

The Death of E-Discovery

By Hon. James M. Rosenbaum

The December 2006 e-discovery rules are in effect. Predictions to the contrary notwithstanding, the Earth remains the third planet from the sun, and it appears the law of gravity may still be working. Some lawyers might not have expected this, especially those who listened to the tumult surrounding the new rules. In reality, e-discovery is turning into the Federal Rules of Civil Procedure's equivalent of the Y2K problem.

Electronic discovery exists. It is, and will likely remain, a part of the modern lawyer's pre-trial repertoire. But the existence of e-discovery is not, and should not be allowed to become, the end of the world. Conversations with managers and companies providing e-discovery services already reveal a regularization and ordering in the process. This is entirely predictable and can be expected to continue. It is also a trend worth considering.

Electronic information seeped into the business world during the antediluvian period, probably in the mid-1960s. At that time, such information was held in proprietary systems that were run by in-house programmers. This was the era of "high priest" programmers, working in air-conditioned, raised-floor rooms, performing their ministrations on un-networked mainframes. The uninitiated, in the form of data-entry people, might input small quantities of information into these systems. In that environment there was little need for, and less interest in, e-discovery.

The sea change in office operations began in the mid-1980s, becoming a tsunami in the 1990s. Preprogrammed, networked personal computers (PCs) were the change agents. As high priest programmers faded into the sunset, access to a company's computers and information systems became a game anybody could play. In today's workplace, virtually all information is electronic. Once the desktop computer became the locus of commerce, communication, and information, e-discovery was spawned as its wicked stepchild.

This development had an effect on pre-trial discovery. At some point in the mid-1990s, almost any information, beyond participants' recollections (call them "depositions"), implicated some form of e-discovery. This is no secret. Lawyers have been seeking and obtaining electronic discovery for decades.¹²⁶ The new consideration of electronic material in the Federal Rules is neither a surprise nor a significant change. The previous version of the rules alluded to and granted access to electronically stored information simply by referring to "data compilations from which information



can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form." Fed. R. Civ. P. 34(a).²⁶²

Prior to the 2006 rule changes, lawyers discovered electronic information by using the tools at hand: a personal request, a court order, or any one of a number of custom-crafted solutions.²⁶³ As could be expected, individual lawyers' sophistication levels varied. This is understandable: lawyers' computer savvy is comparable to their familiarity with almost anything else. Some were better, some were worse.

Meanwhile, the workplace was transformed. E-mail became pervasive, the size of computer memory soared, the number of storage devices surpassed all imagining, and cellular telephones and personal digital assistants (PDAs) proliferated exponentially. Each addition multiplied the quantity of electronic information as well as the means whereby it might be accessed.

A stew began to simmer. There was more information to be gathered and more means of obtaining it. There were more places the information might be stored and more ways it could be manipulated or destroyed. As more lawyers looked for that information, they stirred the soup. The pot simmered.

Then the heat was turned up: the market was flooded with seminars on the “dangers” of electronic discovery. Courts unleashed a flood of opinions outlining the risks of electronic perfidy and the accompanying risk to lawyers who might not be able to manage the beast.

Voilà! A new industry. E-discovery was perfect: it was complex; there was much to do and little product realized. It called for increasingly powerful computers and means of electronic sleuthing. There was much to teach and to be taught. The end product was hideously expensive and of questionable worth. And the electronic priesthood returned, this time transmuted from programming to electronic forensics.

The musical comedy “Little Shop of Horrors” gave us Audrey II, a plant that grew and grew, consuming everything in its reach.⁴²⁷ But Audrey could not live forever. Today e-discovery—absent some calm reflection and some rational control—has become Audrey-at-law. The death of e-discovery is inevitable. And its loss will not be mourned.

The reality is that this is old wine in electronic bottles, as confirmed by e-discovery case law. After breathlessly describing the relevant technology or information storage mechanism, courts’ rulings on the issue are stunningly predictable:

- If backup tapes are missing (read “a file is gone”), a court imposes penalties for misplacing them.²⁷⁵
- When a document-retention hold either has not been instituted or has been disregarded (read “files have been destroyed”), a court imposes penalties for losing the documents.²⁷⁶
- If a file has been deliberately erased (read “a document has been destroyed”), a court considers this spoliation—just as it has been since papyrus was invented—and imposes penalties.²⁷⁷
- In cases where a lawyer told a client to do something and the client didn’t do it, and the lawyer didn’t check up on the client, a court imposes penalties (giving a simple instruction isn’t enough).²⁷⁸

Is any of this shocking? We may use hocus-pocus terms like “native format,” “tiff” files, or “hard copy,” but it remains the same old thing. Electronics have certainly multiplied the number of items stored—after all, nothing is ever really lost and virtually anything that’s deleted can be recovered. There are now “copies” on every copier, file server, PDA, or PC. But most of the important items have usually been downloaded and probably printed out. Smoking guns usually attract attention when fired.

The death of e-discovery will come because, in its present form, its costs are rising exponentially and its benefits are often imperceptible. Lawyers can certainly conduct more discovery and gather more information. But does an electronic marathon dance give greater value to the one who pays for it? Even this question isn’t new; the possibility that the 50th deposition might reveal a diamond has always existed. But how do you balance the value of that diamond against the incremental costs of depositions 15 through 49?

Today we chase hard drives. We seek backups on disks

and tapes. We resurrect data from dead devices and on forgotten storage materials. Where lawyers once looked for needles in haystacks, they now can find infinite numbers of haystacks—regardless of whether they harbor needles at all. Computer forensics might resurrect an electronic Lazarus, but does he have anything to tell us?

Consider today’s electronic rock star: metadata, which track the computer’s internal workings. The myth is that metadata is analogous to an airplane cockpit’s “black box” recordings. Surely the real truth must be there. But it’s not. Metadata are easy to manipulate. Therefore, the information revealed may be true, but cannot be proven. (On a related note, one wonders who, exactly, is metadata’s declarant? The author of the underlying document didn’t write it. Maybe it’s Bill Gates.)

E-discovery is certainly the new “big thing.” But it is also a source of enormous cost to clients who must fund this enterprise. Even though data can be endlessly scoured, it is not at all certain that doing so generates anything of value.

Litigation and discovery require examination of records, memories (both human and electronic), and examination of documents in whatever form. There still remains, however, the sensible winnowing process that good lawyers have performed for years. At a certain point, lawyers and clients must decide if the costs and benefits of endless e-discovery are worth the incremental price.

When lawyers and clients realize that it’s not productive to decant every bottle of old wine in the cellar in order to get one that’s worth drinking, we will see the death of e-discovery. That day is not far off. And when it comes, electronic discovery will properly be seen as simply another arrow in a competent lawyer’s quiver—neither unusually expensive nor particularly exciting. When lawyers simply obtain the information they need, from whatever source, there will be no need for e-discovery. **TFL**

Hon. James M. Rosenbaum was appointed by President Ronald Reagan to the U.S. District Court of Minnesota on July 19, 1985. He became chief judge in 2001. Judge Rosenbaum graduated from the University of Minnesota law school in 1969. Following work as a VISTA attorney in Chicago and private practice in Minnesota, Judge Rosenbaum served as the U.S. attorney for Minnesota in 1981 until his appointment to the federal bench. Judge Rosenbaum has represented the Eighth Circuit on the Judicial Conference of the United States, including on its Executive Committee from 1999-2001. He wishes to thank his law clerk Karin Ciano, who knows and finds the law.

Endnotes

¹See, for example, *Anti-Monopoly Inc. v. Hasbro Inc.*, 1995 WL 649934, *2 (S.D.N.Y., Nov. 3, 1995) (unpublished) (“it is black letter law that computerized data is discoverable if relevant”); *Santiago v. Miles*, 121 F.R.D. 636, 639–640 (W.D.N.Y. 1988); *Adams v. Dan River Mills Inc.*, 54 F.R.D. 220, 222 (W.D. Va. 1972).

²See also its Advisory Committee Note, 1970 Amendment (the amendment “makes clear” that Rule 34 “applies to

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electronic data compilations”).

³See, for example, *Williams v. E.I. duPont de Nemours & Co.*, 119 F.R.D. 648, 651 (W.D. Ky. 1987) (imposing a protective order but allowing limited discovery at the requester’s expense); *Dunn v. Midwestern Indemnity*, 88 F.R.D. 191, 197–198 (S.D. Ohio 1980) (scheduling evidentiary hearing on the burden of producing data on a computer’s capabilities and requiring plaintiffs to comply with the protective order); *National Union Elec. Corp. v. Matsushita Elec. Indus. Co.*, 494 F. Supp. 1257, 1262 (E.D. Pa. 1980) (requiring the plaintiff to generate a computer-readable version of discovery materials at the defendant’s expense and predicting that “by the year 2000 virtually all data will be stored in some form of computer memory”).

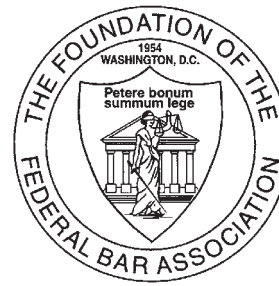
⁴Howard Ashman and Alan Menken, “Little Shop of Horrors” (1982, as amended by Warner Bros. in 1986).

⁵*Compare Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 222 (S.D.N.Y. 2003) (*Zubulake IV*) (requiring the defendant to pay for a re-deposition of witnesses about e-mails lost because of failure to preserve backup tapes) and *Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co. Inc.*, 2005 WL 674885, *9 (Fla. Cir. Ct., March 23, 2005) (unpublished) (granting partial default judgment as sanction for discovery violations relating in part to the search for backup tapes), *judgment for plaintiff reversed on other grounds*, 2007 WL 837221, *8 (Fla. App. 4th Dist., March 21, 2007), with *Reilly v. NatWest Markets Group Inc.*, 181 F.3d 253, 268 (2d Cir. 1999) (affirming the use of adverse inference instruction where the defendant was “at least” grossly negligent in misplacing files for months, and only days before trial, producing files with missing documents).

⁶*Compare Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 437 (S.D.N.Y. 2004) (*Zubulake V*) (adverse inference as an appropriate sanction for e-mails deleted in violation of litigation hold) with *National Ass’n of Radiation Survivors v. Turnage*, 115 F.R.D. 543, 559 (N.D. Cal. 1987) (monetary sanctions and additional discovery obligations imposed on the defendant and counsel in response to extensive destruction of potentially responsive documents).

⁷*Compare Zubulake V, id.* (imposing adverse inference instruction regarding content of deleted e-mails) with *Capellupo v. FMC Corp.*, 126 F.R.D. 545, 553–554 (D. Minn. 1989) (imposing double attorneys’ fees and costs for deliberate shredding of relevant documents).

⁸*Compare Zubulake V*, 229 F.R.D. at 433 (“a party cannot reasonably be trusted to receive the ‘litigation hold’ once and to fully comply with it without the active supervision of counsel”) with *National Ass’n of Radiation Survivors*, 115 F.R.D. at 552 and 558 (counsel’s procedure to send discovery requests to department heads without any followup “bordered on the anarchic”).



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