Electronic Data Production – Courts Begin To Set Parameters – Part II

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Part One of this article appeared in the January 2004 issue of The Metropolitan Corporate Counsel.

Burden v. Probative Value

Federal Rule of Civil Procedure 26 grants courts the discretionary authority to balance the burden that a discovery request will have on the producing party against the likely probative value of the material sought. Courts recognize that judicial authority to limit discovery to protect the producing party from undue burden or expense extends to electronic discovery. *Simon Property Group L.P. v. mySimon, Inc.*, 194 F.R.D. 639 (S.D. Ind. 2000).

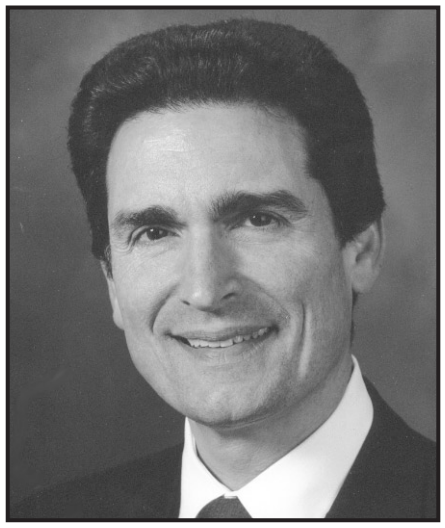
The sheer volume of documents resulting from the ease of sending multiple party e-mails and saving multiple versions of documents can make electronic discovery prohibitively expensive in almost any case. A now well known case out of the Southern District of New York suggests that, in determining whether to grant a discovery request of an extremely voluminous nature, a small sample of material should first be tested to see if it would yield discoverable evidence. *Zubulake v. UBS Warburg*, 2003 WL 21087884 (S.D.N.Y. May 13, 2003). Instead of designating an enormous volume of e-mails "discoverable" and assigning a party to bear the burden for an unknown result, the court required the producing party to analyze only a selection of back-up tapes and submit the analysis to the court. *Id.*

Other courts have found that if a party installs a data storage system from which deleted material can be retrieved, it is unlikely that an undue burden in searching that system can be established. In *Kaufman v. Kinko's Inc.*, 2002 WL 32123851 (Del. Ch. Apr. 16, 2002), the court granted the plaintiff's discovery request to require the defendant to produce e-mails stored in the defendant's back-up system. The court found that installing a data storage system necessarily implies that, at some point, the data may need to be retrieved. The defendant's argument that its data storage system was deficient and expensive to access did not persuade the court to refuse an otherwise good faith request to examine relevant information. In *Linnen v. A.H. Robins Co.*, 1999 WL 462015 (Mass. Super. June 16, 1999), the court found that by availing itself of technology allowing the saving of data and creation of back-up tapes, the defendant assumed the risk it would be called on in litigation to produce the information.

Cost-Shifting

Due to the potentially overwhelming costs of electronic discovery, the case law regarding shifting the expense from one party to another is quickly developing. The traditional discovery rule mandates that the producing party bear the cost of production. Courts, however, retain the discretion to shift the cost to protect the responding party from undue burden or expense.

One court recently commented on the enormous burden that electronic discovery can place on litigants. In *Rowe Entertainment, Inc. v. The William Morris Agency Inc.*, 205 F.R.D. 421 (S.D.N.Y. 2002), the court noted that "[t]oo often, discovery is not just about uncovering the truth, but also about how much of the truth the parties can afford to disinter." *Rowe*, 205 F.R.D. at 423. The court set forth the following eight factors to be considered by courts when deciding whether to shift the costs of electronic discovery: "(1) the specificity of the discovery requests; (2) the likelihood of discovering critical information; (3) the availability of such information from other sources; (4) the purposes for which the responding party maintains the requested data; (5) the relative benefit to the parties of obtaining the information; (6) the total cost associated with production; (7) the relative ability of each party to control costs and its incentive to do so; and (8) the resources available to each party." *Id*. at 430. The rationale of the *Rowe* court has been embraced by other jurisdictions. *See Computer Assoc. Int'l v. Quest Software,* 2003 WL 21277129 (N.D. Ill. June 3, 2002) (referring to *Rowe* factors and denying request to shift cost); *Byers v. Illinois State Police*, 2002 WL 1264004 (N.D. Ill. June 3, 2002) (employing the *Rowe* factors to limit discovery requests and shifting the costs of data to the requesting party); *Murphy Oil USA Inc. v. Fluor Daniel Inc*., 2002 WL 246439 (E.D. La. Feb. 19, 2002) (relying on *Rowe* to determine whether to shift burden).



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The *Rowe* analysis has been further refined. In *Zubulake*, the court criticized the *Rowe* decision for giving equal weight to all the factors and for omitting other important considerations. *Zubulake*, 2003 WL 21087884, at *9. The court required a three-step analysis. First, the responding party's computer system should be assessed to determine what data is stored and where it is stored. All "accessible" data should be governed by the traditional discovery rules. Cost shifting should be considered only if the data is in an inaccessible form, such as back-up tapes. Second, in the case of "inaccessible" data, before deciding to shift the costs, a small sample of the requested back-up tapes should be analyzed to determine what data may be found. Third, when it is decided that the entire electronic storage system will be searched, a series of weighted factors should determine whether the costs should be shifted. *Id.* at *12-13. In a subsequent decision, the court required the producing party to bear 75% of the cost to restore the "inaccessible" data and confirmed that the producing party would bear 100% of producing "accessible" data. *Zubulake v. Warburg*, 216 F.R.D. 280 (S.D.N.Y. July 24, 2003).

As courts continue to apply multi-factor balancing tests to determine whether the costs of discovery should be shifted, attorneys will need to stay informed of the developments in technology and the methods of storing and retrieving electronic data to effectively articulate arguments regarding burden and costs. The distinction between "accessible" and "inaccessible" data is, for now, the most important factor, but many disputes can be expected over just how difficult retrieval of the data must be for it to be deemed "inaccessible."

Document Preservation

While the common law continues to evolve to conform to technological advances, courts remain consistent in requiring parties to retain documents that could be relevant in lawsuits. Since such a high volume of data is not reduced to paper form, the duty to preserve is particularly important in reference to computer data because one stroke of a "delete" key may invite a contempt motion.

The court in *Antioch v. Scrapbook Border, Inc*., 210 F.R.D. 645 (D.Minn. April 29, 2002), determined that computer data that was relevant to the lawsuit might have been in danger of being destroyed. The court ordered the defendant to preserve all computer data and appointed a neutral computer expert to collect the evidence. *Antioch* is notable because the court was concerned with destruction of electronic data through normal daily use of the system. *See also In re Cheyenne Software, Inc. Securities Litigation*, 1997 WL 714891 (E.D.N.Y. 1997) (sanctions imposed for deletion of material on hard drives pursuant to reasonable business practice because preserving material on inexpensive storage material would not have been burdensome).

Courts do not hesitate to levy serious sanctions against parties who have destroyed relevant electronic information. In *Proctor & Gamble Co. v. Haugen*, 1998 WL 191309 (D. Utah April 17, 1998), *reversed on other grounds*, 222 F.3d 1262 (10th Cir. 2000), the plaintiff either destroyed or failed to preserve relevant e-mails after notice of litigation, and with awareness of their significance. Due to the seriousness of the transgression, the court imposed a hefty monetary sanction, and later dismissed the action. *Proctor & Gamble Co. v. Haugen*, 2003 WL 22080734 (D. Utah August 19, 2003). In *Linnen v. A.H. Robins Co.*, 1999 WL 462015, the defendant was sanctioned with costs and an adverse inference jury instruction after failing, among other things, to suspend its document retention policy after litigation had been commenced. *See also Wiginton v. Ellis*, 2003 WL 22439865 (N.D. Ill. October 27, 2003) (noting that defendant's instructions to employees to preserve certain evidence were deficient and allowing plaintiff to use back-up tapes to attempt to ascertain what was destroyed); *Playball at Happauge, Inc. v. Narotzky*, 745 N.Y.S. 2d 70 (2d Dept. 2002) (dismissal of fiduciary duty claim after deletion of data); *Pennar Software Corp. v. Fortune 500 Systems, Ltd.*, 51 Fed. R. Serv. 3d 279 (N.D. Cal. 2001) (sanctions imposed for deletion of web page where court was asked to determine whether it had personal jurisdiction over defendant). Other courts have been reluctant to dismiss actions. *See Kucala Enterprises, Inc. v. Auto Wax Co.*, 2003 WL 22433095 (N.D. Ill. Oct. 27, 2003) (rejecting magistrate's recommendation that plaintiff's complaint be dismissed for intentionally destroying evidence).

The latest word on the issue comes from the *Zubulake* court. The court held that a company need not suspend its normal recycling of back-up tapes maintained for disaster recovery purposes only (actively used back-up tapes would be subject to production). One exception to this rule is if the disaster recovery tapes can be identified as containing information from "key players." *Zubulake v. UBS Warburg, LLC*, 2003 U.S. District Lexis 18771 (S.D.N.Y. October 22, 2003). Hopefully, this type of common sense approach will be adopted in other jurisdictions.

The "Sedona Principles"

The Sedona Conference is a nonprofit research institute that follows developments in the areas of antitrust, complex litigation and intellectual property rights. In October 2002, conference participants met to design and introduce a set of "best practices" to guide discovery requests for computer-based data in complex civil litigation. The working group was comprised of prominent lawyers, technological experts, accomplished business people, jurists and legal educators. "The Sedona Principles" on electronic discovery were printed in March 2003. *See* http://www.thesedonaconference.org. Judge Scheindlin has referenced the principles in her influential opinions in *Zubulake*.

The Sedona Principles articulate several logical procedures for courts to follow, and should be considered by any attorney addressing these kinds of discovery issues. The principles echo the sentiment first expressed by the Southern District of New York in *Rowe* and followed by many courts since, that all discovery should begin with the "active" electronic data that is used in the ordinary course of business. If the producing party cannot readily access, or does not access data in the normal course of business, then the burden should be placed on the requesting party to demonstrate that the probative value outweighs the cost and disruption of retrieving that data. If the burden is carried, some or all of the costs should be borne by the requesting party.

To avoid potential conflicts, the Sedona Principles also encourage parties to attempt to meet early in the litigation process to discuss the preservation and disclosure of electronic data relevant to the litigation. District courts in at least three states, New Jersey, Arkansas and Wyoming, require attorneys to notify the court if electronic discovery will be requested or produced, and to determine what electronic information will be used in the case and understand how it is stored and how it can be retrieved. Most of the federal and state courts are likely to have a similar rule in the very near future.

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