



The E-discovery Missteps that Judges Love to Hate

Thanks to "celebrity defendants" like Martha Stewart and Frank Quattrone, the public at large is generally aware that mishandling electronic evidence can have devastating legal consequences. But not even most attorneys are clear about the specific behaviors that have landed litigants in hot water or how hot that water can get.

Attorneys can no longer blame their knowledge gap on lack of guidance from the courts. **According to a survey of recent published decisions, negligent e-discovery conduct has been sanctioned in all 12 federal judicial circuits.** The potential sting of that statistic is somewhat eased by the realization that those sanctions have generally been limited to assessments of attorneys' fees and costs, rather than case-killing pleading strikes or testimony preclusion. But as *United States v. Philip Morris USA Inc.*, 2004 WL 1627252 (D. D.C.) demonstrated on July 21, the effects of even such "limited" assessments can be harsh. The tobacco giant was ordered to pay \$2.75 million for ignoring a preservation order by destroying e-mails relevant to a fraud and racketeering case.

The Justice Department sued Phillip Morris in 1999, alleging that the company misled the public about the risks and addictiveness of tobacco. Soon after the action was filed, the court issued an order that required Philip Morris to preserve all documents and other records containing potentially relevant information. After the order was entered, Philip Morris and its corporate parent, Altria Group, failed to suspend its routine information destruction program that automatically deleted all company e-mails that were over 60 days old. The company compounded its error by waiting an additional four months before it notified the court of the situation. **But the company's truly fatal mistake was adhering to the original data destruction schedule for another two months after realizing that e-mails covered by the preservation order were being lost.**

While the amount of the Philip Morris sanction is extraordinary, it puts into high relief the three most common e-discovery errors for which litigants have been held accountable:

- 1. Failing to place holds on document destruction routines when litigation is reasonably anticipated (or, more egregiously, as in Philip Morris, when litigation has actually commenced, and a court has entered an order that operationally requires the suspension of**

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- such activities).
2. **Failing to communicate e-discovery problems to the court promptly.**
 3. **Failing to monitor the process to ensure that the appropriate actions and changes in business practices necessary to respond to outstanding discovery requests or orders have been implemented.**

Other companies that have been punished for one or more of these common e-discovery errors include **Prudential Insurance Company** (\$1 million dollar sanction for failing to put a litigation hold in place in time to prevent destruction of electronic data; like Philip Morris, Prudential notified its employees of the preservation order, but documents were destroyed anyway); **USN Communications** (\$10,000 sanction for failing to preserve discoverable documents after investors filed a class action alleging securities violations. Note that this sanction was entered specifically against the corporate CEO, who, despite a directive from outside counsel that "with the filing of the lawsuit, document preservation [must become] a top priority," took no affirmative steps to ensure that the directive was followed); **Wal-Mart Stores** (required to pay attorneys' fees and costs of the sanctions motion and the costs of recovering data which was destroyed as a result of defendant's counsel providing plaintiffs with inaccurate information about computer records); **Local 100, Hotel Employees & Restaurant Employees International Union** (its failure to conduct a reasonable investigation in response to discovery requests, failure to prevent document destruction, inadequate supervision of the person responsible for document collection, and other e-discovery "outrages" resulted in an order against it for attorneys' fees as well as judgment in favor of plaintiff, the Metropolitan Opera Association); and **UBS Warburg** (costs awarded to employment discrimination plaintiff Laura Zubulake as a result of UBS's failure to preserve relevant evidence and its attorney's failure to communicate discovery obligations effectively and institute an appropriate litigation hold.)

Some other sanctionable behavior recently identified by various courts includes delayed discovery responses—called **"purposeful sluggishness" by one federal judge—which has occasioned consequences ranging from the vacating of a \$96 million judgment and a remand for an evidentiary hearing on whether an adverse inference instruction should have been imposed, to barring the late responder from entering any of the tardily-produced material into evidence.**

Predictably, the harshest sanctions have been reserved for the most egregious discovery abuses, like proffering fabricated e-mails (**Munshani v. Signal Lake Venture Fund II, Mass. Super. Ct., 2001 WL 1526954**) or intentionally destroying electronic evidence (**Kucala Enterprises Ltd. v. Auto Wax Co., N.D. Ill., 2003 WL 21230605**, which addressed the use of a computer program entitled "Evidence Eliminator" on the eve of a deposition). Claim dismissal in the context of electronic discovery seems to be the exception rather than the rule, however, with most judges adhering to the truism that judicial interest in trying a case on its merits has priority over punishing a recalcitrant litigant.

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