

## TOP TEN MISTAKES CLIENTS MAKE IN ELECTRONIC DISCOVERY

by  
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**No. 1:** Failing to understanding that electronic information is just as discoverable as documentary information.

- In Crown Life Ins. Co. v. Craig, 995 F.2d 1376 (7<sup>th</sup> Cir. 1993), a party was sanctioned for failing to produce electronic data when it withheld the data because it was stored in an electronic database and not on paper.

**No. 2:** Failing to preserve electronic evidence as soon as client reasonably anticipates litigation.

- In Silvestri v. General Motors Corp. 271 F.3d 583, 590 (4<sup>th</sup> Cir. 2001), the court held that party had duty to preserve evidence “in pending or reasonably foreseeable litigation.” There are many cases of sanctions for spoliation against parties that failed to preserve relevant electronic information. For example, in Zubulake v. UBS Warburg, No. 02 Civ. 1243 (S.D.N.Y. 2005) (known as “Zubulake V”) the court gave an instruction of adverse inference for deleting relevant e-mails.

**No. 3:** Directing or suggesting to employees to delete electronic information that may be relevant to an emerging legal problem.

- In Telectron, Inc. v. Overhead Door Corporation, 116 F.R.D. 107 (S.D. Fla. 1987), the court entered default judgment against a company that destroyed relevant, requested documents at counsel’s direction on the same day counsel was served with the complaint and document requests and which company’s managers failed to act to ensure document retention.

**No. 4:** Failing to understand that the duty to preserve evidence trumps the client’s standard information retention/destruction policies.

- Once litigation is reasonably anticipated the client must not destroy discoverable information even if the information is due for destruction under the client’s policies. This is an extremely dangerous area for clients. If employees are not well-informed about pending or anticipated litigation and well-trained with respect to the duty to preserve, then they may unintentionally delete or destroy evidence leading to sanctions for spoliation of evidence. In Lewy v. Remington Arms Company, 836 F.2d 1104, 1112 (8<sup>th</sup> Cir. 1987), the court decided whether to impose an adverse evidentiary presumption for destroying documents pursuant to a document retention policy. Another example: Rambus, Inc. v. Infineon Technologies AG, 2004 WL 383590 (E.D.Va. May 18, 2004).

**No. 5:** Failing to use appropriate computer forensics software and expertise necessary to preserve all relevant electronically stored data.

- In Gates Rubber Company v. Bando Chemical Industries, Inc., 167 F.R.D. 90 (D. Colo. 1996), the Court held defendant's employee destroyed electronic information by overwriting 7 to 8 % of it during an unnecessary download to copy it for production in discovery and awarded attorney fees to party seeking the information as a sanction.

**No. 6:** Failing to locate all requested electronic information responsive to discovery requests.

- Such a failure and other electronic discovery failings caused the court in Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., 2005 WL 674885 (Fla.Cir.Ct., Mar. 23, 2005) to instruct the jury that certain detrimental allegations were deemed established. The jury then awarded \$604.3 million in compensatory damages and \$850 million in punitive damages. Deleted electronic data may be stored on backup tapes.

**No. 7:** Failing to produce complete electronic information.

- In Williams v. Sprint/United Management Company, 230 F.Supp.2d 640 (D. Kan. 2005), the court ordered the defendant to show cause why it should not be sanctioned for "scrubbing" the metadata and locking certain data on electronic spreadsheets before producing them so that such data could not be viewed by the plaintiff.

**No. 8:** Failing to create before a legal dispute emerges an electronic information (including e-mails) preservation policy in the event of anticipated litigation.

- Clients should hire counsel or a consultant and/or use The Sedona Guidelines at <http://www.thesedonaconference.org/publications.html>, which provides recommended best practices for electronic document retention and production, to help develop their electronic information policies. See Telectron, supra at 123-26 for adverse consequences.

**No. 9:** Failing to follow/enforce its written electronic information retention and deletion policies.

- In U.S. v. Philip Morris U.S.A., Inc., 321 F.Supp.2d 21, 24 (D.D.C. 2004), the court precluded some expert testimony and ordered \$2.75 million in sanctions against high-level executives for failures to comply with defendant's own internal document retention program.

**No. 10:** Failing to train personnel to handle litigation requests for electronic discovery; employees must know what to do when a "litigation hold" is imposed.