New Jersey Law Journal

VOL. CLXVIII - NO. 5 - INDEX 389 APRIL 29, 2002 ESTABLISHED 1878

Complex Litigation

Electronic Discovery Is a Fact of Life

Coming to terms with the nuances — and costs — of discovery in complex litigation

By William S. Gyves

In this digital age, the wary litigator preparing to launch into the discovery phase of a complex commercial dispute invariably will scout three distinct lines of storm clouds looming on the horizon and closing in fast. Confronted individually, each of these forces is menacing enough. When they converge simultaneously, however, they quickly can become the litigation equivalent of *The Perfect Storm*.

Savvy navigation of the largely uncharted waters of electronic discovery is essential to effectively litigating any large-scale dispute.

The first reality a litigator poised on the cusp of discovery will confront is the fact that much of the discoverable information will not be located in the sub-basement file rooms or musty warehouses of yore. Instead, this information is likely squirreled away in a bewildering array of electronic media, including network servers, backup tapes, voice-mail and e-mail systems, disks, hand-held computerized personal organizers and any number of desktop, laptop and personal home computers used to conduct business.

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Indeed, one recent study estimates that fully 93 percent of all information generated worldwide in 1999 was in digital rather than paper form. See P. Lyman & H. Varian, *How Much Information?* (Univ. of Calif. 2000).

As much as 30 percent of the information stored electronically may never be converted into paper form. See C. Giacobbe, "Allocating Discovery Costs in the Computer Age: Deciding Who Should Bear the Costs of Discovery of Electronically Stored Data," 57 Wash. & Lee L. Rev. 257 (2000).

The second reality looming on the horizon of a complex litigation is that the volume of electronically stored information subject to discovery can be nothing short of tsunamic.

As one magistrate judge recently observed, e-mail is becoming "the principal means of communication in the workplace," with an estimated 6.6 trillion electronic messages generated in this country in 2000. See J. Hart & A. Plum, "Litigating the Production of Electronic Media: 'Disk-Covery' Issues for the 21st Century," SG007 ALI-ABA 169 (2001).

In *In re Brand Name Prescription Drugs Antitrust Lit.*, 1995 WL 360526, at *1 (N.D. Ill. June 15, 1995), the defendant contended that responding to the plaintiff's document demands would require a review of 30 million pages of e-mail data. And according to *How Much Information?* authors Lyman and Varian, the average white-collar worker receives approximately 40 e-mails at the workplace each day, internal corporate communications via intranets is growing by 30 percent each year and 110 million Americans use e-mail in the workplace or at home.

The third reality confronting litigators involved in a complex dispute is that the cost of identifying, marshalling, reviewing, organizing and producing electronically stored information can be astronomical and can quickly pose a significant financial hardship for even the deepest of pockets.

For example, one party embroiled in a recent electronic discovery dispute estimated that it would cost $9.75 million to retrieve all e-mails on its backup tapes. See *Rowe Entertainment, Inc. v. The William Morris Agency, Inc.*, 205 F.R.D. 421 (S.D.N.Y. 2002). The staggering cost associated with unfettered electronic discovery prompted the court in that case to observe, "Too often, discovery is not just about uncovering the truth, but also about how much of the truth the parties can afford to disinter."

No Way Around It

All this is enough to make even the most intrepid litigator consider remaining in port until the electronic discovery storm blows over. However, he does not have that luxury, nor does he have the option of plotting a course around those high seas and treacherous winds.

Electronic discovery simply is a fact of life in complex litigation. It must be confronted head on. To ignore, trivialize or play fast and loose with the nuances of electronic discovery today is to flirt with disaster. See, for example, *GTFM, Inc. v. Wal-Mart Stores, Inc.*, 2000 WL 1693615 (S.D.N.Y. Nov. 9,

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2000).

As computers become increasingly ubiquitous in the workplace, the challenges posed by electronic discovery will only grow more pressing and complex.

Indeed, some commentators have questioned whether the existing framework of rules governing pretrial discovery — a framework erected long before the electronic information explosion — is capable of striking the proper balance between, on the one hand, permitting litigants to engage in a robust pursuit of the underlying facts and circumstances of a dispute while, on the other hand, ensuring that electronic discovery does not spin so wildly out of control as to render the actual legal dispute between the parties a mere sideshow to pretrial jockeying and jousting.

One federal judge recently suggested that "the need for a comprehensive overhaul of the federal discovery rules to adapt them to our digitalized society must be debated seriously." S. Scheindlin & J. Rabkin, "Electronic Discovery in Federal Civil Litigation: Is Rule 34 Up to the Task?" 41 B.C. L. Rev. 327 (2000). "After all," the judge observed, "how well can we expect a discovery rule primarily designed to deal with paper documents to function in an increasingly paperless world?"

The problem is not only the superabundance of electronic information and the vast spectrum of media in which it is located but also the fact that this information can be so enormously valuable to a party's claims or defenses.

There are countless accounts of cases won or lost on the discovery of a single unguarded comment recorded in a long-forgotten e-mail between colleagues in the workplace.

As Walt Disney executive Michael Eisner once commented, "I have come to believe that if anything will bring about the downfall of a company, or maybe even a country, it is blind copies of e-mails that should never have been sent in the first place." J. Janes, "Brought Down By a Click of the Mouse," 20 Legal Mgmt. 92 (March/April 2001).

Given the fact that the mother lode of incriminating evidence may be buried somewhere deep within a company's computer infrastructure, it is no wonder that electronically stored information is so jealously guarded by those in possession of it and so tenaciously pursued by those in search of the smoking gun. The battle between those competing interests can exact an extraordinary price from the combatants in terms of litigation expense and business disruption.

Amidst this expensive and high-stakes tug of war, the courts increasingly are being called on to resolve close questions of substantial importance to practitioners.

The volume of electronically stored information subject to discovery can be nothing short of tsunamic.

One of the leading issues is whether, and to what extent, the cost of responding to expansive electronic discovery requests should be shifted from the responding party — on whom the burden traditionally has fallen — to the requesting party itself. See, for example, *Sattar v. Motorola, Inc.*, 138 F.3d 1164 (7th Cir. 1998), and *Playboy Enters., Inc. v. Welles*, 60 F. Supp. 2d 1050 (S.D. Cal. 1999).

The equitable resolution of such cost-allocation issues is critical to the judicial system's overriding objective of "secur[ing] the just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1.

Sticking the requesting party with more than its fair share of the electronic discovery tab could discourage efforts to pursue discovery diligently, thus undermining the objective of ensuring that trials are more an orderly search for truth than a game of blind man's bluff. See *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958), and *McKenney v. Jersey City Med. Ctr.*, 167 N.J. 359 (2001).

Conversely, requiring the responding party to absorb the full brunt of what can be a hefty price tag could encourage the use of electronic discovery not as a tool to uncover the truth but as a weapon designed solely to force an opposing party to the settlement table, if not to its financial knees.

The task of striking the right balance on this cost-allocation issue is confronting a growing number of courts. However, even the courts have acknowledged that the growing body of case law concerning electronic discovery reflects the judiciary's widely diverging views of the parties' obligations in this area and who should be made to foot the bill for what. In *McPeek v. Ashcroft*, 202 F.R.D. 31 (D.D.C. 2001), for example, a "handful of cases" on one electronic discovery issue were described by the court as "idiosyncratic and provid[ing] little guidance."

In re Bristol-Myers Squibb

Until recently, New Jersey practitioners have had few if any reported decisions to guide them in navigating the seas of electronic discovery. Magistrate Judge John Hughes' recent decision in *In re Bristol-Myers Squibb Securities Litigation*, 205 F.R.D. 437 (D.N.J. 2002), however, sheds some much-needed light on these issues.

There, the court squarely addressed, among other things, "the increasingly common problem of the fair allocation of costs associated with discovery in the age of electronic information."

Further, although he acknowledged that the traditional discovery ground rules could stand an upgrading, Hughes concluded that this procedural framework nonetheless is up to the task of adequately regulating electronic discovery provided that counsel are diligent, proactive and conscientious in complying with their discovery obligations.

Discovery Impasse

Bristol-Myers Squibb involved a putative securities-fraud class action based on false and misleading statements the corporate defendant allegedly made regarding Omapatrilat, an anti-hypertension drug. Given the nature and scope of the allegations, it was apparent from the outset that extraordinary amounts of information would be produced in discovery.

True to expectations, a small mountain of documents — in excess of 3 million pages — ultimately was produced by the defendants alone.

Prior to the commencement of document production, the plaintiffs had agreed to reimburse the defendants for the cost of reproducing responsive documents at the standard rate of 10 cents per page. According to the plaintiffs, they did so based on the defendants' preliminary estimate that the universe of responsive documents was in the range of 500,000 pages.

In an effort to contain discovery costs, the defendants offered the plaintiffs the opportunity to review the responsive documents before they were copied and produced. When the plaintiffs declined the offer, the defendants began copying and producing the responsive documents in waves.

Ultimately, the plaintiffs were presented not only with 3,085,994 pages of documentation — six times the universe of documents the plaintiffs purportedly were led to believe existed — but also with invoices for $308,599.40 in reproduction costs.

Apparently only after learning that their reproduction tab topped $300,000 did plaintiffs' counsel begin to aggressively press the defendants on the issue of whether responsive information existed in electronic form rather than hard copies. Three critical facts surfaced in short order.

First, prior to receiving the plaintiffs' formal document requests, the defendants already possessed in digital form substantial volumes of responsive information relating to the so-called New Drug Application for Omapatrilat.

Second, at some point after the plaintiffs served their document requests, the defendants — for their own trial preparation purposes — took the fairly routine step in cases of this magnitude of scanning onto compact discs the remainder of the responsive information that was not previously in electronic form. (That is to say that digital images of the paper documents were recorded on compact discs.)

Third, the mountain of hard documents the defendants eventually produced to the plaintiffs was generated not by the traditional reproduction method of photocopying but by the less expensive process of "blowing back" paper copies of the digital images for the plaintiffs at the same time electronic copies were being generated for the defendants through the scanning process. This method of reproduction was performed at a cost of approximately 8 cents per page as opposed to the 10 cents per page cost of traditional reproduction the plaintiffs had agreed to assume.

Armed with the knowledge that most if not all of the information responsive to their requests was in electronic form, the plaintiffs requested copies of the compact discs containing that information. The request was not surprising given the benefits of discs over hard copies. As stated in the *Manual for Complex Litigation (Third)* §21.444 (1995):

> Because a single disc can store a large amount of information [citing a case in which each disc contained 15,000 pages and could be obtained for $25.00 per disc], voluminous discovery materials can thus be distributed much more conveniently and inexpensively. Computerized search and retrieval of information on a disc can facilitate review of voluminous discovery materials, particularly if adequately indexed.

The defendants agreed to accommodate the plaintiffs' request for the compact discs — for a price. Prior to turning over the discs, the defendants demanded reimbursement not only of the $308,599.40 in overdue reproduction costs, but also an additional $216,109.58 representing one-half of their cost of scanning the information onto compact discs.

Faced now with the prospect of having to advance an eye-popping total of $524,618.98 in discovery costs, plaintiffs' counsel upped the ante, refusing to reimburse the defendants for any of the costs associated with duplicating the responsive information in either hard copy or electronic form. In other words, not a penny for copying the paper documents, scanning the information onto compact discs or even the nominal cost of duplicating the compact discs.

The defendants sought an order compelling the plaintiffs to reimburse them for the $524,618.98 cost of producing the responsive information in both paper and electronic forms.

For Hughes, the dispute raised three interrelated issues: Who should assume the cost of paper discovery; who should assume the cost of electronic discovery; and (perhaps, most significantly for counsel searching for guidance through the electronic discovery thicket) what could and should have been done to avoid the discovery imbroglio in the first place?

Paper Discovery

With respect to paper discovery, the court expressed dissatisfaction with what it characterized as the plaintiffs' lack of diligence in pursuing responsive information in electronic form, noting that the plaintiffs' discovery requests specifically targeted paper documents despite the court's emphasis on electronic discovery at an earlier case management conference.

Notwithstanding the court's heads-up that electronic discovery would likely prove to be a critical issue, Hughes was dismayed that the plaintiffs plowed ahead focusing narrowly on hard documents. "[I]t is apparent," the court observed, "that the plaintiffs had every opportunity to ask for electronic information but failed to do so until after the bill for paper discovery became due."

As for the defendants, the court found "[s]omewhat troublesome" the fact that they possessed in electronic form a substantial amount of information regarding the critical New Drug

Application prior to producing that same information in hard copy. According to the plaintiffs' motion papers, the hard documents pertaining to the NDA alone consisted of some 1.6 million pages.

The court emphasized the defendants' obligations under the initial disclosure provisions of the discovery rules requiring parties at the outset of a litigation to make certain voluntary disclosures without awaiting formal discovery requests from an opposing party. Specifically, Fed. R. Civ. P. 26(a)(1)(B), requires the parties at the earliest stages of a litigation to exchange:

> a copy of, or a description by category and location of, all documents, data compilations, and tangible things that are in the possession, custody, or control of the party and that the party may use to support its claims or defenses, unless solely for impeachment.

The court interpreted this rule as imposing on defendants an affirmative obligation, as part of their voluntary initial disclosures, to provide notice that certain responsive information was in electronic form at that time.

The court observed that the advisory committee notes to this discovery rule state that such initial disclosures "should describe and categorize, to the extent identified during the initial investigation, the nature and location of potentially relevant documents and records, including computerized data and other electronically-recorded information."

In their motion papers, the plaintiffs insisted that contrary to this provision, the defendants' initial disclosure statement indicated only that copies of the NDA were "located in the files of the persons listed in Section A above or in general [Bristol-Myers Squibb] files" and made no mention at all of the electronically stored information.

The court held that under Rule 26(a)(1)(B), "the defendants were mandated to advise the plaintiffs that the NDA was in electronic form at the time 26(a)(1) disclosures were made."

Once the existence of such electronically stored information is disclosed, the court reasoned, "a party may then make an informed decision as to the manner by which discovery could be produced."

Because the defendants did not voluntarily disclose that it possessed the NDA in electronic form at the time they produced the hard copies of documents reflecting that same information, the court declined to require plaintiffs to assume any of the costs associated with reproducing those voluminous records.

The plaintiffs also argued that the automatic disclosure rules required the defendants to voluntarily disclose that they had scanned the hard documents onto compact discs. In their motion papers, the plaintiffs contended that the defendants were under a continuing obligation to supplement their initial disclosures.

Accordingly, the plaintiffs insisted, even if the documents were not scanned until after the defendants made their initial disclosures, the defendants nonetheless should have supplemented those disclosures to advise of the availability of the information in electronic form rather than let the initial disclosure statement stand.

Flatly rejecting this contention, the court held that Rule 26(a)(1) "by its plain language only goes to data already in electronic form at the time mandatory disclosure is to be made."

The court reasoned that "the decision to transform information into electronic form for trial preparation is a party's own business and that decision is not required to be disclosed to an adversary absent an express request by the party or order of the Court."

Implicit in this instruction is that had the plaintiffs' discovery requests specifically addressed the fairly foreseeable possibility (given the nature and magnitude of the litigation) that documents would be scanned onto disks, the defendants would have been required to disclose the existence of the compact discs, thus almost certainly prompting a request for copies of those discs in lieu of hard documents.

Under the circumstances, the plaintiffs were directed to reimburse the defendants only for the reproduction costs relating to the hard copies of responsive materials other than the information pertaining to the NDA. Moreover, the court held that the plaintiffs should reimburse the defendants at the lower "blow back" rate of 8 cents per page rather than the initially agreed-upon rate of 10 cents per page.

Electronic Discovery

The court next addressed the question of whether the plaintiffs should be compelled to share in the defendants' cost of scanning relevant hard documents onto compact discs.

In essence, the defendants were requesting relief from the general rule that the party responding to a discovery request bears the cost of marshalling and reviewing responsive documents (for privilege and other purposes) but the requesting party assumes the cost of reproducing the documents ultimately marshalled in response to the requests.

In their motion papers, the defendants argued that "[b]asic fairness requires that plaintiffs not be allowed to take advantage of defendants' substantial investment in creating electronic images of their production and their willingness to share it with plaintiffs without any equitable consideration to defendants."

The defendants further argued that providing the plaintiffs with the benefit of the electronic discovery as a "freebie" would be contrary to public policy, because it would be a disincentive for parties to invest in the improved efficiencies of electronic discovery. "A rule that requires parties to image documents at their own expense and supply them to their adversaries in litigation," the defendants argued, "would inevitably result in a regression to an earlier, and less efficient, era of discovery."

The court acknowledged its broad discretion under the discovery rules to allocate discovery costs among the parties to avoid "oppression, or undue burden or expense[.]" See Fed. R. Civ. P. 26(c). It was not persuaded, however, that the circumstances warranted saddling the plaintiffs with a portion of the scanning costs:

> There is no question that the defendants had intended, until the request for electronic information from the plaintiffs

> arose, to fully fund the scanning process themselves ... further undisputed that the defendants made the conscious choice of 'blowing back' paper copies ... without having first given the plaintiffs the option of only paying for discovery once, for paper or for disc. Although the defendants were not required to present such a choice to their adversaries, they cannot now, for lack of a better explanation, have [their] cake and eat it too!

Nevertheless, the court was leery of affording the plaintiffs a complete windfall. The court concluded that it was reasonable under the circumstances for the plaintiffs to assume the nominal costs of copying the compact discs containing the digital information.

Sufficiency of Existing Rules

The defendants have formally requested reargument on their motion. Although the court has yet to rule on that application, Hughes in his decision indicated that the disposition of the defendants' original application might very well have been different had they approached their discovery obligations differently.

"For future reference," Hughes wrote, "the Court notes that had the Defendants not produced paper discovery first, thereby requiring the Plaintiffs to incur considerable expense, a greater contribution for the cost of scanning might have been appropriate."

The court admitted to being "sorely tempted" under the circumstances "to place some sort of affirmative burden upon the party creating information in electronic form, for trial preparation purposes, to so advise the adversary before responding to paper document requests." The court stopped short of doing so, however, based on what it suggested "ought to be a familiar maxim: Lawyers try cases, not judges."

Hughes did, however, highlight a number of pragmatic guidelines for counsel attempting to navigate the complexities of electronic discovery.

In essence, the court recommended a proactive approach to the unique challenges of electronic discovery, with counsel conferring early and often to come to grips with those issues.

First, the court instructed that the discovery planning conference between counsel mandated under the disclosure rules should be used as a forum in which to identify — and preferably resolve — any anticipated problems with respect to electronic discovery. This meeting typically is convened at the earliest phases of a litigation.

The court suggested that "[i]n the electronic age," the topics to be addressed at such an initial meeting should include:

- whether the parties possess information in electronic form;
- whether the parties intend to produce such material;
- whether the parties' computer software is compatible;
- whether privilege issue requires the redaction of the electronic discovery; and
- the equitable allocation of costs associated with such electronic discovery.

Hughes acknowledged that there may be room for improvement in the degree to which existing discovery rules provide meaningful guidance to counsel struggling with this evolving area of discovery. In fact, a number of other jurisdictions already have provided counsel with fairly explicit guidelines on how to conduct electronic discovery.

See, for example, Eastern District of Arkansas Local Rule 26.1(4); District of Wyoming Local Rule 26.1(d)(3); Cal. Civ. Proc. Code §2017(e); Tex. R. Civ. Pro. 196.4. See, also, the *Manual for Complex Litigation* §21.446; American Bar Association's Section of Litigation, *Civil Discovery Standards* §29(b) (1999); and K. Withers, "Computer-Based Discovery in Federal Civil Litigation," SE 98 ALI-ABA 1, Appendix (2000) (Federal Judicial Center research associate sets forth a model "Rule 16(c) Pretrial Conference Agenda for Computer-Based Discovery").

Nevertheless, the court suggested, a sufficient framework is in place to facilitate a reasoned and efficient approach to electronic discovery:

> [T]he production of electronic information should be at the forefront of any discussion of issues involving discovery and trial, including the fair and economical allocation of costs.
>
> [I]t is the Court's hope and expectation that the full and meaningful utilization of tools permitted by the Federal Rules of Civil and Criminal Procedure, particularly Rule 26(f) in civil cases, will obviate future problems of fair and economical discovery cost allocation in the production and use of electronic information.

Although gray areas will continue to predominate this evolving area, the court's analysis in *Bristol-Myers Squibb* should jump-start some much-needed debate and perhaps some soul-searching on a number of critical issues.

In light of that analysis, counsel are well-advised to begin focusing closely on electronic discovery at the earliest stages of any litigation with any degree of complexity.

They should consider retaining the services of computer forensics experts as needed, familiarize themselves with their clients' computer infrastructures, take reasonable steps to anticipate problem areas and then raise those issues immediately with their adversaries in an effort to forge real-world solutions to some very difficult challenges.

If Hughes's analysis is any indication, pragmatism and diligence in confronting these challenges will be rewarded. Gamesmanship and indifference to the nuances of electronic discovery, on the other hand, may carry a very steep price. ■