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Hard-Learned Lessons

'NTL' Is a Reminder to Focus on E-Discover Early in Litigation

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With the long-anticipated revisions to the Federal Rules of Civil Procedure having only recently come into effect, the sense of uncertainty that has historically surrounded electronic discovery promises to linger. While the bar will watch with keen interest as the courts begin the slow process of interpreting and applying these new rules, a recent opinion, *In re NTL, Inc. Securities Litigation*,1 serves as a pointed reminder that basic issues of electronic discovery practice continue to trip up even large and sophisticated litigants.

The case also supplies some useful lessons for those who remain befuddled by discovery in the digital age. Although the problems presented by the need to retain, collect, review, and produce electronically stored information can draw attorneys into unfamiliar technological territory, *In re NTL* teaches that the fundamentals of discovery practice that apply in all contexts—such as planning ahead, searching broadly, being forthright with the court and adversaries, and closely monitoring subordinates and clients—have not been displaced but, on the contrary, have only assumed increasing importance in the era of electronic discovery.

'In re NTL'

On Jan. 30, 2007, Magistrate Judge Andrew J. Peck granted plaintiffs' motion for spoliation sanctions—including an adverse inference instruction, attorney's fees and costs—against defendant NTL Europe, a successor to the original defendant, NTL, Inc. (old NTL). The road to spoliation sanctions in the case, as is typical, was a long and winding one, littered with failures to keep track of electronic documents in a shifting business landscape.

A class action securities suit was filed against old NTL and various officers and directors in April 2002, followed by an individual suit brought by Gordon Partners later that year. Having anticipated such litigation due to the company's recently filed Chapter 11 bankruptcy, old NTL had already circulated its first litigation hold memo to a small group of employees in March 2002. After litigation began, that memo was renewed and recirculated in June.

ELECTRONIC DISCOVERY

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In September, the company emerged from bankruptcy as two principal entities: NTL Europe, the legal successor to old NTL, which remained a defendant in the pending lawsuits, and NTL, Inc. (new NTL), a surviving operational company, which was not a defendant.

Immediately following their emergence from bankruptcy, both NTL entities made crucial document-retention missteps that would come back to haunt them before Magistrate Judge Peck.

First, as part of the restructuring, NTL Europe—despite the fact that it remained a defendant in the pending lawsuits—turned over to new NTL all documents in its possession that had been generated by old NTL and, more significantly, failed either to retain copies or to ensure that new NTL maintained the existing litigation hold.

Second, as a result, when new NTL outsourced its information technology systems to IBM and upgraded its computers in late 2002 and 2003, the company "did not have any document hold in place at all," leading to the deletion of many documents and e-mails created during the periods most relevant to the ongoing litigation.

When discovery began in earnest in mid-2005 with the plaintiffs' first set of document requests to NTL Europe and the individual defendants, these errors were revealed and compounded.

In response to the request, NTL Europe "did not produce any responsive documents or e-mails," claiming that all such documents and e-mails were held by new NTL, to whom all old NTL documents had been transferred.

Plaintiffs followed up by serving a third-party subpoena on new NTL requesting the same documents that it had previously sought from NTL Europe. New NTL produced 70 boxes of documents and some e-mails, but it too produced far less relevant information than anticipated. At that time, counsel for new NTL admitted that many requested documents no longer existed, in part due to the data lost in the 2003 computer upgrade.

Plaintiffs could be confident, however, that relevant documents and e-mails had once existed. In fact, one individual plaintiff, George Blumenthal, a former old NTL employee who "had requested and obtained copies of his e-mails upon leaving his employment" in 2002, produced several revealing e-mails in response to plaintiffs' requests, none of which were turned over by the NTL entities, and many of which were from the crucial periods for which both NTL Europe and new NTL claimed to have no responsive documents.

Although new NTL sporadically produced some documents and e-mails over the next year, plaintiffs remained dissatisfied, particularly since e-mails from most of the "key players" had not been produced.

Frustrated by the defendants' production to that point, plaintiffs deposed several NTL Europe and new NTL employees regarding the document retention policies at old NTL, new NTL and NTL Europe.

These depositions exposed the document-retention failures of the post-bankruptcy period, as well as the existence of a document-sharing agreement, which defendants had not previously disclosed, that entitled NTL Europe to access any and all of the documents now possessed by new NTL that were required for compliance with any legal obligation.

By failing either to disclose this agreement or to seek documents from new NTL in response to the plaintiffs' document requests, as it concededly had the right to do, NTL Europe had unnecessarily forced plaintiffs to seek third-party discovery from new NTL.

Armed with these disclosures—the NTL entities' failure to maintain the litigation hold, retain documents relevant to the pending litigation, or disclose the document-sharing agreement—the plaintiffs filed a motion for discovery sanctions in April 2006. These motion papers first revealed the existence of the document-sharing agreement to the court, a development Magistrate Judge Peck considered "quite distressing." Thus, the court ruled, sua sponte, that NTL Europe would have to review any documents currently possessed by new NTL

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and begin production within the week, all at its own expense.

No doubt conscious of the court's displeasure, the junior attorney who represented NTL Europe at the discovery hearing consented to this order on the spot. (The court, not surprisingly, rejected a later claim by the attorney's superiors that she was "too junior to knowingly consent" to such an order.)

Although defendants conducted the review and production mandated by the court, Magistrate Judge Peck nonetheless granted the plaintiffs' motion for sanctions. In his view, (1) NTL Europe retained "control" over all relevant documents held by new NTL because it had the right to access them under the document-sharing agreement; (2) following the bankruptcy, the NTL entities negligently failed to retain those documents or maintain the litigation hold; and (3) the Blumenthal e-mails demonstrated that the negligently deleted documents and e-mails would have been relevant to the plaintiffs' claims.

Six Important Tips

The steps that the NTL entities took—and failed to take—that led to Magistrate Judge Peck's discovery sanctions highlight a number of important lessons that counsel would be well-advised to bear in mind when faced with electronic discovery issues.

1. Plan Ahead: Failing to make an early investment in understanding a client's electronic systems and electronic discovery obligations is the first step down the road to spoliation sanctions. In *In re NTL*, by the time the defendants' counsel started to focus on this issue, it was already too late. Due to NTL's reorganization following bankruptcy, IT upgrades, outsourcing and employee departures, the information subject to the plaintiffs' discovery requests had already been lost. If defendants' counsel had focused on these issues before plaintiffs' document requests ultimately revealed the spoliation, things almost certainly would have turned out quite differently.

2. Stay Focused: Circulation of the litigation hold memo before the plaintiffs filed their complaints was a good first step, but counsel's failure to follow up and ensure compliance was ultimately fatal.

Hold memos issued at the outset of the litigation should be reissued, often multiple times over the course of a multi-year case. Counsel must also monitor compliance with the memos. As In *re NTL* makes quite clear, outsourcing, corporate restructuring, and management changes can cause document-retention issues to get lost in the shuffle. Counsel must take steps to ensure that discovery obligations are being satisfied despite such corporate upheavals.

3. Hide the Ball at Your Peril: As noted in a previous column, being transparent about e-discovery issues, particularly at the outset of a case, can have significant benefits, and *In re NTL* confirms that analysis. The court was obviously troubled that the NTL entities had failed to advise it or plaintiffs of the document-sharing agreement, which at a minimum gave NTL Europe the practical ability to secure documents from new NTL.

Rather than disclose the agreement, NTL Europe threw up its hands and told plaintiffs to go ask new NTL for the documents. After plaintiffs had devoted considerable resources to finding out why the NTL entities claimed to have so few electronic documents, the agreement was revealed, dealing a critical blow to NTL Europe's case and their counsel's credibility with the court. Had this information been volunteered early in the discovery process, it is likely that the entire situation would have been defused.

The steps that the NTL entities took—and failed to take—that led to a magistrate's discovery sanctions highlight a number of important lessons that counsel would be well-advised to bear in mind when faced with electronic discovery issues.

4. Know What You "Control": A party's discovery obligations extend to documents within their "possession, custody or control." *In re NTL* underscores that the concept of "control" may be considerably broader in certain circumstances than many litigants suppose. Documents may be deemed to be in a party's control even if that party has neither physical possession nor legal ownership of the documents, provided that they have the "right, authority or practical ability to obtain the documents." Thus, Magistrate Judge Peck held that even absent the document-sharing agreement between the NTL entities, NTL Europe had "control" over new NTL's documents—and thus an obligation to produce them—because those entities routinely shared documents in the regular course of business. Counsel must be aware of a client's relationships with its subsidiaries and affiliated entities to ensure that the client is fulfilling its document collection responsibilities.

By maintaining a focus on e-discovery throughout a litigation, and developing a knowledge of a client's business and IT systems, counsel can ensure they will not find themselves in a predicament like NTL's.

5. Don't Overdelegate: Perhaps due to the discomfort of some senior lawyers with modern information technology, there is a tendency to delegate responsibility for e-discovery to junior lawyers who are presumptively more familiar with the technology and, in all events, can benefit from the experience of litigating "minor" discovery issues. Given the increased prominence of electronic discovery, however, this strategy entails serious risks. As illustrated here, if a lawyer is considered to be senior enough to handle discovery motions in court, a judge will have little difficulty concluding that they are sufficiently senior to bind their clients on important (and expensive) issues. Parties and their counsel should recognize that their interests may be significantly affected by the outcome of e-discovery disputes and staff their cases accordingly.

6. Or Else: Magistrate Judge Peck acknowledged that the adverse inference instruction "is a severe sanction that often has the effect of ending litigation." *In re NTL* demonstrates, however, that courts are increasingly willing to make use of this powerful weapon to combat perceived e-discovery abuses. Indeed, the standard for imposing this sanction may be less demanding than some realize. To warrant an adverse inference instruction, the allegedly noncompliant party must have had a "culpable state of mind."

But this requirement is not onerous and may be satisfied by mere negligence, which will often be found when documents are misplaced or mistakenly deleted. The party seeking an adverse inference also must demonstrate the relevance of the missing information. In this context, courts require more than "relevance" in the minimal sense of FRE 401.

At the same time, however, courts are unwilling to impose too high a burden on the victims of discovery misconduct in recognition of the inherent difficulties of proving that documents which are no longer in existence because their adversaries destroyed or failed to preserve them would have helped their case. Accordingly, courts have accepted "bad faith" or "gross negligence" as circumstantial evidence that the missing evidence would have been adverse to the noncompliant party, thereby effectively lowering the bar for those seeking an adverse inference instruction.

Adverse inference instructions thus are not necessarily limited to instances of deliberate discovery misconduct, but also may be imposed as a sanction for conduct that is merely careless or lax. It is therefore all the more critical that litigants take e-discovery issues seriously from day one.

Conclusion

Keeping these lessons in mind should help counsel to ensure that their clients avoid NTL's fate. By the time defendants were facing a motion for discovery sanctions, they had already placed themselves in an impossible situation.

By focusing on e-discovery issues early, maintaining that focus throughout the litigation, and developing a knowledge of a client's business and IT systems, however, counsel can ensure that they will not find themselves in a similar predicament.

1. Nos. 02-Civ.-3013, -7377, 2007 WL 241344 (S.D.N.Y. Jan. 30 2007).