

Anticipated Preservation Fine from SEC — Making Sense of the Latest Retention & Preservation Judgments

By Kevin Brady, Attorney, Connolly Bove Lodge & Hutz, LLP and Deidre Paknad, President & CEO, PSS Systems, Inc.

The past six months have been a roller coaster ride for senior management who must structure their company's records retention and preservation policies. Many General Counsel and their staffs are spending much more time balancing their strategic goals to retain and dispose of information with their legal obligations to preserve records and the potentially monumental costs of collecting and preserving relevant electronic data.

The \$1.45 billion damages judgment against Morgan Stanley in *Coleman v. Morgan Stanley*, which largely resulted from a failure to preserve and produce certain electronic records, was stunning. Ironically, Federal regulators are now reportedly looking to fine Morgan Stanley approximately \$10 million for allegedly violating record-keeping rules by failing to preserve certain email messages. The SEC also is accusing Morgan Stanley of submitting a false certification regarding the company's compliance with a document request in connection with a past investigation.

And although the United States Supreme Court's recent decision reversing Arthur Andersen's criminal conviction for obstructing an SEC proceeding by intentionally destroying potentially relevant data immediately before receiving an SEC subpoena, the fact remains that Sections 804 and 1104 of the Sarbanes Oxley Act were enacted very specifically to criminalize the "knowing" destruction of documents with the intent to impede a contemplated investigation by a government agency.

Given all of those factors and the inherent challenges in preserving and producing electronic information, what should a company do to devise and implement an effective corporate strategy for preserving and producing information? The eight guidelines below capture the emerging standards for corporate responsibility:

1. Enable your "discovery liaison" to readily describe information custodians, systems, storage, and your retention policies
2. Affirmatively and repeatedly communicate legal holds to all affected parties
3. Integrate your retention policies and coordinators with discovery challenges and responsibilities
4. Proactively manage and monitor document collections
5. Interview all affected employees to determine relevant sources of information
6. Monitor compliance with legal holds on an ongoing basis
7. Thoroughly document and demonstrate the efficacy of your process
8. Be prepared to take personal responsibility for ensuring that information is preserved, collected, and produced

Today, it's both prudent and cost effective for legal, compliance and corporate management to review and revise their approach to ensure they can meet these standards when tested by regulators and opposing counsel, including upgrading their approach to:

- Litigation hold policies and procedures
- Processes for identifying who is affected and where information is stored; closing any knowledge and process gaps
- Scope and completeness of collecting documents and your related record keeping of these efforts
- Method of retaining collected documents (and your process records) as a part of the request and case record keeping
- Educate business and IT executives on the changing risk profile and standards for preservation and production

About CGOC

The Compliance, Governance & Oversight Council (CGOC) was founded by PSS Systems as a resource to legal and compliance executives who seek advice, guidance and insight on critical policy, compliance and oversight challenges. Resources include executive events, publications, newsletters, and white papers. www.cgocouncil.com

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Kevin F. Brady recently joined Connolly Bove Lodge & Hutz LLP as Of Counsel to the Business, Commercial and Corporate Practice Group. Prior to joining Connolly Bove, Kevin was Counsel in the Complex Mass Torts and Insurance Group of Skadden Arps Slate Meagher & Flom LLP in Wilmington, Delaware, for almost 20 years. He is a member of the Georgetown University CLE Advisory Board for E-Discovery Institute and a member of the Sedona Conference Working Group on Best Practices for Electronic Document Retention and Production.

Kevin is the former chair of the Board of Bar Examiners of the Delaware Supreme Court; member of the Ad Hoc Committee for Electronic Discovery of the U.S. District Court of Delaware and a member of the Delaware Court of Chancery Rules Committee. He is frequently requested to participate as an author, speaker and presenter in the areas of electronic discovery, insurance and ethical issues.

Deidre Paknad

President & CEO, PSS Systems and Founder, CGOC



Deidre is a seasoned entrepreneur and software industry veteran with over 20 years experience including developing software solutions for SEC and FDA regulated markets. She founded the CGOC in early 2004 and assembled an ecosystem of domain experts as a resource to executives who seek advice, guidance and insight on critical compliance and oversight challenges. Deidre joined PSS from Certus, where she launched the company's Sarbanes Oxley compliance strategy and solution. Prior to Certus, Deidre founded and was CEO of CoVia Technologies, a company that was inducted into the Smithsonian Institution for its innovation. Deidre has held numerous marketing and operations management positions in the software, consumer and healthcare industries.



PSS provides the interlocking elements in its AtlasIPM solution

Litigation Communications and Collections Solution

Based on the emerging *Zubulake V* and Delaware standards for preservation and production, the Litigation Communications and Collections solution enables companies to automate and repeat hold notifications, identify and log interviews with affected parties, and plan and thoroughly execute document collection.

Retention Policy Management Solution

To address the difficulties in reconciling diverse business and oversight needs, the Retention Policy Management solution enables companies to coordinate and synchronize corporate retention policies and division retention schedules, ensuring local control and corporate oversight.

Retention and Litigation Agent

To bring defensibility and feasibility to corporate policies, the Retention and Litigation Agent maps applicable retention rules and legal holds to individual employees, automatically tagging information at the point of creation, automating and ensuring proper retention, disposition, holds, and collection as required.

The three Atlas solutions integrate seamlessly with each other to form the AtlasIPM Suite. By using the solutions in concert, you can synchronize information retention, disposal, preservation, and production, thereby reducing legal and IT costs by retaining and collecting only what is needed. Nothing more, nothing less.