

Ungaretti & Harris LLP  
E-Discovery Update

**Blocking the Reach of Employers to View Their Employees' E-mails – The Importance of *Stengart v. Loving Care Agency, Inc.***

*By James M. Carlson*

In June of this year, the New Jersey Superior Court released an appellate opinion that may drastically impact employer's expectations of claiming possession and access to their employees' e-mail. In this case, the Court ruled that a company did not have access to a former employee's e-mails with her attorney even though she had sent them using a company laptop computer. Perhaps the most important part of this ruling is the fact that the company did have a policy with regard to e-mail. But having a policy was not enough. The company had neglected to implement the policy, failed to educate its employees about it, and utterly failed to obtain a signed acknowledgement of receipt of the policy from the former employee. Like many other e-discovery cases, this case can be a road map as to what one should and should not do when mixing electronic data with litigation.

**Background and Facts of the Case**

In *Stengart v. Loving Care Agency, Inc.*, Marina Stengart filed a lawsuit against her former employer for, among

other things, numerous allegations of discrimination under New Jersey law.<sup>1</sup> Her former employer is a home care services company (the "Company") where Ms. Stengart previously worked as Executive Director of nursing. After Ms. Stengart filed suit, her former employer created a forensic image of the computer laptop hard drive she used while an employee. The Company's attorneys were able to retrieve Ms. Stengart's Internet browsing history and read numerous e-mails between Ms. Stengart and her attorney. The e-mails were not sent via the Company's e-mail servers but via Ms. Stengart's own Yahoo e-mail account. Regardless, she had used the Company's work-issued laptop to access these e-mails and the Yahoo website.

Upon discovery of these e-mails, the Company's attorneys did not disclose the fact that they had recovered communications that might have been protected by the attorney-client privilege. Instead, the Company's attorneys used the e-mails during discovery to gain a tactical advantage against Ms. Stengart. Once disclosed, Ms. Stengart sought to block the use of these privileged e-mails and any other privileged matters that the employer's lawyers might have discovered.

**The Competing Arguments**

The Company alleged that it had strict policies with regard to the use of e-mail communication at work. In fact, the Company had a written policy that explicitly stated that it had the right to "review, audit, intercept, access, and disclose all matters on the Company's media systems and services at any time, with or without notice." The policy broadly defined Internet usage and e-mail usage. It strongly asserted the Company's right of immediate and unfettered access to e-mails sent from Company computers. The Company's lawyers argued that by using a Company laptop to send and receive these e-mails Ms. Stengart had waived any attorney-client privilege. Therefore, these e-mails – while normally protected from opposing counsel and from being used at trial – would now be fair game.

In response, Ms. Stengart argued that the Company failed to demonstrate that it ever had such a policy. More importantly, she argued that the Company never successfully adopted or distributed the policy. The policy, in a sense, had sat in somebody's desk drawer and had never been properly implemented at the Company. The Company's employees had never been educated about

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the policy and there was no indication that Ms. Stengart had received, reviewed, and then confirmed her receipt and review of such a policy.

### The Court's Ruling

The Court ruled that the e-mails still remained protected by the attorney-client privilege. Additionally, the Court ruled that the Company's attorney immediately return all of the e-mails between Ms. Stengart and her attorneys. The Court even went so far as to consider whether or not the Company's lawyers should be disqualified from further representing the Company in the case. At the time of press, this matter had not yet been resolved.

### The Key Importance of This Ruling

This case is a clear representation of what happens when a company has a perfectly good policy that is simply not implemented correctly, if at all. Here, the result may well have been drastically different if the Company diligently had implemented its e-mail policy, educated its employees, and required a signed acceptance regarding the policy. In this case, the failure to do so may have cost the Company valuable ammunition in the case. And it still may cost the Company use of its counsel at trial. As is always the risk with e-discovery issues, the case is now known, not for the key issues at the core of the case, but for a battle over improper handling of electronic data. Left unchecked, even the best cases can be overshadowed by e-discovery blunders.

<sup>1</sup> Stengart v. Loving Care Ag. Inc., 973 A.2d 390 (N.J. Super. Ct. June 26, 2009).

tends to frustrate the party requesting discovery from being able to access the information produced."<sup>1</sup> This, however, omits a voluminous amount of data about the documents, or metadata, that is extremely helpful in defending or prosecuting a case.

In our experience litigating in Illinois State Courts, if a discovery request seeks production of documents in native storage format, the producing party acts at its peril by producing the documents in printed form. Judges in the Circuit Court of Cook County often treat Rule 214's requirement to produce documents "in printed form" as a default rule in the event native documents are not requested. But, if native format is requested, judges will often require production in native form. This approach is consistent with the purpose behind Rule 214, which is to make discovery less burdensome for the receiving party. Often, receiving documents in native storage format is more efficient, less costly, and provides more useful information. Such requests require sophisticated counsel who both understand the e-discovery world and are comfortable litigating in Illinois State Courts.

Therefore, as is the practice in federal court, it is best for counsel to confer with opposing counsel on the form of production before relying on Rule 214's "in printed form" requirement. Otherwise, a party who ignores a request for documents in native storage format risks having to reproduce documents in the format requested.

<sup>1</sup> ILL. S. CT. RULE 214 cmt.

## Illinois Supreme Court Rule 214: Is Production "In Printed Form" Sufficient?

*By Richard H. Tilghman IV*

This newsletter has previously explained the importance of requesting and producing documents in native storage format (i.e., .doc, .xls, or .pst files) as opposed to producing paper copies. Such a trend is now a near absolute requirement under the Federal Rules of Civil Procedure and there have been many cases addressing these issues in federal courts. Some state courts, however, are somewhat slower to codify this trend. In fact, despite the growing body of law requiring production of electronic files in native storage format, Illinois Supreme Court Rule 214 provides that a party receiving a document request must produce "all retrievable information in computer storage in printed form." The purpose of requiring production in printed form is to "prevent parties producing information from computer storage on storage disks or in any other manner which

## Liabilities of Unnecessary Retention of Drafts

*By Nile N. Park*

One of the largest issues concerning electronic data arises out of drafting numerous versions of corporate documents including contracts, operating agreements, and other typical documents. Many companies do not know how many drafts – if any – they should retain for the purposes of proper record retention. While there are numerous approaches to dealing with multiple versions of the same document, there are a few points that are absolutely clear. First, drafts of various documents are discoverable. A party usually cannot claim that it should only have to produce the latest version of a document. Each and every draft of a document is discoverable. There are no protections – and very few privileges – against production. Second, sophisticated attorneys and vendors will be able to "mine" digital documents and learn the edits made to a document even if it appears that drafts were not kept by the author.

### **One Management Option – Overwriting Old Electronic Versions**

While there are many valid approaches to dealing with multiple revised versions of the same document, the simplest is to save over the original electronic document instead of creating a new version in a different document. By doing so, the author maintains one “live” version of the document and production would be simplified. Further, while retaining drafts may at times be desirable or even necessary, careless retention of multiple drafts may not be without future cost.

One problem with simply overwriting old drafts, however, is that the old drafts may actually have significant value. A prior draft of a document may be important – if not necessary – both to a company’s work and any litigation in which the company may be involved in. Additionally, a company’s document retention policy should be clear and unambiguous that only one live version of certain documents should be maintained– if that is the approach the company is pursuing.

### **Why Simply Overwriting Old Versions Is Not the Universal Answer**

The idea of simply overwriting all old digital versions of a document, however, can be wrought with danger. If a company, firm, or individual cannot show that this is part of the typical course of business and that there is a written policy endorsing such file maintenance, a court may find that the company, firm, or individual has willfully destroyed potential evidence. The outcome of such a finding would be disastrous.

### **Why Drafts Are Important and Dangerous**

A contract interpretation case illustrates the importance of this rule. In a case where the intent of the parties is the key issue, drafts are discoverable and can potentially change the outcome of a case. A different unexecuted draft of a contract may reveal that either one or all parties have actually considered a proposed interpretation of a contract but rejected it for different terms. Because the content of old versions of documents may determine who wins or loses such a contract interpretation case, it is desirable to have an aggressive written policy that codifies your company or firm’s approach to dealing with such documents. The right approach may be the active overwriting of old drafts.

### **A Separate Issue – Drafts of an Expert Report**

The issue of which drafts to maintain also arises when experts are retained during litigations. The Federal Rule of Civil Procedure 26(a)(2)(B) requires disclosure of all materials considered by a testifying expert, and courts have interpreted the rule as requiring disclosure of communications between the expert witness and attorney, including circulated draft reports. Thus,

once a draft report has been “published” by circulation for comments and edits, it may be discoverable and overwriting may expose a party to sanctions for spoliation. Dealing with this issue is particularly thorny and is best left to experienced and sophisticated counsel. It is a separate and distinct issue from how a company generally maintains and retains its draft documents.

The above-mentioned solutions are only a starting point regarding the issue of retaining document versions. It is an issue that will be further addressed in this newsletter and will no doubt be appearing in case law as a serious issue for years to come.

## **States Begin to React to the Federal Rules Addressing E-Discovery: California’s Electronic Discovery Act**

*By Emily M. Dierberg*

Since the 2006 Amendments to the Federal Rules of Civil Procedure that explicitly address e-discovery, many states have contemplated enacting similar rules affecting state based litigation. On June 29, 2009, the California legislature enacted its own Electronic Discovery Act.<sup>1</sup> By doing so, California promulgated its own e-discovery specific rules that are largely based on the 2006 Amendments to the Federal Rules of Civil Procedure addressing electronic discovery. Most importantly, the California Act specifically includes electronically stored information (ESI) in the state’s Discovery Act and requires the production of such ESI during the discovery process.

The California Act provides significant advantages and opportunities for California litigants in managing the costs of electronic discovery. Traditionally, parties pay for their own discovery production costs. There are exceptions however. For example, Federal Rule of Civil Procedure Rule 26(b)(2)(C) gives a Federal Court the authority to shift discovery costs to the requesting party or between the parties. The California Act has codified its own process for dealing with such concerns.

### **Cost-Shifting Under the California Act**

California’s Act *mandates* cost-shifting to the demanding party when translation is required. Some electronically stored information, as it is ordinarily maintained, is not in a reasonably usable form and requires translation. The California Act provides that “[i]f necessary, the responding party *at the reasonable expense of the demanding party*, shall . . . translate any data compilations included in the demand into reasonably usable form.”<sup>2</sup> This provision

will be very useful if a party is seeking the production of older data or data that is particularly esoteric.

### Subpoena Issues Under the California Act

The California Act also creates a new code section relating to subpoenas seeking ESI. A subpoenaed party can object to ESI from a source that is “not reasonably accessible because of undue burden or expense.”<sup>3</sup> If the court finds good cause for the production of ESI that is not reasonably accessible, the court may allocate the costs of production between the parties. This part of the California Act will be very useful for a third party unexpectedly dragged into a costly litigation process.

California’s Act provides a significant opportunity for parties responding to discovery requests because they may not need to bear the costs of handling and producing ESI. Litigants in California state courts must therefore take these amendments into consideration when formulating a discovery and litigation strategy. Corporations and litigants should also monitor other state’s e-discovery rules for potentially similar provisions. This newsletter will continue to monitor the California Act as well as other new state laws regarding e-discovery.

<sup>1</sup> See generally Cal. Civ. Proc. Code § 2031.280 (2009).

<sup>2</sup> Cal. Civ. Proc. Code § 2031.280 (e) (2009).

<sup>3</sup> Cal. Civ. Proc. Code § 1958.8 (d) (2009).

## Tech Corner – Dealing with Employee Terminations

By Heidi Goldwater

There are many reasons why an employee may no longer work for you. They may have voluntarily left, been part of a company workforce reduction, or terminated for other reasons. Regardless of the reason, there are a few issues that employers should address upon termination.

### Former Employee’s Network Accounts

After dismissal an employee may still have access to an employer’s network and their individual e-mail account. It may be proper to advise your Information Technology staff to immediately disable an employee’s account and lock their computer upon termination. Many times employees will have remote access to company systems from home, so this access may also need to be disabled.

### Return of Company Technology

Once terminated, an employee should be asked to relinquish all of their company-issued technology including laptops, smart phones, or Blackberry devices.

### Be Mindful of Immediately Reusing Computers or Erasing Data

If an employee may be part of future litigation, it is always wise to discuss this with your counsel. Counsel will be able to recommend what data should be retained regarding former employees. Counsel may suggest special retention of a former employee’s computers and/or handheld devices. An up-to-date digital document retention policy can provide such guidance.

Remember: it is important to keep track of what technology devices your employees have and what their level of access is to remote e-mail and other applications. Keeping track of this information will ensure a simplified process of collecting all of a terminated employee’s assets and disabling all of their active accounts.

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