

A Preservation Safe Harbor in e-Discovery

Editor's Note: Standards relating to production of electronic discovery have become important concerns in antitrust matters, where e-mails and other electronic records can shine a powerful light on the competitive nature of company decisions. As the Federal Trade Commission announced in December 2002, "in some cases the search of even a small portion of the parties' archive and backup systems produces valuable information that is helpful to the staff's investigation." Statement of the Federal Trade Commission's Bureau of Competition on Guidelines for Merger Investigations, <http://www.ftc.gov/os/2002/12/bcguidelines021211.htm>. At the same time, the Commission recognized "problems posed by searching archive and backup systems." To balance the need for information with the cost of production of that information, the Commission proposed that merging parties negotiate with staff for limitations on Second Requests relating to search-terms, time periods, or specified personnel. Such self-imposed balancing is practical within the context of a Second Request negotiation during a merger investigation.

In the litigation context, however, this balancing often occurs at the judicial level. The issue of standards related to electronic discovery in antitrust litigation formally arose as long ago as 1995, in *In re Brand Name Prescription Drugs Antitrust Litigation*, 1995 U.S. Dist. LEXIS 8281 (N.D. Ill. June 15, 1995). In that case, the court found that the defendant bore the ultimate responsibility for production of its own electronic documents in discovery and that the plaintiff "should not be forced to bear a burden caused by [defendant's] choice of electronic storage." The court mitigated this burden, however, by assigning various costs of production to the plaintiff and by requiring the parties to consult and agree upon limitations to the production scope.

In the following article, Thomas Allman examines the current balancing considerations related to electronic discovery employed in *Zubulake v. UBS Warburg LLC and Rowe Entertainment, Inc. v. William Morris Agency, Inc.*, two opinions that substantially refine the standard expressed in *In re Brand Name Prescription Drugs Antitrust Litigation*. Allman also goes beyond the case law and proposes a blueprint for areas still left unresolved, even by these most recent cases.

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Much has been written recently about the possible abuse of electronic discovery by parties who have little or no incentive to minimize their demands for electronic data. Indeed, anecdotal concerns over this issue dominate discussions among counsel for producing parties. One proposed solution is adoption in the *Federal Rules of Civil Procedure* of the principle established by the Texas Supreme Court, under which the initial production obligations of a producing party extend only to electronic material which is specifically sought and which is readily available in the ordinary course of business.¹ If sufficient necessity is shown for more heroic efforts, the party seeking discovery must pay for the costs, arguably including the attorney privilege review costs. Recent discussions with Texas counsel from the corporate community indicate that this has essentially cured the problem in state court.

The Federal Rules Advisory Committee, through its Discovery Subcommittee, is well aware of the Texas principle, and has been asked to consider measures of a similar nature. I have advo-

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¹ See TEX. R. CIV. P. 196.4.

cated such an approach,² although in my view the cost shifting should be discretionary but not mandatory. Others have opined that the federal courts already have ample authority to issue orders under Rule 26(b) reducing undue burdens associated with electronic discovery.

Increased Predictability from the Courts Regarding Electronic Discovery

Two recent opinions from the Southern District of New York suggest possible formulations of the proportionality considerations set forth in Rule 26(b) for use in the cost-shifting context.³ Rather than simply grant or deny requests for protective orders, those courts carefully listed the factors that made it more or less fair to have the requesting party absorb the additional costs attributable to an otherwise appropriate request.⁴ Both cases clearly illustrate the significant power of a court to shift discovery costs despite the normal presumption that each party should bear its own costs.⁵ The key point, however, was the adoption of a subtle but important improvement in the Texas rule. Electronic materials not reasonably available to producing parties in the ordinary course of business—such as backup media—should be ordered to be produced only after a careful analysis of cost sharing to the requesting party. A common sense approach adopted by some courts uses the results of sampling techniques to first determine whether production is warranted.⁶ If it is, the sharing or shifting of costs to the requesting party often results.⁷

The *Zubulake* decision also acknowledged the role of the Sedona Conference in producing practical guidance. The Sedona Conference, an ad hoc collaborative effort of a variety of representatives primarily from the defense bar, produced a paper in March 2003 with an abundant analysis of electronic discovery issues and certain suggested principles to guide their resolution.⁸ One key point related to the accessibility of materials sought in discovery and considerations of cost-sharing.⁹ Unlike the *Sedona Principles*, the *Zubulake* court suggests a hierarchy of factors to be considered in the exercise of discretion once the threshold issue of accessibility is resolved.

² See Thomas Y. Allman, *The Need for Federal Standards Regarding Electronic Discovery*, 68 DEF. COUNS. J. 206 (2001).

³ See *Zubulake v. UBS Warburg LLC*, No. 02 Civ. 1243, 2003 U.S. Dist. LEXIS 7939, *17–*21, *36–*49 (S.D.N.Y. May 13, 2003); *Rowe Entm't, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 429–32 (S.D.N.Y. 2002).

⁴ The seven factors discussed by the courts are as follows:

1. The extent to which the request is specifically tailored to discover relevant information;
2. The availability of such information from other sources;
3. The total cost of production, compared to the amount in controversy;
4. The total cost of production, compared to the resources available to each party;
5. The relative ability of each party to control costs and its incentive to do so;
6. The importance of the issues at stake in the litigation; and
7. The relative benefits to the parties of obtaining the information.

Zubulake at *43 (discussing *Rowe Entm't, Inc.*, 205 F.R.D. at 429–32).

⁵ See *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978) (“Under [the discovery] rules, the presumption is that the responding party must bear the expense of complying with discovery requests. . . .”).

⁶ See, e.g., *McPeck v. Ashcroft*, 202 F.R.D. 31, 34–35 (D.D.C. 2001); *McPeck v. Ashcroft*, 212 F.R.D. 33, 34 (D.D.C. 2003); *Zubulake*, at *46–*49.

⁷ See, e.g., *Murphy Oil U.S.A., Inc. v. Fluor Daniel, Inc.*, 52 Fed. R. Serv. 3d (Callaghan) 168, 176–77 (E.D. La. 2002); *Rowe*, 205 F.R.D. at 433.

⁸ See THE SEDONA CONFERENCE, THE SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION (March 2003) [hereinafter SEDONA PRINCIPLES], available at http://www.thesedonaconference.org/publications_html.

⁹ See *id.* at 18–24.

Some years of experimentation still lie ahead of us in agreeing upon and applying the “cost-shifting factors” that are most appropriate, if indeed that can be determined in advance. It may well be that each case is so fact-specific that generalities will not prove useful, but the underlying considerations are now clear and they make sense. By emphasizing “accessibility” as the key distinction in electronic discovery, the opportunity now exists to tackle the other important issues.

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A Remaining Area of Uncertainty in Need of a Standard

One related area that can now be addressed is backup systems. Backup systems periodically copy the contents of the company’s computer systems to a series of tapes, so that in the event of a catastrophic system failure, the company may restore its computer systems. These tapes are routinely recycled for reuse and are not retained. It can and has been argued that the ongoing process of recycling of tapes necessarily constitutes “spoliation” of evidence in a specific case. Federal case law has not properly developed answers to questions such as whether a producing party may commit “spoliation” by maintaining reasonable existing business practices in the face of preservation obligations. Likewise, this question has divided the practical from the academic commentators.¹⁰

Halting the practice of recycling backup tapes is impractical in many instances. Once tapes from an e-mail server are set aside for one case, the same tapes are logically available for review in the context of other subsequently filed cases involving the same servers—potentially resulting in an administrative nightmare. For an entity facing hundreds of suits, this effectively means that no backup systems can ever be purged. Moreover, some backup systems are partially or fully automatic, and interrupting the established automatic processes can be difficult and labor intensive. Finally, halting reuse of backup tapes could require the purchase of unlimited numbers of extra tapes as well as burdensome arrangements for storage and access to the tapes that are no longer being recycled. The costs and burdens of tracking the tapes would convert a disaster recovery system into an extraordinarily expensive and unwarranted record retention program.

Given these substantial costs and difficulties, it is unrealistic to expect that halting of rotation of all backup tapes should be a routine response to the filing of litigation. A far better approach is to acknowledge that determined efforts to identify and collect electronic materials from readily accessible sources represent an effective substitute for the preservation of backup media.¹¹

Even more is at stake, though, than addressing the effect of undue burdens during production of electronic records. A recent opinion from the Second Circuit holds that in cases of breach of discovery obligations, sanctions can issue where the breach occurred not only through bad intent,

¹⁰ Compare *id.* at 18 (“However, the obligation to preserve relevant evidence is generally understood to require on the part of the producing party only reasonable efforts to identify and manage the relevant information readily available to it. Satisfying this obligation must be balanced against the right of a party to continue to manage its electronic information in the best interest of the enterprise even though some electronic information is necessarily overwritten on a routine basis through applications of various computer systems. If such overwriting is incidental to the operation of the systems, it should be permitted to continue after the commencement of litigation.”) with 7 MOORE’S FEDERAL PRACTICE, § 37A.12[5][e] (Matthew Bender 3d ed., 2003) (“The routine recycling of magnetic tapes that may contain relevant evidence should be immediately halted on commencement of litigation.”).

¹¹ See, e.g., Lisa M. Arent, Robert D. Brownstone & William A. Fenwick, *Essay: Ediscovery: Preserving, Requesting & Producing Electronic Information*, 19 SANTA CLARA COMPUTER & HIGH TECH. L.J. 131, 175 (2002) (“[Where] volume of back-ups may be very large given the size of the company. . . . a strategy entailing an ongoing thorough search for, and preservation of, pertinent electronic data. . . . could minimize or eliminate the need for discovery of back-up tapes.”).

but also through mere negligence.¹² Such sanctions may include monetary fines, adverse instructions to the jury, or, in extreme cases, default judgments.¹³ Sanctions, such as adverse jury instructions, may have case-altering effects far out of proportion to the seriousness of the alleged conduct. If a company fails to halt routine recycling of backup tapes as unnecessary in a context where the court ultimately disagrees with the decision, the party may be in the position of having to make the Hobson's choice between going to trial with an instruction that the jury infer that the documents on the backup tape would have been detrimental to the company, and simply settling the case. Indeed, some commentators now predict that the courts will routinely apply harsh sanctions, such as jury instructions commanding the jury to infer that destroyed documents would have been detrimental to the company even where their destruction was due to negligence.¹⁴

A Proposed Preservation Safe Harbor

In light of the uncertainties outlined above, producing parties operating large numbers of computers need to be able to rely on a more clearly defined preservation standard so that they can appropriately plan for litigation. Accordingly, now is the time to enact a Rule-based "preservation safe-harbor" applicable to the operations of business systems involving information that is not routinely accessible at the time of institution of litigation. *Zubulake* is helpful here as well: it can be seen to stand for the principle that where information is not accessible in the ordinary course of business, no automatic requirement exists to halt the ordinary treatment of such information where the systems are operated in good faith for business purposes.

Thus, Rule 37 of the Federal Rules of Civil Procedure could expressly provide that a responding party need not automatically suspend or alter the operation in good faith of electronic backup or other routine disaster recovery or business systems absent a preservation order based on a clear showing of need justifying the expense and disruption inherent in such an order. This would allow the producing party to explain to the court or magistrate the alternative methods and assurances already in place to produce the evidence sought and the burdens of such an order. Such a preservation order should not issue unless the requesting party met the standards for injunctive relief because an order of this nature is, arguably, injunctive in nature.¹⁵

Moreover, given the well-documented varieties of electronic data available in even the ordinary case, Rule 37 should provide that a court should not enter sanctions predicated upon a failure to maintain or preserve electronic information unless a discovery request or preservation order describes with particularity the specific documents or data sought to be preserved. In that situation, entry of sanctions would require evidence that the party upon whom the request or order was served willfully failed to preserve the documents or data. Including language in Rule 37 to reflect this principle would prevent organizations from being blindsided by spoliation sanctions premised

¹² See *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 108 (2d Cir. 2002) ("The sanction of an adverse inference may be appropriate in some cases involving the negligent destruction of evidence because each party should bear the risk of its own negligence.").

¹³ See, e.g., *Danis v. USN Communications, Inc.*, 53 Fed. R. Serv. 3d (Callaghan) 828, 835 (N.D. Ill. 2000) (fining individual defendant \$10,000 and recommending adverse inference instruction be given at trial).

¹⁴ See, e.g., Gregory P. Joseph, *Electronic Spoliation*, SH037 ALI-ABA 163 (2003).

¹⁵ See *Sedona Principles*, *supra* note 8, at 21–23 (citing *In re Potash Antitrust Litig.*, No. 3-93-197, 1994 WL 1108312, at *7–*8 (D. Minn. Dec. 5, 1994); *Humble Oil & Ref. Co. v. Harang*, 262 F. Supp. 39, 42–43 (E.D. La. 1996)).

on conduct that lacked bad intention.¹⁶ This language should be supported by a presumption that the undertaking of reasonable steps to notify custodians of electronic information of the need to preserve such information constitutes prima facie compliance with the standard of care.

Conclusion

Recent progress in solving the practical problems in the production of electronic evidence has been substantial, and the two district court opinions cited provide much needed assistance by opening the debate over cost-shifting factors informing the exercise of judicial discretion. However, the challenge of providing a balanced approach to issues involving the planning for preservation necessitates a “safe harbor” in the *Federal Rules*. Building on the principles underlying those recent cases, this is the time for the Federal Rules Advisory Committee to work towards adoption of such a measure as part of a comprehensive amendment reflecting the differences in electronic discovery. ●

¹⁶ See generally SEDONA PRINCIPLES, *supra* note 15, at 39 (“Sanctions, including spoliation findings, should only be considered by the court if, upon a showing of a clear duty to preserve, it is found that there was an intentional or reckless failure to preserve and produce relevant electronic data, and a showing of a reasonable probability that the loss of the evidence materially prejudiced the adverse party.”).