

Common Sense Remains the Basic Guide in Electronic Discovery

“Common sense grafted onto a huge amount of stuff.” Magistrate Judge Jacob Hart gave this summary admonition toward the end of the seminar “Electronic Discovery: Litigation in the 21st Century” held on January 28, 2004. Judge Hart was among a panel that included the Honorable Vincent Poppiti, a long time Delaware jurist and experienced special discovery master, now in private practice; and Richard Hermann, Esquire, a leading expert on electronic discovery and the entire range of computerization and litigation. The seminar was sponsored by the Business Litigation Committee of the Philadelphia Bar Association’s Business Law Section.

The magnitude of electronic information now subject to discovery, and the need to grasp the issues involved, cannot be understated. Mr. Hermann pointed out a 1998 statistic showing that while nearly 2 billion pieces of mail went through the U.S. Post Office that *year*, 1.5 billion emails were sent *each day*. Further, businesses today create 90% of their information in electronic form.

He reported that over the last 5 years, DuPont experienced an increase from 2% to 30% in discovery requests specifically asking for electronic data. Mr. Hermann also identified the unconventional areas for electronic discovery, e.g, voice mail, blackberries, palms and even home computers.

Case management and cost allocation

In pursuing electronic discovery, the first area of inquiry is whether the party has a record retention policy. If the answer is yes, then both counsel will want to find out: what is that policy; is it enforced; is the policy in written form; and are there remote computers connected to the system.

Judge Poppiti focused on the need for early and close case management of electronic discovery issues. He quoted one commentator describing how the combination of data volume and the expense of retrieval, combined with delay, can create the “perfect storm” scenario where the discovery issues and their cost take over the actual subject matter being litigated. Moreover, although case law has been developing on the issue over the last 8 to 10 years, parties are still struggling with the practicalities of dealing with electronic discovery; especially its economics.

In the current climate, the judge, magistrate or special master cannot stand back, solely acting as an umpire between the parties; rather they must be actively involved early on in understanding and identifying the issues and providing a strong and clear case management order. The panelists observed that if the parties choose to use the services of a special master, they should take the steps necessary to assure there is no waiver of the attorney-client privilege or work product doctrine through disclosure of materials to the master.

Judge Hart agreed that electronic discovery is one area where neither the court nor the parties want surprises, and that the issues require early address. He said that the parties should work to identify the data that is going to be discovered, the people likely to know about it and

those individuals likely to be responsible for the data, i.e. the future 30(b)(6) deponents. The parties should also discuss the very serious issue of cost allocation.

This last issue has become a focal point in electronic discovery disputes. Federal Rule 26(b)(2) presumes that the producing party will pay the cost of production; but with the enormous costs potentially at issue, producing parties often seek to shift that burden to the requesting party.

The most prominent national cases on cost shifting are Judge Shira A. Scheindlin's opinions in *Zubulake v. UBS Warburg LLC*, 217 F.R.D 309 (S.D.N.Y. 2003) ("*Zubulake I*") and *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280 (S.D.N.Y. 2003) ("*Zubulake III*"). Judge Scheindlin, a leading authority on electronic discovery, provides and applies a seven part cost allocation test. In *Zubulake*, UBS asserted that it could cost \$175,000 to produce backup tapes, exclusive of attorneys' fees. The court ultimately ruled that UBS would bear 75% of the restoration costs and all other costs.

Judge Hart observed that even with Judge Scheindlin's seven factor analysis, the actual application would remain subject to how any individual judge chooses to apply and weigh those different factors. This practical ambiguity would limit the predictive value for parties wanting to litigate the cost issue. Thus, absent an agreement on cost and resolving the matter cooperatively, the 26(b)(2) battle can itself become a high stakes piece of litigation.

Preservation and disclosure of electronic information

Judge Hart observed that with electronic discovery, the chance that a client will fail to produce data goes up exponentially. The Panelists agreed that non-disclosure or destruction is typically the result of: (a) the inability to deal with the sheer volume of data; and/or (b) internal communications problems about what is to be preserved, rather than any effort to hide or intentionally destroy relevant material.

Still, even if inadvertent, counsel have to be concerned about sanctions. Judge Hart, citing to an article by Gregory P. Joseph, *Rule Traps*, 30 *Litigation* 6 (Fall 2003), adduced the importance of Federal Rule 37(c)(1). If a party has failed to preserve, produce or identify electronic data, Rule 37 can function as an evidentiary rule that can limit or bar the use of that information as evidence.

The need to preserve electronic data is another important issue. In addition to live data, i.e. information currently in an email file or document file, there may be archival information. Further there may even be deleted information that has not yet been "written over" and still exists on a hard drive. (Judge Hart observed that the pencil eraser has been eliminated as a business tool.) *Zubulake III* gives a good overview of the different types of electronic data.

Counsel must be aware of (a) what data exists; (b) what data needs to be preserved for discovery; and (c) what data the court will likely order the parties to produce. In yet another *Zubulake* decision, 2003 U.S. Dist. LEXIS 18771 (Oct. 22, 2003) ("*Zubulake IV*"), Judge Scheindlin addresses a party's preservation obligation. This was quoted at length:

“Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a ‘litigation hold’ to ensure the preservation of relevant documents. As a general rule, that litigation hold does not apply to inaccessible backup tapes (e.g., those typically maintained solely for the purpose of disaster recovery), which may continue to be recycled on the schedule set forth in the company's policy. On the other hand, if backup tapes are accessible (i.e., actively used for information retrieval), then such tapes would likely be subject to the litigation hold.”

The Panel discussed the scope of what a party should be expected to preserve once litigation is reasonably anticipated. Among other things, a party should quickly identify its employees most involved in the dispute at hand, and put their individual data into an “electronic basket.”

The Panel questioned the need to preserve non-archived deleted information that may still be on a hard drive. Thus, although a party may not have to preserve deleted data, the client had better stop using the delete key. Judge Hart recommended Minnesota Federal Judge James M. Rosenbaum’s piece, *In Defense of the DELETE Key*, 3 Green Bag 2d 393 (2000), for some perspective on the issue.

Additional ethical and practical issues

Mr. Hermann raised a commonly occurring ethical conundrum that lawyers need to consider. If the producing party’s counsel has to review every electronic document before production, this may create untenable time constraints in meeting discovery deadlines; or impose unacceptable costs in the form of legal fees. Thus, to avoid shirking their duties as responsible counsel, while dealing with a mountain of data, some counsel agree to produce unreviewed electronic data subject to protective orders or stipulations permitting counsel to “pull back” or “call back” a privileged or confidential document that has been electronically produced.

This “pull back” solution permits discovery to be completed in time, without running the risk that haste will result in inadvertent disclosure of privileged or confidential data; but there is a concern that a concept as sacrosanct as the attorney-client privilege is being treated too lightly through this practice. As Judge Hart said, it is a terrible conflict, but it may be cost prohibitive in many cases to put a team of attorneys to the task of reviewing the equivalent of rooms full of documents.

Judge Hart stated that in addressing electronic discovery early on, he attempts to weigh the genuine likelihood that discoverable information is present and the intrusiveness of the request. For example, one party might seek to mirror the hard drive of an opposing party employee’s home computer. Unless there is some evidence of withholding documents or spoliation, Judge Hart will not permit that discovery.

The Panel all agreed that the party seeking discovery could never unilaterally choose the expert who would retrieve the electronic data from the producing party; rather, it would be the producing party’s choice as to who would perform that task. By way of comparison, in the

normal course of litigation a party would not be allowed to go through its opponent's office space and paper files because it wanted to be sure the opponent was making full production.

The reality of electronic discovery is upon us, and common sense tells us not to ignore that reality. Fortunately, the realities are not too arcane or mysterious once the effort is made to learn those realities. We can, and must, understand the important practical parameters and elements shaping electronic discovery that are now simply another aspect of litigation practice.

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