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Judicial Attention To Electronic Discovery Heats Up

By Richard E. Donovan and Lauri A. Mazzuchetti*

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The law on computer-based discovery is developing rapidly, reinforcing the need for in-house and outside litigation counsel to familiarize themselves with the world of electronic data. In the past few months, several local federal courts have issued significant decisions and made revealing comments related to electronic discovery. Corporate counsel should be aware of a judicial trend toward embracing technology's role in litigation and a decreasing tolerance toward litigants who seek to hide behind their ignorance of technology.

Zubulake Modifies Cost-Shifting Analysis, Requires Production Of Back-Up Tapes

In *Zubulake v. UBS Warburg, LLC,*[1] a plaintiff-employee in a gender discrimination and retaliation suit contended that key evidence was located in e-mail that had been deleted from the active system of the corporate defendant and existed exclusively on its backup tapes. The plaintiff moved to compel the defendant to produce the e-mail at its expense, estimated at approximately $175,000, exclusive of attorney time.

Judge Shira Scheindlin held that the plaintiff was entitled to discovery of the e-mail contained on the backup tapes even though that data was not readily available in an "accessible" format. The court held that searching the backup tapes and restoring and reproducing the documents at the corporation's expense was not necessarily "unduly burdensome." This holding emphasizes the emerging importance of backup data. *Zubulake* further signals that judges are demanding a heightened level of sophistication from litigants regarding electronic discovery.

Judge Scheindlin also held that it would be appropriate to consider shifting to the requesting party the costs of producing "inaccessible" data. The court then set forth a seven-factor test "designed to simplify application of the Rule 26(b)(2) test in the context of electronic data…," refining factors set out by a Magistrate Judge in an earlier opinion.[2] Judge Scheindlin categorized two types of data as typically "inaccessible":

1. backup tapes of compressed data not organized for retrieval of individual documents or files because the organization of the data echoes the computer's structure, making its restoration time-consuming and expensive; and

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* **Richard E. Donovan** is a Partner, and **Lauri A. Mazzuchetti** is an Associate, in the Litigation Department of Kelley Drye &Warren LLP. The assistance of Elizabeth Guzman, a summer associate, is gratefully acknowledged.

2. erased, fragmented or damaged data, usually tagged for deletion and requiring significant processing to recover.

The court nevertheless warned that a responding party will carry a heavy burden to establish that it is entitled to recover costs associated with producing and searching inaccessible data.

In a subsequent opinion in that case, published on July 30, 2003, Judge Schiendlin allocated 75% of the cost of restoring and searching the back-up tapes to the producing defendant and 25% to the requesting plaintiff.[3] The court noted that this did not include the cost of attorneys and paralegals, since "the responding party should always bear the cost of reviewing and producing electronic data once it has been converted to an accessible form."

At a recent ABA conference prompted by the *Zubulake* decision, Judge Scheindlin observed that the federal rules do not answer many of the questions that arise regarding electronic discovery.

She then identified an additional category of inaccessible electronic information known as "metadata," or "embedded" data. This can be thought of as data about the data. Unlike other categories where the data will be in its native format (the way the document was originally created), metadata is generated by the computer itself. It typically describes how, when and by whom an electronic document was created, modified and transmitted, and to whom.[4] Metadata is itself discoverable under Rule 26.

At the ABA conference, Judge Scheindlin emphasized that in a dispute over the cost of discovery, she would expect to see information from an expert explaining what it will take to retrieve data, including the estimated cost. If a party merely argues that it will be hard or expensive, "I don't think that's going to cut it," said Judge Scheindlin. An expert's affidavit should be written in non-technical English, geared to the judge's level of sophistication in this area. Magistrate Judge John Faccioia of the District Court in D.C. added, at the same conference, that "accessibility should be a function of your document retention policy…. If you are sloppy and have no idea why you're keeping certain things and throwing others out, why should judges take seriously that asking you to do something is particularly burdensome? You are the victim of your own mistake."

Harsh Sanctions Can Result From The Failure To Understand And Satisfy Electronic Discovery Obligations

Courts are raising their expectations about how well-versed litigants should be about electronic discovery, with potentially severe sanctions for the failure to understand and satisfy electronic discovery obligations.

In *Metropolitan Opera Ass'n v. Local 100, Hotel Employees & Restaurant Employees International Union*,[5] the court went so far as to enter judgment against a defendant that failed to conduct an adequate search of its electronic data sources in response to discovery requests. The conduct cited by the court is a primer on what not to do:

- counsel repeatedly represented to the court that all responsive documents had been produced when, in fact, a thorough search had never been made;

- counsel knew that the defendant had no document retention policy but failed to take steps to prevent destruction of responsive documents, either paper and electronic;

- counsel failed to explain to the non-lawyer in charge of document production that a "document" included a draft, or other non-identical copy, as well as any in electronic form;

- the non-lawyer in charge of document production failed to speak to all persons who might have relevant documents, never followed up with the people he did speak to, and failed to contact all of the defendant's internet service providers to attempt to retrieve deleted e-mails as the defendant's counsel represented to the court that he would; and

- shortly after plaintiff's counsel mentioned that it might seek to have a forensic computer expert examine the defendant's computers to retrieve deleted e-mails, the defendant replaced those computers without notice.

While the court recognized that "any one of these discovery failures, standing alone, would not ordinarily move a court to impose the most severe sanction," the "combination of the outrages . . . impell[ed] the most severe sanction."[6] The court emphasized that the defendant had a duty to "establish a coherent and effective system to faithfully and effectively respond to discovery requests," which should have included a diligent inquiry into the defendant's retention of electronic files.[7]

The Second Circuit weighed in on sanctions in the context of electronic discovery in *Residential Funding Corp. v. DeGeorge Financial Corp*.[8] It held that mere negligence in failing to preserve or promptly produce electronic data is sufficient to warrant sanctions. During discovery, the plaintiff advised the defendants that it did not have the internal resources necessary to retrieve e-mail from backup tapes and would be retaining an outside vendor to assist in the process. Months later, the plaintiff's expert produced some e-mail from the backup tapes, but none from the most critical time period. Upon the defendants' demand, the plaintiff produced its actual backup tapes in the midst of trial. Within four days of obtaining the tapes, the defendants' vendor located 4,000 e-mails from the critical time period, 30 of which were responsive to the defendants' previous request. The defendants sought an adverse inference instruction based upon the plaintiff's failure to produce the requested e-mails in time for trial. The trial court refused to award this sanction, finding that there was no evidence that the plaintiff had acted "in bad faith" or with "gross negligence."[9]

At the conclusion of the trial, the plaintiff won a $96.4 million jury verdict. The Second Circuit vacated the order denying sanctions and held that even negligently delayed production is sanctionable and subject to an adverse inference instruction. The court of appeals reached this result even though there was no showing that the unproduced e-mail contained any evidence that would have affected the outcome of the trial. The court noted that the fact that the plaintiff had relied upon an outside expert for the purpose of retrieving the e-mail sought in discovery was not necessarily a defense to sanctions.

Lessons To Take Away

Zubulake, *Metropolitan Opera,* and *Residential Funding* demonstrate that the judiciary is becoming increasingly sophisticated about electronic discovery and more willing to supervise the process actively.[10] These decisions also warn that litigants may face severe sanctions for not possessing sufficient knowledge of their computer systems and electronic retention policies and capabilities. There is preliminary discussion about changing the rules of procedure to clarify parties' obligations with regard to electronic discovery, but such relief is years away. As a result, updated document retention policies − and adherence to them − is more important than ever to avoid handing an adversary a basis for a spoliation argument.

Companies and their lawyers must also have an understanding of the abilities and limitations of the technology they utilize. At the recent ABA seminar, Judge Scheindlin suggested that attorneys and their clients should, at a minimum, develop a full understanding of the client's backup policy and schedule, as well as an understanding of how such policies and schedules are carried out. Lawyers "should absolutely be working with their clients in advance of a discovery dispute or even in advance of a lawsuit…. They should be working on document retention and destruction policies." Prudence suggests that companies go farther, if possible establishing in advance a team of counsel with litigation experience combined with knowledgeable MIS/IT personnel, who can work through the issues before the first discovery request is served.

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[1] 2003 WL 21087884 (S.D.N.Y. May 13, 2003)
[2] *Rowe Entm't, Inc. v. William Morris Agency, Inc*., 205 F.R.D. 421, 429-32 (S.D.N.Y. 2002)
[3] 2003 WL 2174957 (S.D.N.Y. July 24, 2003)
[4] The metadata is essentially the history of a document − where the document went and what happened to it. For example, email carries information about its author, creation date, attachments, the identities of its recipients and when they received and opened the document. Word processing programs also create metadata, such as profiles and editing history, as do spreadsheet programs, data sources and formulae.
[5] 212 F.R.D. 178 (S.D.N.Y. 2003)
[6] *Id.* at 182.
[7] *Id.* at 222.
[8] 306 F.3d 99 (2nd Cir. 2002).
[9] *Id.* at 108.
[10] See also T. Allman, A Preservation Safe Harbor in e-Discovery, www.antitrustsource.com (July 2003); The Sedona Conference, The Sedona Principles: Best Practices, Recommendations, & Principles for Addressing Electronic Document Production (March 2003), available at http://www.thesedonaconference.org/publications_html: www.kenwithers.com (website of research associate at Federal Judicial Center).