

2004 Year in Review – Groundbreaking Electronic Discovery Developments in the United States

Michele C.S. Lange, Esq.

Kroll Ontrack E-Evidence Staff Attorney

In 2004, the U.S. e-discovery arena saw significant progress, particularly in the area of electronic discovery case law. Cases involving multimedia maven Martha Stewart, Credit Suisse First Boston banker Frank Quattrone, and NBA all-star Kobe Bryant were just a few of the electronic discovery headliners in America in 2004.

Perhaps the most discussed case of the year came out of the Southern District of New York -- *Zubulake v. UBS Warburg*, 2004 WL 1620866 (S.D.N.Y. July 20, 2004). In this fifth opinion by Judge Shira Scheindlin, the court determined an employer had willfully deleted relevant emails despite contrary court orders. Based on the employer's spoliation, the court granted the employee's motion for sanctions and ordered the employer to pay costs. The court further noted that defense counsel was partly to blame for the document destruction because it had failed in its duty to locate relevant information, to preserve that information, and to timely produce that information. In addressing the role of counsel in litigation generally, the court stated that "[c]ounsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched."

In another notable U.S. e-discovery case, *United States v. Phillip Morris USA Inc.*, 327 F.Supp.2d 21 (D.D.C. 2004), a district court judge imposed \$2,750,000 in sanctions and precluded key witnesses from testifying at trial where the company failed to preserve relevant electronic documents. Despite a court order, the defendants maintained their normal monthly email deletion policy, automatically destroying email messages older than sixty days. The deletion policy continued unrestrained for two years even after the court ordered the defendants to halt the policy. Both of these important cases illustrate that courts in the U.S. will not hesitate to impose sanctions for intentional or negligent "spoliation" (i.e. destruction) of electronic documents.

In addition to case law developments, American judges, litigators, academics, and others worked in 2004 to clarify e-discovery issues by publishing a set of proposed rule amendments to the Federal Rules of Civil Procedure. If adopted, the proposed rules could be implemented as early as 2006. Topics addressed by the rule proposals include:

- Early discussion of e-discovery issues
- Better definition of what constitutes electronically stored information
- Specification of production format
- Producing reasonably accessible information
- Assertion of privilege
- Imposition of sanctions

These developments represent just a sampling of the important efforts underway in the United States relating to e-discovery – and more exciting advancements in the case law, rules, and technology are likely to come in 2005.

Disclaimer

This document is neither designed nor intended to provide legal or other professional advice but is intended merely to be a starting point for research and information on the subject of legal technology. While every attempt has been made to ensure accuracy of this information, no responsibility can be accepted for errors or omissions. Recipients of information or services provided by Kroll Ontrack shall maintain full, professional, and direct responsibility to their clients for any information or services rendered by Kroll Ontrack.