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Thomas C. Tew Esq.

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## ARTICLES

### **Electronic Discovery Misconduct in Litigation: Letting the Punishment Fit the Crime**

THOMAS C. TEW, ESQ.\*

#### I. INTRODUCTION

The electronic age has redefined the way individuals conduct business in the twenty-first century. The infiltration of computers and e-mail into the corporate world has increased the efficiency of conducting business – allowing access to an enormous amount of data with a stroke of a key and enabling instantaneous communication through e-mail. The electronic age has not only impacted the business world, but also has impacted the practice of law, specifically the litigation arena and the discovery process.

Computers' accessibility, ease of use, and ability to send e-mail has exponentially increased discoverable information. Consequently, litigators are forced to engage in electronic discovery and tackle unique problems the current rules of civil procedure do not adequately address.<sup>1</sup> On the one hand, electronic information frequently offers contemporaneous insight into the thinking and actions of both parties and witnesses alike. On the other hand, electronic communication can be misleading and prejudicial because contemporaneous electronic information often gives rise to an unwelcome spontaneity which – when retrospectively examined – can create an inaccurate impression.<sup>2</sup>

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\* Thomas Tew is a partner at Tew Cardenas LLP in Miami, Florida. Mr. Tew has extensive experience in commercial and securities litigation.

1. Harvey L. Kaplan, *Electronic Discovery in the 21st Century: Is Help on the Way?*, 733 *PLI/LIT* 65, 67 (2005).

2. Nicolas Varchaver, *The Perils of E-mail*, *FORTUNE*, Feb. 17, 2003, at 96 ("For prosecutors, it has become the star witness . . . the corporate equivalent of DNA evidence, that

This Article explores current and potential sanctions for misconduct that occurs during the electronic discovery process. In particular, *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co.*<sup>3</sup> offers a rare glimpse into the myriad paper-era sanctions, including grants of adverse inferences and default, which can be particularly appropriate for egregious discovery violations – whether electronic, paper, or a combination thereof.<sup>4</sup> In contrast, the *Coleman* cases also vividly illustrate electronic discovery's susceptibility to discovery violations. This tension forms the heart of the following analysis.

## II. THE CHARACTERISTICS OF ELECTRONIC DOCUMENTS AND THEIR DISCOVERY

Electronic discovery embraces a variety of information, for example: e-mail messages, word processing files, spreadsheets, diaries, cell phone text messages, textbook information, data from personal digital assistants, internet use histories, and downloaded files.<sup>5</sup> Electronic discovery poses special problems compared to traditional paper document discovery.<sup>6</sup> As the Committee on Rules of Practice and Procedure noted in its Report relating to certain previously proposed amendments to the Federal Rules of Civil Procedure,

[t]he discovery of electronically stored information raises markedly different issues from conventional discovery of paper records. Electronically stored information is characterized by exponentially greater volume than hard-copy documents. Commonly cited current examples of such volume include the capacity of large organizations' computer networks to store information in terabytes, each of which represents the equivalent of 500 million typewritten pages of plain text, and to receive 250 to 300 million e-mail messages monthly. Computer information, unlike paper, is also dynamic; merely turning a computer on or off can change the information it stores. Computers operate by overwriting and deleting information, often without the operator's specific direction or knowledge. A third important difference is that electronically stored information, unlike words on paper,

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single hair left at the crime scene that turns the entire case. In theory you can explain it away, but good luck trying.”).

3. See *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co. (Coleman II)*, No. CA 03-5045 AI, 2005 WL 674885 (Fla. Cir. Ct. Mar. 23, 2005); *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co. (Coleman I)*, No. 502003CA005045XXOCAI, 2005 WL 679071 (Fla. Cir. Ct. Mar. 1, 2005) [collectively “*Coleman*”].

4. *Coleman II*, 2005 WL 679071, at \*10.

5. Bradley C. Nahrstadt & Hanson L. Williams, *Electronic Discovery: An Overview of the Power and the Pitfalls*, PRAC. LITIGATOR, Nov. 2005, at 25, 26; see also Kaplan, *supra* note 1, at 69.

6. See generally Michael R. Nelson, *A Duty Everlasting: The Perils of Applying Traditional Doctrines of Spoliation to Electronic Discovery*, 12 RICH. J.L. & TECH. 14 (2006).

may be incomprehensible when separated from the system that created it.<sup>7</sup>

There are many obstacles to compiling and producing electronic discovery. In addition to requiring successful retrieval and preservation of the information, electronic discovery poses additional challenges. For instance, retrieving the electronic information can be costly if special programming tools or expert technicians are required to extract the electronic information from its stored location into a usable format.<sup>8</sup> Similarly, systems may fail and, thereby, compromise or delete information.<sup>9</sup> Preservation obligations can also impose an economic burden on, as well as interfere with, a party's operation of its day-to-day business.<sup>10</sup> Accessing, utilizing, and reconstructing electronic data is technology-dependent, in contrast to traditional documents that merely need to be located and gathered by anyone who could read, reconstruct, or interpret written indices.<sup>11</sup> Because machinery to replay and retrieve old storage tapes may be obsolete or unavailable, efforts to preserve old data in new systems frequently fail.<sup>12</sup>

E-mail messages raise additional issues. Do e-mail messages differ from traditional documents, and do e-mail messages provide accurate information? Many e-mails are flawed, impulsive, half-baked, anecdotal, and discursive, instead of polished and edited.<sup>13</sup> The probative value of electronically generated information varies widely: it ranges from

7. SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, at 22-23 (Sept. 2005), available at <http://www.uscourts.gov/rules/Reports/ST09-2005.pdf> [hereinafter *Report*].

8. Mohammed Iqbal, *The New Paradigms of E-Discovery and Cost-Shifting*, 72 DEF. COUNS. J. 283, 284 (July 2005).

9. Nahrstadt & Williams, *supra* note 5, at 29-30 ("Because electronically stored information is subject to deletion at any time and because such deleted information is subject to being overwritten at any time, there is an overriding need to act quickly early in the litigation to conduct discovery regarding electronically stored data.").

10. See *Zubalake v. UBS Warburg LLC*, 217 F.R.D. 309, 313 (S.D.N.Y. 2003).

11. Paul M. Robertson & Larry Stanley, *E-mail Management After Zubulake: Searching for Safe Harbours in a Sea of Adverse Instructions and Multi-Million Dollar Judgments*, 733 PLI/LIT 217, 242 (2005) ("[I]naccessible data, meaning backup tapes and 'erased, fragmented, or damaged data,' was not stored in a 'readily useable format' and had to be restored, de-fragmented, or reconstructed before it could be usable."); see also *Zubulake*, 217 F.R.D. at 320.

12. *Id.*

13. See Steven C. Bennett, *Electronic Materials and Other Discovery Considerations*, 724 PLI/LIT 111, 119 (May 2006) ("Because e-mail has a casual, informal feel, people get caught up in the speed of sending and receiving e-mail and respond without the careful thought that would be put in a memo."); see also Robert R. Trumble, Joshua J. Bartels, David M. Pace, and Mark A. Yancey, *Telecommuting: The Manager, the Employee, and the Technology That Connects Them*, HR ADVISOR: LEGAL & PRACTICAL GUIDANCE, Mar.-Apr. 2006, at 4 ("E-mail is often used today as a quick and informal way of messaging. It is the most common way of delivering mail-type messages and is on track to outpace the use of regular mail to deliver information that does not require signatures or stamped seals.").

extremely valuable (instantaneously preserving a snapshot in time), to collateral transaction data of less value (but more burdensome), to totally irrelevant information, to information that is outright misleading and prejudicial.<sup>14</sup> For example, the ability to reconstruct every keystroke can create sideshows, such as scrutinizing every draft of an agreement rather than focusing on the final agreement's terms. The computer is changing the way in which people communicate, generating more information, but, in the minds of many, yielding less truth. As attributed to McLuhan, the medium is the message.<sup>15</sup>

This poses the threshold question of whether the discovery rules, which were created to address the discovery of paper documents, need to be reexamined and revised when the medium creating, generating, and presenting the discoverable information has changed. The discovery of electronic documents opens up new avenues of information – potential portals to the truth – but at the risk of great burden and expense.<sup>16</sup> Electronic discovery, by the nature of the material and the attendant burden and expense of retrieving it, creates two opposing gamesmanship risks: one on the part of the discovering party and another on the part of the responding party.

### III. THE GAMES PEOPLE PLAY: THE DANGERS OF GAMESMANSHIP

Electronic discovery poses two opposing risks. First, a discovering party may use electronic discovery as a sword, seeking to turn the enhanced likelihood of procedural missteps into a substantive advantage which overshadows the adjudication of the merits. Second, calculating wrongdoers may seize on the technical nature of the electronic material being discovered as a shield, counting on a tendency of courts to view electronic discovery lapses as merely negligent and to be unduly forgiving of discovery lapses.<sup>17</sup>

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14. See Jessica Lynn Repa, Comment, *Adjudicating Beyond the Scope of Ordinary Business: Why the Inaccessibility Test in Zubulake Unduly Stifles Cost-Shifting During Electronic Discovery*, 54 AM. U. L. REV. 257, 258 (2004).

15. See Todd Kappelman, *Marshall McLuhan: The Medium Is the Message*, PROBE MINISTRIES, Jul. 14, 2002, available at <http://www.leaderu.com/orgs/probe/docs/mcluhan.html>.

16. One may also wonder if electronic discovery is a "luxury good" that only pays in high-stakes disputes. After all, the costs attendant to securing and using this type of discovery are greater, and large litigants are the parties that primarily generate this material. See *Zubulake*, 217 F.R.D. at 311 ("[I]n the end, '[e]lectronic] discovery is not just about uncovering the truth, but also about how much of the truth the parties can afford to disinter.'") (quoting *Rowe Entm't, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 423 (S.D.N.Y. 2002)).

17. For example, in *Jones v. Goord*, No. 95 Civ 8026, 2002 U.S. Dist. LEXIS 8707 (S.D.N.Y. May 15, 2002), the plaintiffs' lawyers served the defendants with a document request, which, in retrospect, could have encompassed electronic documents. *Id.* at 6. Plaintiffs' counsel did not move to compel production of any electronic documents until six years into the litigation. *Id.* The

A. *The First Risk: Gamesmanship by the Discovering Party*

The Solovy and Byman article, entitled *There Ought to Be a Law*, focuses attention on the problems of discovery in the electronic age.<sup>18</sup> The article appeared in the *National Law Journal* on January 27, 2003, and was designed to provoke debate within the bar concerning electronic discovery.<sup>19</sup> It postulated one hypothetical in which electronic discovery could be used as a litigation weapon of choice.<sup>20</sup> The idea was that in cases where the burden of electronic discovery fell only on one side, electronic discovery requests could be made so limitless, oppressive, and unforgiving that the potential for noncompliance could be exploited to secure an improved litigation outcome.<sup>21</sup>

The authors began their commentary by stating that “[t]he computer age has turned David into Goliath. The computer age also has put Goliath at a distinct, overwhelming disadvantage.”<sup>22</sup> They then posed the following colorful hypothetical – a “perfect storm” of discovery – to illustrate how electronic discovery might be weaponized:

Sue Decrepe brings a sexual harassment claim against her boss, Heywood Jacisme, at Nicenbig Enterprises. Sue is represented by Han Solo, whose practice is smaller than his name; Nicenbig is represented by Thorough & Redundant, the largest law firm in the capitalist world.<sup>23</sup>

But it is Solo, in this electronic age, who has the economic leverage. Sue alleges she was harassed, in part, via e-mail; Heywood, she alleges, forwarded his boorish insults to his cronies, each of whom were doing similar awful things to other poor Sues. Solo makes a Rule 34 request for every e-mail ever sent by or to any

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court denied plaintiffs’ motion to compel, preventing the electronic discovery because of the request’s expense and untimely nature. *Id.* at 48.

18. Jerold Solovy & Robert Byman, *There Ought to Be a Law*, NAT’L L.J., Jan. 27, 2003, at B6. Messrs. Solovy and Byman are members of Jenner & Block, Coleman’s counsel in the litigation discussed at length below. *Id.*

19. *Id.*

20. *Id.*

21. See Mark D. Robins, *Civil Justice Reform - Law Firms: The Duty to Preserve Evidence in a Digital World*, METRO. CORP. COUNS., Dec. 30, 2005, at 22; see also Memorandum from David P. O’Brien, Chief Litig. Counsel, Wachovia Sec. LLC, to the Comm. of the Fed. Judiciary on Rules of Practice & Procedure 1-2 (Feb. 15, 2005), available at <http://www.uscourts.gov/rules/e-discovery/04-CV-214.pdf> (“Wachovia Corporation’s comments to the Committee regarding the proposed amendments to the Federal Rules of Civil Procedure concerning electronic discovery. . . . [T]he ease with which virtually limitless volumes of electronic information can be created by a company’s employees each day means that it can be impossible for many corporations to track and effectively manage all electronic information generated within their confines.”); Posting of Alexander H. Lubarsky to Alextronic Discovery, [http://discoveryresources.blogspot.com/2004\\_01\\_25\\_discoveryresources\\_archive.html](http://discoveryresources.blogspot.com/2004_01_25_discoveryresources_archive.html) (Jan. 29, 2004).

22. Solovy & Byman, *supra* note 18.

23. *Id.*

supervisor in Nicenbig. 50,000 employees. Average 100 e-mails per work day per worker bee. Five years. Do the math. We're talking a billion messages.<sup>24</sup>

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So what does Solo get for his half-hour of effort? If Nicenbig is to comply, it must suspend normal business operations and tie up its computers to search and reconstruct the files.<sup>25</sup>

And then it has to produce a billion pages of e-mails. If it does that in hard copy (get out your calculator again) it will have a copying bill with more zeros than hit Pearl Harbor. Well, come on, you say, no judge is going to make Nicenbig go to that cost. Maybe, maybe not - but so long as there is discretion, there will be abuse of discretion. We need a rule.<sup>26</sup>

The example suggests ample opportunity for the discovering party to engage in gamesmanship under the following conditions:

1. Differential in the size of the litigants and/or their counsel;
2. Differential in the discovery burden, with one party in possession of massive discoverable information, and the other having little;
3. Creating the discovery burden is easy; e.g. expending one-half hour at the word processor;
4. The claim invokes issues of collateral behavior on the part of the responding party, such as demonstrating a pattern and practice of conduct in instances other than the claimant's transaction. The number of potentially comparable transactions in a large company, e.g. hiring decisions are enormous - imposing crushing discovery costs;
5. Enormous additional costs presented by the search for and reconstruction of events relating to the potential electronic evidence;
6. The risk that a court, in the exercise of discretion, may side with the discovering party on both the scope of discovery and the allocation of the economic burden of providing it; and
7. The risk that errors in making discovery, having little or nothing to do with the underlying merits, may lead to a discovery controversy, which, in turn, could drive the litigation outcome.

We have long known the dangers of "strike suits." Flourishing in the area of securities litigation (not to mention consumer fraud and employment discrimination), a small investor, acting on behalf of a

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24. *Id.*

25. *Id.*

26. *Id.*

class, can leverage a tiny loss.<sup>27</sup> The attendant defense process can cost millions, and often settlements are forged around the proverbial “cost of defense of burdensome and protracted litigation.”<sup>28</sup> Electronic discovery raises the prospect of strike suits “on steroids.”

One must forestall the creation of discovery victims while at the same time provide access to evidence. Litigation should center on the underlying wrong, not the conduct in adjudicating the underlying wrong.<sup>29</sup> It is essential that the merits of the dispute, not the process for adjudicating those merits, be case dispositive, except in cases where the prejudice is so severe that ultimate sanctions are needed to level the playing field, punish the deliberate wrongdoer, or deter parties from playing games.<sup>30</sup>

The need for vigilance becomes ever more acute. Bad faith litigation against insurance companies, tort cases seeking punitive damages, workplace claims based on alleged discrimination, and civil RICO and consumer practices claims – combined with the powerful motive of the recovery of attorneys’ fees as an economic windfall beyond mere compensation for the plaintiff – have elevated litigation’s economic stakes. Raising the stakes fits hand in glove with a strategy of electronic discovery gamesmanship since litigation success typically centers on demonstrating a pattern and practice of misbehavior. Cases in which other instances of alleged misconduct are at issue – besides the claimant’s own transaction – provide ideal growing conditions for unbridled, unlimited discovery.

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27. *Novak v. Kasaks*, 216 F.3d 300, 306 (2d Cir. 2000) (stating “strike suits” were “opportunistic private plaintiffs fil[ing] securities fraud claims of dubious merit in order to exact large settlement recoveries”).

28. *In re PaineWebber Ltd. P’ships Litig.*, 171 F.R.D. 104, 126 (S.D.N.Y. 1997).

29. Charles W. Sorenson, Jr., *Disclosure Under Federal Rule of Civil Procedure 26(A) – ‘Much Ado About Nothing?’*, 46 HASTINGS L.J. 679, 794 (1995) (“The lawyer in possession of evidence tending to show that the claim should not have been brought or a defense should not be made, can no longer rely on well-worn strategies like waiting for the ‘proper request,’ delaying tactics, or hoping that the other side fails to request the information. Instead, the underlying premise of disclosure is that the outcome of civil litigation should relate more closely to the substantive merits than to the willingness and ability of counsel to stretch partisan zealotry to its limits at a potentially significant, unwarranted cost to the civil justice system.”).

30. Hon. J. Thomas Greene, *The Practice of Law: Still a Noble Profession Despite Gamesmanship and Commercialism*, 13 EXPERIENCE 20, 21 (Fall 2002) (“[D]iscovery abuse is the foremost example of misplaced gamesmanship. Some lawyers would conduct seemingly endless discovery by manipulating the rules that permit the taking of depositions and written interrogatories or require production of documents. This can cause pretrial proceedings to go on and on ad nauseam. Such tactics are employed by unscrupulous counsel to discourage or exhaust the other side, which is often underfunded or outgunned. If left unchecked, this can result in the protraction of litigation, needless discovery, and incredible costs. This is where case management and control by the court should occur. Early pretrial conferences and adoption of a discovery plan with reasonable limitations can be very effective. Then, if there are excesses, directions and sanctions can and should be imposed to solve the problem.”).



Society ultimately bears the burden of weaponized discovery. Routine claims for bad faith and punitive damages, enhanced by the extra burdens of electronic discovery and fencing over discovery failures, in the end plague those who bear the economic brunt – the rank and file consumers.<sup>31</sup> Litigation comprises two percent of the American gross national product and costs each American \$845.00 per year.<sup>32</sup>

### B. *The Second Risk: Gamesmanship by the Responding Party*

There is also danger that due to the material's electronic nature, courts will too often forgive improper conduct arising from failures to produce electronic materials.<sup>33</sup> This tendency begets gamesmanship by the responding party in the hope of securing judicial forgiveness if caught. Such improper conduct can include interposition of spurious objections, misrepresentation as to location and availability of electronic information, incomplete disclosure of the nature or capabilities of the party's information technology system, misrepresentation as to destruction and recoverability of electronic material, and misrepresentation of retrieval costs.<sup>34</sup> The facts may be so technical as to require mediation

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31. Nahrstadt & Williams, *supra* note 5, at 31 ("Responding to electronic discovery requests becomes expensive not so much because of the underlying technology, but because of the immense amount of data that must be collected and reviewed. A single back-up tape may hold well over 50,000 e-mail messages; a company's file server may store in excess of 500,000 documents. Multiplying these figures by the number of computers or back-up tapes to be searched demonstrates the gigantic amount of information at issue in some e-discovery requests.").

32. R. Wagoner, *A Portrait of My Industry*, WALL ST. J., Dec. 6, 2005, at A20.

33. See *Concord Boat Co. v. Brunswick Co.*, No. LR-C-95-781, 1997 WL 33352759, at \*5 (E.D. Ark. Aug. 29, 1997); see also Ophir D. Finkelthal, *Scope of Electronic Discovery and Method of Production*, 38 LOY. L.A. L. REV. 1591, 1635-36 (2005) ("Where the decision to sanction a party in the electronic document arena varies significantly from the analysis in traditional paper discovery, is in the more complex assessment of spoliation. . . . The difficulty in divining spoliation in the electronic context is illustrated by the gymnastics of the court in 'the fifth written opinion in [*Zubulake v. UBS Warburg LLC*] . . . . In order to decide whether sanctions are warranted, the following question must be answered: Did [the responding party] fail to preserve and timely produce relevant information and, if so, did it act negligently, recklessly, or willfully.'").

34. See, e.g., *Zubalake v. UBS Warburg LLC*, 217 F.R.D. 309, 324 (S.D.N.Y. 2003) (ordering an adverse inference instruction in a case that cost defendant \$29 million); *Metro. Opera Ass'n v. Local 100, Hotel & Rest. Employees Int'l Union*, 212 F.R.D. 178, 221-22 (S.D.N.Y. 2003) (entering judgment against a defendant who failed to conduct an adequate search of its electronic data sources in response to discovery requests); *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co. (Coleman II)*, 2005 WL 674885, at \*10 (Fla. Cir. Ct. Mar. 23, 2005) (ordering an adverse inference instruction in a case that ultimately cost defendant \$1.45 billion); see *Four Seasons Hotels & Resorts B.V. v. Consorcio Barr, S.A.*, 267 F. Supp. 2d 1268, 1299 (S.D. Fla. 2003) *aff'd in part, rev'd in part*, 2005 WL 850304 ("In the context of electronic discovery, sanctions have most often been awarded where a party either intentionally or inadvertently deletes relevant electronic documents stored on a computer system or hard drive.").

by information technicians.<sup>35</sup>

The tendency to forgive misconduct is due to a variety of factors, including:

1. The diversity and quantity of electronic material;
2. The fact that electronic material covers multiple media generations, is constantly subject to deletion or overwrite, requires technicians to design storage facilities and mediate the recovery process, and can be stored in multiple places on multiple systems; and
3. The fact that retrieval entails multiple tasks, technical complexity, and cost-benefit evaluations.<sup>36</sup>

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35. See, e.g., ADAM I. COHEN & DAVID J. LENDER, *ELECTRONIC DISCOVERY: LAW AND PRACTICE* § 2.09 (Aspen 2004) (discussing the possibility that “third-party computer technicians or experts . . . may be necessary in retrieving, searching, or analyzing electronic information”).

36. See *Convolve, Inc. v. Compaq Computer Corp.*, 223 F.R.D. 162, 167 (S.D.N.Y. 2004) (where there was no evidence that evidence would have been favorable to requesting party and no evidence of bad faith, sanctions were not warranted); *Danis v. USN Commc’n, Inc.*, No. 98 C 7482, 2000 WL 1694325, at \*43 (N.D. Ill. Oct. 23, 2000) (requesting party’s failure to demonstrate that missing information and documents were critical to proving their case was an appropriate basis for denying request for sanctions); *Concord Boat*, 1997 WL 33352759, at \*5 (“[T]o hold that a corporation is under a duty to preserve all e-mail potentially relevant to any future litigation would be tantamount to holding that the corporation must preserve all e-mail.”); *In re Cheyenne Software, Inc.*, No. CV-94-2771(NG), 1997 WL 714891, at \*2 (E.D.N.Y. Aug. 18, 1997) (declining to issue an adverse inference instruction where defendants failed to preserve financial information on hard drives, reasoning that plaintiffs did not clearly establish they were prejudiced by the destruction of the information); *Gates Rubber Co. v. Bando Chem. Indus., Ltd.*, 167 F.R.D. 90 (D. Colo. 1996) (evidence of what relevant material was actually destroyed must be presented to determine whether spoliation occurred and whether such spoliation was an appropriate basis for a negative inference); *Lombardo v. Broadway Stores, Inc.*, No. G026581, 2002 WL 86810, at \*8-10 (Cal. Ct. App. Jan. 22, 2002) (destruction of computerized payroll data, while preserving the same information in a voluminous printed form, sufficiently prejudiced plaintiff’s ability to query the data that spoliation sanctions were appropriate); *Hildreth Mfg., LLC v. Semco, Inc.*, 2003-Ohio-741, 785 N.E.2d 774, 780-82 (Ohio Ct. App. 2003) (trial court did not abuse its discretion in denying motion for sanctions where appellant failed to preserve magnetic tape containing copies of computer files, but there was no evidence that the missing hard drives contained evidence that would have been favorable to appellee); see also Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 *DUKE L.J.* 561, 621 (2001) (“(1) Electronic evidence destruction, if done routinely in the ordinary course of business, does not automatically give rise to an inference of knowledge of specific documents’ destruction, much less intent to destroy those documents for litigation-related reasons, and (2) to prohibit such routine destruction could impose substantial costs and disruptive burdens on commercial enterprises.”). *But see Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99 (2d Cir. 2002) (acts of ordinary negligence that have the effect of destroying potentially relevant data can be an appropriate basis for discovery sanctions); *Mosaik Tech. Inc. v. Samsung Elecs. Co.*, 348 F. Supp. 2d 332, 338 (D. N.J. 2004) (holding that failure to institute a litigation hold on e-mail destruction, which resulted in destruction of all technical e-mail, warranted an adverse inference instruction and monetary sanctions because it prejudiced plaintiff, regardless of whether destruction was in bad faith); *Telecom Int’l Am., Ltd. v. AT&T Corp.*, 189 F.R.D. 76, 81-82 (S.D.N.Y. 1999) (finding that defendant’s destruction of documents subject to existing discovery requests, although not deliberate or in bad faith, “demonstrate[s] an indifference to its discovery obligations” that

The technological complexities associated with electronic discovery do not fully explain the frequently forgiving judicial approach to discovery lapses. Some courts have an incomplete understanding of the technology and processes used to generate, store, and retrieve electronic information, and therefore they approach electronic discovery failures with undue caution. Others have an excessive willingness to believe technical explanations for problems, regardless of the explanations' actual validity. The result is a tendency to indulge discovery failures when it comes to "technology."<sup>37</sup>

Game-playing litigants can exploit this situation. Given the difficulty and complexity of full production in an electronic world, which enhances the opportunity for negligent lapses and oversights, parties may be encouraged to practice old-fashioned fraud and then seek to disguise their fraud as mere negligence. The process' very complexities, and the limits on judicial understanding, beget this tendency. The task, therefore, is to design procedures to prevent old-fashioned fraud from masquerading as a negligent lapse.

Deliberate discovery misbehavior has long taken place in the pre-electronic world.<sup>38</sup> While paper discovery violations have at times been shrouded in secrecy, the complexity of electronic discovery greatly enhances the potential problem. As background to an analysis of the electronic sanctions issue, it is useful to consider several discovery "horror stories" that arose in a paper discovery context. These cases have all been the subject of news reports, and interestingly, involve lawyers and law firms of the highest caliber.<sup>39</sup> They fall into two categories: outright concealment and obfuscated evasion.

The sad tale of Mahlon Perkins, a former senior partner at the major Wall Street firm of Donovan Leisure, provides an example of the first category.<sup>40</sup> In the 1970s, Kodak was sued by upstart Berkey Photo,

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required the imposition of appropriate sanctions, but did not warrant default judgment or striking defendant's answer and counterclaims); *Linnen v. A.H. Robbins Co., Inc.*, No. 97-2307, 1999 WL 462015, at \*11-12 (Mass. Super. Ct. June 16, 1999) (negligent failure to communicate a need to halt routine destruction of system backup tapes is nonetheless an appropriate basis for imposition of a negative inference jury instruction and other sanctions).

37. As noted by Judge Shira Scheindlin in a recent law review article on electronic discovery sanctions, "courts are less likely to issue written opinions when they are denying sanctions than when they are granting them." See Shira A. Scheindlin & Kanchana Wangkeo, *Electronic Discovery Sanctions in the Twenty-First Century*, 11 MICH. TELECOMM. TECH. L. REV. 71, 74 (2004). Accordingly, it is difficult to find empirical support for techno-indulgence.

38. See, e.g., *United States v. Gonzales*, 164 F.3d 1285, 1294 (10th Cir. 1999).

39. While these incidents involve large firms, this may be due to the fact that the incidents occurred in high-profile cases, which are better publicized or present an environment in which the misconduct is more prone to exposure. Obviously, no category of lawyer or law firm has a monopoly on egregious conduct.

40. See W. Keichel, *The Strange Case of Kodak's Lawyers*, FORTUNE, May 8, 1978, at 188.

a film development chain, for violation of various antitrust laws.<sup>41</sup> Donovan Leisure represented Kodak.<sup>42</sup> Perkins furnished documents to Kodak's economics expert, who had later returned the documents to Perkins in a suitcase.<sup>43</sup> When asked by Berkey's counsel what happened to the material, Perkins said he discarded it thinking the documents were duplicates of other documents already produced.<sup>44</sup> However, Perkins had lied about the status of the documents.<sup>45</sup> He then submitted a sworn statement affirming the lie.<sup>46</sup> The suitcase remained hidden until the final days of trial, when Perkins disclosed the fact that he lied about the destruction of the contents of the suitcase.<sup>47</sup> The contents of the suitcase were then produced.<sup>48</sup> Ironically, the material contained nothing particularly damaging to Kodak.<sup>49</sup> However, the fact that Perkins had lied under oath became a "smoking gun;" as the trial judge commented in the Microsoft antitrust trial, "untrue in small things, untrue in all things."<sup>50</sup> After receiving an adverse jury verdict, Kodak ultimately settled the case for a fraction of the award.<sup>51</sup> One can only guess what motivated Perkins.<sup>52</sup>

Another apparent case of concealment took place in the *Benlate* litigation, where DuPont withheld studies regarding the effect of Benlate, a pesticide, on the soil of farmers whose crops had been ruined.<sup>53</sup> DuPont and its law firm, Alston & Bird, facing possible criminal charges, agreed to pay a total of \$11.25 million to settle the claims alleging that they had withheld information during discovery.<sup>54</sup> Of the \$11.25 million, DuPont paid \$11 million, while Alston & Bird paid

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41. *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979).

42. Keichel, *supra* note 40, at 188.

43. See Robert Hinefeld, *A Broader View of Discovery Ethics: The Societal Context*, 2002 SYMPOSIUM ISSUE OF THE PROFESSIONAL LAWYER 35, 41-44.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. As later reported by Brian Dumaine, *Kodak's Revenge on Its Law Firm*, FORTUNE, May 30, 1982, at 80, Perkins served 26 days for criminal contempt; he is now president of the Greenwich Philharmonic Orchestra in Connecticut. He has never publicly explained his mysterious lapse, except to tell the trial judge, "I understand absolutely what I did was wrong. I injured many people as a consequence." Interestingly, this incident came to light when another Donovan Leisure partner was belatedly forced to disclose a letter from Kodak's expert stating the expert had initial qualms about the defense's theory – an entirely different "smoking gun."

53. *In re E.I. DuPont De Nemours & Co.-Benlate Litig.*, 99 F.3d 363, 366 (11th Cir. 1996).

54. See Richard Zitrin & Carol Langford, *The Moral Compass: Calculated Misfeasance*, LAW NEWS NETWORK, May 7, 1999, available at [http://www.law.com/jsp/newswire\\_article.jsp?id=1015973958083](http://www.law.com/jsp/newswire_article.jsp?id=1015973958083) (membership required for access).

\$250,000.<sup>55</sup>

The cases involving obfuscation and evasion are equally illuminating. In *Washington State Physicians Insurance Exchange & Ass'n v. Fisons Corp.*,<sup>56</sup> a drug manufactured by Fisons was alleged to have caused permanent brain damage in a three-year-old girl, and both the drug company and the physician were sued.<sup>57</sup> During discovery, the physician requested all documents pertaining to any warning letters, including "Dear Dr." letters and warning correspondence to the medical profession, regarding the use of "Somophyllin Oral Liquid."<sup>58</sup> The physician also requested copies of "any letters sent by your company to physicians concerning theophylline toxicity in children."<sup>59</sup> Bogle & Gates, the law firm for Fisons, withheld both a warning letter sent to certain physicians and an internal client memorandum referring to "a dramatic increase in reports of serious toxicity."<sup>60</sup> To this end, Bogle & Gates framed discovery responses that limited their client's response to documents referring to, or found in files denominated with, the product name as opposed to its active ingredient.<sup>61</sup> Clearly, the spirit of the request, if not the precise letter of the request, was frustrated by the responding party. Indeed, the Washington Supreme Court opined that "[i]t appear[ed] clear that no conceivable discovery request could have been made . . . that would have uncovered the relevant documents."<sup>62</sup>

It took an anonymous whistle-blower, who sent a copy of the physician warning letter, to uncover the deception.<sup>63</sup> Fisons ultimately settled the lawsuit for \$6.9 million within a month after it had to disgorge the two "smoking gun" documents.<sup>64</sup> The co-defendant physician, however, furious at the cover-up, pressed on with the cross-claim against the drug company.<sup>65</sup> After a one-month trial, the jury awarded the physician \$3.3 million, including \$1.1 million for injury to his professional reputation and \$2.1 million for pain and suffering, despite a finding that the physician was 3.3 percent contributorily negligent and despite the absence of compelling evidence of actual damages suffered by the phy-

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55. *Id.*

56. 858 P.2d 1054 (Wash. 1993).

57. *Fisons Corp.*, 858 P.2d at 1058.

58. *Id.* at 1080.

59. The document requests are quoted in Stuart Taylor, Jr., *Sleazy in Seattle*, AMERICAN LAWYER, April 1994, at 5, which also discusses the entire discovery episode and both the trial and Washington Supreme Court's responses.

60. *Fisons Corp.*, 858 P.2d at 1075.

61. *Id.* at 1080.

62. *Id.* at 1083.

63. *Id.* at 1058.

64. *Id.* at 1059.

65. See Zitran & Langford, *supra* note 54.

sician.<sup>66</sup> The trial court also awarded \$450,000 in attorney's fees to the doctor, although the court rejected the doctor's discovery abuse motion.<sup>67</sup> On appeal, the Washington Supreme Court reversed the trial court's discovery abuse decision as an abuse of discretion and reversed the pain and suffering award.<sup>68</sup> The Supreme Court remanded the case with instructions to punish Bogle with an amount severe enough to deter the firm and others from engaging in such conduct. Bogle agreed to pay \$325,000 and to make a public admission of its mistake.<sup>69</sup>

Less than two years later, Bogle & Gates was involved in a claim brought against its client, Subaru of America.<sup>70</sup> In this case, the plaintiff alleged that the driver's seat could collapse backwards when hit from the rear and potentially cause serious injuries to the driver.<sup>71</sup> In one discovery request, plaintiffs asked for National Highway Traffic Safety Administration records that showed the collapse of driver's seats from a rear impact force of thirty miles per hour.<sup>72</sup> Bogle responded that thirty miles per hour was a velocity rather than a force and that the confusion in technical terms prevented a meaningful response.<sup>73</sup> A federal judge, terming this response "lawyer hokum," directed Bogle to pay the other side's legal fees.<sup>74</sup>

In a Texas case against Wal-Mart, the plaintiff – a woman who was kidnapped from one of the retailer's parking lots – sought studies that showed customers were more likely to be victims of crimes outside than inside the store and that exterior security patrols appeared to effectively limit crime.<sup>75</sup> Wal-Mart allegedly concealed the document, claiming that it was a survey, not a study, and therefore did not fall within the document request.<sup>76</sup> The court found that Wal-Mart had made discovery abuse "a corporate policy" and imposed an \$18 million sanction against Wal-Mart with an additional \$50,000 sanction against its law firm.<sup>77</sup> The *National Law Journal* observed that this case was one of four actions that resulted in discovery sanctions against Wal-Mart in Texas alone.<sup>78</sup>

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66. See Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 858 P.2d 1054, 1059 (Wash. 1993).

67. *Id.*

68. *Id.* at 1085.

69. See Zitrin & Langford, *supra* note 54.

70. *Id.*

71. *Id.*

72. See *id.*

73. *Id.*

74. *Id.*

75. See Zitrin & Langford, *supra* note 54.

76. *Id.*

77. *Id.*

78. *Id.*

It is not difficult to postulate the lawyers' motivations in these cases, which include the desire to please existing clients, to develop new clients, to project a reputation as a successful litigator (i.e. the toughest practitioner of "hardball litigation"), and to increase legal fees by accumulating billable hours fencing over discovery disputes.<sup>79</sup> Underlying these motivations, not surprisingly, is a desire to stand out in a crowded field, enhance income, or obtain the ego gratification of a visible public profile as a successful advocate.<sup>80</sup>

Because the client's purse is ultimately at risk, there are equally powerful motives that can lead clients to explicitly or tacitly endorse discovery violations.<sup>81</sup> Clients may dupe their lawyers, particularly where clients with internal lawyers take marching orders from management and give marching orders to outside counsel. One is reminded of Arthur Andersen's document non-retention episodes in the Enron matter, in which internal counsel figured prominently.<sup>82</sup> In large organizations, internal counsel may be motivated to excel, in much the same way as outside counsel, by securing a favorable litigation result "at all costs."<sup>83</sup> Indeed, it is not unknown for outside counsel who wishes to play by the rules to bemoan the difficulty of securing client cooperation.

Alternatively, there may be a combination of causes in the form of varying degrees of attorney-client collusion. By way of a descending scale, one could note attorneys advising clients on gaming the system; attorneys of record choosing to "see no evil" and adopting a hands-off posture to known client impropriety; and attorneys simply failing to ask penetrating questions for fear of receiving an awkward answer.

Past incidents are a prologue to the sanctions issue. We briefly leave to one side the issue of discovery misconduct – magnified in the era of electronic discovery – to consider recently enacted federal rules amendments.

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79. See generally John S. Beckerman, *Confronting Civil Discovery's Fatal Flaws*, 84 MINN. L. REV. 505, 509 (2000) ("[R]egardless how we define 'discovery abuse,' the increased and apparently still increasing frequency of discovery disputes strongly suggests that over-discovery, evasion, delay, and confrontation rather than cooperation remain problematic aspects of civil discovery practice.").

80. *Id.*

81. See generally Kathleen F. Brickey, *Andersen's Fall from Grace*, 81 WASH. U. L.Q. 917 (2003); Mary Kreiner Ramirez, *The Science Fiction of Corporate Criminal Liability: Containing the Machine Through the Corporate Death Penalty*, 47 ARIZ. L. REV. 933, 964-66 (2005).

82. *In re Enron Corp. Sec., Derivative & ERISA Litig.*, Nos. MDL-1446, Civ.A. H-01-3624, 2003 WL 230688, at \*19 (S.D. Tex. Jan. 28, 2003).

83. Ralph D. Cook, *Reflections on Ethical Issues*, 64 ALA. LAW. 226, 228 (2003) ("It has been said that lawyers today are perceived as being 'less interested in justice and more interested in winning at all costs.'") (quoting Paul J. Kelly, Jr., *A Return of Professionalism*, 66 FORDHAM L. REV. 2091, 2092 (1998)).

#### IV. THE 2006 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PREVENTING PROBLEMS BEFORE THEY ARISE

The challenge in an electronic age is to weigh relevance, however attenuated, with probative value to decide if the discovery justifies the resulting expense.<sup>84</sup> Some comments are of ephemeral import. Real-time e-mails may be of different value than after-the-fact e-mails because some may involve actors directly involved or persons only collaterally involved and still others may involve the transaction in controversy or only other (and possibly comparable) transactions. A proper balance between affording relevant information through discovery and a recognition of the burdens and expense of providing that information is required to prevent problems from arising in the first place.<sup>85</sup>

Recently, amendments to the Federal Rules of Civil Procedure were considered to address these competing needs.<sup>86</sup> The Rules have long balanced relevance with expense. Federal Rule 26(b)(2) previously addressed discovery limitations and, in pertinent part, provided:

The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.<sup>87</sup>

The problem was who has the burden, the party objecting or the party seeking discovery?

In 2000, the Advisory Committee on Civil Rules began work specifically to amend the Federal Rules to address problems with computer-based discovery.<sup>88</sup> The Advisory Committee's stated mission was "to devise mechanisms for providing full disclosure in a context where potential access to information is virtually unlimited and in which full discovery could involve burdens far beyond anything justified by the interests of the parties to the litigation."<sup>89</sup> With input from bar organiza-

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84. *Rowe Entm't, Inc. v. William Morris Agency*, 205 F.R.D. 421, 429 (S.D.N.Y. 2002).

85. Iqbal, *supra* note 8, at 285.

86. *Report*, *supra* note 7.

87. FED. R. CIV. P. 26(b)(2) (amended 2006).

88. *Report*, *supra* note 7, at 22.

89. *Id.*



tions, attorneys, academics, judges, litigants, and computer specialists, the Advisory Committee proposed amendments to Rules 16, 26, 33, 34, 37, and 45, along with revisions to Form 35.<sup>90</sup>

Of particular note to this discussion are the amendment to Rule 26(b)(2) and the addition of Rules 26(f)(4) and 37(f).<sup>91</sup> The amendment to Rule 26(b)(2) addresses the production of electronically stored information that is "not reasonably accessible because of undue burden or cost."<sup>92</sup> New Rule 26(f)(4) sanctions agreements between parties relating to attorney-client privilege and the work-product privilege.<sup>93</sup> New Rule 37(f) addresses the imposition of sanctions "for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system."<sup>94</sup>

As amended, Rule 26(b)(2) now contains a procedure whereby a party would initially be relieved of the obligation to produce electronically stored information that the party considers not to be reasonably accessible, so long as they specify the sources of that information for the requesting party.<sup>95</sup> However, should the information's production become an issue in the litigation, the party would then have to demonstrate that the information is in fact "not reasonably accessible because of undue burden or cost."<sup>96</sup> Even if a party were to be successful in meeting this burden, the party might still be ordered to produce the

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90. *Id.*

91. *Id.* at 25.

92. *Id.* at 31. The amendment to Rule 26(b)(2) broke the previous rule into two subparts and added the following third subpart:

(B) A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

FED. R. CIV. P. 26(b)(2)(B).

93. New Rule 26(f)(4) reads as follows:

(4) [A]ny issues relating to claims of privilege or of protection as trial-preparation material, including – if the parties agree on a procedure to assert such claims after production – whether to ask the court to include their agreement in an order.

FED. R. CIV. P. 26(f)(4).

94. New Rule 37(f) reads as follows:

(f) Electronically stored information. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

FED. R. CIV. P. 37(f).

95. *Id.* at 31.

96. *Report, supra* note 7, at 25.

information “if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C).”<sup>97</sup>

One might question whether this is enough relief for the parties on whom the burden falls. For example, as to discovery of matters concerning the existence of a pattern and practice of behavior, the failure to adhere to internal guidelines, the receipt of notice, the presence of malice, or the failure to correct impropriety may require an elevated standard.<sup>98</sup> Such standard might be analogized to the preliminary showing of a legitimate grievance in cases under the Private Securities Litigation Reform Act of 1995 or in punitive damages cases.<sup>99</sup> The underlying rationale is that unless and until a threshold is passed, the cost of defense may become outcome-determinative and strike suits, based on that unfortunate reality, should be discouraged.<sup>100</sup>

Although new Rule 26(f)(4), which relates to privilege issues, is not by its terms limited to electronic discovery, its genesis lies in the discovery difficulties inherent in guarding against waiver of privilege and work-product protection – i.e. the expenditure of time or expense and the difficulty of identifying materials subject to a claim of privilege or protection – which “often become more acute when discovery of electronically stored information is sought.”<sup>101</sup> A cursory privilege review could consume years of man-hours. The Rule properly recognizes that

97. As now enacted, FED. R. CIV. P. 26(b)(2)(C) is what was previously the portion of FED. R. CIV. P. 26(b)(2) relating to limitations on discovery.

98. See, e.g., *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510 (1991) (actual malice must be proved by clear and convincing evidence).

99. See *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 51 (1991) (punitive damages must be proved by clear and convincing evidence).

100. See *Cordova v. Lehman Bros., Inc.*, 413 F. Supp. 2d 1309, 131 (S.D. Fla. 2006) (“Congress found that the high costs of defending strike suits often forced defendants to settle meritless class actions.”).

101. *Report, supra* note 7, at C-35. The Committee explained the problems as follows:

The volume of such data, and the informality that attends use of e-mail and some other types of electronically stored information, may make privilege determinations more difficult, and privilege review correspondingly more expensive and time consuming. Other aspects of electronically stored information pose particular difficulties for privilege review. For example, production may be sought of information automatically included in electronic files but not apparent to the creator or to readers. Computer programs may retain draft language, editorial comments, and other deleted matter (sometimes referred to as “embedded data” or “embedded edits”) in an electronic file but not make them apparent to the reader. Information describing the history, tracking, or management of an electronic file (sometimes called “metadata”) is usually not apparent to the reader viewing a hard copy or a screen image. Whether this information should be produced may be among the topics discussed in the Rule 26(f) conference. If it is, it may need to be reviewed to ensure that no privileged information is included, further complicating the task of privilege review.

*Id.*

inadvertent production of privileged e-mail, for example, should not result in a general subject matter waiver.<sup>102</sup> Rather, the Rule would allow the parties to enter into agreements both to establish procedures for asserting claims of privilege and work-product protection after production and to have their agreement entered as an order of the court.<sup>103</sup>

New Rule 37(f)'s safe harbor provision recognizes the fact that, during the "routine operation of an electronic information system," information is modified, overwritten, and deleted.<sup>104</sup> As such, the Rule seeks to provide parties some limited protection from sanctions when they are unable to produce electronically stored information because it has been destroyed in the course of the routine operations of the parties' electronic information systems.<sup>105</sup> In presenting the proposed addition to Rule 37, the Committee emphasized, however, that the Rule "is not intended to provide a shield for parties that intentionally destroy information because of its relationship to litigation by, for example, exploiting the routine operation of an information system to target specific electronically stored information for destruction in order to avoid producing that information in discovery."<sup>106</sup>

The new Rule 37(f) provides a safe harbor only to those litigants who act in good faith and, then, only absent exceptional circumstances.<sup>107</sup> As the Committee Note to the then-proposed Rule stated: "[G]ood faith [in the routine operation of an information system] may require that a party intervene to suspend certain features of the routine operation of an information system to prevent loss of information subject to preservation obligations."<sup>108</sup>

The adopted Rule amendments go a long way toward addressing the relevance-burden dichotomy and the mistake issues, but they only address the first abuse; i.e. establishing limits on the party seeking discovery and protecting the party against whom discovery is sought.<sup>109</sup> The amendments leave the second abuse, gamesmanship to evade discovery, to the preexisting sanctions structure.<sup>110</sup> But, even as to the first abuse, there are many opportunities for improvement in the Rules.<sup>111</sup>

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102. *Report, supra* note 7.

103. *Id.* at C-62.

104. *Id.* at C-83.

105. *Id.* at C-84.

106. *Id.*

107. *Id.* at C-85.

108. *Id.* at C-87.

109. *See generally Report, supra* note 7.

110. Nelson, *supra* note 6, at 49 (Committee Note makes clear that courts will continue to have significant discretion to impose sanctions for "wrong guess" as to precise moment when litigation hold should be applied).

111. *Id.* ("The Committee Note makes it clear that the extent of a party's preservation

For example, one might consider establishing additional safe harbors based on generally accepted system operation and performance methodology. This would encourage the implementation of better systems to file, index, retain, and retrieve electronic documents. The adoption of a generally accepted information technology convention, when operated properly and certified by a third-party evaluator, might afford immunity from further discovery obligations or penalties.<sup>112</sup> One might also fashion a safe harbor provision that prohibits further electronic discovery where all electronic messages are contemporaneously reduced to paper.

At the same time, one might consider correcting the bilateral requirement of Rule 26(f)(4), which leaves the issue of waiver of privilege to the parties' discretion.<sup>113</sup> In situations where one party's discovery burden is light and the other's is heavy, there would be no incentive for the party having the light discovery burden to agree to non-waiver of an assertion of privilege after production. Moreover, the Rule ignores the harm that may result simply by giving opposing counsel the opportunity to view the privileged document or work product.<sup>114</sup>

Finally, the requirement of Rule 37(f), the comments to which make clear that once a party is aware of potential litigation it must take steps to protect relevant electronic information in order to avail itself of the protection afforded by the safe harbor rule, poses several problems.<sup>115</sup> What exactly is the trigger point for the "litigation hold" obligation? Is it the actual filing of a complaint, or is an oral communication of intent to sue sufficient? Placing a "litigation hold" on elec-

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obligations with regard to electronic discovery will remain dependent upon pre-existing common law. Therefore, the proposed Rule will continue to provide courts with significant discretion in which to make after-the-fact determinations of when a party was required to place a 'litigation hold' on the destruction of electronic discovery.").

112. Interestingly, installation of such a system might have a collateral benefit: renewed focus on the issue of what gets recorded in the first place. To eliminate extraneous documents or prejudicial references, businesses might establish employee practices for what to record and the medium in which to record it. One is reminded of the old dictum: "never create a memo, never throw one away." See Diana Gale Matthiesen, *Is HTML E-mail Really "Better" than ASCII Text E-mail?*, <http://www.dgmweb.net/genealogy/Ancillary/OnE/ASCIIvHTML.shtml> (last visited Aug. 27, 2006). There is nothing wrong with a disciplined approach to document creation or information generation. For years, large firm accountants have been instructed on work-paper's litigation implications, specifically what not to record and how not to say it. They receive instructions regarding the retention of notes and drafts; in fact, these firms have formal policies on work paper retention. Few would question the ethics of "real time" (pre-litigation) document-creation practices. Similarly, experts hired to testify at trial routinely destroy all drafts of reports prior to issuing final reports. Obviously, long and hard experience has shown the mischief that can occur when an opposing lawyer twists tentative remarks out of their proper context.

113. See Report, *supra* note 7, at C-62.

114. See Report, *supra* note 7.

115. See also *Arthur Andersen LLP v. United States*, 544 U.S. 696, 704 (2005) (recognizing the permissibility of document retention systems).

tronic information can be an expensive prospect for a company and can seriously interfere with the operation of its business. It is not something that courts should arbitrarily order.

Underlying these concerns are fundamental decisions regarding the legal system's preferences and values. Discovery exists, at least in significant part, to equip a party with the information necessary to prove a case: discovery can be sought if it is merely likely to lead to the discovery of admissible evidence – a standard the courts have applied expansively.<sup>116</sup> The issues surrounding electronic discovery provide us with useful cause to re-examine some of the assumptions about discovery and some of the “sacred cow” notions, which emerged during an era of paper documents. In an electronic age, one might decide basic issues of societal values or litigation philosophy differently.

The mere ability to lead to discoverable evidence may be too liberal of a discovery standard. While “smoking guns” should be uncovered, some restriction on discovery access is not a denial of justice. The current system already includes some discovery restrictions: e.g. limits of twenty-five interrogatories and ten depositions.<sup>117</sup> Moreover, briefs are often limited to a prescribed number of pages.<sup>118</sup> It is difficult to seriously contend that limits on access to discovery deny a fair case resolution, or that unlimited access to discovery will produce a fair one.

In the end, it may all be a question of societal choices, the law being the mediator of societal relationships with one's view depending upon whose ox is being gored. Nevertheless, the electronic discovery debate should properly address our collective value choices.

#### V. THE *COLEMAN* DECISION – AN EXAMPLE BY CONTRAST

The *Coleman* cases present an example of an all too frequent tendency to exploit judicial electronic discovery permissiveness to perpetrate old-fashioned fraud. In *Coleman*, the Fifteenth Judicial Circuit in and for Palm Beach County, Florida, addressed the issue of whether to grant Coleman Holdings, Inc. (“CPH”) an adverse inference instruction due to the misconduct of Morgan Stanley & Co.<sup>119</sup> Morgan Stanley's misconduct included the destruction of e-mails and its failure to comply with the court's Agreed Order requiring a search for backup tapes and review e-mails, production of non-privileged e-mails, and certification

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116. Discovery is also designed to prevent unfair surprise at trial.

117. FED. R. CIV. P. 33(a); FED. R. CIV. P. 30(a).

118. See, e.g., S.D. FLA. LOCAL R. 7.1.C.2.

119. *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co. (Coleman I)*, No. 502003CA005045XXOCAI, 2005 WL 679071, at \*1 (Fla. Cir. Ct. Mar. 1, 2005).

of compliance with the Agreed Order.<sup>120</sup> The court subsequently addressed Morgan Stanley's continuing discovery violations on CPH's Renewed Motion for Entry of Default Judgment – which the court granted, in part.<sup>121</sup>

CPH claimed that Morgan Stanley was complicit in a fraud committed by Sunbeam Corporation that caused CPH to end up with more than 14 million shares of essentially worthless Sunbeam stock.<sup>122</sup> The Sunbeam fraud took place primarily in 1997 and 1998.<sup>123</sup> Prior to trial, Morgan Stanley engaged in epic discovery misconduct.<sup>124</sup> The discovery misconduct ultimately led the court to “read to the jury the statement of facts . . . during whatever evidentiary phase of CHP's case that it requests,” reasoning that Morgan Stanley had so interfered with the process of searching for the truth regarding its prior motives and conduct that a fair trial on all elements of CPH's claims would be impossible.<sup>125</sup> Additionally, the court held that Morgan Stanley “shall bear the burden of proving to the jury, by the greater weight of the evidence, that it lacked knowledge of the Sunbeam fraud.”<sup>126</sup>

The Florida discovery sanction rules governed the disposition of the *Coleman* cases.<sup>127</sup> The Florida Rules of Civil Procedure, however, track the Federal Rules of Civil Procedure as amended through 1970 and, therefore, do not incorporate recent, post-1970 refinements.<sup>128</sup> The scope of discovery is set out in Florida Rule of Civil Procedure 1.280(b):

(1) *In General.* Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.<sup>129</sup>

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120. *Id.*

121. *Coleman* (Parent) Holdings, Inc. v. Morgan Stanley & Co. (*Coleman II*), No. CA 03-5045 AI, 2005 WL 674885, at \*13 (Fla. Cir. Ct. Mar. 23, 2005).

122. *Coleman II*, 2005 WL674885, at \*16; *Coleman I*, 2005 WL 679071, at \*1.

123. *Coleman I*, 2005 WL 679071, at \*1.

124. *Id.* at \*6.

125. *Id.* at \*7; *Coleman II*, 2005 WL674885, at \*10.

126. *Coleman I*, 2005 WL 679071, at \*7.

127. *See generally Coleman II*, 2005 WL674885; *Coleman I*, 2005 WL 679071.

128. *Ruiz ex rel. Ruiz v. Brea*, 489 So. 2d 1136, 1137 (Fla. 3d Dist. Ct. App. 1986) (stating Rule 1.280 of the Florida Rules of Civil Procedure was patterned after Rule 26 of the Federal Rules of Civil Procedure); *Alachua Gen. Hosp. v. Zimmer USA, Inc.*, 403 So. 2d 1087, 1088 (Fla. 1st Dist. Ct. App. 1981) (same).

129. FLA. R. CIV. P. 1.280(b). The scope of document discovery is set out in Rule 1.350(a) of the Florida Rules of Civil Procedure:

(a) Request; Scope. Any party may request any other party (1) to produce and permit the party making the request, or someone acting in the requesting party's

The Florida sanction rules also expressly provide for either the dismissal of an action where the plaintiff is disobedient to a court order, or the rendering of a default judgment where the disobedient party is the defendant.<sup>130</sup> Rule 1.380(b) provides:

- (2) If a party or an officer, director, or managing agent of a party or a person designated under rule 1.310(b)(6) or 1.320(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or rule 1.360, the court in which the action is pending may make any of the following orders:

. . . .

- (C) An order striking out pleadings or parts of them or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part of it, or rendering a judgment by default against the disobedient party.
- (D) Instead of any of the foregoing orders or in addition to them, an order treating as a contempt of court the failure to obey any orders except an order to submit to an examination made pursuant to rule 1.360(a)(1)(B) or subdivision (a)(2) of this rule.

. . . .

Instead of any of the foregoing orders or in addition to them, the court shall require the party failing to obey the order to pay the reasonable expenses caused by the failure, which may include attorneys' fees, unless the court finds that the failure was justified or that other circumstances make an award of expenses unjust.<sup>131</sup>

The *Coleman* decision involved three kinds of discovery misconduct by Morgan Stanley: (a) failure to disclose responsive communications; (b) failure to produce known responsive communications; and (c) active concealment of the misconduct.<sup>132</sup> In the final analysis, much of that discovery misconduct had little or nothing to do with the electronic nature of the discovery material being sought.<sup>133</sup> Instead, the case con-

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behalf, to inspect and copy any designated documents, including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the party to whom the request is directed through detection devices into reasonably usable form, that constitute or contain matters within the scope of rule 1.280(b) and that are in the possession, custody, or control of the party to whom the request is directed; . . . .

FLA. R. CIV. P. 1.350(a).

130. FLA. R. CIV. P. 1.380.

131. *Id.*

132. See *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co. (Coleman I)*, No. 502003CA005045XXOCAI, 2005 WL 679071, at \*1-9 (Fla. Cir. Ct. Mar. 1, 2005).

133. See generally *id.*

cerned failures to make proper discovery of internal and external communications that would have been improper if they arose in a paper discovery context.<sup>134</sup> In other words, while the context of the discovery misconduct in *Coleman* was electronic, the decision's true meaning revolves around punishing both old-fashioned discovery fraud and fraud on the court.<sup>135</sup>

### A. *The Morgan Stanley Misconduct*

#### I. MISCONDUCT INVOLVING DELIBERATE NON-PRODUCTION OF ELECTRONIC DOCUMENTS AND COVER-UP OF THE NON-PRODUCTION

The first type of *Coleman* discovery misconduct that led to the partial default judgment involved the deliberate non-production of electronic documents (i.e. relevant e-mails) and the cover-up of that non-production.<sup>136</sup> Morgan Stanley was found, based on extensive evidence, to have engaged in a wide range of improper discovery misbehavior: (1) actively misrepresenting the company's ability to recover old e-mails from the relevant time period by concealing the existence of a Morgan Stanley archive that was easily searchable; (2) falsely certifying full compliance with the narrow e-mail production order that resulted from concealment of the archive, even though Morgan Stanley knew of hundreds of unreviewed backup tapes; (3) consistently misrepresenting the relevant facts after circumstances later forced Morgan Stanley to reveal the existence of the unsearched tapes; and (4) failing to locate thousands of additional unsearched backup tapes until the eve of trial, despite repeated assurances that complete searches had been performed.<sup>137</sup>

Although Morgan Stanley's misbehavior amounted to deliberate concealment of evidence and lying to cover-up that concealment, it had little or nothing to do with electronic issues; rather, it merely arose in the context of electronic documents.<sup>138</sup> It was akin to deliberately failing to look in the correct filing cabinets and closing one's eyes to the existence of other filing cabinets known or suspected to contain relevant files and then dissembling about what had taken place.

##### a. Hiding the Archive

The *Coleman* discovery saga began innocently. Both sides exchanged reciprocal discovery requests which were commonplace for

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134. *See id.* at \*2-6.

135. *Id.*

136. *Id.* at \*5.

137. *Id.*

138. *See id.* at \*6.



litigation of this magnitude.<sup>139</sup> Morgan Stanley's initial response to the routine document requests was to produce only a handful of e-mails, despite testimony that the company was handling approximately 6,000,000 e-mails per week in 1999.<sup>140</sup>

After Morgan Stanley failed to respond to an October 2003 letter from CPH requesting that Morgan Stanley search backup tapes for responsive e-mails, CPH filed a motion to compel.<sup>141</sup> CPH's motion requested that Morgan Stanley be required to "make a full investigation for e-mail messages, including a search of magnetic tapes and hard drives."<sup>142</sup> Morgan Stanley opposed the motion, claiming that such a search would be extraordinarily expensive and that restoration would be futile because its previous policy of overwriting backup tapes every twelve months meant that the tapes could not contain e-mails generated prior to 2000.<sup>143</sup>

Negotiations aimed at resolving the dispute ensued.<sup>144</sup> Morgan Stanley rejected CPH's offers to have a third-party vendor search both parties' data for responsive materials and to have the parties split the cost of such search evenly – a deal that would likely have provided significant savings to Morgan Stanley.<sup>145</sup> Throughout these negotiations, CPH relied on Morgan Stanley's assertions that all of its e-mail from the time period at issue was on hard-to-search backup tapes that had, for the most part, been overwritten in any event.<sup>146</sup> Morgan Stanley's corporate representative on discovery issues, Robert Saunders, testified that the company was building an e-mail archive that would allow easy searching and production, but was being loaded only with new e-mails as they were generated.<sup>147</sup> The archive, therefore, would not contain e-mails prior to January 2001.<sup>148</sup>

In fact, and as CPH learned on the eve of trial, this was not true.<sup>149</sup> Morgan Stanley's e-mail archive was slated to hold all pre-2000 e-mail and already had been loaded with material from thousands of "historic"

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139. See *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co. (Coleman II)*, No. CA 03-5045 AI, 2005 WL 674885, at \*1 (Fla. Cir. Ct. Mar. 23, 2005).

140. *Id.*

141. *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co. (Coleman I)*, No. 502003CA005045XXOCAI, 2005 WL 679071 (Fla. Cir. Ct. Mar. 1, 2005), at \*1, \*7.

142. *Coleman II*, 2005 WL 674885, at \*1.

143. *Id.* at \*2.

144. *Id.*

145. *Id.* at \*2.

146. See *id.*

147. *Id.* at \*5 n.12.

148. *Id.*

149. See *id.* at \*3 n.4; *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co. (Coleman I)*, No. 502003CA005045XXOCAI, 2005 WL 679071 at \*4 (Fla. Cir. Ct. Mar. 1, 2005).

backup tapes at the time of Saunders's false testimony.<sup>150</sup> In effect, Morgan Stanley had lied, and its lie was tantamount to saying it did not have filing cabinets containing relevant evidence which it knew it possessed.

b. Falsely Certifying Compliance with the Agreed Order

Relying on misrepresentations that Morgan Stanley's pre-2000 e-mail was either nonexistent or overly burdensome to search, the parties entered an Agreed Order on April 16, 2004.<sup>151</sup> Under the Agreed Order, Morgan Stanley was obligated to: (1) identify the oldest full backup e-mail tapes for specific employees and former employees; (2) search those tapes for e-mails from a certain date range or containing certain keywords relating to the transaction; (3) produce, by May 14, 2004, both responsive e-mails and a privilege log; and (4) certify, by May 14, 2004, that it had fully complied with the Agreed Order.<sup>152</sup>

On May 14, 2004, Morgan Stanley produced 1,300 pages of e-mail but failed to provide the required certification.<sup>153</sup> On June 23, 2005, and after repeated demands by CPH, Morgan Stanley finally produced a Certificate of Compliance signed by Arthur Riel, a senior Information Technology staffer at Morgan Stanley who later became a "whistleblower."<sup>154</sup>

As CPH would later learn on the eve of trial, Riel's certification was wholly inaccurate: from the moment he signed it, both Riel and in-house counsel *knew* of thousands of tapes that Morgan Stanley had completely failed to search.<sup>155</sup> These consisted of 738 8-mm tapes discovered in Manhattan during 2002 and 1,423 DLT tapes discovered in Brooklyn before May 2004.<sup>156</sup> Neither set of tapes had been loaded on the secret archive by June 2004.<sup>157</sup>

Despite this knowledge, Morgan Stanley issued its Certificate of Compliance, knowing full well that it had not searched these thousands

150. *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co. (Coleman II)*, No. CA 03-5045 AI, 2005 WL 674885, at \*5 nn. 11-12 (Fla. Cir. Ct. Mar. 23, 2005).

151. *Id.* at \*3.

152. *Id.*

153. *Id.*

154. *Id.* at \*3. Although CPH did not effectively learn this information until March 2005, it turned out that by August 2004, Arthur Riel had been effectively fired by Morgan Stanley and had gone to the SEC as a whistleblower, leading to an investigation into the company's e-mail retention and destruction policies. *Id.* at \*7; *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co. (Coleman I)*, No. 502003CA005045XXOCAI, 2005 WL 679071, at \*2 (Fla. Cir. Ct. Mar. 1, 2005).

155. *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co. (Coleman II)*, No. CA 03-5045 AI, 2005 WL 674885, at \*1 (Fla. Cir. Ct. Mar. 23, 2005); *Coleman I*, 2005 WL 679071, at \*2.

156. *Coleman I*, 2005 WL 679071, at \*2.

157. *Id.*

of tapes.<sup>158</sup> Morgan Stanley also falsely suggested that it had searched individual tapes, thereby continuing to conceal the existence of the archive and its easy searching capabilities.<sup>159</sup> Moreover, soon after the certificate was issued, Riel and the lawyers learned that the unsearched tapes contained e-mails from the relevant time period.<sup>160</sup> Morgan Stanley, however, failed to withdraw the Certificate of Compliance, failed to proceed with searching those tapes, and failed to disclose that additional e-mail discovery might be required by the court order with which it had already certified as constituting “full compliance.”<sup>161</sup> Morgan Stanley deceived both its adversary and the court regarding compliance with a consented discovery order and compounded that deceit when it learned of additional facts that augmented the known falsity of its certification.<sup>162</sup> Morgan Stanley’s failure to correct any of these issues further compounded its prior deceit.<sup>163</sup>

c. Making False Representations When the Existence of Unsearched Tapes Had to Be Revealed

All remained quiet on the electronic-discovery front, at least as far as CPH was aware, until November 17, 2004, when Morgan Stanley was forced by collateral circumstances to reveal that it had not previously complied with the Agreed Order to produce e-mail.<sup>164</sup> But Morgan Stanley still failed to come clean. Morgan Stanley simply stated that it had “discovered additional e-mail backup tapes,” that some of the data on those “newly discovered” tapes had been restored, and that searches were being re-run.<sup>165</sup> A day later, Morgan Stanley produced approximately 8,000 pages of e-mail.<sup>166</sup> Morgan Stanley did not say, however, that this constituted a complete production.<sup>167</sup> Despite CPH’s repeated requests, Morgan Stanley provided no other information, such as when the tapes were found, how many tapes existed, whether the tapes were restored, how much data they contained, how many e-mails they contained, or when Morgan Stanley would produce additional e-mails.<sup>168</sup>

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158. *Id.*

159. *Id.*

160. *Id.*

161. *Coleman I*, 2005 WL 679071, at \*5.

162. *Id.*

163. *Id.*

164. *Id.* at \*3. As discussed in note 154, *supra*, because Riel had been fired and had approached the SEC, it must have become evident to in-house counsel that the falsity of Riel’s certificate of compliance would eventually be revealed.

165. *Id.*

166. *Coleman I*, 2005 WL 679071, at \*3.

167. *Id.*

168. *See id.*

On January 26, 2005, as a result of Morgan Stanley's suspicious stonewalling, CPH filed a Motion for Adverse Inference Instruction Due to Morgan Stanley's Destruction of E-mails and Morgan Stanley's Non-Compliance with the Agreed Order.<sup>169</sup> In a hearing a few days later, Morgan Stanley's counsel continued to dissemble, falsely representing to the court that the Brooklyn tapes were found "sometime during the summer" of 2004, that the 8-mm tapes were found on November 4, 2004, and that no one in Morgan Stanley's Law Division knew the unsearched tapes contained e-mail until late October 2004.<sup>170</sup>

The court granted CPH's request that a third-party vendor be retained at Morgan Stanley's expense to search the additional backup tapes for e-mails which met the Agreed Order's terms.<sup>171</sup> The court also scheduled an evidentiary hearing for February 14, 2005, at which Morgan Stanley would be given an opportunity to present evidence explaining the deficiencies that had been uncovered by that time.<sup>172</sup>

It was at the February 14, 2005 hearing that Morgan Stanley's misconduct – the archive hiding, the failure to comply with the Agreed Order, and the earlier false statements about the circumstances relating to the unsearched backup tapes – began to surface.<sup>173</sup> Partly based on these facts, the court ultimately ordered on March 1, 2005, that Morgan Stanley bear the burden of proof on several elements of the fraud claims.<sup>174</sup> The court reasoned that it was not fair to saddle CPH with such burdens given Morgan Stanley's failure to comply with basic discovery obligations.<sup>175</sup>

Following the February 14, 2005 hearing, and before the court had entered the March 1 Order, CPH continued to pursue Morgan Stanley for its discovery misconduct based, in part, on Morgan Stanley's then regular discoveries of new e-mail tapes.<sup>176</sup> The court ordered Morgan

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169. *Id.* at \*4.

170. *Id.*

171. *Coleman I*, 2005 WL 679071, at \*5.

172. *Id.* at \*4.

173. *Id.*

174. *Id.* at \*6.

175. *Id.* At the February 14, 2005 hearing, there was also considerable testimony regarding new unsearched tapes found during January and February 2005 – indeed, some were found as recently as the day before the hearing. *Id.* at \*4. These tapes were sitting in obvious locations in Morgan Stanley's IT department, thus making it clear that no serious effort to find the entire set of existing backup tapes had been made. *Id.* The pattern of finding more and more unsearched tapes continued after February 14, 2005. *Id.* at \*5. All told, by March 2005, Morgan Stanley informed the court that it had found approximately 7,000 tapes that had not been searched when Morgan Stanley certified compliance with the Agreed Order in June 2004. *Coleman II*, 2005 WL 674885 at \*7. In other words, it was as if Morgan Stanley was "discovering" intentionally misplaced filing cabinets up to the eve of trial.

176. *Coleman I*, 2005 WL 679071, at \*4.

Stanley to produce, at CPH's request, documents in which Morgan Stanley described its e-mail production capabilities to other litigants and information related to Arthur Riel's employment status.<sup>177</sup> Through these productions, CPH learned both that Morgan Stanley had been the subject of a Security and Exchange Commission (SEC) investigation into its alleged destruction of backup tapes and that the archive had greater problems than those disclosed at the February 14, 2005 hearing.<sup>178</sup> CPH also learned, based on preliminary information from the court-ordered third-party vendor that was reviewing Morgan Stanley's work, that many tapes which Morgan Stanley had claimed contained no e-mail *did*, in fact, contain e-mail.<sup>179</sup>

Due to these discoveries, CPH asked for and was granted permission to depose Arthur Riel and to re-depose Allison Gorman, Riel's successor at Morgan Stanley.<sup>180</sup> Based on information revealed in these depositions and related discovery, CPH asked that the order shifting the burden of proof be changed to a default judgment and that the court set another evidentiary hearing for March 14 and 15, 2005.<sup>181</sup>

Much new information had come to light since the February 14, 2005 hearing. Most importantly, it had become clear that Morgan Stanley went to great lengths to conceal the backup-tape destruction, which triggered the SEC investigation into the company's failure to follow regulatory rules concerning electronic information retention.<sup>182</sup> In December 2002, Morgan Stanley settled alleged rules violations relating to this practice with the SEC, New York Stock Exchange (NYSE), and National Association of Securities Dealers (NASD) and agreed to pay a \$1.65 million fine.<sup>183</sup> Not only did Morgan Stanley tell the SEC and CPH different stories concerning critical facts, the company intentionally omitted a key document from its privilege log and violated court orders regarding the production of e-mail-related documents.<sup>184</sup> At the same time, Morgan Stanley misrepresented the status of its e-mail

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177. *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co. (Coleman II)*, No. CA 03-5045 AI, 2005 WL 674885, at \*6 (Fla. Cir. Ct. Mar. 23, 2005).

178. *Id.* at 7.

179. *Id.* at \*5 n. 6.

180. Susanne Craig, *How Morgan Stanley Botched a Big Case by Fumbling E-mails*, WALL ST. J., May 16, 2005, at A1, available at <http://www.post-gazette.com/pg/05136/505304.stm>; [http://courtcon.co.palm-beach.fl.us/pls/jiwp/ck\\_public\\_qry\\_doct.cp\\_dktrpt\\_docket\\_report?case\\_id=502003CA005045XXOCAI&begin\\_date=&end\\_date=](http://courtcon.co.palm-beach.fl.us/pls/jiwp/ck_public_qry_doct.cp_dktrpt_docket_report?case_id=502003CA005045XXOCAI&begin_date=&end_date=) (last visited Jan. 12, 2007) (*Coleman I* docket entries).

181. *Coleman II*, 2005 WL 674885, at \*1.

182. *Id.* at \*5.

183. *How Did Morgan Stanley Defraud Investors?*, [http://www.securitiesfraudfyi.com/morgan\\_stanley.html](http://www.securitiesfraudfyi.com/morgan_stanley.html) (last visited July 28, 2006).

184. *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co. (Coleman II)*, No. CA 03-5045 AI, 2005 WL 674885, at \*5 n. 7 (Fla. Cir. Ct. Mar. 23, 2005).

archive, which contained more data and performed more accurate searches than it represented.<sup>185</sup>

Based on this evidence, along with the other discovery misconduct, the court ultimately revised its sanction and entered a partial default judgment.<sup>186</sup> Effectively, Morgan Stanley told CPH and the court a series of lies that were compounded by another series of subsequent lies intended to cover-up the underlying series of initial lies – lies upon lies, upon lies.<sup>187</sup> Disclosure of the falsity took place only when necessitated by outside events, and then only to the extent that Morgan Stanley felt compelled to make some form of disclosure.<sup>188</sup>

## 2. CONCEALMENT OF KEY EXECUTIVE'S BACKGROUND

In addition to misconduct arising from the production of electronic documents, Morgan Stanley engaged in a second area of serious discovery misconduct relating to the discovery of materials involving William Strong, a Morgan Stanley managing director who in many ways was the driving force behind the Sunbeam deal.<sup>189</sup>

This misconduct began near the litigation's inception. CPH's first discovery request sought "[a]ll documents concerning [Strong's] employment contracts, performance evaluations, and/or personnel files (including without limitation any documents that describe or discuss [his] training, experience, competence, and accomplishments)."<sup>190</sup> Morgan Stanley refused, insisting that such documents were not relevant and would, therefore, infringe on Strong's privacy interests.<sup>191</sup> On March 15, 2004, the court ordered Morgan Stanley to produce "[a]ll references (positive or negative) to [Strong's] truthfulness, veracity, or moral turpitude."<sup>192</sup>

When limited portions of Strong's evaluations were produced in

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185. *Id.* at \*5.

186. *Id.* at \*9.

187. *See generally* *Coleman II*, 2005 WL 674885; *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co. (Coleman I)*, No. 502003CA005045XXOCAI, 2005 WL 679071 (Fla. Cir. Ct. Mar. 1, 2005).

188. *See generally* *Coleman II*, 2005 WL 674885; *Coleman I*, 2005 WL 679071. Morgan Stanley's situation worsened when the court received considerable testimony during the February and March 2005 hearings regarding various "glitches" in the software used to search the e-mail archive. *Coleman II*, 2005 WL 674885, at \*6. Prior searches needed to be redone after the various glitches were revealed and repaired, rendering Morgan Stanley's other excuses all the more problematic. *Id.* The software glitches were not a primary focus of the sanctions orders since it was unclear whether they flowed from deliberate misconduct. *See id.* at \*5.

189. Craig, *supra* note 180.

190. *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co. (Coleman II)*, No. CA 03-5045 AI, 2005 WL 674885, at \*8 (Fla. Cir. Ct. Mar. 23, 2005).

191. *Id.*

192. *Id.*

response to the March 15 order, it became clear that Strong's colleagues had held reservations about his candor and ethical compass.<sup>193</sup> Strong's evaluators, Joseph Perella and Tarek Abdel-Meguid, gave only vague explanations of those concerns.<sup>194</sup> Morgan Stanley withheld Strong's 1994 performance evaluation, even after CPH specifically requested it in spring 2004, on the grounds that the document was non-responsive.<sup>195</sup> When the evaluation was finally produced during the court's hearing on CPH's default motion on March 15, 2005, it became clear that the document was responsive to the court's initial order and had been wrongly withheld.<sup>196</sup>

In the midst of Morgan Stanley's evasive tactics and vague explanations, CPH continued to independently investigate Strong. On January 25, 2005, counsel for CPH obtained a copy of a November 10, 1998 news article describing an investigation by Italian authorities into allegations that Strong had been complicit in a foreign bribery scheme.<sup>197</sup> As it turned out, Strong had been indicted in Italy for alleged complicity, while working for Salomon Brothers International in the 1992 formation of a joint venture with Italian companies, that involved bribing various Italian officials.<sup>198</sup>

Morgan Stanley was aware of Strong's prosecution, but failed to produce the requested documents relating to it, even after the court ordered production of documents relating to Strong's "truthfulness, veracity, or moral turpitude."<sup>199</sup> Morgan Stanley initially argued that Strong's prosecution did not occur until after the Sunbeam deal had closed in March 1998.<sup>200</sup> Therefore, Morgan Stanley argued, CPH was not to be entitled to any inference that the Italian investigation gave Strong an incentive to engage in fraud relating to Sunbeam in order to boost his fees and cement his position at Morgan Stanley.<sup>201</sup> Discovery showed, however, that the Notice of Prosecution was filed and sent to Morgan Stanley in April 1996.<sup>202</sup> The court-ordered production of more than 350 documents in February 2005 also showed that Morgan Stan-

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193. *Id.* at \*8.

194. *Id.*

195. *Id.* at \*9.

196. *Id.*

197. *See id.* at \*8; *see also* Susan Beck, *Morgan Stanley's Recipe for Disaster: Discovery Abuses, a Preoccupied GC and an Overconfident Law Firm Helped Create a \$1.6 Billion Fiasco for Morgan Stanley*, AMERICAN LAWYER, April 1, 2006, at 88, available at <http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1149239119470>.

198. Craig, *supra* note 180.

199. *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co. (Coleman II)*, No. CA 03-5045 AI, 2005 WL 674885, at \*8 (Fla. Cir. Ct. Mar. 23, 2005).

200. *Id.* at \*8 n.16.

201. *Id.*

202. *Id.* at \*8.

ley's counsel in the Sunbeam transaction, Davis, Polk & Wardwell, had served as Strong's counsel in the Italian criminal prosecution at Morgan Stanley's request.<sup>203</sup> Morgan Stanley had been aware of Strong's involvement in the Italian prosecutor's investigation since at least late 1993.<sup>204</sup>

The privilege logs that Morgan Stanley produced in connection with these revelations demonstrated even further misconduct. First, the logs erased any doubt as to whether Morgan Stanley knew about the Strong prosecution when it received CPH's requests and the court's order for discovery.<sup>205</sup> Morgan Stanley's current general counsel, Donald Kempf, appeared in the privilege logs concerning events surrounding the Strong prosecution.<sup>206</sup> In addition, a managing director in charge of litigation appeared more than eighty times in the privilege logs concerning events surrounding the Strong prosecution.<sup>207</sup> Thus, Morgan Stanley executives clearly knew of the Strong prosecution at the time the company responded to CPH's discovery requests.

Furthermore, the logs revealed that Morgan Stanley was claiming privilege over documents that had been shared with third parties.<sup>208</sup> Morgan Stanley first sought to defend its privilege claims by arguing that it was in a joint-defense agreement with the Italian and American law firms that represented Strong and Salomon Brothers.<sup>209</sup> But, when that claim was put to the test, and the court reviewed the documents *in camera*, it became clear that no such agreement existed.<sup>210</sup>

Accordingly, CPH was permitted access to additional documents relating to Strong and his prosecution.<sup>211</sup> This misconduct, like the electronic document misconduct, helped form the basis for the court's March 23, 2005 partial default order.<sup>212</sup>

### B. *Analysis of the Coleman Court's Sanctions Decision*

On March 1, 2005, the *Coleman* court entered a sanctions order:

- (i) Granting CPH's motion for an adverse inference instruction due to Morgan Stanley's destruction of e-mails and Morgan Stanley's non-compliance with the Agreed Order;

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203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.* at \*9.

212. *Id.* at \*8-9.



- (ii) Requiring Morgan Stanley to use its best efforts to comply with two previous court orders relating to production of e-mails and the searching of e-mail back-up tapes;
- (iii) Providing for the reading to the jury of a statement of facts setting forth (a) Morgan Stanley's violation of a federal regulation requiring the preservation of e-mails for three years and their preservation in a readily accessible place for two years; (b) Morgan Stanley's certification to the Court of full compliance with the April 16, 2004 order relating to the production of e-mails, when, in fact, it was aware at the time of the certification of the existence of 2161 back-up tapes that had not been searched; (c) Morgan Stanley's delay in taking any steps to search known back-up tapes for relevant e-mails; (d) Morgan Stanley's late discovery of 200 back-up tapes openly stored in locations known to be used for tape storage; and (e) Morgan Stanley's delay in advising CPH of the discovery of additional back-up tapes;
- (iv) Allowing CPH to argue to the jury that Morgan Stanley's concealment of its role in the Sunbeam transaction is evidence of malice or evil intent, going to the issue of punitive damages; and
- (v) Placing the burden on Morgan Stanley of proving to the jury, by the greater weight of the evidence, that it lacked knowledge of the Sunbeam fraud and did not aid and abet or conspire with Sunbeam to defraud CPH.<sup>213</sup>

The Morgan Stanley discovery violations that prompted the March 1, 2005 sanctions order were not the result of any difficulty in navigating the waters of electronic discovery.<sup>214</sup> There is no indication in the record that Morgan Stanley represented that it could not produce certain e-mails because they had been lost as a result of the "'good faith' routine operation of an electronic information system."<sup>215</sup> Morgan Stanley also made no representations that its back-up tapes could not be searched for relevant e-mails or could do so only at great cost and difficulty.<sup>216</sup> Instead, as previously noted, the misconduct was analogous to a situation where a litigant represents to the court that it has produced all relevant documents in its paper files when it is aware that there exists a

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213. *Id.* at \*7.

214. *See generally* *Coleman II*, 2005 WL 674885; *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co.* (*Coleman I*), No. 502003CA005045XXOCAI, 2005 WL 679071 (Fla. Cir. Ct. Mar. 1, 2005).

215. *See* Report, *supra* note 7, at C-85

216. Morgan Stanley's cost and undue burden argument induced CPH to enter into the Agreed Order. However, this argument was an outright fabrication, as demonstrated by the undisclosed existence of the Morgan Stanley archive and its attendant searching capability.

warehouse full of filing cabinets containing potentially relevant documents but has made no real effort to review those documents.

On March 23, 2005, the court entered another sanctions order in light of further discovery misconduct that had been uncovered since the February 14, 2005 sanctions hearing.<sup>217</sup> That order increased the severity of the sanctions imposed by: (1) providing that certain facts set forth in CPH's Amended Complaint be read to the jury and that the jury be instructed that such facts were deemed established for all purposes in the action; and (2) providing that a statement be read to the jury setting forth in detail all of Morgan Stanley's discovery misconduct in this action and instructing the jury that it may consider those facts in determining whether Morgan Stanley sought to conceal its offensive conduct when determining whether an award of punitive damages is appropriate.<sup>218</sup>

Among other things, the newly discovered information showed that Morgan Stanley: (1) had misrepresented to the court, under oath, the amount of electronic data that it had located;<sup>219</sup> (2) had not made a good faith search for its back-up tapes because it had only recently discovered an additional 6,925 back-up tapes; (3) had not advised the court and CPH of software errors in its search process that resulted in certain data not being collected; (4) had intentionally withheld information regarding an SEC investigation into its e-mail retention policy; and (5) had intentionally withheld information about an SEC investigation into whether Morgan Stanley had violated the SEC's cease and desist order relating to the overwriting of backup tapes.<sup>220</sup>

Again, there was no evidence that Morgan Stanley was unable to or had difficulty meeting CPH's discovery requests because of problems unique to electronic discovery.<sup>221</sup> The evidence presented to the court showed that Morgan Stanley made a conscious decision not to conduct a good faith search for relevant electronic information and then made misrepresentations to the court to prevent the discovery that it had not made a good faith effort.<sup>222</sup>

The court also took note of Morgan Stanley's desire to cheat, observing that

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217. *Coleman II*, 2005 WL 674885, at \*9.

218. *Id.* at \*10.

219. *Id.* at \*6. Morgan Stanley told the Court that it had located 600 gigabytes of data but contemporaneously told the SEC that it had located a terabyte of data. The 400 gigabyte difference – as alluded to above – is enormous. *Id.*

220. *Id.* at \*6-\*7; *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co. (Coleman I)*, No. 502003CA005045XXOCAI, 2005 WL 679071, at \*5 (Fla. Cir. Ct. Mar. 1, 2005).

221. *See generally* *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co. (Coleman II)*, No. CA 03-5045 AI, 2005 WL 674885 (Fla. Cir. Ct. Mar. 23, 2005); *Coleman I*, 2005 WL 679071.

222. *Id.*

[i]t is now clear why MS & Co. was so unwilling to provide CPH with basic information about how and when the tapes were found or when production would be complete. First, candor would have required MS & Co. to admit that it had not done a good faith search for the oldest full backup tapes, and that Riel's certificate of compliance was false. Some unsearched tapes had been found by 2002; others had been found no later than May 2004. Together, over 2,000 tapes had been found which were not searched prior to the May production. It is untrue that the tapes were "not in locations where e-mail backup tapes customarily were stored." Second, MS & Co. desperately wanted to hide an active SEC inquiry into its e-mail retention practices. Finally, MS & Co. did not want to admit the existence of the historical e-mail archive, which would expose the false representations it had made to the Court and used to induce CPH to agree to entry of the Agreed Order.<sup>223</sup>

Moreover, the court imposed the sanctions because it concluded that Morgan Stanley's pervasive discovery misconduct had made it impossible to cure the prejudice to CPH and had "call[ed] into doubt all of [Morgan Stanley's] discovery responses."<sup>224</sup> The only way that the court could level the playing field was to impose the sanctions.

### C. Coleman's True Meaning: The Theory of Sanctions and Their Wise Imposition

*Coleman* – essentially an old-fashioned fraud on the court that arose in the context of electronic discovery issues – provides valuable insight regarding the imposition of sanctions in an electronic age. A court's authority to impose sanctions derives from the statutory powers provided by the legislature, as well as from the court's own inherent power to control the litigants and to guarantee the integrity of the court and its proceedings.<sup>225</sup> Sanctions serve four purposes that are both case-specific and systemic. First, sanctions serve to deter litigants from avoiding their obligations under the discovery rules, which would otherwise be rendered ineffectual without the threat of punishment for their violation.<sup>226</sup> Second, they serve to punish litigants for wrongful conduct

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223. *Coleman II*, 2005 WL 674885 at \*5.

224. *Id.* at \*9.

225. See *Chambers v. Nasco, Inc.*, 501 U.S. 32, 43 (1991). For a discussion of the bases for a court's authority to impose sanctions, see generally Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1678 (2004); Stephen B. Burbank, *Sanctions in the Proposed Amendments to the Federal Rules of Civil Procedure: Some Questions About Power*, 11 HOFSTRA L. REV. 997, 997-1011 (1983).

226. See *Nat'l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 643 (1976) ("[T]he most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence

or disrespect of the integrity of the legal process.<sup>227</sup> Third, sanctions have curative objectives – to restore the prejudiced party to the same position he would have been in had the opposing party faithfully discharged its discovery obligations.<sup>228</sup> This goal, in particular, is suited to the preclusionary sanctions (as to plaintiff misbehavior) or default sanctions (as to defendant misbehavior) because sometimes the playing field cannot be leveled. Fourth, sanctions encourage respect for the judicial system and the court’s authority.<sup>229</sup>

Trial courts generally have broad discretion in crafting a sanction for discovery abuse.<sup>230</sup> Due process requires that the court: (1) “ask whether there is a sufficient relationship between the discovery and the merits sought to be foreclosed by the sanction to legitimate depriving a party of the opportunity to litigate the merits;” and (2) “determine whether the party guilty of a failure to provide discovery was unable to comply with the discovery.”<sup>231</sup>

In weighing the application of sanction rules, courts might well consider whether the concealment would have gone undetected but for the fortuity of a disgruntled employee, the intervention of a whistleblower, or the occurrence of some other unexpected event. In such cases, this speaks volumes about whether the conduct was intentional. Likewise, if the matters concealed were central to the adjudication of the merits – the proverbial “smoking gun” – this, too, speaks volumes. The inability to know the content of what is destroyed may itself justify an adverse inference.<sup>232</sup> Finally, serial or widespread violations are highly probative; they evince the unmistakable conclusion that the misconduct could not be an accident.<sup>233</sup>

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of such a deterrent.”); 8A CHARLES A. WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2281 (2d ed. 1994) (“Without adequate sanctions the procedure for discovery would often be ineffectual.”). However, as demonstrated by *Coleman*, pickpockets will ply their trade at the gallows whilst their comrades are being publicly hanged: sometimes even one set of sanctions is not enough to deter continued discovery misbehavior.

227. See *Nat’l Hockey League*, 427 U.S. at 643.

228. See *Zubulake v. USB Warburg LLC*, 229 F.R.D. 422, 437 (S.D.N.Y. 2004) (citing *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999)).

229. The Washington Supreme Court in *Fisons Corp.*, discussed above in the text accompanying notes 56-69, reversed the trial court and held that the *failure* to impose sanctions was an *abuse* of the trial court’s discretion. *Washington State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 858 P.2d 1054, 1085 (Wash. 1993). The court was obviously mindful of the potential breakdown of judicial authority if it failed to intercede. *Id.*

230. WRIGHT, MILLER & MARCUS, *supra* note 226, § 2284.

231. *Id.* § 2283.

232. A wrongdoer, like Perkins, should not catch a break simply because the concealed documents were not damaging. In the cases detailed above, the discovery abuse primarily involved “smoking gun” documents. In some cases, however, the sin of withholding was more prejudicial than the withheld documents themselves.

233. See *generally*, *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co. (Coleman II)*,

In the context of electronic discovery, two concerns generally guide state and federal courts in determining whether to impose sanctions: (1) whether a party has been prejudiced by the non-production, late production, or incomplete production of discoverable information; and (2) whether the party charged with failing to provide the requested discoverable information acted willfully or in bad faith.<sup>234</sup>

In a survey of written opinions in the sanctions arena since January 1, 2000, Judges Shira Scheindlin and Kanchana Wangkeo found that courts willingly imposed sanctions, regardless of culpability, where a party had been prejudiced by incomplete or non-compliant discovery responses.<sup>235</sup> The goal of the sanctions was to place the party in the position that they would have been in had they obtained the requested discovery.<sup>236</sup> Accordingly, the sanctions of choice were evidentiary sanctions or adverse inference instructions.<sup>237</sup>

Scheindlin and Kanchana also found, however, that courts were unwilling to ignore intentional discovery misconduct, even if it caused little or no prejudice to the opposing party.<sup>238</sup> The courts' concerns under such circumstances included both the need to deter obstructionist behavior to protect the integrity of the court's orders and its ability to control proceedings.<sup>239</sup> Thus, where defiance of the court's authority was egregious enough, the dismissal of a party's claims or the entry of a default judgment was considered appropriate.<sup>240</sup>

Ultimately, Judges Scheindlin and Kanchana concluded that there existed a sliding scale between the elements of willfulness and prejudice, i.e. the more willful the discovery violation, the less prejudice the courts required before sanctioning a party, and vice versa.<sup>241</sup> On the other hand, the most extreme sanctions may be imposed for deliberate and egregious misbehavior whose consequences fall far short of altering a level playing field.<sup>242</sup> Otherwise, only the irreparable destruction of crucial evidence would warrant the imposition of extreme sanctions, allowing a party to commit serial frauds on the court as long as some means of curing their ill-effects could be found.

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No. CA 03-5045 Al, 2005 WL 674885 (Fla. Cir. Ct. Mar. 23, 2005); Coleman (Parent) Holdings, Inc.v. Morgan Stanley & Co. (*Coleman I*), No. 502003CA005045XXOCAI, 2005 WL 679071 (Fla. Cir. Ct. Mar. 1, 2005).

234. Scheindlin & Wangkeo, *supra* note 37, at 80, 84.

235. *Id.* at 81.

236. *Id.*

237. *Id.*

238. *Id.* at 89, 91

239. *Id.*

240. *See, e.g., id.* at 85.

241. *Id.* at 89.

242. *See id.*

Courts are permitted to issue sanctions that are case-dispositive because, without that power, an incentive exists to practice egregiously obstructive conduct so long as the gain from the discovery deceit – protecting the smoking gun – outweighs the potential penalty.<sup>243</sup> The proper focus is whether the misconduct was intentional, not whether the harm is irreparable. Otherwise, the system would become self-defeating – begging one to ask, how much fraud and deceit will a court tolerate? Without severe sanctions, litigants would continue to commit infractions so long as their financial risk-reward calculations demonstrated that the consequences of the infractions were less onerous than compliance or obedience. One must consider whether the discovery violation was the product of a calculated risk-reward decision since it is undesirable for litigants to apply game theory with respect to making discovery decisions.<sup>244</sup>

Obviously, there is no one-size-fits-all sanctions template. The combination of variables is endless. Their application must be entrusted to the trial court's sound discretion. In the end, there must be balance in imposing sanctions – they should be reserved for the egregious cases and not used to punish minor infractions.

## VI. CONCLUSION

*Coleman* teaches that with enhanced opportunities to commit discovery violations, litigants require concomitantly strong legal deterrence. While there has always been cheating, as the discussed case studies make evident, *Coleman* also teaches that the advent of electronic documents has brought with it new and novel opportunities for the dishonest and unscrupulous to conceal evidence via a medium that can complicate detection.<sup>245</sup>

*Coleman* was a high-stakes case where, even after Morgan Stanley was sanctioned for disobeying a court order and not complying with regulatory rules, the misconduct continued. “The nuclear option” – case dismissal or default judgment – may therefore be needed more than ever to deter misconduct and prevent a “wild west” litigation environment.

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243. See *Greviskes v. Universities Research Ass'n*, 417 F.3d 752, 758 (7th Cir. 2005) (“The district court may dismiss a case for discovery violations or bad faith conduct in litigation under Federal Rule of Civil Procedure 37 or under the inherent authority of the district court.”).

244. The calculus is similar to a strategy of committing tax fraud and then trying to settle if you are caught; telling a lie and not getting caught is not the same thing as telling the truth.

245. As Taylor states, “[s]omething is very wrong when even first-rate lawyers cannot contrive discovery requests exquisite enough to prompt their adversaries to cough up highly relevant documents that the defense lawyers have in hand.” Taylor, *supra* note 59, at 78-79. If they're doing this with paper, what about documents found only on the computer? Or, is this a commentary not on the medium but the process itself?

Given the comments on why lawyers (or parties) commit discovery violations, the penalties must be sure and decisive. Otherwise, one can imagine serial violations and abuses which are the product of careful risk-reward calculations. As Taylor observed:

Chief Justice James Andersen's opinion also stressed that "a spirit of cooperation and forthrightness during the discovery process is necessary for the proper functioning of modern trials." He said that "conduct is to be measured against the spirit and purpose of the rules, not against the standard of practice of the local bar. . . . Misconduct, once tolerated, will breed more misconduct, and those who might seek relief against abuse will instead resort to it in self-defense."<sup>246</sup>

In this regard, Zitrin and Langford note the inadequacy of monetary remedies to curb calculated risk-reward decisions:

Monetary sanctions alone are simply insufficient to deter discovery abuse. But judges have the power to stem the tide by the more liberal use of issue sanctions. These sanctions range from determining specific issues adversely to the offending side, to making an adverse finding on liability, to striking a party's answer, as a Nebraska judge did in a 1997 case. They work because they have a direct effect on the outcome of a case. Most judges are reluctant to use such extreme remedies. But unless members of the bench are willing to do more than complain, and start acting on what they see, the deterrent to future abuses simply won't be enough. If we want discovery abuses stopped, it will require greater consequences than money.<sup>247</sup>

The Zitrin and Langford commentary seeks to plumb the motives of the practitioners because an understanding of the motives may help one recognize what is needed to curb the misconduct. The picture presented is not pretty:

Why would Alston & Bird risk such disapprobation? Why did Bogle & Gates engage in a repeat performance? The answer, unfortunately, is that discovery is such a high stakes game – and such a vital profit center for some law firms – that monetary sanctions, even in the hundreds of thousands of dollars, are too often seen as simply the cost of doing business.<sup>248</sup>

Zitrin and Langford proceed to note the absence of adverse fallout to those implicated in these incidents:

Both Alston & Bird and Bogle may have suffered from a temporarily sullied reputation, but the ultimate effect on their pocketbooks was relatively minimal – undoubtedly a small fraction of the fees they had charged. Bogle's *mea culpas* aside, the two lawyers primarily

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246. *Id.* at 76-77.

247. Zitrin & Langford, *supra* note 54.

248. *Id.*

responsible for the *Fisons* discovery remained with the firm in good standing. The younger one was even promoted to partner.<sup>249</sup>

Taylor, too, took note of the fact that *Fisons* eloquently spoke to the “going rate” of conduct at the bar – Bogle recruited fourteen lawyers and professors as “experts” to speak on its behalf in a case where justice came within a hair’s breadth of woeful perversion:

It would be easy to dismiss this sad story as simply one episode of rogue lawyering by a single big law firm and its client. But it’s more than that, judging by the parade of leading lights that stepped up to defend Bogle. In the view of Bogle’s 14 distinguished litigation experts (and of Judge French), the kind of ducking and dodging that took place in this case is a routine aspect of the discovery process, and is permitted and (some say) even required by the rules of professional ethics.

. . . .

The conduct that these experts condone – after describing it in highly euphemistic terms – is not just a lawyers’ game. It causes real injustice, by denying essential evidence to wronged parties like the Pollocks and Dr. Klicpera. The discovery process, and indeed the legal process, fail in their most basic functions when they fail to unearth such highly relevant documents, and thus allow the truth to be concealed, denied, and perverted.<sup>250</sup>

While one may have reservations about the liberality of discovery, particularly as the system may be set up with respect to electronic discovery, there is one thing about which no doubt can be tolerated: once there are rules in place, all must play by those rules, regardless of beliefs as to their soundness. This applies doubly to lawyers; otherwise, a license is created to violate rules with which lawyers profess not to agree.

Against this backdrop, *Coleman* clearly was correctly decided. It may be viewed as an old-fashioned case of contumacious conduct, fraud on the court, and corruption of the judicial process – involving deliberate spoliation and discovery abuse. It is a case that would be decided the same way if it had taken place twenty years ago in the paper era.<sup>251</sup>

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249. *Id.*

250. Taylor, *supra* note 59, at 77-78.

251. Had the new amendments to the Federal Rules governed in *Coleman*, they would not have altered the outcome. Even if Rule 37(f) had been available to Morgan Stanley, it would not have provided a lifeline to rescue Morgan Stanley from the discovery quagmire that it had created for itself. Rule 37(f)’s safe harbor provision would have been inapplicable. The heart of the discovery dispute between Morgan Stanley and CPH was not the destruction of electronic information during the routine good faith operation of an electronic information system, but rather the purposeful withholding of potentially relevant information contained within an electronic information system. Indeed, much of the rationale for the sanctions had nothing to do with the electronic nature of the requested discovery; some sanctions related to misbehavior having



Indeed, the ultimate sanction in *Coleman* was imposed in the face of the clear failure of a prior sanctions order to deter Morgan Stanley from further misconduct.<sup>252</sup> One is reminded of the pickpockets that plied their trade at the Tyburn gallows whilst their comrades were being publicly hanged.

Even more remarkably, in November 2002, Morgan Stanley was one of five firms that agreed to pay SEC regulators a total of \$8.25 million for failing to properly retain, and maintain in readily-accessible status, internal e-mails.<sup>253</sup> Until January 2001, Morgan Stanley systematically overwrote e-mail backup tapes every year, a practice which violated SEC rules requiring the firm to keep the e-mails readily accessible for at least two years.<sup>254</sup> Morgan Stanley's concealment of electronic documents in the *Coleman* litigation included its failure to disclose prior discipline by a federal regulatory agency for violating e-mail retention rules.

The court's approach to Morgan Stanley's discovery misconduct was both measured and appropriate.<sup>255</sup> The court held two hearings.<sup>256</sup> After the first hearing, the court imposed sanctions that were commensurate with the discovery misconduct disclosed at that hearing.<sup>257</sup> It was only after the second hearing, where it was revealed that Morgan Stanley had engaged in a pattern and practice of purposefully avoiding its discovery obligations and lied to the court about its efforts, that the court entered the partial default sanction.<sup>258</sup> The entry of the partial default judgment against Morgan Stanley was in no sense the court's knee-jerk reaction to a first sign of wrongdoing.

*Coleman* has its critics. For some, the case was a poster child for those concerned about the pitfalls of electronic discovery because, superficially, it appears to be a paradigm of the misuse of the discovery

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nothing to do with electronic documents, while the principal sanctions for the electronic discovery misbehavior related to the knowing concealment of information resources that were available but which Morgan Stanley chose, deliberately, not to disclose or to search. Of course, the ultimate sanction was imposed only after Morgan Stanley had lied to the court about compliance with a prior sanction order – showing that even one sanction did not deter further egregious misconduct.

252. See *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co. (Coleman II)*, No. CA 03-5045 AI, 2005 WL 674885 (Fla. Cir. Ct. Mar. 23, 2005).

253. See *Storage Strategies: A New IT Challenge*, <http://www.nec-gss.com/topics/usa/2003/030226.html> (last visited Sept. 21, 2006).

254. See *More E-mail Problems, More Fines for Morgan Stanley*, <http://informationweek.com/showArticle.jhtml?articleID=187202749> (last visited Sept. 21, 2006).

255. See *Coleman II*, 2005 WL 674885, at \*9-10; *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co. (Coleman I)*, No. 502003CA005045XXOCAI, 2005 WL 679071, \*6 (Fla. Cir. Ct. Mar. 1, 2005).

256. See *Coleman II*, 2005 WL 674885, at \*9-10; *Coleman I*, 2005 WL 679071, at \*6.

257. See *Coleman I*, 2005 WL 679071, at \*6-7.

258. See *Coleman II*, 2005 WL 674885, at \*8-9.

process for tactical gain. Indeed, an article appearing in the August 2005 issue of *SmartMoney*, authored by Roger Lowenstein, sought to excuse Morgan Stanley's conduct with public relations spin, painting old-fashioned fraud by the discovered party as electronic abuse by the discovering party.<sup>259</sup> The article claimed that CPH – represented by the law firm where the authors of *There Ought to be a Law* practiced – tried to “put the theory into practice” by the use of aggressive discovery to trip up Morgan Stanley.<sup>260</sup>

Nothing could be further from the truth. *Coleman* was an old-fashioned case of egregious fraud on opposing parties and the court. That this fraud occurred, in part, in the context of discovery involving the production of electronic documents is of no moment to its venality. Morgan Stanley first failed to take the claim seriously and then tried to wear down its opponent – a strategy that backfired. Morgan Stanley was directly implicated in the misconduct which was severe, repeated, and had little to do with the nature of the material being discovered. The serial discovery failures were the subject of serial cover-up efforts designed to protect Morgan Stanley's prior lies. The misconduct included repeated misrepresentations to the court and the opposing party, including misrepresentations about compliance with court orders. Morgan Stanley, however, was not deterred from continuing its fraud on the court even after it had been sanctioned once. In other words, *Coleman* was not a case involving the effort to burden an opposing party with unlimited electronic discovery, and the Lowenstein article represents nothing more than an effort to provide old-fashioned fraud a refuge in faux respectability.<sup>261</sup>

In the end, *Coleman* teaches that old-fashioned discovery abuse should not be tolerated and underscores the need for vigilance and the imposition of severe sanctions to deter the most appalling litigation misconduct. The Morgan Stanley problems were so widespread that the inescapable conclusion was that Morgan Stanley had engaged in a pattern and practice of deliberate deception. The *Coleman* sanctions, then,

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259. See Roger Lowenstein, *Unconventional Wisdom - Justice Done? Or Denied?*, SMARTMONEY, Aug. 1, 2005, at 56.

260. See Solovy & Byman, *supra* note 18.

261. See Lowenstein, *supra* note 259. The Lowenstein article contains other serious errors. Lowenstein ignores that the electronic discovery requests were mutual and typical for a case of this size and type. He ignores that Morgan Stanley deliberately withheld information about its electronic resources and prior SEC discipline. He ignores that the discovery failures came to light only as the result of a whistleblower. He ignores that but for the whistleblower, the discovery fraud would have evaded detection. He ignores that Morgan Stanley failed to come clean even after the court imposed one set of sanctions. Finally, he suggests that even CPH was surprised by the outcome, notwithstanding the fact that economic losses were some \$600,000,000, and exemplary damages were sought by reason of the fraud.

were eminently well-decided; the punishment clearly fit Morgan Stanley's crime.

By the same token, if the punishment is to fit the crime in other cases, discovery should not become a trap for the unwary. In the end, the litigation process should represent a fair search for truth, involving zealous advocacy by practitioners operating within the rules, not a tournament where victory awaits the dirty fighter and professional mores become "a race for the bottom."<sup>262</sup>

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262. *The Volokh Conspiracy, A Race to the Bottom*, <http://www.volokh.com/posts/1128791484.shtml> (last visited Sept. 21, 2006).