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# Electronic Discovery: An Overview

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No longer is electronic discovery reserved for the rare case involving complex technical issues, or those involving large damage claims. In modern-day complex litigation, as well as simpler cases involving individuals, the proverbial "smoking gun" is as likely to be a deleted e-mail or electronically stored draft document as it is a "hard copy" of a document. The proliferation of computers not only in the office but in the home — and, indeed, portable computers that travel with the user — greatly increases the odds that many discoverable documents will be available, and perhaps *only* available, in electronic format. This article provides a general primer on the subject of electronic discovery, discussing some recurring issues in the case law, as well as issues that should be of particular interest to franchisors and franchisees.

## Statutory Provisions Governing Electronic Discovery

The federal rules permit, and, indeed, require, discovery of electronic documents. Rule 26 of the Federal Rules of Civil Procedure permits discovery of "any matter" relevant to the claim or defense of any party. Fed. R. Civ. P. 26. Rule 34 — concerning requests for discovery of documents and things — defines the term "document" to include "writings, drawings, graphs, charts, photographs, phono-records, *and other data compilations*." Fed. R. Civ. P. 34. While neither rule specifically mentions electronic data, there is no question that this inclusive definition encompasses electronic data. *See generally Simon Prop. Group L.P. v. MySimon, Inc.*, 194 F.R.D. 639, 640 (S.D. Ind. 2000) (computer records are documents discoverable under Rule 34). Moreover, some federal district courts have adopted local rules that define the term "document" to include, specifically, electronic data. *See, e.g.*, E.D.N.Y. Local Civil Rule 26.3, *available at www.nyed.uscourts.gov/ Local_Documents/localrules.pdf*.

Of course, state statutes must be consulted in state court litigations. In New York, for example, although the Civil Practice Law and Rules (CPLR) do not make specific mention of electronic discovery, its provisions are broad enough to encompass electronic data. Rule 3120 permits discovery of "documents *or any other things* which are in the possession, custody or control of the party served." CPLR 3120(1)(i) (emphasis added). New York state courts have only recently begun to apply "generic" discovery rules to electronic documents. *See, e.g.*, *Lipco Elec. Corp. v. ASG Consulting Corp.*, No. 8775-01, 2004 WL 1949062 (Sup. Ct. Nassau Cty Aug. 18, 2004).

As an aside, it should be noted that production of materials in hard copy does not preclude a party from receiving the same information in electronic form. *See Anti-Monopoly, Inc. v. Hasbro, Inc.*, No. 94-Civ-2120 (LMM) (AJP), 1995 WL 649934 (S.D.N.Y. Nov. 3, 1995); *Cornell Research Foundation, Inc. v. Hewlett Packard Co.*, No. CIV.A.5:01-CV-1974 (NAM/DEP), 2003 WL 23712246, at *21 (N.D.N.Y. Dec. 9, 2003); *Lipco*, 2004 WL 1949062 at *6-8.

## Types of Data Files

In May 2003, a federal judge sitting in New York, Hon. Shira A. Scheindlin, issued the first in a series of decisions in *Zubulake v. UBS Warburg LLC*, No. 02 Civ. 1243 (SAS) (S.D.N.Y.). The *Zubulake* decisions — five so far — have gone further than ever before in defining the scope of electronic discovery, *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 316-17 (S.D.N.Y. 2003); providing the test to be employed for cost-shifting of electronic discovery, *id.* at 322; defining a client's duty to preserve electronic data, *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2004); defining an attorney's obligation to ensure that the client satisfies its discovery obligations, *Zubulake v. UBS Warburg LLC*, No. 02 Civ. 1243 (SAS), 2004 WL 1620866 at *9 (S.D.N.Y. July 20, 2004); and discussing the possible sanctions resulting from a party's failure to preserve and produce electronic discovery, *id.* at *51.

In the first *Zubulake* decision, 217 F.R.D. 309 (S.D.N.Y. 2003), the court identified five categories of electronic

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data, listed in order from most accessible to least accessible:

- *Active, online data*, including hard drives. *Id.* at 318.
- *Near-line data*, typically consisting of robotic storage devices that house removable media, use robotic arms to access the media, and use multiple read/write devices to store and retrieve records, including optical disks. *Id.* at 318-19.
- *Offline storage/archives*, consisting of removable optical disk or magnetic tape media, which can be labeled and stored in a shelf or rack, including disaster or archival copies of records. *Id.* at 319.
- *Backup tapes* — a device, like a tape recorder, that reads data from and writes it onto a tape. *Id.*
- *Erased, fragmented or damaged data*, defined by the court as follows: "When a file is first created and saved, it is laid down on the [storage media] in contiguous clusters. ... As files are erased, their clusters are made available again as free space. Eventually, some newly created files become larger than the remaining contiguous free space. These files are then broken up and randomly placed throughout the disk." *Id.* Such files can only be accessed after significant processing. *Id.*

The relative accessibility of the various forms of electronic data is relevant to, among other things, the analysis utilized to determine which party will be required to bear the costs of the discovery. *See Zubulake*, 217 F.R.D. at 318.

## Maintaining or Waiving Privilege

While there is no question that the attorney-client privilege and work product doctrine apply to electronic documents as to paper, application of the body of law governing waiver of such protections is only beginning to be developed with respect to electronic communications. The reluctance to forward hard copies of documents does not always carry over to forwarding electronic mail. The question has arisen, does forwarding otherwise privileged communications result in waiver of privilege?

In *U.S. v. Stewart*, 287 F. Supp. 2d 461, 464, 466 (S.D.N.Y. 2003), the government requested a determination of whether an e-mail that Martha Stewart sent to her attorney and then forwarded to her daughter was protected either as attorney-client privilege or as attorney work product. *See id.* at 462. The court held that the e-mail was protected work product, and that Stewart did not waive its immunity by forwarding the document to her daughter (described by the court as "a nonlawyer family member whose interest in the case can only be described as personal"). *Id.* at 465-70. Significantly, however, the court held that the e-mail communication was also protected by attorney-client privilege, and that Stewart waived that privilege by forwarding the e-mail to her daughter: "Defendant's arguments regarding Stewart's intent and the sanctity of the family notwithstanding, the law in this Circuit is clear: apart from a few recognized exceptions, disclosure to third parties of attorney-client privileged materials results in a waiver of that privilege. No exception is applicable in this case." *Id.* at 464.

## Duty to Preserve

As Judge Scheindlin noted in a later *Zubulake* decision, "[a]s documents are increasingly maintained electronically, it has become easier to delete or tamper with evidence (both intentionally and inadvertently) and more difficult for litigants to craft policies that ensure all relevant documents are preserved." 220 F.R.D. 212, 214 (S.D.N.Y. 2003).

Addressing the scope of the duty to preserve, the court posed the following question and gave the following answer: "Must a corporation, upon recognizing the threat of litigation, preserve every shred of paper, every e-mail or electronic document, and every backup tape? The answer is clearly, 'no'. Such a rule would cripple large corporations, like UBS, that are almost always involved in litigation. As a general rule, then, a party need not preserve all backup tapes even when it reasonably anticipates litigation." *Id.* at 217.

The court determined that 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. *Id.* at 218. Generally, the litigation hold does not apply to inaccessible backup tapes (*eg*, 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. *Id.* But if backup tapes are accessible (*ie*, actively used for information retrieval), then such tapes would likely be subject to the litigation hold. *Id.*

## Possible Effects of Breaching the Duty to Preserve

In *Zubulake IV*, the court ordered the defendant that had destroyed backup tapes to bear the plaintiff's costs for re-deposing certain witnesses for the limited purpose of inquiring into issues raised by the destruction of evidence and any newly discovered e-mails. *See* 220 F.R.D. 212, 222.

In the latest *Zubulake* decision, Judge Scheindlin imposed sanctions, including an instruction of adverse inference, against the defendant for deleting e-mails germane to discovery requests and failing to timely produce other e-mails. *See* WL 1620866, at *12. The opinion serves as a primer on counsel's obligation to instruct a client concerning the duty to preserve, a client's obligation to heed those instructions, and counsel's duty to monitor compliance. According to the court, counsel has the duty to locate relevant information and a continuing duty to ensure preservation. *Id.* at *8.

The court concluded that the defendant acted willfully in destroying relevant information, after being instructed not to do so by its counsel, and by delaying in the production of that information. *Id.* at *10-11. The court reprimanded counsel for failing to coordinate and oversee their client's

discovery efforts. *See id.* at *1. According to the court, "[t]he conduct of both counsel and client thus calls to mind the now-famous words of the prison captain in *Cool Hand Luke*: 'What we've got here is a failure to communicate.'" *Id.* The court noted that counsel has a duty to: issue a "litigation hold" at the outset of the litigation or whenever litigation is reasonably anticipated; communicate directly with "key players" in the litigation, communicating to them the duty to preserve; and, finally, instruct all employees to produce electronic copies of their relevant active files and make sure that all backup media are identified and preserved. *Id.* at *8. The court determined that the harsh sanction of an adverse inference was appropriate. *Id.* at *13.

## Does a Franchisor Have a Duty to Produce a Franchisee's Electronic Data?

Is a franchisor obligated to provide electronic data generated by its franchisees? Research has disclosed no case law addressing this issue. However, applying well-established general principles, a persuasive argument can be made to impose such a duty.

Generally speaking, Rule 34 of the Federal Rules of Civil Procedure provides that a party may have discovery of documents and things that are in the "possession, custody or control" of another party. FED. R. CIV. P. 34. In *Bifferato v. States Marine Corp. of Delaware*, the court explained that "[p]ossession by an attorney or a third party of the document or matter required to be produced cannot be used as a means of avoiding compliance with a direction for its production. The true test is control and not possession." 11 F.R.D. 44, 46 (S.D.N.Y. 1951).

Control has been defined by various federal courts to mean "not only possession, but [also] a legal right to obtain the documents requested upon demand." *Searock v. Stripling*, 736 F.2d 650, 653 (11th Cir. 1984); *see also Gerling Int'l Ins. Co. v. Comm. of Internal Revenue*, 839 F.2d 131, 140-41 (3d Cir. 1989) (where agency relationship exists, "if the agent-subsidiary can secure documents of the principal-parent to meet its own business needs and documents helpful for use in the litigation, the courts will not permit the agent-subsidiary to deny control for purposes of discovery by an opposing party").

Applying these legal principles, a franchisor may well be in "control" of documents — including electronic data — in the possession or custody of its franchisees. Inasmuch as most franchise agreements permit franchisors to inspect and demand documents and records maintained by the franchisees, the franchisors certainly have the "legal right to obtain the documents requested upon demand." *Searock*, 736 F.2d at 653.

## Proposed Amendments to Federal Rules

On Aug. 9, 2004, the Civil Rules Advisory Committee published for comment proposed amendments to the Federal Rules of Civil Procedure, some of which deal specifically with discovery of information stored electronically. They are available at *www. uscourts. gov/rules/newrules1.html.*

Rule 26(f) requires a discovery conference among counsel at an early juncture of the litigation. FED. R. CIV. P. 26(f). The proposed amendment to the rule will require counsel to discuss the preservation of evidence, an issue that, according to the Committee, is particularly important with regard to electronically stored information. The proposed rule also adds two new topics to be addressed in the discovery plan. First, issues related to electronic discovery and, in particular, the form of production. Second, the new rule would require the parties to consider a privilege waiver agreement, pursuant to which the parties would request that the court enter an order protecting the parties' right to assert a claim of privilege with respect to discovery materials that have been produced without intending to waive the privilege. The purpose of the order would be to reduce the cost and delay required by an initial "privilege review" of electronic documents.

The proposed amendments also redefine the term "document" for purposes of Rule 34. While, as noted above, Rule 34 can already be fairly construed to encompass electronic documents, the proposed rule will specifically include electronically stored information in the definition.

The proposed amendment to Rule 26(b)(2) would require a party to produce, without court order, those electronic documents that are relevant and "reasonably accessible," *ie*, those that are routinely maintained in the usual course of the responding party's regular activities. Electronic data that are not reasonably accessible would be available by court order, when the demanding party demonstrates good cause.

Finally, the proposed amended rules create a "safe harbor," protecting a party from court-imposed sanction under limited circumstances. Specifically, a party must show that it "took reasonable steps to preserve information after it knew or should have known the information was discoverable in the action." In addition, the party must demonstrate that "the failure to preserve resulted from loss of the information because of the routine operation of the party's electronic information system."

## Conclusion

Electronic discovery is here, and attorneys and their clients must be aware of their respective obligations. Thus far, the cases decided on the issue all stand for the proposition, to a greater or lesser extent, that parties must be prepared for the electronic discovery process *before* a dispute arises, and must pay detailed attention to discovery obligations immediately *after* a dispute arises.