

Discovery Games

The High Stakes of Electronic Data Discovery

By Stacy Jackson



The age old game of plaintiffs' counsel was to place as many bets on the discovery roulette wheel as they could afford in order to increase their chances of winning. Today, in the age of electronic data discovery, that strategy has not changed—but the stakes have risen dramatically. We are in a post-*Arthur Andersen*, *Zubulake* and *Morgan Stanley* world where exposure is in the billions. Yes, that's right, the billions—with a “b.” Additionally, the passage of the



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new Federal Rules Amendments has put increased pressure on counsel. The new rules, as well as *Zubulake*, have taken the litigation hold to a new level. The new Federal Rules also force counsel to know, understand and be conversant in the electronic data of their client very early on in the case. Now that the ante has been raised significantly, it behooves us to understand how the nuances of the discovery game have changed and to prepare for them.

The object of the game, as it always has been, is to create the perception the defendant is destroying documents or withholding evidence because it has something to hide. Thanks to Morgan Stanley and Arthur Andersen—the poster children for “something to hide”—we are all paying the price. Add to that the massive volume of electronic data and the multi-layered review process and you've just given the plaintiffs better odds at recovering sanctions. There are several ways that plaintiffs will try to play the game.

Early Notification to Preserve Electronic Data and Motion for Preservation

Plaintiffs will provide early notification to the defendant that electronic data will be sought and all electronic data should be preserved, including back up data, deleted files and file fragments, and for the defendant to cease the deletion of electronic

information. By making such a demand, plaintiffs are virtually putting a bet on every number of the roulette wheel, hoping the ball will land on their number and lead to a big payout.

Such a broad request can cripple your client or government agency's business operations. For instance, Exxon Mobil generates 121,000 back up tapes per month and recycles them in accordance with its document retention policy. If ordered to stop the recycling of its back up tapes, the cost of simply purchasing new tapes would be \$1.9 million dollars. See, *Summary of Testimony and Comments on E-Discovery Amendments, 2004-05* at 3. Then there would be added costs for physical storage, cataloging, etc. What if a government agency was forced to turn off its SPAM filter so as not to delete electronic information in accordance with the preservation letter or order? The agency would become crippled. Considering that the mere turning on and turning off of a computer or the opening and closing of a database will change and/or delete information, an overly broad preservation letter could grind business operations to a halt. Indeed, the court in *Turner v. Restor Condos Int'l, LLC*, 2006 WL 1990279 (S.D. Ind. July 13, 2006), found the pre-suit letter to preserve electronic data on "any mainframe, desktop, or laptop computers, or other storage media or devices, and not upgrade or replace any equipment or software" did not accommodate the day-to-day needs of the business with a complex computer network. The Turner court cited Rule 37(f) of the Federal Rules, which recognizes discovery should not prevent the routine, good-faith use of the corporate computer systems.

The duty to preserve evidence exists independently of a court order. The Federal Rules of Evidence require parties to take steps to preserve relevant evidence—electronic and paper. As such, preservation orders should be the exception, not the rule. See, *United States, ex rel. Smith v. Boeing Co.*, 2005 WL 2105972. The critical question then becomes under what circumstances a preservation order should be issued. Don't just fold your cards and comply with the letter of preservation or stipulate to an order of preservation, look to the laws of your jurisdiction. The three main tests for a preservation order are:

1. The party seeking the preservation order must meet the standards for obtaining injunctive relief. See, *Green Party of New York State v. New York State Board of Elections*, 389 F.3d 411, 418 (2d Cir. 2004).
2. A three factor balancing test: 1) the level of concern for the continued existence and integrity of the evidence in

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the absence of a protective order; 2) the likelihood of irreparable harm to the party seeking the preservation order; and (3) the capability of the parties to maintain the evidence and the physical, spatial and financial burdens created by ordering the preservation. *Capricorn Power Co. v. Siemens Westinghouse Power Corp.*, 220 F.R.D. 429, 433-34 (W.D. Pa. 2004).

3. The party seeking the preservation order must demonstrate it is necessary and not unduly burdensome. See, *Pueblo of Laguna*, 60 Fed. Cl. 133, 138 (2004).

For example, in the case of *U.S. ex rel. Smith v. Boeing*, the plaintiffs used the age old argument that Boeing was sweeping evidence under the rug and that an employee was asked to "to lose" an item of correspondence. However, Boeing was able to show that within days of being notified of the lawsuit it took appropriate steps to preserve evidence—including the item of correspondence an employee was allegedly asked to lose. What Boeing did right in this case, thereby avoiding a burdensome motion for preservation, was to show that it promptly acknowledged its duty to preserve and effectively implemented its litigation hold. Plaintiffs will use a big corporation's bureaucracy, lack of organization, inability to locate information and mobilize quickly to show it is slothful, unresponsive and generally uncooper-

ative and therefore has something to hide. So, the lesson is to be nimble and agile—to display an aura of responsiveness and cooperation so there is no need for a preservation order. Additionally, savvy litigators will document what they did so you will know the cards you hold and be prepared for the next move when the court or opposing counsel ups the ante. Plaintiffs' counsel begin to see dollar signs when they can show evidence has been spoliated. In the end, it is the monetary sanctions they seek and not exactly the evidence itself. One important lesson we should all take away from the *Zubulake* decision is that the litigation hold is no longer just a letter or memo sent out to document custodians, it is now a process made up of a series of events. First, you must become fully familiar with your client's document retention policies, as well as the client's data retention architecture. See *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 432 (S.D.N.Y. 2004) (*Zubulake V*). Second, the litigation hold letter must go out promptly to all document custodians and key witnesses. "Promptly" is defined as when you know of litigation or reasonably should have known of the litigation. The litigation hold letter should be written in terms laymen can understand and should expressly discuss electronic data. Third, you must sit down with the document custodians, managers of key business units and key witnesses and talk to them about the case, the documents and data they will need to collect and secure, and how they will collect, secure and provide documents and data to the litigation team. You should also discuss with them the potential sanctions your company or agency will suffer if documents or data are not preserved correctly. Fourth, you must monitor the litigation hold. You can do this by reissuing the litigation hold letter, overseeing compliance and monitoring efforts. Lastly, this work will all be for naught if you do not document all of your efforts to preserve the information.

Request Electronic Data That Is Not Reasonably Accessible

Until recently, cases were settled due to the cost of expert witnesses. Today, cases are settled due to e-discovery costs. Plaintiffs are now using these costs to drive up the price of a case in an attempt to force

defendants to settle. To that end, plaintiffs will seek electronic data that is difficult to find or produce and prey upon your company or agency's inability to move quickly. Before you decide whether to fold or stay in the game, you should first understand what data you have and what is being requested.

Judge Scheindlin characterized data into two separate categories: 1) accessible, and 2) inaccessible. Accessible data is data that is more than likely readily available to you, such as active data on your hard drive, near line data on a CD ROM and offline storage archives. Inaccessible data is not so readily available and causes you to incur time and expense to locate and restore, *i.e.*, disaster recovery back up tapes and fragmented or deleted data. *Zubulake v. UBS Warburg, LLC*, 217 F.R.D. 309, 318-19 (2003). Per the new Federal Rules, you are only required to provide opposing counsel with reasonably accessible data. Don't get caught in the trap of thinking you have to provide all of it. You must only provide that which is relevant, not privileged and reasonably accessible. Once you have done so, the opposing party must show good cause for their need for the inaccessible information. A good cause showing will balance the party's need for the information versus the burden to supply the information.

If you want to be a high roller in the discovery game, then you should determine what type of data you have early on. It can be done at the time you implement or revise your document retention plan or when you are collecting documents for a particular case. Be mindful of the fact that although you do not have to restore and produce inaccessible data as a matter of course, you are still responsible for preserving the inaccessible data.

30(b)(6) Depositions

Plaintiffs will use discovery to obtain an overview of a defendant's computer system and document retention plan. Plaintiffs' counsel will begin their cases with a 30(b)(6) deposition notice of your IT department personnel, records manager and corporate executives. A bad roll of the dice at this stage of the game can hound you through discovery process and trial.

Consider the case of *GTFM, Inc. v. Wal-Mart Stores, Inc.*, 49 F.R.D. 3d 219 (S.D.N.Y.

2000), where sanctions were imposed upon the defendant for misrepresenting its very own computer system. Wal-Mart refused to produce documents based on the statement of a senior executive that the computer system had a limited capability and could not produce sales information that was older than five weeks. Wal-Mart again represented its limited computer capacity to

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the court during a hearing. Approximately one year later, a Wal-Mart vice president revealed the company's computer system had the capability to track the information for more than a year. Wal-Mart was sanctioned and ordered, among other things, to allow the plaintiff's expert to conduct an on-site inspection of Wal-Mart's computer facilities. *Id.*

In today's litigation environment, lawyers are charged with fully understanding the e-discovery landscape of their clients. Failure to do so can be a fatal blow to your case. In order to avert this crisis, you should sort your cards ahead of time. Prior to the commencement of any litigation, you should immediately identify those persons capable of explaining the IT system, the data retention, compliance and enforcement mechanisms in an accurate and user-friendly manner. This information will prove to be invaluable to you once litigation commences as it will be readily at your fingertips. An attorney without a working knowledge of his or her client's computer system and retention policy will not be able to refute the plaintiff's claims that a mere push of a button can generate the data the plaintiff desires. Ready access to this information will put you in control of showing your hand when you are ready and you will not be forced to allow the plaintiffs to sneak

a peek at your cards. Also, you must prepare your witnesses well in advance. They all need to "sing from the same sheet of music" in areas where their expertise will overlap. For instance, both the IT manager and the records manager are charged with executing the corporate retention policy. If the IT manager says he or she deletes emails every 60 days in order to save storage space, but your records manager says the policy is to delete emails every 90 days, then you should just fold. Plaintiffs will use these inconsistencies between 30(b)(6) witnesses to drive up your costs and also to color your client as a corporation with something to hide because you delete your emails.

Plaintiffs' counsel will dig for information from all of your 30(b)(6) witnesses to show you destroyed evidence *after* the litigation commenced. An ability to show that evidence was destroyed after litigation commenced provides plaintiffs counsel with significant leverage. Therefore, you should go over the document retention policy with each 30(b)(6) witness to ensure no data was lost or modified after the litigation commenced. If it was destroyed, then you should start looking at what was destroyed and whether the destroyed data would have been helpful to the plaintiff's case. If you can show that it was not helpful to the plaintiff's case, *i.e.*, overwritten system files, then you can avoid or lessen the damage to your case.

Motion to Compel

Plaintiffs will repeatedly file motions to compel and argue the defendant is not complying with its duty of full disclosure when it objects to discovery or fails to produce. Take notes on this subject from *Bell v. Woodward Governor Co.*, 2004 WL 3121301 (N.D. Ill. Dec. 20 2004). In this case, the defendant was ordered to "(1) confirm that a reasonable search for documents was conducted and indicate what the manner of the search was, (2) produce responsive documents, (3) confirm if no responsive documents exist, and (4) confirm instances where the documents have been destroyed, indicating by whom and when." *Id.* at *1. This case simply highlights the need to document what steps you have taken to preserve, protect, locate and secure your documents and data. When you are at the

craps table and chips and dice are flying everywhere, you need to be responsible for the placement of your own bets. Don't rely on the boxman to straighten up your chips on the table so you are paid correctly; do it yourself.

In the aforementioned *Turner* case, the plaintiff used the motion to compel as a weapon to show the defendant was hiding documents and data. The judge stated the parties engaged in the "familiar minuet" of overly broad discovery demands, which were met with overly broad objections. With the assistance of the court, the parties resolved several disagreements and still the plaintiff filed her motion to compel. The court took note of the fact that "[m]uch of what the plaintiff sought to preserve and all relevant information was provided to her. . . . The additional production effectively resolved the motion to compel. Those documents offered no support for her claim that RCI was somehow engaged in subterfuge." *Turner* at *8.

The case of *Treppel v. Biovail Corp.*, 2006 WL 278170 (S.D.N.Y. Feb. 6, 2006), also sheds some light on plaintiffs' tactic of using a motion to compel as a way to stack the discovery deck. Prior to filing the motion to compel, Treppel's attorney sent Biovail a proposed e-discovery preservation order that included provisions for exchanging document retention information, identifying a deposition witness with computer system knowledge and preserv-

ing all electronic data. The proposed order also stated accessible data would be produced in its native format and inaccessible data would be identified—but not immediately produced. Biovail's counsel refused to agree to the proposed order, stating that, among other things, the order was onerous. The court sided with Biovail and stated that the proposed order was overly burdensome. Biovail, however, was ordered to answer the electronic data management questions as if they were interrogatories. Here, the plaintiffs used two "stack the deck" tactics in that they sent out the early notice to preserve data via the proposed order and then filed a motion to compel when defendant disagreed with the unduly burdensome proposed order. The lesson here is not to fold too early. When it appears the plaintiff's requests will cripple your business operations or drive up your operating costs (e.g., because you cannot rotate your backup tapes), you must push back.

Sanctions

At the end of the day, it's really not the information opposing counsel seeks—it's the monetary discovery sanctions, or sometimes just the threat of them. Indeed, Morgan Stanley was ordered to pay \$1.45 billion dollars in a directed verdict caused by its discovery abuses and Laura Zubulake was awarded \$29 million after she was granted an adverse inference instruction. Be on guard that plaintiffs will seek harsh

sanctions for spoliation of evidence and discovery abuse. Plaintiffs will attempt to paint you into the corner very early on in the case and begin to lay their foundation that you have spoliated evidence or that you are dragging your feet on discovery matters. Do not allow them to start papering their files with these "perceived" discovery abuses. Instead, start papering your file with documentation to show everything you have done to preserve evidence and comply with discovery requests. Be forewarned that monetary sanctions and favorable settlements are the primary objectives of the discovery game, not the information the plaintiffs allegedly seek.

Conclusion

The bottom line is don't think you are playing penny ante poker; you are at the table with the high rollers. You and your clients have a lot to lose if you are not paying attention to the game that is unfolding before you. The easiest way to take care of most of the game playing by opposing counsel is to make sure your electronic data is in order. You need to wrap your brain around what you have, how long you keep it, where you have it, whether it is reasonably accessible and who will testify about it. Once you do all of that, you will be able to move quickly when plaintiffs come at you with an unreasonable demand or try and paint you in a less than glowing light. 