

Ethical Issues for Business Lawyers

Documents and Lawyers: Oil and Water?

By C. Evan Stewart

George Eliot once observed that “[h]istory, we know, is apt to repeat itself.”¹ One area where it seems to repeat itself with a fair amount of frequency is in document discovery; not only are lawyer memories demonstrably short, but the rules governing that process (e.g., certification as to completeness) have made it more and more dangerous.²

The Fairly Recent Past

It does not seem so long ago that Arthur Andersen got into a whole lot of trouble for destroying Enron-related documents, just as Enron was publicly imploding.³ Part and parcel of that brouhaha (at least based upon publicly available materials) was that internal Andersen lawyers, most notably, Nancy Temple, appear to have either: (i) encouraged the destruction of materials by not very subtle hints, or (ii) recklessly turned a blind eye to the wholesale destruction of documents.⁴ Of course, neither option was a really happy one, especially given the then applicable federal statutes governing obstruction of justice.⁵ Ms. Temple, facing potential criminal liability on a number of fronts, publicly took the Fifth Amendment on these matters. For better or worse, Ms. Temple was able to dodge a criminal bullet (as well as exposure to sanction by the Illinois Bar),⁶ and (as of April 1, 2008) she is now working for a small law firm she co-founded in Chicago.

In 1998, a deal was brokered by Morgan Stanley between its client, Sunbeam, and Ronald Perelman, whereby Perelman merged his majority interest in Coleman into Sunbeam for \$1.5 billion (\$680 million of which was conveyed in Sunbeam stock). Shortly after the deal closed (Morgan Stanley’s fees were \$33 million), Sunbeam went into the tank and later filed for bankruptcy. The value of Perelman’s Sunbeam stock went to zero.

In 2003, Perelman approached Morgan Stanley to see if a lawsuit charging the investment bank with fraud could be avoided. Settlement discussions were unsuccessful, so Perelman sued Morgan Stanley in Florida state court. As is usually the case, there was a fair amount of taffy-pulling over discovery issues (on both sides), but the main battleground focus soon shifted to Morgan Stanley’s e-mails. Ultimately, it was determined that Morgan Stanley had not only failed to comply with SEC retention rules *vis-à-vis* e-mails, but more importantly, it was determined that the bank had tendered a false certification of completeness; 1,423 e-mails, back-up tapes and other materials—8,000 pages in all—were discovered after the certification had been submitted to the court.

This caused a very angry judge to find that Morgan Stanley had “contumaciously” engaged in a “willful and gross abuse of discovery obligations,” and that finding led her to issue three rulings: (i) an adverse inference instruction would be given to the jury; (ii) the burden of proof would be shifted at trial—Morgan Stanley would have to prove that it was not guilty of conspiring with Sunbeam to defraud Perelman, and (iii) the jury would be allowed to hear about Morgan Stanley’s discovery abuses as part of Perelman’s request for punitive damages.⁷

At trial, the jury not surprisingly found against Morgan Stanley. Compensatory damages of \$604 million were awarded to Perelman. Later, \$850 million in punitive damages were added, to which the judge thereafter piled on another \$120 million in interest.⁸

Happily for Morgan Stanley, the verdict and damages award were vacated on appeal in 2007.⁹ Unhappily for the Morgan Stanley lawyers involved in the case, they took a huge hit—the bank’s distinguished outside law firm was fired and publicly threatened with a malpractice suit (it is unclear whether this ever proceeded any further than the threat stage), and the bank’s distinguished general counsel left the company (as did a number of his protégées).¹⁰

The Really Recent Past

You might think lawyers pondering just the foregoing examples would be very careful about how they handle documents. You might, but you would be wrong.

The case of *Qualcomm Inc. v. Broadcom Corp.*¹¹ is a prime example. In that patent-infringement dispute, 21 e-mails on a key Qualcomm witness’s laptop were revealed for the very first time in front of the jury at trial (counsel had decided that the e-mails were not responsive to the other side’s discovery requests). The jury ultimately ruled against Qualcomm; thereafter, the trial judge ordered Qualcomm to pay Broadcom approximately \$8 million in attorneys’ fees and costs.

If that were not bad enough, Qualcomm’s lawyers (trial counsel and the company’s general counsel) then wrote to the trial judge, informing the court that the 21 e-mails had only been the tip of the iceberg. In fact, the company had failed to produce more than 46,000 e-mails that had been called for by Broadcom’s discovery requests, and many of those materials turned out to be “inconsistent” with positions proffered at trial.

Nineteen Qualcomm lawyers were subsequently cited by the trial judge for discovery non-compliance,

referred to the California Bar authorities, and ordered to participate in a sanctions hearing before a magistrate judge. Ultimately, the magistrate dismissed 13 of the lawyers without sanction. As to the remaining six lawyers, the magistrate found that Qualcomm had intentionally withheld the discovery materials and that those lawyers—skilled and experienced litigators all—must have known about Qualcomm’s duplicity. This latter finding was important insofar as (i) there was no record evidence that the six Qualcomm lawyers did in fact know about the additional 46,000 e-mails, and (ii) the lawyers could not defend themselves under governing California professional responsibility rules—i.e., California lawyers are not allowed to divulge client confidences under any circumstances.¹²

The affected lawyers objected to the Article III judge, who vacated the magistrate judge’s order and remanded the matter back for a hearing in which the lawyers would “not be prevented from defending their conduct by the attorney-client privilege of Qualcomm.” This decision was based upon (i) the attorneys’ “due process right to defend themselves,” and (ii) other states’ rules (like New York’s) and the ABA Model Rules, which allow lawyers to divulge client confidences in order to defend themselves against specific charges of wrongdoing.¹³ The second prong of the trial court’s decision is not built on a strong foundation (i.e., the lawyers are California lawyers, not governed by New York’s rules or the aspirational ABA Model Rules). As for the first prong, that is a closer question—the due process issue might well be counter-balanced by the notion that California lawyers knowingly gave up that right when they agreed to practice law under the rules of the State of California.¹⁴

The ultimate outcome—both before the magistrate judge and the California Bar authorities—is yet unknown. But we do not need to wait for that outcome to have learned (again) some important, and seemingly obvious, lessons.

The first lesson is that electronically stored information is a trap for the unwary.¹⁵ And this is not only for retrieving e-mails, but sometimes with respect to trading desk telephones and voice messages as well.¹⁶ Even innocent mistakes can prove to be enormously costly, as seen above—both to clients and their lawyers.

Perhaps less obvious is the fact that the current nature of law practice has produced inverse (and perhaps perverse) incentives and results. The ever-escalating cost structure of the legal profession (most notably, associate salaries and technology)¹⁷ has led to document discovery being carried out exclusively by the most junior lawyers, or by outside/contract lawyers, or by paralegals, or by clerical staff at the client—all in the name of saving money. Recognizing that this is likely to be a less precise process, with greater errors, the profession cut itself a bit of slack by enrafting a new provision onto

Rule 26(b)(5)—whereby inadvertent waivers of privileged materials will (at least in principle) not constitute actual waivers and the materials will not be usable by litigation opponents.¹⁸ All of the foregoing has meant that senior lawyers (both inside the client and outside) have become farther and farther removed from the discovery process.

This loosening of standards and the absence of grey hair have coincided precisely at the same time regulators have been requiring certifications that “everything” has been turned over, with the courts on that same wavelength. In light of the *Qualcomm* and *Morgan Stanley* rulings, clients, as well as their grey-haired lawyers, need to re-jigger how they staff and monitor the retrieval of materials for the litigation process. As is quite clear, delegating completeness certifications to the “low man on the totem pole” will not save senior lawyers or their clients in case of material screw-ups.

What Was She Thinking?

Every once in a while there is something that comes up that is now, always has been, and always will be, indefensible. *In re Kristian Peters*,¹⁹ surely qualifies on that score.

In that case, Ms. Peters, a seasoned litigator and a (then) partner at a well-known law firm, had received deposition transcripts covered by a protective order in a case before Judge Harold Baer in the Southern District of New York. On the eve of Ms. Peters’ voluntarily dismissing the New York action before Judge Baer and seeking to file an identical suit in Boston, Judge Baer ordered the return of all documents covered by the protective order. To forestall part of that return, Ms. Peters instructed a first-year associate at her firm to “scribble all over” unmarked deposition transcripts; she believed (wrongly) that by so “scribbling” on the transcripts they would be turned into attorney work product and thus not be subject to being returned.²⁰ The associate promptly reported the incident to senior members of the law firm, which then launched an investigation.

After this was brought to Judge Baer’s attention, the matter was fully vetted in an evidentiary hearing. Ms. Peters did not deny the incident; she testified instead that it was merely a “joke” or that she was being “facetious” or “sarcastic.” Judge Baer himself asked the associate: “What is your view about whether she was saying it in jest?” The associate’s under-oath response was: “It was absolutely not in jest.” Based upon the record before him, Judge Baer concluded that Ms. Peters had engaged in “a blatant disregard for court orders, and a willingness to take any action necessary towards the desired end, including ordering subordinates to commit misdeeds that, apparently, she felt uncomfortable committing herself.”²¹ He accordingly imposed more than 24 separate reprimands or sanctions on Ms. Peters; he also referred the matter over

to the Committee on Grievances for the Southern District of New York.

Headed by Judge Jed Rakoff, the Committee on Grievances issued its own decision on April 10, 2008, fully in accord with Judge Baer's analysis and critique of Ms. Peters' behavior and ordering her suspended from law practice in the Southern District, pending her appeal of Judge Baer's order to the Second Circuit.²²

Conclusion

Regardless of what the Second Circuit does in its review of Judge Baer's order, emulating Ms. Peters' conduct would clearly not be a good career move. Beyond that obvious point, however, lies the fact that the line between clever lawyering and irresponsible (or worse) lawyering in the document-discovery process seems for some lawyers not to be a very clear one.²³ Is it really worth it to be too cute in parsing the depth and breadth of discovery boundaries, especially with respect to electronic materials—which can turn up in any number of unexpected places? It is undoubtedly better in the short and long term—for lawyers and clients both—to do your best to find and then dump all relevant materials on your opponent; then, you can start being a clever lawyer and advocate.

Endnotes

1. George Eliot a/k/a Mary Ann Evans, *SCENES OF CLERICAL LIFE* (1858). Yogi Berra, of course, also once said: "It's déjà vu all over again." Berra was not musing on history, however; he made his famous comment "after Mickey Mantle and Roger Maris hit back-to-back home runs for the umpteenth time." Yogi Berra, *THE YOGI BOOK* (Workman Publishing, 1998).
2. Not that document discovery screw-ups did not always have significant risks. See S. Brill, *When a Lawyer Lies*, *ESQUIRE*, Dec. 19, 1979.
3. The firm itself was criminally prosecuted by the Department of Justice. After it was found guilty at trial, Arthur Andersen (which at its peak had 90,000 employees) went out of business. The Supreme Court later overturned the verdict, a result that did not resuscitate the firm. See C. E. Stewart, *The Post-Enron Pendulum: Is It Swinging Back (And in What Direction)?* *AMERICAN BANKER*, June 25, 2005.
4. See C. E. Stewart, *Andersen Agonistes: The Ethics of Document Destruction*, N.Y.L.J., April 15, 2002. One e-mail from Ms. Temple played a particularly key role in the government's decision to prosecute Arthur Andersen (and the jury cited this e-mail as a pivotal piece of evidence that led to Andersen's criminal conviction). It reads in whole:

To: David B. Duncan
Cc: Michael C. Odum@ANDERSEN WO;
Richard Corgci@ANDERSEN WO
BCC:
Date: 10/16/2001 08:39 PM
From: Nancy A. Temple
Subject: Re: Press Release draft
Attachments: ATT&ICIQ; 3rd qtr press release memo.doc
Dave—Here are a few suggested comments for consideration.
—I recommended deleting reference to consultation with legal group and deleting my name on the memo. Reference to

the legal group consultation arguably is a waiver of attorney-client privilege advice and if my name is mentioned it increases the chances that I might be a witness, which I prefer to avoid.

—I suggested deleting some language that might suggest we concluded the release is misleading.

—In light of the "non-recurring" characterization, the lack of any suggestion that this characterization is not in accordance with GAAP, and the lack of income statements in accordance with GAAP[*sic*] I will consult further within the legal group as to whether we should do anything more to protect ourselves from potential Section 10A issues.

Nancy

This document, at least on its face, has always seemed relatively innocuous to me. Ms. Temple's e-mail of Oct. 12 ("It might be useful to consider reminding the engagement team of our documentation and retention policy."), on the other hand, I have always thought to be much more problematic—coming, as it did, after Andersen (and Temple) were aware of how dire a predicament Enron really faced.

5. See 18 U.S.C. §§ 1503 and 1505. In passing Sarbanes-Oxley, Congress added two more weapons to attack document destruction. See 18 U.S.C. §§ 1512(c) and 1519. In New York State, it is a class E felony for a person to tamper with physical evidence "believing that [the] evidence is about to be produced or used in an official proceeding or a prospective official proceeding . . ." N.Y. Penal Law § 215.40(2) (McKinney 1999).
6. Ms. Temple was not only identified as a target of the Justice Department's grand jury investigation, but the House Energy and Commerce Committee separately asked the Justice Department to look into whether she had lied to the Committee in sworn testimony (which pre-dated her Fifth Amendment invocation at a civil deposition). Notwithstanding, no criminal charges were ever brought against Ms. Temple. She also faced potential exposure to Illinois Rules of Professional Conduct 3.4(a), which states:

[A lawyer shall not] unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value.
7. See *Coleman (Parent) Holding, Inc. v. Morgan Stanley & Co.*, 2005 WL 674885 (Fla. 15th Cir. Ct. 2005).
8. In *Treppel v. Biovail*, 249 F.R.D. 111 (S.D.N.Y. 2008), a similar adverse inference instruction (and other sanctions) were sought in light of the defendant's "clearly inadequate" / "clearly deficient" efforts to preserve electronically stored information when litigation was obviously imminent. Luckily for the defendant, the judge rejected the requested instruction for two reasons: (i) the discovery failures did not appear to be willful, and (ii) the plaintiff could not demonstrate that any missing materials were relevant to his claims.

More recently, in shareholder litigation against Oracle Corp. and its CEO, Larry Ellison, the judge ruled that he would issue an adverse inference instruction against Mr. Ellison for his failure to preserve more than 1,500 e-mails, as well as a number of recorded interviews with a biographer. See B. Worthen, *Judge Rules Oracle CEO Withheld Emails*, *WALL ST. J.*, Sept. 5, 2008, at B6.
9. The issue that swayed the Florida appeals court was that the compensatory damages calculation was wholly speculative. And without a compensatory damages award, the punitive damages award (punitive damages being a purely derivative claim) could not stand alone.
10. The trial judge said in open court that she had seen "no evidence of malpractice" by Morgan Stanley's outside counsel, adding that the only evidence before her was that the law firm had merely "follow[ed] the directions" of their client. See generally S. Beck, *Morgan Stanley's Recipe for Disaster*, *THE AMERICAN LAWYER* (June 5, 2006).

11. 2008 U.S. Dist. LEXIS 16897 (S.D. Cal. March 5, 2008), *reversing in part and remanding* 2008 WL 66832 (S.D. Cal. Jan. 7, 2008).
12. In New York, lawyers do have the ability to divulge client confidences to defend themselves against specific charges of wrongdoing. *See* DR 4-101(C)(4).
13. *See* DR 4-101(C)(4); ABA Model Rule 1.6 (b)(5) and comment 10.
14. *See, e.g.,* Balla v. Gambro, 584 N.E. 2d 104 (Ill. 1991). *See also* C. E. Stewart, *In-House Counsel as Whistleblower: a Rat with a Remedy?* N.Y.L.J., Aug. 21, 2008.
15. Judge Shira Scheindlin comprehensively defined the landscape of this subject matter in Zubulake v. UBS Warburg, 217 F.R.D. 309 (S.D.N.Y. 2003).
16. Most companies have systems that automatically recycle or delete telephone taping systems after a set period (e.g., 30 or 60 days). Unlike emails, which are subject to legislated document retention requirements, such voice messages are not subject to those same requirements. If litigation is expected or imminent, however, such tapes would have to be preserved.
17. *See* G. Fields, *Digital Data Drive Up Legal Costs*, WALL ST. J., Sept. 6, 2008, at A3.
18. *See* C. E. Stewart, *Will Waiving the Privilege Save It?* N.Y. BUS. L.J., Vol. 11, No. 1, at 13 (Spring 2007); C. E. Stewart, *The Internet, Litigation, and the 'Oops' Factor*, N.Y.L.J., May 15, 2006. This was recently (September 2008) codified by Congress in Rule 502 of the Federal Rules of Evidence. Fed. R. Evid. 502.
19. M-2-238 (S.D.N.Y. April 10, 2008, per Judge Jed S. Rakoff), N.Y.L.J., April 17, 2008.
20. It never ceases to amaze me how many lawyers do not understand attorney-client and work product issues. *See* C.E. Stewart, *The Attorney-Client Privilege: The Best of Times, the Worst of Times*, THE PROFESSIONAL LAWYER, March 2000. This lack of understanding is most frequently displayed to the judiciary in privilege logs, often compiled by junior lawyers or paralegals who are instructed to withhold any document with a lawyer's name on it.
21. *See Wolters Kluwer Financial Services, Inc. v. Scivantage*, 525 F. Supp. 2d 448, 549-50 (S.D.N.Y. 2007).
22. *See* M-2-238 (S.D.N.Y. April 10, 2008, per Judge Jed S. Rakoff), N.Y.L.J., April 17, 2008. Besides Judge Rakoff, the Committee consisted of Judges Wood, Castel, Haight, Keenan, Lynch, McMahon, Stanton, and Magistrate Judge Freeman. The Committee determined that Ms. Peters violated at least DR 1-102(a)(5), DR 1-102(A)(4), and DR 7-106(A).
23. Incredibly, there has been some encouragement by the organized Bar, as well as the courts, for attorneys playing fast and loose with ethical obligations in discovery. *See* New York County Lawyers' Association's Committee on Professional Ethics Formal Opinion 737 (May 23, 2007) (endorsing an ethical safe harbor for lawyers who employ "dissemblance" in the evidence gathering process); *Gidatex v. Campaniello Imports, Ltd.*, 82 F. Supp. 2d 119 (S.D.N.Y. 1999) (counsel held to be "technically" violative of ethics obligations in discovery but not sanctioned and materials procured thereby admitted into evidence). This approach to law practice is obviously not one that aspires to the highest level. *See* C. E. Stewart, *When Exceptions Swallow the Rule: the Growing Demise of the 'No-Contact' Rule*, N.Y. BUS. L.J., Vol. 12, No. 1, at 34 (Spring 2008).

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