

E-DISCOVERY CHALLENGES TRADITIONAL RULES AND PRACTICE

By ***Tabitha Justice***

In recent months, Dayton attorneys have been inundated with private promotional materials, CLE listings, e-mails, and other informational literature directed to the management of electronic discovery, or “e-discovery.” For those lucky enough to have avoided all this, e-discovery for litigation purposes involves the production in discovery of electronic evidence, or any information that is created or stored on a computer, network, backup tape, hard drive or other storage media. Yet, most of us have probably spent very little time worrying about the complexities of e-discovery unless we have clients that are large corporations. Much of the recent interest has been spurred by the federal judiciary’s review and proposed amendments to several rules of procedure with reference to discovery.

The current rules already allow for the discovery of electronic data. In fact, Rule 26(a)(1)(B) was amended to require the disclosure of “data compilations” as early as 1970. At that time, there were paper documents, carbon copies, tape and video recordings and, lest we forget, the occasional 8” floppy disc from the very first IBM computers. Indeed, the 5-¼” floppy discs that are now spoken of only in jest, were not used until the mid-1980’s. Nonetheless, federal courts have universally interpreted the Rule 26 reference to “data compilations” as requiring the production of modern electronic media.

Of course, the landscape has changed dramatically in 35 years. Today, there are desktop computers in nearly every household and workplace. There are also laptops, PDA’s, e-mail, digital voice mail, “iPods,” thumb drives, CDs, DVDs, servers, internet or “virtual” document storage sites, etc., -- all with potentially discoverable “data compilations.” In fact, today’s average cell phone has more documentary and photographic memory than most computers of the 1970’s. This vast increase in “new media” poses a challenge to the way attorneys conduct discovery and has led to long and costly disputes over the scope and format of production.

Undue Burden

It is not surprising that most federal courts have been reluctant to place limits on electronic discovery regardless of cost. These courts adhere resolutely to the traditional language of Rule 26(b)(1), which allows discovery of “any matter, not privileged, that is relevant to the claim or defense of any party.” In *Hickman v. Taylor*, 329 U.S. 495, 500-01 (1947), the Supreme Court explained that the “fullest possible knowledge of the issues and facts before trial” can only occur through application of broad discovery rules.

However, the costs for the production of discovery materials are traditionally borne by the responding party. While courts have discretion to limit discovery and to shift costs to the party requesting burdensome discovery, most have resisted doing so out of concern that it will discourage litigants from bringing otherwise meritorious

lawsuits. The development of so much new media for discovery, nevertheless, challenges our understanding of these traditional rules of discovery.

While the basic legal framework for electronic discovery is currently the same as for paper discovery, the sheer volume of available electronic information can be extraordinarily costly and otherwise impractical for the responding party, which are often corporations and businesses. The current system also lends itself to abuse by parties interested in forcing settlement through the simple act of making discovery overwhelmingly cost-prohibitive. Consequently, the same rules intended to encourage a plaintiff to bring his or her case before the court for resolution, often result in a system that deprives the opposing party of that same right.

For instance, it is the unlikely scenario that would require a law firm to hire experts just to sort through and find paper documents and to make those documents usable for the requesting party. Yet there is a growing market of experts and specialists with no other purpose than to locate electronic documents on servers, hard drives, back up tapes, and other electronic media and to present that data in a useable format. Additionally, most courts and attorneys today remain surprisingly unfamiliar with the intricacies and scope of electronic discovery, which often leads to heated battles over who is going to pay for such extensive discovery.

In *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421 (S.D.N.Y. 2002), the defendants moved for an order relieving them from producing e-mail responsive to the plaintiffs' request because the burden and expense involved far outweighed any possible benefit. There were a number of plaintiffs, all requesting the recovery of saved e-mails on backup tapes. The defendants provided the court estimates from a computer consultant for recovery of the requested documents for each plaintiff. For just one plaintiff, the consultant estimated costs ranging from \$395,944 for eight selected backup tapes to \$9.75 million for all backup tapes. While that plaintiff disputed that estimate, even its consultant estimated costs in the range of \$24,000 to \$87,000 – to recover emails that may or may not have been relevant to the claims in the case.

In *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 313 (S.D.N.Y.2003), the defendant estimated that the cost of producing e-mails on backup tapes would cost approximately \$300,000. *Zubulake* is not a corporate trade secrets case. It is not even a complex anti-trust case in which you might expect millions of computerized records to be at issue. Rather, *Zubulake* is an otherwise ordinary, everyday employment discrimination case – little different from those commonly on the local federal court docket.

Many more examples of the extraordinary costs of electronic discovery can be found in the case law and literature. In both *Rowe* and *Zubulake*, the courts were forced to recognize the differences between paper discovery and electronic discovery. Both courts established variations on the burden and cost-shifting tests of Rule 26 to address these differences, particularly with regard to inaccessible or stored electronic data. There are many articles and detailed explanations of these two tests generally

available. But the lesson to be learned is that, until technology develops that will allow users to easily analyze, search, and copy the expansive array of storage media and software, the process of searching and producing e-discovery will be very expensive.

Moreover, the obvious financial burden of recovering electronic data is only one of the growing concerns about preserving and obtaining electronic media. Producing parties also face the practical implication and potential burden of sweeping preservation orders. Once litigation begins, the parties have a duty to preserve all documents and electronic data that are relevant to the claims in the case. It is no longer uncommon for a requesting party to ask the Court for an order to preserve electronic data. Determining how this should be accomplished in a business or corporation that is dependent upon the constant use and manipulation of electronic data is sometimes a staggering proposition. For example, this of the number of e-mails we receive and delete in a given day. Then imagine a corporation the size of GM or Lexis and the vast electronic data created each day in those companies. The implementation of a pervasive preservation order on these companies would be crippling. Should the courts require that these entities simply grind to a halt?

These concerns have not gone unnoticed by the federal judiciary. In August 2004, the Civil Rules Advisory Committee of the Judicial Conference of the United States began evaluating the need to amend the rules of discovery to address the changing way in which business is conducted. They and subsequent committees decided electronic discovery is different in some ways from traditional discovery. A set of final proposed amendments was transmitted to the Supreme Court on November 29, 2005, with a recommendation that they be approved. The Supreme Court had until May 1, 2006, in which to act. The proposed rules are expected to take effect on December 1, 2006.

The proposed amendments to the Federal Rules of Civil Procedure attempt to balance the requesting party's need for full production and discovery of electronic data relevant to the claims and defenses of a suit with the responding party's continuing need for efficient and cost-effective management of electronically stored information.

Rule 26(b)(2)(iii) already permits a court to limit the frequency or extent of discovery if it determines the burden or expense of the proposed discovery outweighs any likely benefit taking into account the needs, of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. Rule 26(c) already allows courts to shift the costs of discovery to the requesting party to protect a party from undue burden or expense. These rules permit the court to balance the cost and burden of producing the discovery against the likelihood of finding relevant evidence that would be important to resolving a material issue in the lawsuit.

Nonetheless, many courts such as *Rowe* and *Zubulake* felt it necessary to narrow this analysis by setting forth the specific characteristics of electronic evidence to be considered in determining on a case-by-case basis whether discovery and production

should be compelled and/or whether the costs of such discovery should be shifted to the opposing party.

Under proposed Rule 26(b)(2)(B), a party may refuse to produce electronically stored information that is “not reasonably accessible because of undue burden or cost.” This is in addition to the traditional rules allowing defendants to object to broad, vague, or cumulative discovery requests or requests for information that could be obtained from some other source that is more convenient, less burdensome or less expensive. Then, if the requesting party moves to compel the refused discovery, the producing party must demonstrate that the information is not reasonably accessible because of undue burden or cost. This may be done with cost estimates for recovery of the requested data. Of course, the court continues to have authority to order discovery of the information if the “requesting party shows good cause, considering the limitations of” Rule 26(b)(2)(i) - (iii).

It is also likely, under the proposed rules, that courts will require the requesting party to pay at least some portion of the cost of producing data that is expensive to recover because, in accordance with a party’s normal business practices, it has been destroyed or archived in a media that is not easily accessible.

Additionally, Rule 34 will no longer limit the format for production of electronic discovery to “as they are kept in the usual course of business. Rather, a responding party may submit electronically stored information in the form “in which it is ordinarily maintained *or in a form or forms that are reasonably usable*” unless some other form was requested.

If a responding party objects to a requested form of electronic discovery, the amended Rule 34(b) will provide an outline for resolving the dispute. Specifically, “[i]f objection is made to the requested form or forms for producing electronically stored information – or if no form was specified in the request – the responding party must state the form or forms it intends to use. Thereafter, the responsibility falls on the requesting party to move to compel discovery in a particular format under Rule 37. In no circumstances must the responding party produce the electronically stored information in more than one form.

Meet and Confer

Perhaps the most practical rule change is found in proposed Rule 26(f), which will expressly require attorneys to consider and “discuss any issue relating to preserving discoverable information” in the initial pretrial discovery conference. Parties should be encouraged to use this opportunity to discuss informal discovery and other cost-reduction measures; protective orders and special procedures for handling claims of confidentiality and privilege; the adoption of a uniform numbering system for documents; and additional limitations upon form and scope of electronic discovery.

The discovery plan required to be prepared by counsel under Rule 26(f) will specifically entail disclosure of “any issues relating to disclosure or discovery of

electronically stored information, including the form in which it should be produced” and any issues relating to claims of privilege. In all federal cases, the court will want to know whether there have been or will be requests for electronic production and whether any such requests will be limited to readily accessible data. *See Proposed Form 35*

In preparation for the Rule 26 discovery plan, the parties must begin the bulk of the investigation and preparation of electronic discovery materials much earlier. Specifically, the Advisory Committee notes to Rule 26(a)(1)(B) provide that initial disclosures should “describe and categorize, to the extent identified during the initial investigation, the nature and location of potentially relevant documents and records, including computerized data and other electronically-recorded information, sufficiently to enable opposing parties (1) to make an informed decision concerning which documents might need to be examined, at least initially, and (2) to frame their document requests in a manner likely to avoid squabbles resulting from the wording of the requests.” Thus, the initial investigation by a party to identify documents in support of its claims or defenses should include a detailed evaluation of the client’s electronic medium.

The “meet and confer” rule amendments seek to avoid the cost and delay involved in litigating electronic discovery disputes by requiring the parties to discuss the practical aspects early in litigation. By discussing format and preservation issues at the beginning of the case, at a minimum, the court and parties will be able to get a reasonable idea about scope, cost, and time that may be involved.

Inadvertent Production & Waiver of Privilege

Ultimately, legal fees to review electronic documents will be more costly for producing parties than the technical process of locating and sorting relevant electronic data. Again, one of the benefits (or detriments) of electronic data is that it easily and cheaply stored. So, there is more of it. Considering that the employees of a large corporation could easily produce millions of e-mails in a year, it is easy to understand how a privilege review of all potentially relevant documents in any given litigation with such a company could result in a staggering financial burden.

One of the ideas of the Rules Committee to reduce this burden on a responding party was to simply allow the responding party to produce complete computer backups to the requesting party without the risk of waiving privilege. Specifically, Rule 26(b)(5) will be amended significantly from the current “privilege log” type of statement, to:

If information is produced in discovery that is subject to a claim of privilege or protection as trial preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the

information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

Interestingly, this Rule will clearly affect far more than just electronic discovery, and its appearance in the proposed rules seems to be an attempt at mirroring the ABA's Formal Ethics Op. 92-368 (1992), which we all know as the opinion holding that an attorney who inadvertently receives a clearly privileged document is responsible for notifying the producing party. The proposed rule's reflection of the ABA opinion is somewhat distorted in that it requires the producing party to realize its mistake in a timely fashion and make a request that the data be returned.

Moreover, this pie-in-the-sky notion ignores the realities of the adversarial system. This is the classic problem of "un-ringing the bell." Additionally, while e-mail is often the focus of most requests for backup tapes and server access, uninhibited searches through the electronic data of most businesses or entities would uncover not only evidence potentially relevant to claims at issue, but also everything else contained on the electronic media, including irrelevant or privileged information not otherwise discoverable. Few litigators would be comfortable with allowing the opposing party to come into their clients' business and sort through every file cabinet or desk in the place, regardless of the waiver concern. The same is true with respect to backups of entire computer systems.

Additionally, the proposed amendments do not encompass all, or even most of, the concerns raised by turning over un-reviewed documents. In fact, our clients are rarely as concerned about turning over attorney-client privileged materials as are their attorneys. Rather, they often have more direct concerns about turning over materials not necessarily encompassed under proposed Rule 26(b)(5). For instance, businesses are much more concerned about the discovery of proprietary information, particularly if the requesting party is a competitor.

It is also true that the Sixth Circuit has concluded that employees who are not a party to the lawsuit may have a privacy interest in their addresses, phone numbers, marital status, wage information, medical background, credit history, and other work-related problems unrelated to the claims and defenses of the parties. *See, Knoll v. AT&T*, 176 F.3d 359, 365 (6th Cir. 1999). The Electronic Communications Privacy Act also limits the ability of government and private parties to obtain private computer communications. These are all important concerns that are likely to hamper this particular goal of the proposed amendments.

Limitation on Sanctions Related to E-Discovery

With the development of new media that is by its very nature highly volatile, has come an increase in charges and sanctions for spoliation. A duty to preserve documents and discoverable information exists the minute a party knows *or reasonably anticipates* litigation. This includes the preservation of electronic data of all sorts. Any failure to comport with this duty could constitute "spoliation" and result in sanctions.

For that reason, the practice has been to direct our clients in a preservation letter to secure all evidence relevant to the cause of action. Today, such a letter should include an instruction to place a hold on or back up all electronic media. In reality, it is difficult to imagine how this can be effected on an all-inclusive basis.

While it is possible to instruct clients to preserve or backup servers, e-mails, calendars, and computers, what about all the other electronic media potentially discoverable? Should we require our clients to back up the SIM cards in their cell phones and PDAs? What about companies with digital voice mail on their entire phone system, as is common in most businesses? Do we instruct clients not to delete voice mail from the entire phone system? In many businesses, certain e-mail is automatically deleted and certain data is automatically scrubbed from documents. Many networks are also designed to routinely delete or overwrite electronic data.

The new rule proposals make sanctions or spoliation charges more difficult by acknowledging the realities of electronic data. Proposed Rule 37(f) provides that, “[a]bsent 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.” Of course, this limited protection requires not only an established policy for retaining electronically stored information, it also requires that the policy actually be implemented.

In Closing

As new technology evolves, businesses, courts, and even some law firms are shifting to paperless operation. The use of e-mail and other electronic correspondence will largely replace most forms of business communication. These changes will directly impact our practices; not only in the discovery stage, but in all aspects of litigation -- from electronic filing to paperless courtrooms.

The rules of procedure are being changed to encourage parties to think about these issues very early in a case. An early plan for discovery of electronic information will go a long way toward preventing lengthy and costly discovery disputes. Additionally, while the proposed rules attempt to make electronic discovery more practical, attorneys should think about and learn how to identify, preserve, and produce electronic data. Moreover, attorneys should prepare their clients for these realities and encourage the creation of reasonable data preservation and retention policies.

Eventually, technology and a growing market for cost-effective means of document production will make electronic discovery and over-all case preparation more efficient and economic. Until that time, litigants and courts should work to resolve discovery disputes using the flexibility provided by the new rules, and work to create a body of case law that narrows the issues open for debate.