Challenges for Corporate Counsel in the Land of E-Discovery: Lessons from a Case Study[1]

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Introduction

"Bad facts make bad law"[3] is a maxim oft used to dismiss unfavorable decisions absent careful analysis but well employed to describe the emerging jurisprudence regarding electronic discovery, and the many examples of missteps in discovery that have led to significant sanctions.[4] If only these cases and sanctions could be dismissed by a maxim and distinguished on their facts.

The better practice is to discover the important lessons that diminish, if not preclude, the onerous consequences. This article addresses the case of Danis v. USN Communications, 2000 WL 1694325 at 2 (N.D. Ill.), which provides a number of valuable lessons concerning electronic discovery for corporate and outside counsel, many of whom are addressing such issues for the first time.

The Danis Case

Danis v. USN Communications, was decided by the Federal District Court for the Northern District of Illinois on October 23, 2000. The pertinent facts of the case are as follows:

- The case was a class action involving two groups of purchasers of common stock issued by USN Communications. The plaintiffs alleged various violations of federal securities law. Id. at 7.
- The suit specifically named USN Communications, as well as Mr. Elliott, the Chief Executive Officer and the Board of Directors in addition to others. Id.
- Prior to the commencement of the action, USN did not have a formal document retention policy covering the categories of documents and electronic information USN regularly created and received. Id. at 39.
- USN routinely created backup tapes that were stored on computers. Id. at 11. USN maintained copies of these back-up tapes only for a period of about thirty days to facilitate disaster recovery; the tapes used to make these copies were then reused. Id. The court found that these back-up

[1] This article orginially appeared in the January 21, 2002, Vol. 3, Iss. 5, edition of *E-Business Law Bulletin*. Reprinted with permission of Andrews Publications © 2002. www.andrewsonline.com

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[3] See Ludwig v. State, 298 S.W.2d 166, 170 (Tex. Ct. App. 1956)

[4] See, e.g., In re Prudential Ins. Co. Sale Practices Litig., 169 F.R.D. 598 (D.N.J. 1997) (sanction of $1,000,000 for destruction of electronic data) and Linnen v. A.H. Robins Co., 1999 WL 462015 (Mass. Super. June 16, 1999) (sanction of spoliation instruction and adverse inference to jury).

tapes were not intended to, and did not, create an archival record of the e-mail system. Id.

- Three months prior to the filing of the complaint, USN put into place a set of procedures for "preserving company assets and retrieving key records in anticipation of upcoming office closures and layoffs. This process involved deleting computer information. Id.
- Additionally in the summer of 1998, the company embarked on a program of purging the computer drives of terminated USN employees in response to security concerns and to preserve computer storage space. This process also involved the deletion of data. Id. at 12.
- On the same date that the complaint was filed, the Board of Directors met and discussed the necessity of preserving documents for the case. Mr. Elliott, the CEO, was ordered to promptly take steps to preserve documents. Id.
- Mr. Elliott took no affirmative steps to ensure that no documents were destroyed. Mr. Elliott delegated all responsibility to Mr. Monson an in-house attorney with no litigation experience. Id. at 14.
- Mr. Monson did nothing to ensure that the directives were followed as to document preservation. Mr. Monson did not review the current actions of destroying documents of terminated employees or those of closed offices to ensure that document destruction was being halted. Id.
- Electronic documents were apparently destroyed in accordance with pre-litigation practices.
- Plaintiffs filed a motion and amended motion for sanctions following discovery of the document destruction. Plaintiffs premised their motion on the assertion that "USN employees, acting at the direction or under the supervision of the individual defendants and USN's senior officers, destroyed virtually all evidence of the massive fraud alleged in plaintiff's complaint" As a sanction for this alleged misconduct, plaintiffs sought…default judgment. Id. at 2.
- The court opined that discovery occurred at a breakneck pace and neither side had a good handle on what was occurring in the process. Id. at 4.

Lessons Learned: Document retention plans must anticipate litigation and include contingency plans.

Many corporations and other entities have document retention policies under which they destroy at stated intervals documents for which they anticipate having no further need. Cedars-Sinai Medical Center v. Superior Court, 74 Cal.Rptr.2d 248, 257 (Cal. 1998.); see also Akiona v. U.S., 938 F.2d 158, 161 (9th Cir. 1991); Lewy v. Remington Arms Co., Inc., 836 F.2d 1104, 1111-112 (8th Cir. 1988). Regardless of the

nature and detail of such a program, it must be designed to account for what happens when litigation is anticipated, threatened or filed.

The most practical step, of course, is the suspension of any disposal practices for documents impacted by the litigation. In Danis, this failed to happen. The court placed the blame for the failure on the corporate executive team, stating that "when senior management fails to establish and distribute a comprehensive document retention policy, it cannot shield itself from responsibility because of field office actions." Danis, 2000 WL 1694325 at 32. The court further reiterated that the obligation to preserve documents that are potentially discoverable materials is an affirmative one that rests squarely on the shoulders of senior corporate officers. Id.

In order to assess the needs of the corporation and construct a plan for when e-discovery will occur, parties cannot act in a vacuum. Attorneys from outside counsel, in-house legal staff and individuals from different areas of the corporate structure must cooperate to develop retention programs in addition to litigation hold procedures and memorialize these plans in the document retention policy. The document should include delegations of authority among departments and a meaningful reporting structure.

Litigation Response Plan

This plan must be a key component of the document retention policy for the organization. It acts as a roadmap and an action plan for the litigation response teams discussed in the subsequent subsection. This plan must account for electronic documents, both created and anticipated, archived and non-archived. In terms of electronic documents, the foundation for the plan is the current network landscape for the organization, including site information, file saving protocols, back-up protocols, past application and operating system information and planning for segregation of server space in the event of ongoing discovery efforts. The plan must include methods for capturing data, protocols for file saving, following imaging, and back-up and archive access.

Litigation Response Teams

One of the key measures that would have alleviated the consequences in Danis is the implementation of litigation response teams prior to pending litigation. The teams should be comprised of individuals from the outside counsel, experts, legal department, human resources department and IT staff, as well as individuals from key departments within the organization. The purpose of the team is to follow through on the litigation response plan discussed in the preceding subsection. The team should be familiar with the document retention policies and the need for litigation "holds" for records, including electronic records. The IT staff will be critical to ensuring that no caches of electronic documents are ignored or forgotten.

Outside Counsel

It is critical to employ outside counsel knowledgeable and skilled in the area of electronic discovery.

In Danis, the court stated that Mr. Elliott, the CEO of the Defendant organization, did not consult its retained law firm that had "scores of experienced attorneys capable of developing and implementing a suitable document preservation program in a major

securities lawsuit." Danis, 2000 WL 1694325 at 14. Instead, Mr. Elliott entrusted this vital task to Mr. Monson, an attorney with no litigation experience and no experience in formulating document retention strategies. Id. There is no evidence that the Defendant consulted their outside counsel for any assistance in the formulation or execution of the retention plan whatsoever. Id. It was this breach of duty that resulted in the sanctions placed by the court upon Mr. Elliott.

Expert Technical Assistance

It is equally critical to obtain expert technical advice to assess document retention and production issues in litigation.

The court in Danis stated that "neither side to this motion has demonstrated to this Court a complete mastery of what types of documents were generated by USN in the ordinary course of business, how they were used or their significance." Id. at 4. The court went on "as a result, both sides were the losers. They lavished huge sums of time and money on an issue that did not remotely justify the expenditure, and which would have been more profitable spent focusing on the merits of this case." Id. at 5. This summary aptly reflects the reality in many other cases: the failure to appreciate and understand electronic documents in litigation can lead to extraordinarily costly and wasteful efforts.

The forensic and discovery experts that focus on electronic discovery bring to bear experience and resources that are critical to meeting court obligations and litigation budget considerations. During the formation of the document retention policy, the electronic discovery expert can assist IT staff in assessing network structure and storage functions with an eye to any later need to locate and produce documents. Advance planning can result in more systematic storage that allows for narrowly tailored productions in litigation that can drastically reduce the costs of discovery compliance. Moreover, when faced with litigation demands, the electronic discovery expert can employ the specialized tools and personnel to locate and review documentation on a timely basis, avoiding unnecessary discovery battles that can prolong and derail litigation and can provide support for the company's due diligence in retention and production.

Corporate Leadership

Corporate leadership will be held responsible for document retention problems, including e-discovery mistakes.

The Danis court did not hesitate to impose sanctions upon the corporation and its officers for the electronic document destruction. Even though it refrained from imposing a default judgment, the court allowed an inference to the jury regarding the spoliation of evidence that presumes the evidence would have been harmful to the defendants. Id. at 53. Moreover, the court imposed a $10,000 fine on Mr. Elliott for his role in the mismanagement of the document retention issues, stating that Mr. Elliott may not "escape responsibility by virtue of the fact that he assigned Mr. Monson the task of handling document preservation. The buck must stop somewhere — and here, the Court believes that the appropriate place is with Mr. Elliott, the CEO." Id. at 41.

Conclusion

The Danis case is an example of the perils that are faced by any organization that does not take meaningful steps to address the preservation and production of electronic documents in litigation. Do not make the bad facts; do not make bad law. Know your electronic media; develop appropriate retention policies and schedules; plan for litigation contingencies; and follow through with prompt and efficient implementation.