Ethics Watch

King Kong v. Godzilla: *Discovery Meets Modern Technology*

By Nathan M. Crystal

If asked to identify the greatest monsters in movie history, a respondent would probably mention either King Kong or Godzilla. In the 1962 movie, *King Kong v. Godzilla*, the two monsters battle off the coast of Japan. King Kong emerges from the ocean, apparently victorious, but onlookers speculate that Godzilla may have survived the clash. They were right, since Godzilla appeared in more than 20 subsequent films.

Modern litigators are participants in a similar epic struggle between two monsters: the disclosure requirements of the rules of discovery and the technological ability to access and produce vast quantities of electronically stored information (ESI).

The federal Rules of Civil Procedure were amended in 2006 to include several provisions to deal with some of the issues involved in electronic discovery. The *Federal Courts Law Review* housed at the Charleston School of Law recently sponsored a conference on the ethical and legal issues facing lawyers in electronic discovery. Professor Allyson Haynes organized the conference, prepared the materials, and drafted hypotheticals addressed by the panelists, covering topics such as the scope of the duty to cooperate with opposing counsel, methods of production, and preservation of privileges during discovery of electronic material. Professor Haynes deserves the uniformly outstanding praise expressed by the attendees.

A central issue in discovery, particularly with regard to electronic materials, is when must a potential party preserve such materials? Revised Federal Rule 37(e) provides: "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." The commentary provides that good faith may involve a modification or suspension of the operation of a routine electronic system if information is subject to a preservation obligation. Commentary and case law refer to such intervention as a "litigation hold."

Panelists discussed the following hypothetical situation regarding litigation holds:

> An employee of Company A has a big disagreement with her superior and speaks to HR about her concerns. She mentions that her boss treats male employees better than he treats her. As in-house counsel, you know the company has a document preservation system that takes a snapshot of the company's e-mails each day and saves it for 90 days, although if an e-mail is written and deleted in the same day it is not backed up. What must you do at this point? What about one month later when the employee files an EEOC claim? What if it is cost and space prohibitive to avoid deletion of documents?

Rule 37(e) does not explain when a potential litigant must institute a litigation hold. It simply refers to the possibility of preservation obligations arising from common law, statutes, regulations, or court orders. It is clear that the obligation to initiate a litigation hold may attach prior to the institution of litigation or formal governmental investigation. In the leading case of *Zubulake v. UBS Warberg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003) (*Zubulake* IV), one of a series of cases in which Judge Shira Scheindlin established many of the basic principles regarding electronic discovery, Judge Scheindlin held in an employment discrimination case that UBS reasonably anticipated litigation five months before the plaintiff filed EEOC charges based on the e-mails of several employees revealing that they knew that plaintiff was planning to sue. *Id.* at 216-17.

Two organizations provide guidelines that are useful in deciding when a potential litigant must institute a litigation hold: the Sedona Conference and the ABA Section of Litigation. In 2007 the Sedona Conference, a nonprofit organization devoted to study of law and policy in antitrust, intellectual property, and complex litigation, issued a Commentary on Legal Holds: The Trigger and the Process. Guideline 1 states: "Reasonable anticipation of litigation arises when an organization is on notice of a credible threat that it will become involved in litigation or anticipates taking action to initiate litigation" (emphasis added). Guideline 4 indicates that the determination is based on all the facts and circumstances and specifies factors to be considered. Because the moment that a preservation obligation attaches may be unclear, the Guidelines provide that process is important in determining whether an organization has acted reasonably and in good faith. Process involves identification of a responsible person to determine if a litigation hold should be issued (Guideline 3) and adoption of a policy to guide the decision maker (Guideline 2). The ABA Section of Litigation Civil Discovery Standard 10 provides as follows: "When a lawyer who has been retained to handle a matter learns that litigation is probable or

has been commenced, the lawyer should inform the client of its duty to preserve potentially relevant documents in the client's custody or control and of the possible consequences of failing to do so" (emphasis added).

In my opinion the employee's discussion of the matter with HR should not, absent other factors, trigger a duty to initiate a legal hold. The employee has informed HR that she has a major disagreement with her boss, and she mentions that he treats male employees better than female employees. At this point, litigation does not appear to be probable nor is there a credible threat of litigation. However, other factors could change that conclusion. For example, if the company has received other complaints against the boss, if the employee has retained a lawyer, or if the employee makes specific threats of litigation. See Guideline 4. On the other hand, one month later, when the employee files an EEOC complaint, the preservation obligation clearly attaches.

At the Charleston School of Law conference questions were raised about whether a preservation obligation attaches to a plaintiff's Internet sites, such as Facebook, which may contain embarrassing or detrimental information if the plaintiff has decided to file suit. In my opinion the duty to preserve applies equally to plaintiffs and defendants and turns on the probability of litigation. In fact, the commentary to Sedona Guideline 1 states: "On the plaintiff's side, a decision, for example, to send a cease and desist letter or to initiate litigation by filing a lawsuit triggers the plaintiff's duty to preserve." Members of the audience asked whether it would be proper for a plaintiff's lawyer to advise his client to comply with the preservation obligation by taking a snapshot of the site, while advising the client to remove the site or the offending material. Perhaps, but such tactics seem risky at best. By way of comparison, could a defendant threatened with litigation delete detrimental e-mails from its servers while preserving hard copy that might be more difficult for the plaintiff to find?

Once a preservation obligation attaches, a potential litigant and its counsel must take reasonable steps to implement the litigation hold. Sedona Guidelines 6 and 7. Guideline 8 sets forth the elements of an effective legal hold:

(a) Identifies people likely to have relevant information to whom a litigation hold should be communicated;
(b) Communicates the litigation hold in an effective manner;
(c) Issued in written form;
(d) Defines information to be preserved and the method of preservation; and
(e) Is reviewed and modified periodically as necessary.

A hypothetical discussed at the conference dealt with the allocation of authority between corporate counsel and outside counsel with regard to the implementation of legal holds:

> Your law firm regularly serves as outside counsel for Company A, which also has an internal legal department. As a cost-saving measure, Company A is increasingly relying on its internal counsel with respect to discovery matters. In its latest litigation involving an internal employment dispute, Company A informs you that your participation in its litigation hold communication process is not necessary. What ethical issues does that raise for you?

In my opinion, if a lawsuit has been filed, litigation counsel cannot simply turn over to the office of corporate counsel compliance with the preservation obligation. Litigation counsel, not corporate counsel, is counsel of record in the case and has the obligation to comply with rules and standards applicable to the litigation. This conclusion does not reflect a lack of trust in the competence of corporate counsel, but rather the principle that obligations of counsel of record cannot be transferred to another lawyer. This principle does not mean that litigation counsel must do all the work involved in implementing a litigation hold. Just as a lawyer may delegate work to a paralegal, a lawyer may delegate aspects of the legal-hold process to the corporate legal department, but litigation counsel remains ultimately responsible for compliance. If outside counsel has not been retained with respect to a matter, then it would be appropriate for corporate counsel to handle the implementation of the litigation hold until litigation counsel is retained.

The consequences of failure to comply with a duty to preserve evidence can be substantial. The doctrine of spoliation of evidence refers to the set of remedies available if a party destroys evidence when it has a duty to preserve the evidence. The remedies may include an adverse inference instruction, dismissal, or an independent tort claim. Both South Carolina state and federal courts recognize the doctrine of spoliation. See *King v. American Power Conversion Corp.*, 2006 WL 1344817 (4th Cir. 2006) (affirming trial court decision to dismiss plaintiff's complaint because of negligent spoliation of evidence); *Austin v. Beaufort County Sheriff's Office*, 377 S.C. 31, 659 S.E.2d 122 (2008) (recognizing torts of negligent or intentional spoliation by third party, but finding that facts did not support claims); *Stokes v. Spartanburg Regional Medical Center*, 368 S.C. 515, 629 S.E.2d 675 (Ct. App. 2006) (holding that spoliation of evidence instruction should have been given to jury); Kevin Eberle, Spoliation in South Carolina, 19-Sept. S.C. Law. 26 (2007).

An article in the December 17, 2008, issue of the *National Law Journal* reports that in the first 10 months of 2008 there were 138 reported opinions dealing with electronic discovery, 25 percent of which involved sanctions issues. The epic battle between King Kong and Godzilla may be ancient movie history, but the modern legal equivalent as discovery meets technology is center stage for today's litigators. ■