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Expert Analysis

Digital Age Expands Communication but Creates Discovery, Litigation Pitfalls

Emails. Text messages. Instant messages. Social media. The digital age has given birth to powerful new ways to communicate that have transformed how we live and conduct business. But the proliferation of communication options has come with increased exposure to claims in litigation of withholding, hiding, destroying, and losing evidence.

A reminder of the increasing danger of the digital age in discovery recently arose in the New York state attorney general's investigation of ExxonMobil's research into the causes and effects of climate change. After receiving documents from Exxon pursuant to a subpoena, the state attorney general informed a New York court that it had discovered that former Exxon CEO and Chairman Rex Wayne Tillerson had used an "alias email address on the Exxon system under the

CARRIE H. COHEN, a former Assistant U.S. Attorney in the Southern District of New York, is a partner in Morrison & Foerster's securities litigation enforcement and white-collar defense practice.

By
Carrie H.
Cohen



pseudonym 'Wayne Tracker' from at least 2008 through 2015." Letter from John Oleske, Senior Enforcement Counsel, to The Hon. Barry R. Ostrager (March 13, 2017).

In the Exxon matter, the state attorney general claimed that emails from the Tracker email address contained information responsive to its subpoena, but that neither Exxon nor its outside law firm had disclosed to the state attorney general that the Tracker email address belonged to Tillerson and that it appeared that some of the arguably responsive Tracker emails had not been properly saved and produced. Exxon, in its reply to the court, claimed that there was nothing improper with Tillerson's use of the Tracker email address, which it said "allowed a limited

group of senior executives to send time-sensitive messages to Tillerson that received priority over the normal daily traffic that crossed the desk of a busy CEO. The purpose was efficiency, not secrecy." Letter from Theodore V. Wells to The Hon. Barry R. Ostrager (March 16, 2017). Exxon's lawyers also suggested that a technical glitch may have prevented automatically preserving emails from the Tracker account. *Id.*

Tillerson is hardly the first or only CEO who has used more than one email address. As *The Wall Street Journal* recently reported, high-profile CEOs whose email inboxes can be overwhelmed often use another email address that allows a more select group of people to reach them without their email message perhaps getting lost in the CEO's inbox. While use of an alias email is an understandable and perhaps necessary inbox management tool, the Exxon matter should serve as a reminder of how the expanding array of communication tools can cause issues in litigation. Even if

a secondary email address serves a legitimate purpose, if it is not searched and preserved during discovery and sufficiently disclosed and produced, it can, at minimum, allow the opposing party to try to bias the judge and create advantageous press. Indeed, shortly after

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the New York state attorney general raised the Tracker email issue with the court, it was widely covered in the press. Of course, much more serious consequences can result from mishandling of electronically stored information (ESI).

Severe Consequences

In a criminal investigation, mishandling of ESI can influence charging decisions by prosecutors or expose defendants to further probes and charges of obstruction of justice.

In civil litigation, a judge can impose sanctions or give an adverse inference charge to a jury, which essentially instructs the jury that it would be proper for them to infer that the missing evidence would have been harmful to the party who failed to preserve it.

To be sure, it is not easy to obtain an adverse inference. Effective December 2015, the Federal Rules

of Civil Procedure (FRCP) were amended to address the failure to preserve ESI. The changes were made, according to the Advisory Committee, to take account for the “serious problems resulting from the continued exponential growth” of ESI and the differing standards among circuit courts for imposing sanctions. “These developments have caused litigants to expend excessive effort and money on preservation in order to avoid the risk of severe sanctions if a court finds they did not do enough.” Fed. R. Civ. P. 37(e) Advisory Committee Notes to 2015 Amendment.

Under the new Rule 37(e) of the FRCP, it first must be established that the ESI “should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery.” As the Advisory Committee noted, since “electronically stored information often exists in multiple locations, loss from one source may be harmless when substitute information can be found elsewhere.” If that first requirement is satisfied, then a court may impose measures “no greater than necessary to cure the prejudice.” Fed. R. Civ. P. 37(e) Advisory Committee Notes to 2015 Amendment.

For more serious sanctions, a court must find that a “party acted with intent to deprive another party

of the information’s use in the litigation.” If that intent is established, then a court may “(A) presume that the lost information was unfavorable to the party; (B) instruct the jury that it may or must presume the information was unfavorable to the party; or (C) dismiss the action or enter a default judgment.” Fed. R. Civ. P. 37(e). Previously, some courts had imposed severe sanctions for negligence and gross negligence. The new rule seeks to end that practice.

New Rule in Practice

The new rule already has had a significant impact. Take, for instance, *GN Netcom v. Plantronics*, 2016 U.S. Dist. LEXIS 93299 (D. Del. July 12, 2016), a case alleging violations of the Sherman Act, the Clayton Act, as well as tortious interference with business relations against Plantronics over its program for distributing its headsets. At issue in *GN Netcom* were thousands of emails intentionally deleted by a senior-level Plantronics executive who had responsibility for a Plantronics’ headset distribution program that was central to the underlying claims in the case. Such executive also encouraged other employees to delete emails as well.

As recounted in the court’s opinion, Plantronics argued sanctions for the deleted emails were unwarranted, noting that the company “went to great lengths to ensure

that its employees were aware of and understood their preservation obligations,” including issuing multiple litigation holds and conducting training sessions to ensure compliance. *Id.* at *20. Plantronics also claimed that upon learning of the deleted emails, it “immediately took steps to preserve documents and prevent any further loss of data, and to recover whatever missing data it could.” *Id.* at *21. Those efforts, Plantronics asserted, were proof that it took the requisite responsible steps to preserve ESI and that it did not intend to deprive GN Netcom of evidence.

But in his opinion, U.S. District Judge Leonard P. Stark disagreed and found “Plantronics’ extensive document preservation efforts do not absolve it of all responsibility for the failure of a member of its senior management to comply with his document preservation obligations.” *Id.* at *21. Judge Stark also wrote that he was “not convinced that Plantronics took all the reasonable steps it could have taken to recover deleted emails.” *Id.* at *22.

The court in *Plantronics* ordered a \$3 million punitive monetary sanction against Plantronics as well “instructions to the jury it may draw an adverse inference that emails destroyed by Plantronics would have been favorable to GN’s case and/or unfavorable to Plantronics’ defense.” *Id.* at *48.

Under the new rule, a showing of bad intent is not required to obtain less severe remedies. For instance, in *Security Alarm Financing v. Alarm Protection Technology*, 2016 WL 7115911 (D. Alaska Dec. 6, 2016), a lawsuit between home security competitors about the alleged poaching of customers, a district court judge in Alaska considered a motion for sanctions for customer call recordings that had been lost by the plaintiff.

The court concluded that the evidence prejudiced the defendant and that the plaintiff had failed to take steps to preserve the recordings. But based on a “murky” record involving discussions between the parties over what they agreed needed to be produced, the court wrote it was “not persuaded that the failure to preserve the recordings ... was done with the intent to deprive APT of the recordings.” *Id.* at *6. Accordingly, instead of ordering an adverse inference, the court allowed the jury to hear about the spoliation of evidence and precluded the plaintiff from using 150 saved call recordings that were favorable to its case. *Id.* at *7.

Clear Protocols Needed

These recent cases demonstrate how the digital age exposes litigants to potentially serious setbacks in litigation. Adverse inference jury instructions—among the most severe sanctions—have been made tougher to obtain by recent

amendments to the Federal Rules of Civil Procedure, which now require a showing of intent to deprive a party of information. But, it is important for companies to recognize that a showing of bad intent by just one of its employees can be attributed to the organization.

Even if bad intent is not established, mishandling ESI still negatively can affect the outcome of a case in less severe but crucial ways. The bottom line: As new communications technologies continue to expand, it is important to establish clear protocols for preserving and disclosing relevant content and using those protocols to avoid costly court setbacks.