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## The Next Chapter

*E-Discovery's Latest Phase Poses Great Risks for Firms, Clients*

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We are clearly entering a new phase in electronic discovery and the potential risks facing law firms and their clients are monumental. These risks can traumatically impact all litigation participants: the client, the trial counsel, the expert witness and the vendor community.

Inevitably, the courts and, indeed, jurisprudence itself, will be negatively impacted by this ominous new world of discovery practice.

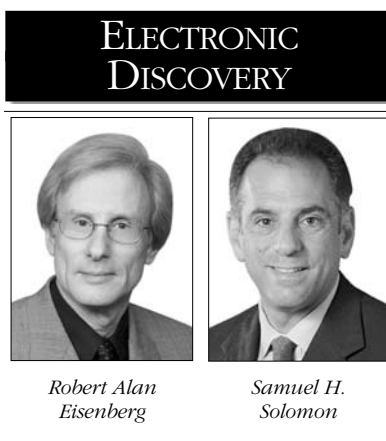
When did this perilous shift occur and how did it happen?

The recent Morgan Stanley electronic discovery debacle may be the Rubicon across which, for the uninitiated, awaits a risk-infested technological terra incognita. Morgan Stanley has brought starkly to light the fact that a proponent's counsel capable of effectively "weaponizing" e-discovery matched against responding trial counsel with poorly formulated and executed e-discovery strategies can create a major (occasionally existential) source of trial risk for the respondent.

Ultimately, the risk created is borne not only by the party, but by trial counsel itself in the form of the professional liability to which it may become exposed.

In *Coleman v. Morgan Stanley* (2005 WL679071), a Florida judge found that Morgan

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Stanley possessed an affirmative duty to preserve and produce its e-mails. In spite of its obligations, the defendant corporation failed to preserve numerous potentially relevant e-mails and to

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produce the electronic communications as provided in a court order.

Examples of Morgan Stanley's misconduct in addressing its electronic discovery obligations were legion, including overwriting e-mails after 12 months; failing to conduct proper searches for backup tapes that might contain e-mails; providing a certificate of compliance to the court that it knew to be false and withdrawing the certificate belatedly; failing to notify plaintiff

when additional tapes were located; failing to use reasonable efforts to search the newly discovered tapes; failing to timely process and search data it had isolated for production and notify plaintiff of the delays; and failing to create search protocols consistent with the existing court order.

Finding that the defendant-respondent had intended to and did, in fact, willfully thwart discovery, the court levied draconian sanctions designed not merely to level the playing field but to administer a judicial rebuke of momentous proportions.

Consequently, a finding of fact enumerating the defendant's failings was read by the court to the jury reflecting both Morgan Stanley's unquestionable culpability and the applicability of punitive action against the corporation for what constituted, in the court's opinion, a brazen contempt for the discovery process and the court itself.

The adverse inference sanction reversed the burden of proof on the aiding and abetting and conspiracy elements of the case; a devastating reversal of roles for the party-defendant. The sanctions order also specifically required Morgan Stanley to continue to search for additional e-mail backup tapes or appoint a third party to conduct such searches.

The *Morgan Stanley* decision was not aberrational. The trend of the decisional law has constituted a series of warning volleys targeted at counsel concerning the degree of care and expertise required in addressing electronic discovery issues.

The need for respondent's counsel to expertly and comprehensively meet discovery demands was especially well delineated by Southern District Judge Shira Scheindlin's earlier decision in *Zubulake V. Zubulake v. UBS Warburg*, (*Zubulake I*) 217

FR.D 309 (2003); *Zubulake v. UBS Warburg* (*Zubulake II*) No. 02 Civ. 1243, 2003 WL 21087136 (2003); *Zubulake v. UBS Warburg*, (*Zubulake III*) 216 FR.D. 20 (2003); *Zubulake v. UBS Warburg* (*Zubulake IV*) 220 FR.D. 212 (2003); *Zubulake v. UBS Warburg* (*Zubulake V*), No. 02 Civ. 1243, 2004 U.S. Dist. LEXIS 13574 (2004).

But it was the prominently publicized *Coleman v. Morgan Stanley* case in Florida that highlighted both the full extent of counsel's responsibility and the full magnitude of the exposure to risk in flouting e-discovery requirements.

In its recitation of counsel's failings and in the punishment meted out for same, *Morgan Stanley* has become an integral chapter in the "Catastrophic E-Discovery Canon" that sends shivers down the spines of even the most seasoned litigators. Indeed, the violations are so egregious and the punishment so harsh that there is little doubt that a Rubicon has been crossed.

The *Morgan Stanley* decision could be viewed as a developing trend. And despite its stunning impact, many law firms continue to mistakenly treat electronic discovery as a commodity "bid" business and lack a realistic concern for the litigation risk associated with poorly conceived and executed e-discovery decisions.

In large part, this is because the risk typically associated in the representation of a client, in terms of "errors and omissions" professional liability, is perceived to be primarily grounded in the substantive, non-discovery-related, legal advisory services provided, including, most notably, recommendations concerning settlement versus trial.

When trial counsel calibrates his risk in rendering legal services, it is typically in these traditional realms where the focus has remained. The viewpoint appears to be that although litigation support services are of importance, they only rarely have significant potential impact upon the trial risks confronted by law firm and client.

This is not to say that the scanning and coding of paper documents, the processing of electronic data, jury research, trial graphics and trial technology services are not considered of strategic import. But until very recently—and still not to the degree warranted—the senior litigation partners in high-stakes matters fail to fully consider the jeopardy that may arise from a lack of competence and comprehensiveness in the planning and execution of litigation support strategies.

This failure to fully acknowledge the potentiality for the case-transforming

impact of discovery practice is especially grievous in the realm of electronic discovery. The truth of the matter is that e-discovery, in its inherent complexity and massive volume, in its novel application in many instances, in the lack of clarity with which it is addressed in some courtrooms and jurisdictions, and in its potentiality to overtake the merits of an action by virtue of a respondent's failure to take preventive measures long before a production demand, is like no other ancillary service provided in the course of representing a client engaged in documentation-heavy litigation.

This is not to say that elements of the defense bar have failed to address the risks inherent in electronic discovery. However, although the issues have been confronted by a corps of dedicated and talented attorneys, jurists, consultants, educators and vendors, in general, the full measure of the risks inherent in this realm have not been adequately appreciated and proactively grappled with by many otherwise highly capable trial attorneys. And, indeed, the initial tactics taken in reacting to the exigencies of e-discovery may have been ill-chosen.

Best practices in addressing the production of electronic evidence has been extremely helpful and so has the effort to improve and benchmark the technology used in the processing and production of electronic data.

But a concerted effort to develop the electronic record management tools for organizations to rationalize and organize their data stores in an effort to reduce the chaotic nature of archives and the resulting electronic discovery dangers arising from the lack of such preventive maintenance has been vigorously addressed only relatively recently.

Although often it seems there is an over-abundant faith in the power of technology to overcome issues of electronic data preservation, retention, reduction, culling and production, until relatively recently there has been a lack of focus and even an unusual level of cynicism in the search for enterprise wide content management software (including e-mail management systems) to help ameliorate the multiplicity of e-discovery pitfalls.

This mindset is in transformation, as more and more organizations respond to the evident danger abroad in the land by promulgating carefully designed data retention policies and developing data management compliance systems that are fashioned to reduce the

corporation's exposure to the vagaries of e-discovery storms.

Further indicative of this trend is the pending amendment to Rule 35 of the Federal Rules of Civil Procedure, establishing a "safe harbor" as a sanctuary from evidence spoliation, for data disposed of in the course of the routine operation of an electronic record retention program (provided that adequate preservation "holds" are provided for in the policy, as well). It is obvious that the route to this safe harbor is by way of a comprehensive retention policy and the technology to implement it.

Whatever the future holds for electronic record management, of primary importance is the need for senior trial counsel to become actively engaged in the e-discovery process to a degree that has not been previously necessary.

In the past, supervising partners have delegated the management of e-discovery to associates, paralegals and litigation support professionals. Given the current level of liability exposure, this practice should be routinely reconsidered.

Moreover, associate counsel and professional practice support personnel, as dedicated and effective as they often are, are not bound by the same level of fiduciary duty in representing the client and, therefore, should not be the penultimate guardians of the clients' e-discovery data and the production of same.

In the current litigation and investigatory environment, e-discovery issues are more than ever before located at the very heart and soul of a litigation's value and the issues confronted by the client should be treated with the sobering gravitas that we now are compelled to recognize they truly command.

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