Electronic Discovery: Strategic and Practical Considerations for Federal Court Litigation

by Michael A. Oropallo
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The advent of the internet age brought with it more than just the unbounded freedom to communicate on the worldwide web, and the benefits of a paperless office. The cyber-sphere has created an unprecedented cache of information such as e-mail, e-data and other information now referred to as "electronically stored information" ("ESI") whose electronic signatures remain permanently embedded on magnetic media long after an e-mail or e-file is deleted. These bits and bytes of electronic information have resulted in an entirely new and sometimes troublesome evidentiary source for attorneys and civil litigants.

Early courts to address the issue, such as the *Zubulake* cases, (*Zubulake v. UBS Warburg LLC*, 382 F. Supp. 2d 536 (S.D.N.Y. 2005); *Zubulake v. UBS Warburg LLC*, 231 F.R.D. 159 (S.D.N.Y. 2005); *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004); *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003); *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280 (S.D.N.Y. 2003); *Zubulake v. UBS Warburg LLC*, 230 F.R.D 290 (S.D.N.Y. 2003); *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003), responded to litigants' demands to "mine" this newly found "motherload" of discoverable information. In addition, forward thinking practitioners and jurists attempted to standardize the process, or provide guidance to the masses, through such efforts as the *Sedona Principles*. *See The Sedona Principles: Best Practices, Recommendations, & Principles for Addressing Electronic Document Production, available at* http://www.thesedonaconference.org/dltForm?did=TSC_PRINCP_2nd_ed_607.pdf 2007). Then the federal courts "jumped in with both feet" and amended Rule 26 of the Federal Rules of Civil Procedure ("FRCP") to mandate a discussion of ESI at the earliest stages of the litigation, during the Rule 26 and Rule 16 conferences.

This article seeks to provide some practical advice to this evolving area of law that has become commonplace in complex civil litigation, and sets forth suggestions for handling common problems that can arise in the discovery of ESI, which costs can sometimes be more than the damages sought in the action.

Complex civil litigation, such as the proliferation of patent infringement cases and other technology-related litigation, typically involves at least one party that has almost unlimited financial resources that can be devoted to the litigation process. These types of cases are often mired in discovery disputes over issues that may be legally sound, but are more tactical than legally resourceful. Not only do these disputes result in exorbitant transaction costs, but they place a burden on our already overburdened judiciary.

Some courts, such as the Western District of Wisconsin, have attempted to combat these types of disputes by instituting expedited practices, such as scheduling regular motion days, with limited briefing and short notice periods. Other courts have delegated discovery duties to magistrate judges. However, the majority leave the litigants to fend for themselves, whether they are the party forcing the issue or seeking an end to incessant motion practice. ESI has escalated such discovery issues to a form of modern electronic warfare. Practical solutions are a necessity, and thinking innovatively a must.

Few litigants, however, take the Rule 26 “meet and confer” or Rule 16 conference seriously when it comes to an informed discussion of ESI, which is a mistake. The volume of electronic data at issue in a typical civil case can be immense. Before the advent of ESI, it was common practice for trial counsel to demand “any and all” correspondence by and between his or her client and the adversary, during, let’s say, the previous ten-year period. When records were stored conventionally, or even on primitive microfiche, it was not an unreasonable task to cull through a decade of paper files to respond to such a demand. With ESI, the paradigm has definitely shifted. If you take that same ten-year period demanded

In a typical case now, that ten-year period might require the review of multiple computers, individual e-mails, and years of backup tapes (if they have not been over-written, which can raise issues of spoliation, or worse). In a simple example, can you imagine trying to sift through just two years worth of sent and received e-mails for a busy sales force or chief executive? It would take hours just to segregate his or her e-mails from others on the network or system; more hours to download the e-mails; and many more hours to parse through each e-mail to identify relevancy and/or privilege issues. Now, multiply that task by ten or twenty potential witnesses, and the task grows exponentially, as does the burden. That is why addressing a few simple issues at the early stages of the litigation can save hundreds of man-hours, and tens or even hundreds of thousands of dollars of your client’s hard earned money.

The first thing I recommend is to get a handle on your client’s information technology. Whether you are a techno-geek or a “hunt and peck” dinosaur, the best source of such information is your client’s IT professional (or third party vendor). Among other things, you should find out how electronic data is stored, what servers hold the data, and how the ESI is backed up. Such efforts serve a dual purpose. At the same time you are learning about the data, it will provide

you with the opportunity to discharge your new legal duty to issue a "litigation hold" against the destruction of any ESI. Failure to do so can be catastrophic, resulting in a spoliation motion or adverse inference.

If the case is big enough, it might even be worth hiring a "consulting" expert to guide you through this cyber-maze. A cottage industry has developed for the identification, searching, and organization of ESI. Regardless of your method, understanding your client's technology is essential before you can effectively address ESI issues with your adversary or the court.

Once you have a handle on your client's technology, it is imperative that you learn at least the basics of your adversary's technology. Again, a consulting expert is an asset, but is not possible in all cases. One way to gain this knowledge is to request a short set of preliminary interrogatories directed solely to the specifics of your adversary's system. Another way is to take a limited deposition of your adversary's IT professional through a preliminary Rule 30(b)(6) notice. Usually, if you are well-prepared, and your requests are laser-focused, a court will grant such preliminary discovery, especially if you provide an adequate explanation why it is more efficient to do it that way.

In whatever manner you obtain the information, the goal is to have enough preliminary information so that you can focus your electronic discovery requests in as specific manner as possible. For example, rather than send out a discovery demand that seeks "any and all" communications between your client and opponent for the last ten years, a more focused approach is necessary for several reasons.

First, is cost. Such broad discovery demands can get expensive in a number of ways. If your adversary does provide you with everything you ask for, it will be up to you to sift through it all. And, you might be the recipient of a similar demand, which means you have to sift through all of your client's information too (to assess relevancy and avoid a waiver of a privilege).1[1] Also, if you insist on such broad demands, you could be ordered to pay the costs associated with your adversary pulling such a large volume of electronic data, as fee-shifting has become a tool in the courts' arsenals to guard against such discovery abuses.

Second, by at least preliminarily limiting the number of adversary witnesses whose personal ESI is requested, a court might perceive your actions as reasonable, and it may prevent allegations that you are conducting a proverbial "fishing expedition."

Third, by choosing a reasonable number of search terms, and applying those searches to the limited number of key individuals chosen, it will allow you to focus your search, and get the type of information you desire, much in the same manner you focus a Google search on the internet to find what you are looking for. In some ways, the use of electronic searching tools, if used in a well-thought

and focused manner, makes finding relevant information easier than it was by reading paper documents.

So what about the adversary counsel that is intent on opposing everything you suggest, or who threatens motion practice every step of the way? My first suggestion is to try and set a civil tone at the beginning. Many times, we face an attorney with the reputation of being difficult, only to find out that the attorney is zealous, but not unreasonable. Unfortunately, that is not going to work every time.

One suggestion I have in such an instance, is to request the appointment of a special master to address all discovery issues. Judges are very receptive to such a request, and an experienced trial lawyer can often make a good special master, diffusing and quickly resolving discovery issues. Even when "appealed" to a judge or magistrate, usually, their appetite wanes. Especially, when the threat of *sua sponte* sanctions loom. Though an added expense, the cost often pays off.

Bottom line, preparation and focus is the key to handling electronic discovery issues.

Michael Oropallo is a partner in the Syracuse office of Hiscock & Barclay, LLP. Mr. Oropallo has handled the litigation, trial and appeal of complex civil matters for the past twenty years. While focusing primarily on patent, trademark, copyright, trade secret and unfair competition matters, as well as environmental litigation and toxic tort matters, he has a wide breadth of federal and state jury trial experience and regularly counsels clients on litigation and non-litigation alternatives to legal disputes.

2[1] Specific inadvertent disclosure and/or "claw-back" provisions are recommended when there are large volumes of ESI to review.