



Litigation e-Newsletter



Judiciary Rules on E-Discovery Mishaps

Recent findings by Judges Denise Cote, Leonard B. Sand and Miriam Goldman Cedarbaum illustrate the mindset of the judiciary in response to the recent mishandling of electronic evidence in *Keir v. UnumProvident Corp.*, *U.S. v. Rigas* and *United States v. Stewart*. In each case, the Judges found that although reasonable actions were taken by in-house technical personnel, the results showed a poorly executed effort resulting in a loss of data or improper exchange of work product. These occurrences underline how limited or insufficient understanding of the complexities of handling e-data can impede litigation. While these recent decisions (see below) show leniency on the part of the judiciary, how long will this tolerance last?

Overwritten E-mails

Judge Cote issued findings of fact that chronicled how discovery was mishandled in *Keir v. UnumProvident Corp.* In her report, the judge observed that the people making critical decisions about how much and what e-mail to preserve were ill-equipped to handle the task. In an effort to preserve e-mail files, the defendant's enterprise security architect implemented a special snapshot backup system that would back up system e-mails as of the day or days the snapshot was taken. This system unwittingly caused the backup tapes containing the e-mails requested by the plaintiff to be overwritten. Further, once the defendant realized its e-mails were lost, it delayed in reporting the situation to plaintiff and the court, losing credibility with the judge.

In this case, the issue of sanctions is reserved until the extent of the loss, the possibility of retrieval and the resulting prejudice to the plaintiffs are determined.

Link to: [The full story](#)

Work Product Transfer

In *U.S. v. Rigas*, Judge Sands denied the defendants' application for an order authorizing them to retain certain privileged "work product" documents contained on a computer hard drive that was produced to them by the Government

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during discovery. Defendants argued that the Government waived its work product privilege when it voluntarily permitted defense counsel to copy the hard drives that contained a Government employee's work product. The defense enlisted the help of E-Discovery expert Paul Neale, VP/General Manager, Litigation at DOAR who testified during the hearing that the situation could have been prevented had a pristine copy of the hard drives been secured by the government.

In denying the defendants' application, Judge Sands noted that while the Government did unwittingly copy work product onto the hard drives, they had also taken reasonable precautions to protect the hard drives' integrity. According to the opinion, "the prevailing view in this District, as well as in the majority of the circuits, is that a more flexible, 'middle of the road approach' should be applied" on the reasonableness of precautions.

Link to: [The opinion](#)

Breach of Document Production Agreement

An assistant U.S. attorney mistakenly reviewed e-mails outside the document production agreement established between the Government and Martha Stewart Living Omnimedia in (***U.S. v Stewart***). In doing so, the assistant uncovered an e-mail that Martha Stewart forwarded to her daughter that described the events leading up to the sale of her ImClone Systems stock. The government asked Judge Miriam Cedarbaum for a determination concerning the status of this newfound e-mail.

The judge noted that because this e-mail was originally prepared for and sent to Ms. Stewart's attorney, it was "clearly protected by the attorney-client privilege."

Link to: [The opinion](#)

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