

# Document Retention Is Paramount in New Jersey Business Litigation

by Christine M. Vanek on July 2, 2012

A recent decision by a New Jersey appeals court highlights the importance of document retention during business litigation. The court upheld sanctions against a New Jersey law firm for failing to take adequate precautions to retain privileged emails exchanged between the client and a former attorney.

The case, *Goldmark v. Mellina*, involved a real estate contract dispute. The buyers argued that they had negotiated a settlement relieving them of their contractual obligations, while the seller maintained they had breached the contract. To prove the existence of a settlement, the buyers sought discovery of two e-mails in which the seller discussed the settlement negotiations with their prior attorney.

The sellers claimed the emails were privileged and refused to disclose them. When the court ordered in camera review of all privileged documents, the e-mails were not included. The sellers' current attorneys told the court they no longer had the e-mails in question. The buyers ultimately hired a forensic specialist who was able to locate the documents on a back-up server.

Once the emails were retrieved, the court ordered them to be turned over to the buyers, and ordered the Seller's attorneys and the seller each to pay half of \$11,505, consisting of \$10,575 in attorney fees, the \$900 specialist's fee and \$30 in costs. Seller's counsel appealed, arguing that the sanctions were not warranted because the documents were privileged and their loss was not deliberate.

As the appellate court highlighted in its opinion, "Upon taking the position that relevant material is privileged or subject to protection from discovery, a litigant has the obligation of maintaining and eventually disclosing the material as directed by the court. See, e.g., R. 4:10-2(e)(1). It would make a mockery of our discovery rules to allow a party or its counsel — after identifying privileged information — to destroy or carelessly lose or misplace the materials in question."

The court was also quick to point out that the loss of the emails did not need to be intentional to warrant sanctions. As the court explained, "Here, the judge was not required to find that the law firm knowingly allowed the disappearance of the e-mails in order to impose a sanction. The matter was clearly one of interest to the purchasers, and counsel was obligated to protect against what either deliberately or accidentally occurred here."

While this case involved a New Jersey law firm, the lessons extend to businesses as well. When litigation is reasonably anticipated, New Jersey businesses are also expected to

prevent the destruction of relevant documents and to take steps to preserve new documents. Failure to do so can lead to sanctions and fines as well as more drastic legal consequences such as dismissals and directed verdicts.