E Discovery in United States Federal Courts: A Survey of Current Issues

By Marc J. Goldstein, Marc J. Goldstein Litigation & Arbitration Chambers, New York City

An Introductory Lesson

Consider the plight of poor Eugene Melnyk. The embattled owner of the Ottawa Senators, in a continuing saga begun in his former life as CEO of Toronto's Biovail Corporation, is now slogging through the sixth year of a brutal litigation in the United States District Court in Manhattan. He stands accused of conspiring to ruin the career of a securities analyst whose assessments depressed the price of Biovail's stock, and he has asserted a counterclaim for defamation. (The decision discussed below is *Treppel v. Biovail Corp.*, 249 F.R.D. 111, 2008 U.S. Dist. LEXIS 25867 (S.D.N.Y. April 2, 2008)).

Evidently lacking sound electronic document retention policies before this lawsuit began, Biovail had seen fit until the summer of 2005 -- two years after the lawsuit started, to permit Mr. Melnyk to download all his e-mail to his personal laptop, without any backup of his email on Biovail's server. To make matters worse, the "litigation hold" instructions given by Biovail's general counsel in the month after the lawsuit began were issued orally; Mr Melnyk could not recollect receiving those instructions; and no instructions were given to Biovail's IT department by the general counsel until seven months after the lawsuit had started.

So how hot is the hot water in which Biovail and Mr. Melnyk find themselves immersed as the result of slipshod document preservation practices?

Actually, those waters are remarkably tepid considering the circumstances. First, the plaintiff's request to impose sanctions for violation of the Court's discovery order was denied, as Biovail had conducted the search directed by the Court, and had furnished the fruits of the search to plaintiff's counsel.

Second, the plaintiff's request for an adverse inference, as a sanction for spoliation of evidence, was also denied -- despite the Court finding that the failure to back up the files of Mr. Melnyk and other key executives, until two years after the lawsuit began, constituted gross negligence or recklessness. The reason for denying this sanction was that even though the loss of evidence may have been reckless, it was not willful, and so it was the plaintiff's burden to show that the missing evidence would support his claim. And plaintiff's position in this regard, the Court found, was so threadbare that "' the only evidence plaintiff has produced suggesting that the (unproduced) discovery would be unfavorable to Defendants is the non-production itself. '"

But Plaintiff was not left without any relief. The court did authorize plaintiff "to undertake, at defendants' expense, a thorough forensic examination of Mr. Melnyk's laptop in an effort to recover additional e mails that were deleted by Mr. Melnyk. " But in the circumstances this must have seemed to the plaintiff, after the expenditure of tens of thousands if not hundreds of thousands of dollars in legal fees on E discovery motion practice, to be a consolation prize at best.

Survey of the U.S. Legal Landscape

The Melnyk-Biovail case is a useful starting point for this short paper, not only because its protagonist is an expatriate Canadian tycoon, but because his case illustrates the fundamental problems for parties, counsel, and courts, that are posed by the demands of discovery of electronically-stored information. For parties and their counsel, complex litigation now almost inevitably entails pitched battles over the sufficiency of electronic discovery and the measures taken to preserve e mails for production. And those battles, moreover, are not merely motions to compel production and to obtain slap-on-the-wrist attorneys' fees sanctions, as in days of conventional paper discovery. The battles are quite frequently high- stakes contests over sanctions for destruction ("spoliation") of evidence, in which the aggrieved party, often an individual plaintiff attacking adverse actions taken by a large corporation, seeks sanctions in the form of adverse inferences on the merits that could be decisive to the outcome and critical in creating leverage for a favorable settlement.

1. The Zubulake Cases

In the United States, the Rosetta Stone for legal analysis of E Discovery issues is a series of opinions issued in 2003-2004 by a respected federal judge in New York City, in a gender discrimination case brought against the UBS investment bank. It is important to catalog the holdings in those cases, and I will do so here in summary fashion. But my main submission about the Zubulake cases – made without derogation of the extraordinary effort and meticulous analysis by the judge in that case – is that they reflect a systemic failure in the United States

courts - a failure to reconfigure standard litigation management practices to deal with E discovery issues in an efficient way. In the last of the opinions in Zubulake, the judge expressed hope that codification of E discovery standards through court rules and professional association guides to best practices would relieve the burdens on courts and the cost to the parties of motion practice. Unfortunately, that promise seems not to have been fulfilled.

To summarize the holdings in the Zubulake cases:

1. In the penultimate opinion of the Zubulake saga, the Court granted the requested sanction of an adverse inference. (*Zubulake v UBS Warburg LLC*, 2004 U.S. Dist. LEXIS 13574 (S.D.N.Y. July 20, 2004) That is, it held that the jury would be instructed that it should infer that e mails deleted by UBS were unfavorable to UBS's position, i.e. that the deleted e mails would have furnished probative evidence of gender discrimination. Important to the result was the Court's finding that both inside and outside counsel were partly to blame, for failing to follow up on the "litigation hold" instructions with all key players, and for failing to take measures to preserve backup tapes.

2. In the preceding opinion, the Court set forth the legal standards governing a motion seeking an adverse inference in the context of deleted e mails: notably that there must have been a duty to preserve them at the time of the deletion, and that the movant need only prove relevance if the deletion was negligent, whereas relevance is presumed from a willful deletion. (*Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 2003 U.S. Dist. LEXIS 18771 (S.D.N.Y. Oct. 22, 2003).

3. Earlier, the Zubulake Court had addressed the allocation between the parties of the costs for restoration of backup tapes. UBS was made to bear the lion's share of those costs, with the Court placing emphasis on the general rule that a party bears its own costs of discovery compliance, and that UBS had failed to show either that the costs were very large in proportion to its resources of the stakes in the case, or that the chances of unearthing probative evidence through the restoration were very remote. (*Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 2003 U.S. Dist. LEXIS 12643 (S.D.N.Y. July 24, 2003)).

4. Finally, yet another earlier opinion had first elaborated the multi-factor test for cost-shifting, and had ordered a restoration of a sampling of backup tapes, to furnish some evidence to inform the Court's further decision. (*Zubulake v. UBS Warburg LLC,* 217 F.R.D. 309, 2003 U.S. Dist. LEXIS 7939 (S.D.N.Y. May 13, 2003).

2. The Need for More Reform

As the Biovail and Zubulake cases illustrate, a notorious consequence of the duty to produce electronically-stored information is a proliferation of motions seeking a dispositive sanction of dismissal, or the striking of defenses, or an adverse inference against the non-compliant party. The purportedly aggrieved party, claiming spoliation or willful noncompliance with requests or orders to produce vast stores of electronic data, seeks to short-cut the entire lawsuit on the merits by obtaining a crippling sanction for discovery misconduct. With such high stakes, the parties invest vast resources in the discovery battle, often engaging in elaborate discovery, collateral to the merits of the case, concerning the adequacy of the parties' and counsel's efforts to fashion, communicate, and enforce "litigation hold" directives. Another emergent vein of litigation

concerns so-called "metadata" – data in a relatively less accessible format that may reveal important information about how the data created, edited, and shared.

For example, in a Michigan case between a credit union and an insurance company, the Magistrate granted plaintiff's motion to compel production of "electronically stored data." But neither the requests for production nor the order to compel referred to "metadata" or production of files in "native format." When plaintiff moved for sanctions for non-production of such data, the Magistrate denied relief and the District Court sustained that ruling. Not only had the movant failed to ask for "native format" files and "metadata" but the Magistrate found further that "the limited evidentiary value of producing 'native format' documents with accompanying metadata is outweighed by the overly burdensome task of generating such documents." (*Michigan First Credit Union v. Cumis Insurance Society, Inc.*, 2008 U.S. Dist. LEXIS 57031 (E.D. Mich. July 22, 2008).

In response to concerns of the business community about the potential costs and burdens of compliance with broad requests for disclosure of ESI, Congress in 2006 enacted an amendment to the Federal Rules of Civil Procedure that provides "*A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost.* "

But this provision would appear to be another battleground for litigation rather than a clearly demarcated safe harbor.

In a case in Seattle earlier this year (*Mirkon Industries v. Hurd Windows,* 2008 U. S. Dist. LEXIS 35166, W.D. Wash. April 21, 2008)), the Defendants' request for a judicial order of protection against plaintiff's requests, or a shifting of the costs of further search, was denied on the basis that Defendant's claims that further search would be redundant were speculative and conclusory.

And in a case decided in July 2008 by a federal judge in Washington DC, it was held that Defendant would have to bear the costs of as forensic examination by outside consultants, to reecover deleted e mail, because the forensic effort was made necessary by the party's failure to take reasonable steps to preserve ESI after the lawsuit began. (*Peskoff v Faber*, 2008 U. S. Dist. LEXIS 51946 (D.D.C. July 7, 2008)).

3. The Case Management Problem

To understand the burden that E Discovery has imposed on our judicial system, and to begin finding solutions, a brief review of our overall discovery framework is in order. I suggest this primer on US discovery procedure because, I submit, the main problems posed by E discovery are not the costs of searching for electronic data, or the effort needed to execute an effective litigation hold, but the costs of litigating over alleged non-compliance with obligations under our procedural rules to preserve and produce such data.

The cases teach us that a litigation hold must be placed on electronic data, and all data, as soon as it appears reasonably likely that litigation will ensue. But the time when our federal courts get involved with the adequacy of the litigation hold is generally deep into a case, when the party

claiming deficiencies in discovery makes claims that the litigation hold was not imposed, or that it was imposed in effectively or too late.

In our federal courts, the parties are directed, after the pleadings are complete, to take two vital steps: first, they must voluntarily produce all documents (including electronic documents) known to be relevant to the case, and second, they are directed to formulate a jointly proposed case management plan that will be reviewed by the Court at a first conference, held in many instances with a US Magistrate Judge assigned to the case.

In my experience, our Magistrate Judges do not act proactively, at this case planning stage, to manage E discovery issues. The case law appears to confirm the experience. By tradition, the parties through counsel are expected to carry on discovery on a cooperative basis, without judicial involvement until there is a dispute. What this means, in terms of electronic discovery, is that the first substantive judicial intervention is unlikely to occur earlier than 4-6 months into the case, after the parties have exchanged requests for production and reviewed the initial wave of objections and responsive documents.

This is almost certainly too late in the game to salvage electronic evidence at reasonable cost if the initial litigation hold was deficient or non-existent. Earlier intervention is required, but the Rules, by and large, do not mandate it.

4. Early Intervention Strategies

Remarkably few courts or judges have adopted early intervention rules calculated to reduce E discovery disputes through early case management strategies. In the federal court in Manhattan,

no Local Rules governing all cases have been adopted, and only two of the sitting judges have adopted individual rules of practice governing all cases coming before them.

The rules adopted by US District Judge Colleen McMahon are a useful example of early intervention. They require the parties to exchange lists of the most likely custodians of relevant electronic data, at the stage of drafting the case management plan. At the same stage, each party must identify its electronic storage systems and whether backup tapes or other limited access systems exist. The client's document retention policy must be disclosed, and an E discovery "liaision" for the case must be appointed. If an electronic search is to be used to identify relevant electronic documents, the search methodology proposed must be disclosed to the opposing side, and an agreement reached on the methods to be used. (www.nysd.uscourts.gov, link to Judges, Judge Colleen McMahon, Rules Regarding Electronic Discovery).

These rules are a useful advance, but even broader measures should be adopted. Full disclosure should be made, at the case management plan stage, of the timing and scope of the "litigation hold" put into operation, including compliance measures. The adverse party would then have to raise any objections to the scope of the "hold," or be barred from later raising issues based on the alleged deletion/loss of relevant information. Also, if a party anticipates that it will require. disclosure of relatively old, and probably archived, electronic files, that issue should have to be raised before the first case management conference, so that issues concerning existence and retrieval of archival files can be addressed before there is a dispute.

Conclusion

E discovery continues to be a troublesome case management problem, and regrettably the problem continues to be addressed largely through motion practice after discovery disputes have arisen. More early intervention solutions of the type discussed above are needed to reduce the burdens on the judiciary and the litigants.