K&LNG Alert

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Records Management & E-Discovery

For How Long Must Your Records Be Retained?

The topic of records preservation, some contend, is too boring to dwell on for long. However, when a litigant finds itself before a court that has decided that the litigant has failed to preserve records pursuant to applicable legal requirements, the topic suddenly becomes a bit too exciting, as the litigants in the cases below learned:

- In 2005, a New York jury awarded a plaintiff $29.3 million in an employment discrimination dispute after the trial judge ruled that the corporate defendant failed to preserve relevant e-mails after learning of the potential claim.[1] Despite clear instructions from in-house and outside counsel not to destroy relevant documents, several of the defendant's employees were found to have deleted relevant e-mails while other employees failed to preserve backup tapes and other responsive electronic data. The trial judge issued an adverse inference instruction directing the jury to assume that any missing documents were, in fact, damaging to the defendant. This instruction, combined with a damaging e-mail that was discovered, led to a damages award far in excess of the amount originally sought by the plaintiff.
- In 2005, a Minnesota judge imposed monetary sanctions and granted an adverse inference instruction against a securities company after finding that the company failed to preserve potentially relevant e-mails.[2] The judge ruled that the company acted in bad faith by permanently erasing, after becoming aware of a claim against it, all of its hard drives pursuant to a routine e-mail retention policy. According to the court, the company was obligated to halt its routine e-mail recycling programs once it realized the electronic documents could be pertinent to the litigation.
- On the heels of suffering a 2005 jury verdict of $1.45 billion in damages following the issuance of a default judgment for various e-discovery missteps,[3] a prominent investment company has now reportedly reached an "agreement in principle" with the Securities and Exchange Commission ("SEC") to pay $15 million over the firm's failure to preserve e-mails, according to its filings with the SEC.[4]
- In 2004, a New Jersey judge affirmed an award of over half a million dollars in sanctions and an adverse inference instruction against a defendant in a patent litigation.[5] The judge found that the offending party had "willfully blinded itself" to its obligation to preserve potentially relevant electronic information by failing to place a "litigation hold" or "off switch" on its record retention policy concerning e-mail. Unchecked, the automatic computer e-mail policy allowed potentially relevant e-mails to be deleted, or at

1 *Zubulake v. UBS Warburg LLC*, No.1:02-cv-01243-SAS-GWG (S.D.N.Y 2005).

2 *E*Trade Securities v. Deutsche Bank AG*, No. 02-3711 (D. Minn. 2005).

3 *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.*, No. CA 03-5045 AI, 2005 WL 674885 (Fla. Cir. Ct. March 23, 2005).

4 Phyllis Skupien, *Morgan Stanley May Pay Over $15 Million Over E-Mail Destruction*, FINDLAW, Feb. 20, 2006, http://news.findlaw.com/andrews/bf/scl/20060220/20060220morganstanley.html.

5 *MOSAID Techs. Inc. v. Samsung Elecs. Co., Ltd.*, 348 F. Supp.2d 332 (D.N.J. 2004).

least to become inaccessible, on a rolling basis. According to the court, the defendant had an affirmative obligation to preserve these potentially relevant e-mails as soon as it knew or reasonably should have known that litigation was foreseeable, and it failed to satisfy this obligation by allowing the e-mails to be destroyed.

Much is being written about the potential record management and e-discovery nightmares facing companies subject to pending or anticipated litigation or government investigations.[6] The significant amount of time and material being devoted to records management and e-discovery illustrates the topic's growing importance in today's corporate and legal environment. Indeed, a number of recent general counsel surveys rank electronic records issues as a top priority.

While the literature articulates the proliferating risks associated with not preserving records that may be subject to litigation, investigations, or other legal requirements, to address those risks, as a practical matter, one must answer the question – **how long must records legally be retained?** To establish a sound records management program, and to avoid the consequences of failing to preserve records when required, this question must be answered for each of the categories of records created and stored by a company or entity. As in-house counsel and records managers grapple with records preservation issues, they find that each state, as well as the federal government, has a myriad of statutes and regulations governing records retention, and they come to understand how daunting it is to determine exactly how long records must be kept.

Over the past several years, Kirkpatrick & Lockhart Nicholson Graham LLP ("K&LNG") has spent literally thousands of hours researching record retention requirements in all fifty states, in the District of Columbia, and under federal law, and has created a comprehensive database capturing these requirements. This database is over 800 pages in length (when printed) and accounts for dozens of categories, or series, of records, including, among many other categories, accounting, administration, broker-dealer, corporate, environmental, government contracts, operations, intellectual property, and personnel records.

K&LNG's records retention database was created in part by working with various clients so that K&LNG could better understand, and help to meet, their need for legal advice in regard to records management obligations. There are also other steps that companies can take to reduce liability related to records management and e-discovery, but a critical first step that every company should take is evaluating existing record management policies and retention periods.

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[6] For instance, Kirkpatrick & Lockhart Nicholson Graham LLP has published numerous *K&LNG Alerts* relating to records management and e-discovery issues. The firm's most recent Alerts are available on-line at http://www.klng.com/practices/newsstand.asp?id=000066943701.

Recent and Upcoming Presentations of K&LNG's Records Management and E-Discovery Group:

Scenes From an E-Discovery Case, Your 12-Step Program for Avoiding E-Discovery Disasters
– The Legal Strategic Guide to E-Discovery, September 28-30, 2005 (New York, NY).

An Ounce of Prevention: Your 12-Step Program for Avoiding E-Discovery Disasters
– FIOS, Inc., Webinar, November 29, 2005 (National Audio Conference and Webcast).

E-Discovery Secrets: How to Build a Process for Success
– Pike & Fischer, January 26, 2006 (National Audio Conference).

Overcoming IT Hazards in Electronic Evidence
– LegalTech, January 31, 2006 (New York, NY).

E-Discovery and Information Management: Effective Strategies for Avoiding Litigation Disaster
– Strafford, February 22, 2006 (National Audio Conference).

The Digital OK Corral: A Demonstrative Argument
– Pennsylvania Bar Institute's E-Discovery Conference on March 14, 2006 in Pittsburgh, Pennsylvania. For additional information regarding this conference, including registration information, please visit the Pennsylvania Bar Institute's website at http://www.legalspan.com/pbi/calendar.asp?UGUID=&ItemID=20051209-105169-74517.

Scenes from an E-Discovery Case
– Pennsylvania Bar Institute, on August 23, 2006 in Pittsburgh, Pennsylvania and August 29, 2006 in Philadelphia, Pennsylvania.

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