Michael Cowie, Esq., a Partner in the Washington D.C. office of Howrey Simon Arnold & White, LLP
- **The E-Evidence Thought Leading Litigation Support Manager Award** - Barbara Gueth, a Litigation Support Manager in the Boston office of Ropes & Gray LLP
- **The E-Evidence Thought Leading Scholar Award** - Michael R. Arkfeld, Esq. author of Electronic Discovery and Evidence and The Digital Practice of Law.
- **The Thought Leading Electronic Discovery Case of the Year Award** - Zubulake v. UBS Warburg (presented to the Plaintiff's attorneys, Defendant's attorneys, and Judge Shira A. Scheindlin)
- **The Thought Leading Computer Forensics Case of the Year Award** - Kucala Enters. Ltd. v. Auto Wax Co. (presented to the Plaintiff's attorney, Defendant's attorney, Magistrate Judge Arlander Keys, and Judge Joan Humphrey Lefkow)

Meet Kroll Ontrack Representatives at the Following Events:

4/15/04 - 4/16/04	Glasser LegalWorks	San Francisco, CA
4/23/04 - 4/24/04	Paralegal SuperConference	Los Angeles, CA
5/16/04 - 5/18/04	Legal Technology Summit	Marino Del Ray, CA

Visit http://www.krollontrack.com/eEvidence/UpcomingEvents/ for more information on these events and others.

For more information on electronic discovery and computer forensics, contact
Kroll Ontrack Inc.
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This document is not intended to provide legal or other professional advice and should not be relied upon as anything other than a starting point for research and information on the subject of electronic discovery and computer forensics.

*** Portions of this newsletter are written by Michele C.S. Lange, staff attorney with Kroll Ontrack. Ms. Lange has published numerous articles and speaks regularly on the topics of electronic discovery, computer forensics, and technology's role in the law. She can be contacted by writing to mlange@krollontrack.com.***

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