Spoliation and E-Discovery: Educating the Practitioner

Daniel K. Cray
Cray Huber Horstman Heil & VanAusdal LLC
303 West Madison
Suite 2200
Chicago, IL 60606
312-332-8450
dkc@crayhuber.com

Daniel K. Cray is a founding partner in the Chicago office of Cray Huber Horstman Heil & VanAusdal LLC. Mr. Cray is a member of the Drug and Medical Device Litigation Committee, and a frequent presenter at DRI conferences. He has authored a number of litigation tactics articles, and provides insights on preventive law issues at national legal/business programs. Mr. Cray serves as National Trial Counsel to several international product manufacturers and sellers, and has extensive trial experience in the areas of products liability, professional liability, and commercial disputes. Mr. Cray is a graduate of the University of Illinois School of Law (1981).

* * *

A spoliation claim is a constant and serious threat to targeted companies, both prior to and after commencement of litigation. Prevention and defense of this type of claim in the context of electronic discovery is a unique challenge for the practitioner due to the ever-changing capabilities and constraints of technology, the difficulty of managing, storing and protecting data, and the limits of lawyers' knowledge of technological issues. To protect clients against this threat, practitioners must be familiar with the evolving law surrounding spoliation claims, and their applicability in the electronic discovery arena.

In Section I below, I briefly describe the law of spoliation claims as encountered by many of us in traditional discovery disputes. The applicability of the law of spoliation to the unique circumstances presented by electronic discovery is included in Section II. Finally, in Section III, I discuss some practical suggestions to help protect your clients from the potential and actual spoliation claim arising out of electronic discovery matters.

I. A spoliation attack can take on many forms. Being prepared for an attack requires familiarity with the various ways your client can be subject to a charge or claim.

The doctrine of spoliation is inextricably linked with the duty to produce all non-privileged documents during the progression of any civil litigation. Spoliation has been defined as "the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably

foreseeable litigation." *Byrnie v. Town of Cromwell*, 243 F.3d 93, 107 (2d Cir. 2001 (quoting, *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999). Courts have the power to impose sanctions, including monetary sanctions and dismissal of a party's action or entry of a default judgment, when a party participates in the destruction of relevant documents or information. *See* FED. R. CIV. P. 37(b)(2); *see also*, *Procter & Gamble Co. v. Haugen*, 179 F.R.D. 622 (1988) (imposing $10,000 in sanctions against Procter & Gamble for deleting e-mail correspondence among five individuals that Procter & Gamble had previously identified as having relevant information). Regardless of the ultimate sanction, defending a spoliation attack can be costly. Consider the plight of the parties in *Danis v. USN Communications, Inc.*, 2000 U.S. Dist. LEXIS 16900 (N.D. Ill. 2000), who calculated their collective expenditures in litigating a sanctions issue alone, at a whopping $1,524,762.03. *Danis*, at 154.

Jurisdictions have adopted different approaches to address the problems of spoliation. In some jurisdictions, spoliation only includes the "intentional" destruction of relevant information, rather than inadvertent or innocent loss of evidence. *See, Crescendo Investments, Inc. v. Brice*, 61 S.W.3d 465 (Tex. App. Ct. 2001); *Kippenhan v. Chaulk Services, Inc.*, 428 Mass. 124 (1998). Other jurisdictions, though, impose sanctions, and even recognize a cause of action in tort, for negligent spoliation. *See, e.g.*, *Communities for Equity v. Michigan High School Athletic Ass'n.*, 2001 U.S. Dist. LEXIS 16019 (W.D. Mich. 2001) (finding spoliation of evidence occurred when defendant negligently destroyed hard copies of relevant questionnaires, even though an electronic recording of the questionnaires was intact); *Temple Comm. Hosp. v. Superior Court*, 20 Cal. 4th 464 (1999) (recognizing an independent cause of action for negligent spoliation); *Miller v. Allstate Ins. Co.*, 573 So.2d 24 (Fla. App. Ct. 1990) (finding that a tort action for negligent failure to preserve evidence for civil litigation has been recognized under Florida law).

The timing of the alleged destruction of evidence, particularly in relation to notice of impending litigation and the relevancy of materials to litigation is critical to a spoliation claim. For most courts, a complaint puts a party on notice of a duty to preserve evidence, regardless of whether specific document requests are made. *See, Computer Associates International, Inc. v. American Fundware, Inc.*, 133 F.R.D. 166 (D. Colo. 1990) ("inconceivable" that after the meeting wherein plaintiff advised defendant that it believed software had been copied in violation of an agreement, that defendant did not realize the software would be sought through discovery, thereby giving rise to duty to preserve the "irreplaceable" evidence; "commencement of the action settled any doubts"). On the other hand, some courts have held that a defendant is entitled to a reasonable period of time to "familiarize itself with the pleadings to determine what information is relevant and responsive" even after service of production requests. *Applied Telematics, Inc. v. Sprint Communications*, 1996 U.S. Dist. LEXIS 14053, 9-10, 1996 WL 539595 (E.D. Penn. 1996) (the defendant's affirmative duty to preserve information commenced several weeks after complaint, first request for

production and first interrogatories were served). Laxness in a party's pursuit of computer-based discovery at the onset of a case may diminish that party's later claim that the other side improperly destroyed once-available evidence. *Fujistu Ltd. v. Federal Express Corp.*, 246 F.3d 423, 435-36 (2nd Cir. 2001). For example, in *Saul v. Tivoli Systems, Inc.*, 2001 U.S. Dist. LEXIS 9873 (S.D.N.Y. 2001), the court found that Tivoli's failure to marshal documents that were in existence at the time of the beginning of the lawsuit, along with its subsequent failure to pursue the matter in a timely fashion in the litigation, diminished the alleged harm that Tivoli suffered from plaintiff's destruction of evidence. *Saul*, at 50-51.

Prior to the filing of a complaint, the necessity of preservation of evidence rises and falls on the potential relevancy of the evidence to litigation of which the defendant has notice. *See Capellupo v. FMC Corp.,* 126 F.R.D. 545, 547-51 (D. Minn. 1989) (gender discrimination defendant sanctioned for destroying employment records after plaintiff notified defendants about discrimination concerns but before complaint was filed); *but see McGuire v. Acufex Microsurgical, Inc.*, 175 F.R.D. 149, 153-56 (D. Mass. 1997) (general obligation to preserve evidence after filing does not prohibit party from editing and discarding drafts contained in employee files that were not directly relevant to the plaintiff's claim of sexual harassment).

Naturally, disregard of specific court orders compelling the production or preservation of evidence are typically met with harsh sanctions. *See Linnen v. A.H. Robins Co.,* 1999 Mass. Super. LEXIS 240, at 16, 1999 WL 462015, at 6 (1999)*; In re Prudential, supra.* Efforts to hold defense counsel responsible for evidence destruction have been largely ineffective. However, the courts do generally expect counsel to advise clients of "pending litigation and the duty to preserve evidence." *New York Nat'l Org. for Women v. Cuomo*, 1998 U.S. Dist. LEXIS 10520, at 6 (S.D.N.Y.) (citing *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 73 (U.S. Dist. S.D.N.Y. 1991).

The severity of sanctions for spoliation of evidence is limitless. In *In re Prudential, supra*, the defendant was alleged to have made misrepresentations in sales materials affecting 10.7 million policyholders. The trial court ordered Prudential to remove deceptive marketing materials from circulation and refrain from continued use, but to preserve the materials for the litigation. The court found Prudential lacked coordination with its 334 field offices of the pendency of the litigation and only "haphazardly" attempted to preserve documents in compliance with the court order. The court characterized Prudential's effort as "grossly negligent," meriting sanctions, including requiring Prudential to mail a copy of the court's order to every employee; requiring preparation a written manual embodying Prudential's document preservation policy; establishment of a "hotline" telephone number to facilitate reports of document destruction; a $1 million fine; and reimbursement of fees and costs incurred by plaintiff in presenting the motion for sanctions.

Claims of destruction of evidence and the protection of clients from such claims have long been a part of the defense practitioner's discovery experience. The evolution of computer networks, data storage capabilities, e-mail and the Internet have affected that experience dramatically. In her paper for the DRI e-discovery conference in 2001, my former partner, Lori Iwan, addressed several issues pertinent for our discussion of spoliation. I have used and expanded her listing of issues and suggestions in order to increase the practitioner's awareness of spoliation in the e-discovery context. A discussion of the particular challenges posed by electronic discovery follows.

II. The "electronic age" is continually changing the spoliation landscape, but guidance can be drawn from the courts' treatment of various issues that arise.

Federal Rule of Civil Procedure 34 defines discoverable documents to include "data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form…." The courts have remained true to the Rule. *See, e.g., Anti-Monopoly, Inc. v. Hasbro, Inc.*, 1995 U.S. Dist. LEXIS 16355, at 4, 1995 WL 649934 (S.D.N.Y. 1995) ("[I]t is black letter law that computerized data is discoverable, if relevant."); *Crown Life Ins. Co. v. Craig*, 995 F.2d 1376 (7th Cir. 1993) (sanctions appropriate where producing party ignored its obligation to produce electronic data because the requesting party had only asked for "documents"); *Linnen v. A.H. Robins Co.*, *supra* ("discovery request aimed at production of records retained in some electronic form is no different, in principle, from a request for documents contained in an office file cabinet").

"What data is discoverable?" is not as difficult a question as "When is data discoverable?". Sanctions have been entered against defendants for failure to preserve electronic evidence, regardless of the reason for its destruction. For example, in *Lewy v. Remington Arms Co., Inc.*, 836 F.2d 1104 (8th Cir. 1988), the defendant was on the receiving-end of a "missing evidence" instruction as a result of its failure to retain certain documents. The documents were destroyed during suit pursuant to a 15-year-old record-retention policy. The court found there was an obligation to retain records, notwithstanding the reasonability of the destruction policy. *Lewy*, at 1112. On the other hand, some courts are less-inclined to require interruption of record-retention policies. *See*, *Stricklen v. Fed. Aviation Admin.*, 1994 U.S. App. LEXIS 19533 (9th Cir. 1994) (FAA not sanctioned for destroying computer tapes pursuant to its own recycling policy); *Cuomo, supra*, at 6 (destruction of evidence during regular recycling procedures not sanctionable because content of deleted evidence was unknown, and because destruction was inadvertent and not in bad faith). The above cases guide lawyers toward the practice of advising clients to give immediate consideration to ceasing destruction of data, and preserving relevant evidence, electronic and otherwise, when litigation becomes a possibility.

The "afterlife" of a deleted computer file also raises issues about the discoverability of evidence properly "destroyed" pursuant to a retention policy. The American Bar Association Section of Litigation has attempted to alleviate the concern of practitioners when deleted data has left an "electronic trail" by adopting the following standard with regard to restoration of electronic information:

> Unless the requesting party can demonstrate a substantial need for it, a party does not ordinarily have a duty to take steps to try to restore electronic information that has been deleted or discarded in the regular course of business but may not have been completely erased from computer memory.
>
> ABA Section of Litigation, Civil Discovery Standards, Part VIII, Para 29(a)(iii).

While the ABA and most courts find no duty to restore "deleted" files, the questions still remain as to the duty your client has in maintaining and preserving electronic data. Maintaining computerized data as it exists at the (elusive) time when the duty to preserve arises seems to be the best protection from a spoliation claim. The following provides some suggestions on how to protect a client from an electronic spoliation problem, even considering the ever-changing technology and legal environment.

III. Implementation and keen supervision of data-retention and destruction policies, combined with immediate legal guidance in the event of potential litigation will diminish the threat of a spoliation claim.

As lawyers, we should encourage our clients to anticipate electronic discovery issues before litigation starts, in light of the unambiguous obligation to produce electronic evidence, and we should help them anticipate and plan for the contingency of electronic discovery requests.

1. Assist clients in preparing and maintaining data retention policies.

"To be sure, the duty to preserve does not require a litigant to keep every scrap of paper in its file." *See* 7 *James Wm. Moore et al., Moore's Federal Practice* §37.120 (3d ed. 1999). A sound corporate data retention policy is business, rather than litigation-related. The goal is to preserve valuable business information in useable, retrievable form, on demand, to aid in the cost-effective operation of the business. Properly drafted, the policy is clear in its mission and its implementation, and has been disseminated to all employees. Despite the business-focused intentions, a good data retention policy will be invaluable in the

context of litigation, as well. In two cases where severe discovery sanctions were entered against the corporate defendants, the courts noted that the disorganized and haphazard approach to document preservation in litigation could be traced back, in part, to the absence of any corporate retention program.

2. Sensitize clients and their employees of the lasting nature of electronic data.

The electronic age has certainly changed our method of communication from the paper and pen to the keyboard and mouse. It can hardly be disputed that the form and substance of our communication has changed as well. Communication, even in the workplace (perhaps, *especially* in the workplace), has become casual and less than thoughtful. Jokes, pictures, petitions, off-hand comments, intimate conversation and private business communications are exchanged via e-mail at a rate of 6.8 trillion messages per year. David S. Bennahum, *Daemon Seed*, WIRED, May 1999.

The fact is, these files may remain in a computer long after having been deleted. "Deleting" a file sometimes means nothing more than eliminating access. "Fingerprints" of an e-mail or other deleted file can remain on a computer's hard drive indefinitely. Moreover, a computerized file can reveal additional information about a document not available in the "pen-and-paper" version, including date of creation of the document, changes to the document, identification of machines or even users who had access to the document, etc.

Psychologists may be able to provide an explanation why we have taken less responsibility for the written word as it appears in an e-mail, as opposed to the handwritten word, because the technology and the ability to "delete" electronic data do not. It is apparent that we have been lulled into a sense of security that we can deny what we write in an e-mail or a draft of a document because we can cause the message to disappear from our computer monitor, and seemingly be erased forever.

It is critical that clients be warned about the potential "revival" of deleted data, both before its creation and after. Being aware of the potential of living with an e-mail or other writing forever may prompt your clients and their employees to think twice before typing. In reality, the best way to avoid potentially damaging effects of "bad evidence" is never to create it. Once the communication has made its way into cyberspace, your clients should rightfully believe that damaging evidence will be discovered.

3. Encourage clients to work with IT departments to prepare a practical and helpful crash recovery policy.

We need only look as far a September 11, 2001, to know the necessity of a good document- and data-recovery system. A well-thought out data-retention plan does

not begin to meet a business' needs or the demands of litigation in the event of an electronic crash. In the event the business network servers fail, a crash recovery plan must restore the business to its operating status as it existed moments prior to the crash. Historically, IT departments have largely been left on their own to devise disaster recovery plans. IT departments may indiscriminately save everything or nothing, absent oversight from management. Disaster can strike when suit is filed and one learns too late that the IT department has ten years' of e-mail stored on hundreds of storage tapes. PC hard drives may never have been cleaned. It can be a rude awakening to be served with a discovery request and learn that the tapes and PC data must be organized, copied, and produced at great cost, both in terms of money and risk exposure. Good business planning involves senior management, the legal team, business unit supervisors, and the IT personnel in the creation of a disaster recovery plan.

A cogent crash recovery policy will also assist the legal team in determining the scope of information that has been maintained by the IT department when searching for information relevant to the litigation. For example, if IT permanently archives one tape per year and recycles all other backup tapes every thirty days, per the crash recovery policy, then defense counsel can credibly argue to the court that the scope of electronic discovery should be limited to the available data, and quickly dispel any inference that other data is being withheld or intentionally destroyed by the defendant.

4. Work with clients to establish a protocol to enforce and document compliance with data retention and crash recovery policies.

If a requesting party can provide evidence to the court that your client's e-discovery policies were at best haphazardly followed, our ability to limit the breadth of an e-discovery request will be hampered. Strict adherence to the policies will allow counsel to credibly argue to the court that available evidence is limited to the materials identified in the corporate retention and recovery policies. Furthermore, the risk that years of data is sitting on company backup tapes is lessened if the company policies are routinely monitored and enforced.

5. Encourage clients to educate all employees regarding the scope of data retention and recovery policies, and their obligation to comply with the policies.

More than one defendant has been undone in discovery by employees' testimony that they were unaware of obligations to retain certain information, and to destroy other information. The courts have dealt harshly with defendants when employees destroyed relevant information due to the employees' ignorance of court orders and company policies requiring the retention of the information. Periodic meetings and new employee orientations must address e-discovery issues and policies.

6. Establish a protocol through which your clients' employees are notified of the need to retain information when litigation is threatened or filed.

Your clients have an affirmative obligation to preserve evidence, including electronic data, as soon as it becomes "reasonably foreseeable" that the evidence may be relevant to litigation, regardless of whether a lawsuit has been filed. "The duty to preserve documents in the face of pending litigation… must be discharged actively." *Danis, supra*. In *Danis,* the court described several components of that duty, *i.e.*, to communicate obligations to employees, monitor the condition of physical evidence, maintain and preserve information and to establish and distribute a comprehensive document retention policy. *Danis*, at 96-98. According to the Danis Court a failure to do so may constitute "extraordinarily poor judgment' or "gross negligence." *Id.* (citing *Marrocco v. General Motors Corp.,* 966 F.2d 220, 224 (7th Cir. 1997)).

The case law seems clear that a general directive from management to "preserve the necessary information" is woefully inadequate to fulfill the duty to retain documents in litigation. The prudent litigant will be prepared to provide all employees with specific direction concerning a need to preserve evidence and data in the face of threatened litigation. All employees must be given clear, timely and specific direction not to destroy documents, computer files or other data. Directives to employees should include enough information to quickly identify data that should be preserved. The following (where applicable) should be included in any directive to ensure that it can be followed with accuracy: date ranges; departments; employee names/positions; files by name (files involving customer x, or salesperson y, etc.); types of data (design, production, sales, purchasing, patents, etc.); key words or terms ("male", "female", "competition", "dangerous", etc.). Defense counsel should be prepared to discuss with management the information that must be preserved, and appropriate means of directing employees at all levels to adhere to the preservation program.

Such a policy would have helped the defendant avoid heavy sanctions in *Linnen v. A.H. Robins, Co.*, *supra*. The defendant, in *Linnen*, asked the court to lift an *ex parte* order regarding preservation of relevant documents, having promised that all relevant documents would be preserved. The court later learned, however, that the defendant had continued its routine practice of recycling e-mail backup tapes during the period that the *ex parte* order was in place. Despite the defendant's claim that the continued recycling was inadvertent and that no relevant e-mail had been destroyed, the court held that when "the *ex parte* order requiring the defendant to preserve all documents relating to this action was in effect, the customary recycling of back-up tapes for the electronic mail system should have been suspended." *Linnen, supra,* at 10. Finding such conduct "inexcusable," the court ordered the defendant to reimburse the plaintiff for its costs associated with

e-mail discovery issues, and agreed to instruct the jury to infer that e-mail had been destroyed intentionally. *Id.* at 11, 13.

7. Encourage your client to appoint a team to monitor compliance on a routine and random basis throughout litigation.

The courts have dealt harshly with defendants that issued general directives for evidence preservation and failed to follow-up to ensure compliance. A compliance team needs to be in place during the litigation. The team must document its efforts to inform employees of the retention requirements, and its efforts to monitor and ensure compliance.

8. Remind clients that it is appropriate to provide for a means to save the required data in an alternative storage medium to free up company resources for the regular operation of the business during litigation.

The courts have found it acceptable for a business to transfer relevant electronic data relevant to litigation to other storage media and return the regular backup tapes back into circulation. If the cost of freezing the backup system is too high, remind clients they may consider an alternate storage plan for electronic information relevant to the litigation. The defendants in *In re Cheyenne Software, Inc. Securities Litigation,* 1997 WL 714891, at 1 (E.D.N.Y. 1997), would have benefited from storing data in another form, considering they were sanctioned for continuing regular business practices that resulted in deletion of electronic evidence on hard drives, even though practice was not "entirely unreasonable," because they could have saved information by copying it onto any other relatively inexpensive storage media.

9. Ask clients for assistance with identifying costs associated with the retrieval and storage of litigation-related information.

A key factor in determining the scope of electronic discovery is whether the cost of retrieving, storing and managing data is justified by the magnitude of the litigation. A well-researched cost assessment of the retrieval of electronic information will be invaluable to the defense in the argument that the court should limit discovery or shift the cost to the plaintiff.

10. Identify the person(s) within the company who are suitable corporate representatives for depositions regarding the storage, retrieval and document retention plans as they related to electronic information.

Sophisticated plaintiffs' counsel will start cases with the deposition of IT department personnel (corporate representative depositions) to identify where evidence is located, how it is stored and how it can be retrieved. A misstep at this deposition can haunt the defendant throughout the discovery process. A solid litigation plan includes immediate identification of those persons capable of explaining the IT system, the data retention and crash recovery policies, and compliance and enforcement mechanisms in an accurate manner.

11. Immediately notify opposing counsel of the possibility of computer-based discovery requests so as to avoid negligent spoliation.

Attorneys should ensure that the opposing counsel is provided with notice that there is a possibility of computer-based discovery. Providing opposing counsel with notice will serve as a basis for arguing that electronic data need not be produced or preserved, if opposing counsel does not make a request in a reasonable time period after notice is given.

12. Reach agreements with opposing counsel early in the litigation with respect to discovery of back-up data.

Attorneys should attempt to discuss the discovery of any electronic data with opposing counsel, prior to mandated disclosures so that the judge can issue a clear preservation order, based upon the agreement between the parties. The agreement should address the nature and extent of permitted discovery, as well as the costs of such discovery. Such an approach will help to avoid disputes concerning such data, and will provide the client with clear guidance, from the start of litigation, as to the necessary preservation of data.

13. Be prepared to educate the court as to your client's computer system(s) and data-retention policies and capabilities.

Regardless of his or her knowledge or expertise, you can be sure your opponent will advise the court of the "ease" at which your client can access, search, sort, print, copy and send the volumes of data, for several years, requested in a production report. A defense attorney, without an immediately responsive and realistic description of the availability of data, the means to obtain the data, the relevance of that data to the litigation, and the intrusiveness of the request, will appear to be stone-walling when he or she returns to court empty-handed when the time to comply with a court order is running out. An attorney with a working knowledge of the client's computer system and data-retention policies and

capabilities, and an ability to respond to questions, can refute the opposition's claim that a "push of a button" can generate a response to a document request. A defense practitioner who takes time to educate the court (and the opposition) before such a claim is made will certainly gain credibility for himself and his client, and may have more control over discovery as the case progresses. This would include knowledge of the computer system as a whole, including network design and dial-in access, the nature and extent of archival files, the methods available to conduct a search of particular data and the potential volume of data likely to result from a search, and the availability of other, non-computerized methods to secure particular evidence.

Being knowledgeable of your client's computer system can directly protect your client from sanctions, as well. Consider the court's decision in *GTFM, Inc. v. Wal-Mart Stores, Inc.*, 2000 U.S. Dist LEXIS 16244 (No. 98 Civ. 7724), (U.S. Dist. S.D.N.Y.), where the plaintiff was awarded $109,753.81, for fees and expenses incurred in pursuit of discovery and prosecution of a motion for sanctions "due to [Wal-Mart's] failure to make an accurate disclosure of its computer capabilities." *GTFM*, at 10.

14. Consider use of a neutral expert to conduct inspections of computer files for purposes of electronic discovery requests.

Enhancement of credibility with the court, preserving information necessary for both business operations and litigation, and protection against continued probes into the client's computer system can be achieved through the use of an investigator, acting as an "officer of the court" to conduct discovery. Recent Federal cases have instituted a procedure for inspections by neutral, third-party computer experts, in part, in response to the problems created by a plaintiff's expert in *Gates Rubber Co. v. Bando Chemical Indus., Ltd.*, 167 F.R.D. 90 (U.S. Dist. Ct. D. Colo. 1996), wherein the "expert" failed to obtain and preserve creation dates of essential files, failed to use accepted computer evidence preservation procedures, and even randomly erased seven to eight percent of a computer during an on-site inspection of a defendant's computer system pursuant to the court's order. "Accepted" procedures instituted by the courts for the use of such an inspector are as follows:

> The parties agree on a neutral inspector;
> The parties, with assistance from the expert, agree on scope of inspection and form of production;
> The expert preserves the integrity of the original system by creating a "mirror image" of the data;
> The expert execute a search on the "mirror image," identifying responsive data;
> The expert supplies the respondent's attorney with the responsive data, so that it may be reviewed for privilege; and
> Respondent produces relevant, non-privileged data to the requesting party.

See, *Simon Property Group, L.P. v. mySimon, Inc.*, 194 F.R.D. 639, 641-42 (U.S. Dist. Ct. S.D. IN 2000); *Playboy Enterprises, Inc. v. Welles*, 60 F. Supp. 2d 1050, 1055 (U.S. Dist. Ct. S.D. CA 1999).

* * *

Recent events involving Arthur Andersen & Co. and Enron Corporation demonstrate the effects of a charge of spoliation, not only inside, but also outside the courtroom. Charges of possible insider trading, failure to comply with SEC regulations, false accounting and deceptive practices have not lingered in the public's memory as has the charge against Arthur Andersen of shredding documents. While both Andersen and Enron may have managed to survive the former, the latter appears to be smothering the accounting giant. We might take a lesson from these events and conclude a jury may prefer to hear the evidence than an instruction advising that the evidence had been intentionally destroyed. Corporations with a well-planned, regularly enforced, data-retention and litigation management plan and counsel familiar with the issues encountered in electronic discovery can avoid a charge that the corporation randomly (or worse, selectively) destroyed information relevant to the pending litigation, which can be invaluable, not only to litigation, but to business, as well.