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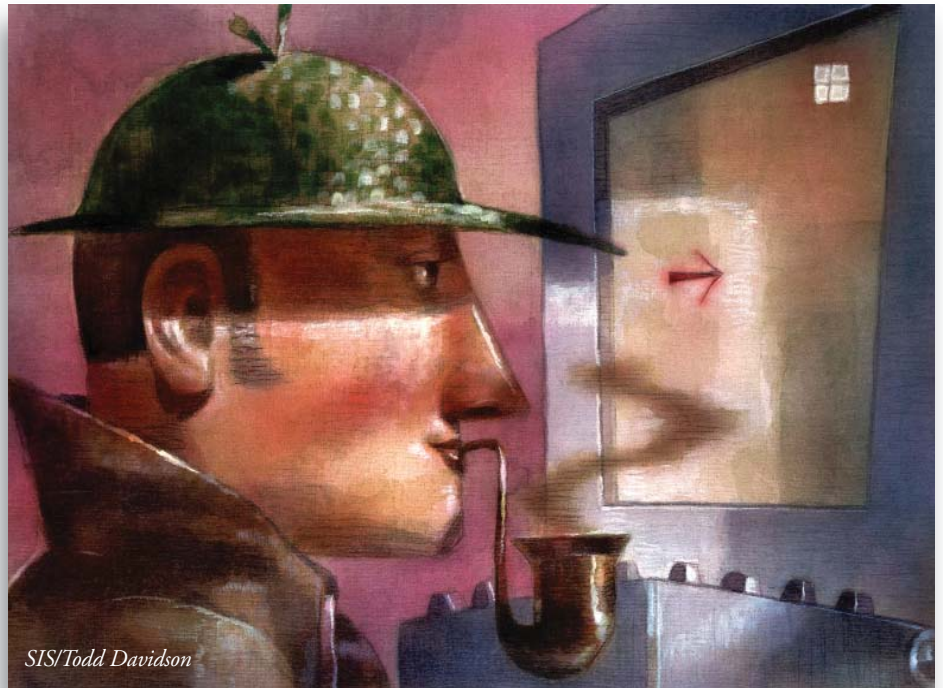


E-Discovery 101

BY RONALD R. DAVIS

E-mail. E-books.
E-libraries. E-commerce. The world around us

seems inundated by the addition of the letter “e” to terms we thought we knew and understood. So it is perhaps not surprising that “e-discovery” has achieved



prominence in the world of litigation. But what does the term “e-discovery” really mean? And does the process of e-discovery differ from traditional rules of discovery familiar to seasoned litigators?

This article will (1) summarize what e-discovery is and (2) explain the ways in which e-discovery procedures depart from or supplement traditional discovery. The goal of this article is to provide North Carolina attorneys with a basic overview of the topic of e-discovery and the rules that may apply in North Carolina.

What is “e-discovery,” and why should I be concerned?

The topic of e-discovery may at first glance seem daunting. Your client has gigabytes of potentially discoverable data stored in her

inbox, iPhone, or laptop, but your ability to provide counsel is limited by your familiarity with the technology she is using. E-discovery guides abound but often read like they are written in binary code rather than English. Third-party vendors, hungry for your client’s money, remind you with daily e-mails that they are much better than you are at e-discovery. Fortunately, e-discovery is not nearly as complicated as they make it out to be. Essentially, e-discovery is the process of discovery of electronic data and documents. The term “e-discovery” is shorthand for “electronic discovery,” just as “e-mail” and “e-commerce”

refer to “electronic mail” and “electronic commerce,” respectively.

In today’s digital world, e-discovery is more important than ever because over 99% of all information being generated is created and stored electronically.¹ This data exists in a variety of formats and mediums, ranging from simple documents stored on a client’s hard drive to archived data kept on backup tapes or hidden metadata containing information about electronic documents.² However, business technology is built to be used for everyday business and personal communications, not for facilitating discovery in a lawsuit.

Therefore, accessing relevant information can be more expensive and difficult than traditional discovery.

As North Carolina attorneys, we must know e-discovery rules because of the potential consequences for us and our clients of non-compliance. For example, a North Carolina federal court recently gave an adverse inference instruction to the jury when a plaintiff discarded a laptop containing relevant files and e-mails.³ Likewise, a Michigan plaintiff who intentionally erased data from a zip drive, backdated computer files, and lost a CD and an audio recording had its case dismissed.⁴ Sanctions for e-discovery violations are becoming more common, tripling in frequency between 2003 and 2004 and growing rapidly since then.⁵

How does e-discovery work?

Fundamentally, e-discovery operates like traditional discovery. However, e-discovery can be more complex because electronically stored information is retained in exponentially greater volume than hard-copy documents, electronically stored information is dynamic, rather than static, and electronically stored information may be incomprehensible when separated from the system that created it.⁶ One handy tool to help remember the most important differences between e-discovery and traditional discovery is to think of the Four P's: Preservation, Processing, Production, and Privilege.

Preservation

A client has a duty at the outset of litigation to not destroy potentially discoverable information and data. This duty is triggered once a party reasonably foresees litigation, perhaps before an actual complaint is filed. Therefore, attention to e-discovery should begin immediately upon learning of the potential for litigation.⁷ Once litigation becomes foreseeable, a client should apply a "litigation hold" to govern the storage and alteration of electronic records. Within this "litigation hold," non-privileged information that is potentially discoverable must be retained. Preservation may be more difficult in the e-discovery context, however, because electronic information is so easily generated, manipulated, and deleted. Further, clients may have standardized procedures in place to retain only a certain amount of information at any one time. For example, a client's e-mail retention policy might be to store emails for a

period of only 30, 60, or 90 days and then delete or store those emails on backup tapes for emergency purposes only. Convincing a client to suspend its routine e-mail retention or destruction policy and apply a "litigation hold" can be both difficult and time consuming due to pushback from the client.

To ensure that the "litigation hold" is properly administered, the attorney first should develop a strong knowledge of his client's technology and its retention and destruction policies. This information is best obtained by a personal visit with client personnel at the outset of litigation. It may be necessary to retain a technology expert to assist you if the client uses sophisticated data systems. Soon after this meeting, the attorney should issue a "litigation hold" letter, outlining the client's duty to preserve relevant e-mails and other electronic documents. Counsel should continue to remind his client of its preservation duties and ensure that new employees are aware of this duty as well. Resending the "litigation hold" communication, working with the client's technology staff to make sure data is preserved, and even taking possession of a client's actual electronic storage media can ensure that this obligation is met.

Processing

Processing involves collecting, cataloging, and analyzing preserved information so that relevant documents can be targeted for production and to assist attorneys in their evaluation of the case. For complex matters involving large amounts of data, processing can be time-consuming and expensive. Costs range as high as \$500 to \$1,000 per gigabyte to process and host data. However, an effective processing plan can save time and money later by ensuring that the most relevant documents are quickly produced for use in the litigation.

Production

In the production stage, the first step is to identify what must be produced. Imagine your client has preserved 20 backup tapes with e-mails from 2006. Recovering these e-mails will cost tens of thousands of dollars, even though the exact content of the messages is unknown. This situation is common in e-discovery because, although technology allows large volumes of information to be generated and stored with ease, the information is quickly archived and recoverable sometimes only at great expense. In such situations, the key issue is the familiar standard of "undue burden." If

production would impose an undue burden, it is not required. Of course, the parties may not see eye-to-eye on this issue. To show undue burden, the responding party must prove that the burdens and costs of production outweigh the relevance of the responsive information. By contrast, the requesting party can defeat this argument by showing that its need for the requested information outweighs the costs of producing it. Courts can test these arguments by ordering a sampling of the potentially-relevant data before compelling full production, and parties often compromise by agreeing to a specific set of search terms.

In some situations, courts will offset the burden of production by requiring cost-sharing arrangements between the parties.⁸ In deciding whether to grant such an order, courts generally consider the following factors: the specificity of the request, the availability of the information from other sources, the cost of production relative to the amount in controversy, the cost of production relative to the parties' resources, the ability of each party to control costs, the importance of the issues in the litigation, and the benefit to the parties of having the information.⁹

The second step is to decide how the data should be produced. Unlike paper documents and tangible items, electronic information can be produced in a variety of formats ranging from static image files to fully-functional native forms. For instance, your client could produce e-mails as PDF files, which are essentially pictures of the e-mails viewable on a computer screen. Alternatively, your client could produce e-mails in the form of the original software, like Microsoft Outlook. Production in such a native format allows the requesting party to fully sort and search the data while also viewing it with attachments intact. Discovery requests can specify a desired form of production, but the responding party is not necessarily bound by the request and it can voice objections. Ultimately the form of production will be whatever is agreed to by the parties or mandated by the court.

Privilege

Protecting privileged information is an especially difficult exercise in e-discovery. The potentially enormous volume of discoverable data often makes it impracticable (if not literally impossible) to review every piece of responsive electronic material to determine if any are privileged. For instance, e-mail correspondence with a client might be protected by

attorney-client privilege, yet it might take hundreds of hours to review tens of thousands of responsive e-mails to weed out the few privileged ones. To deal with this difficult situation, courts have approved “clawback” agreements. In a clawback agreement, the parties mutually agree to produce all identified information, and also agree to return and not use as evidence any information that is later identified as privileged. This approach expedites litigation and saves clients time and money by eliminating the need for attorneys to spend hundreds of hours searching for every privileged document. Note, however, that clawback agreements in no way affect the substantive law of privilege as contained in evidence rules or statutes.

Specific Rules for North Carolina

Specific e-discovery rules can vary by jurisdiction. Different rules apply in North Carolina federal courts and North Carolina state courts.

North Carolina Federal Courts

The Federal Rules of Civil Procedure (FRCP) were amended in 2006 to address e-discovery. Rule 26 includes basic e-discovery procedures. Rule 26(b)(2)(B) contains an added stipulation that production of electronic documents not reasonably accessible is not required when the responding party would suffer undue burden or cost. Additionally, according to Rule 26(f)(3)(C), the parties must discuss e-discovery issues at their Rule 26(f) conference, including the form in which electronic documents should be produced. Revised Rule 16(b)(3)(B)(iii) empowers the court to include a plan for e-discovery in its scheduling order.

The FRCP also contain rules relating to production. Rule 33(d) provides that a party’s electronically stored business records can be examined by the other party if such an examination would provide an answer to an interrogatory. Rule 34(a)(1)(A) empowers parties to specify the form of production, but Rule 34(b)(2)(D) allows responding parties to object to a specified form. Rule 45 allows third parties to be subpoenaed for their electronic information, subject to the other pre-existing Rule 45 procedures for third-party subpoenas. Finally, Rule 26(f)(3)(D) now specifically provides for the creation of clawback agreements to manage privilege issues.

The western district of North Carolina has local rules on e-discovery. LCvR 16.1(G) pro-

vides that an initial pretrial conference can be requested by the parties, at which e-discovery and other issues can be discussed and resolved before a magistrate judge. Additionally, LCvR 45.1(C) states that non-parties producing readily retrievable electronic data should do so in electronic format, preferably on a CD.

North Carolina State Courts

Until June 2011 North Carolina had no specific rule of civil procedure governing e-discovery. The North Carolina Rules of Civil Procedure were amended in June 2011 to add rules pertaining to e-discovery in North Carolina state courts.¹⁰ The new procedures resemble the federal rules outlined above and apply to actions filed on or after October 1, 2011. Specifically, Rule 26 now includes “electronically stored information,” including metadata, within the scope of discoverable material. Additionally, Rule 26 now provides for a discovery meeting, conference, and plan that must address, in part, e-discovery. Rules 34 and 45 were amended to address electronically stored information. Finally, and perhaps most notably, Rule 37 contains a new protective clause that may shield clients from sanctions for destruction of electronic information. According to the new rule, a court may not impose sanctions if a party has lost electronically stored information as part of routine, good-faith operation of an electronic information system, absent exceptional circumstances. In addition to the new requirements of the North Carolina Rules of Civil Procedure, Rules 17 and 18 of the North Carolina Business Court place additional requirements on litigants with cases in the North Carolina Business Court.

Conclusion and Additional Reading

Despite its seeming complexity, e-discovery actually operates much like traditional discovery. By remembering the Four P’s (Preservation, Processing, Production, and Privilege), North Carolina attorneys should be able to sufficiently manage the complexities and procedural requirements implicated by the addition of modern technology into the world of litigation. For further reading on this topic, several court opinions are particularly helpful. The entire *Zubulake v. UBS Warburg* series, consisting of seven different opinions authored by Judge Shira Scheindlin, is a must-read for federal court practice.¹¹ Many of Judge Scheindlin’s recommendations were incorporated into the Federal Rules of Civil

Procedure in 2006. For North Carolina law, *Analog Devices v. Michalski*¹² provides a thoughtful analysis of e-discovery issues by the North Carolina Business Court. Finally, the Sedona Conference, a group devoted to “best practices” in e-discovery, maintains an extensive collection of helpful resources, available online at thesedonaconference.org. ■

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Endnotes

1. David K. Isom, *Electronic Discovery Primer for Judges*, Fed. Cts. L. Rev. 1, 1 & n.1 (2005).
2. For more information on metadata, see Erik Mazzone, *Metadata 101: Beware Geeks Bearing Gifts*, NC State Bar J., Spring 2011, at 10.
3. *Teague v. Target Corp.*, 2007 WL 1041191, at *2 (W.D.N.C. 2007).
4. *Pharmacy Records v. Nassar*, 248 F.R.D. 507, 530 (E.D. Mich. Mar. 31, 2008).
5. Dan H. Willoughby, Rose H. Jones, & Gregory R. Antine, *Sanctions for E-discovery Violations: By the Numbers*, 60 Duke L.J. 789, 790-91 (2010).
6. *Analog Devices v. Michalski*, 2006 WL 3287382, at *5 (NC Super. Nov. 1, 2006) (citing Comm. on Rules of Practice & Procedure, Judicial Conference of the US Report of the Judicial Conference Committee on Rules of Practice and Procedure Rules App. C-18 (2005), www.uscourts.gov/rules/Reports/ST09-2005.pdf).
7. The issue of when litigation is foreseeable has recently been litigated in federal court. See *Micron Tech. v. Rambus Inc.*, 2011 WL 1815975 (Fed. Cir. May 13, 2011); *Hynix Semiconductor v. Rambus*, 2011 WL 1815978 (Fed. Cir. May 13, 2011) (holding that reasonable foreseeability is a flexible standard and that litigation need not be “imminent” to be foreseeable). These companion opinions provide a helpful clarification of the “reasonably foreseeable” standard.
8. See, e.g., *Analog Devices, Inc. v. Michalski*, 2006 WL 3287382 (NC Super. Nov. 1, 2006).
9. *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. May 13, 2003).
10. An Act to Clarify the Procedure for Discovery of Electronically Stored Information and to Make Conforming Changes to the North Carolina Rules of Civil Procedure, Session Law 2011-199 (2011).
11. *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. May 13, 2003); *Zubulake v. UBS Warburg LLC*, 230 F.R.D. 290 (S.D.N.Y. May 13, 2003); *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280 (S.D.N.Y. July 24, 2003); *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. Oct. 22, 2003); *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004); *Zubulake v. UBS Warburg LLC*, 231 F.R.D. 159 (S.D.N.Y. Feb. 3, 2005); *Zubulake v. UBS Warburg LLC*, 382 F.Supp.2d 536 (S.D.N.Y. Mar. 16, 2005).
12. 2006 WL 3287382 (NC Super. Nov. 1, 2006).