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E-Discovery for Arbitrators

John M Barkett*

Introduction

No citation is required to establish the principle that throughout the world today most information is stored electronically. It is no surprise, therefore, that everyone involved with dispute resolution – whether within a judicial system or arbitration – has an interest in rules governing the production of electronically stored information to comply with production obligations or orders of the tribunal.

In the United States, ‘e-discovery’ had been addressed ad hoc in the federal courts until the Civil Rules Advisory Committee of the United States Judicial Conference¹ adopted new rules for discovery of ‘electronically stored information’. They became effective on 1 December 2006.² According to the Advisory Committee, the new rules are intended ‘to be broad enough to cover all current types of computer-based information, and flexible enough to encompass future changes and developments’. What I will call the ‘e-discovery

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1 See www.uscourts.gov/rules/proceduresum.htm for a description of the rule-making procedure.

2 The Advisory Committee report, dated 5 May 2005, can be found at www.uscourts.gov/rules/Reports/CV5-2005.pdf. The rules are applicable in the federal courts. State courts in the United States must develop their own rules, state by state, although the Conference of Chief Judges of the State Supreme Courts has issued guidelines on e-discovery which, for the most part, mirror the federal e-discovery rules. See Guidelines for State Trial Courts Regarding Discovery of Electronically-Stored Information (August 2006) which can be found at www.ncsconline.org/WC/Publications/CS_EIDiscCCJGuidelines.pdf. The Federal Rules of Civil Procedure were ‘restyled’ effective 1 December 2007. In some cases, rules have been renumbered. See www.uscourts.gov/rules/congress0407.htm to find the text of the new rules and supporting documentation. All cites below are to the restyled rules except, in some cases, for quotations from decisions.

rules' address, among other things, the obligations of lawyers to meet and confer to establish ground rules for the production of electronically stored information, the difference between 'accessible data' and data that are not accessible because of 'undue burden or cost', conditions for obtaining data that are not reasonably accessible because of undue burden or cost, forms of production of electronically stored information, sampling of inaccessible data to determine relevance, and devices for addressing attorney-client privileged information contained within electronically stored information.³

Many international arbitrators use Article 3 of the IBA Rules on the Taking of Evidence in International Commercial Arbitration (IBA Rules) to address the production of documents.⁴ The preamble to the IBA Rules states that the rules are 'intended to govern in an efficient and economical manner' the taking of evidence in international arbitrations which 'shall be conducted on the principle that each Party shall be entitled to know, reasonably in advance of any Evidentiary Hearing, the evidence on which the other parties rely'.

The IBA Rules were adopted on 1 June 1999. Their authors anticipated electronic document production. Article 1 to the IBA Rules defines 'document' as a 'writing of any kind, whether recorded on paper, electronic means, audio or visual recordings or any other mechanical or electronic means of storing or recording information'. Beyond this reference, the IBA Rules offer no guidance on 'electronic documents'.

I first describe the IBA Rules. Then I describe the difference between the paper world and the electronic world and how the federal courts in the United States responded to those differences with the e-discovery rules. I next outline the 'duty to preserve' as interpreted by US courts because it takes on greater significance in the electronic world for reasons explained below. I then return to the IBA Rules to test their scope in relation to electronic document production and make suggestions for possible changes to the IBA Rules to account for electronically stored information or, at a minimum, research that could be conducted to evaluate the need for such changes.

The IBA Rules

Article 3.1 of the IBA Rules begins by stating that each party 'shall submit' to the tribunal and the other parties 'all documents available to it on which it relies'. Under Article 3.2, within the time provided by the tribunal, a party may also submit a request to produce. Under Article 3.3, the request 'shall contain':

³ See, generally, Barkett, *The Battle for Bytes: New Rule 26 and the Return of the Judges* (Shook Hardy & Bacon, 2007) available at www.shb.com/FileUploads/newrule26_1737.pdf.

⁴ See www.camera-arbitrale.com/upload/file/1234/617497/FILENAME/IBA%20Rules%20on%20Taking%20of%20Evidence%201999.pdf.

- a description of 'a requested document sufficient to identify it', or a description 'in sufficient detail (including subject matter) of a narrow and specific requested category of documents' that are 'reasonably believed to exist';
- a description of how the documents requested 'are relevant and material to the outcome of the case'; and
- a statement that the documents requested are not in the possession, custody or control of the requesting party, and the reason why the requesting party assumes the documents requested are in the possession, custody or control of the producing party.

Article 3.4 provides that within the time ordered by the tribunal, the producing party 'shall produce' to the tribunal and the other parties 'all the documents requested in its possession, custody, or control as to which no objection is made'.

If the producing party has objections, the objections are to be made in writing and within the time ordered by the tribunal. Article 3.5 provides that the 'reasons for such objections shall be any of those set forth in Article 9.2'.

Article 9.2 states in pertinent part that the tribunal shall exclude 'from evidence or production' any document 'for any of the following reasons':

- '(a) lack of sufficient relevance or materiality;
- (b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable;
- (c) unreasonable burden to produce the requested evidence;
- (d) loss or destruction of the document that has been reasonably shown to have occurred;
- (e) grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling;
- (f) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling; or
- (g) considerations of fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling'.

After receipt of objections, under Article 3.6, the tribunal 'in consultation with the parties and in timely fashion', then considers the request and the objections. The tribunal 'may order' the producing party to produce the requested documents in its possession, custody or control 'as to which the tribunal determines' that (i) the issues that the requesting party 'wishes to prove are relevant and material to the outcome of the case', and (ii) 'none of the reasons for objections set forth in Article 9.2 apply'.

Under Article 3.7, in 'exceptional circumstances', if the 'propriety of an

objection' can only be determined by review of the document, the tribunal may determine that it should not review the document and instead may, after consultation with the parties, appoint an impartial expert 'bound to confidentiality' to review the document and report on the objection. If the objection is upheld, the expert 'shall not disclose' to the tribunal and the other parties 'the contents of the document reviewed'.

Article 3.8 provides that, to obtain documents from third parties, a requesting party may, within the time ordered by the tribunal, ask the tribunal 'to take whatever steps are legally available to obtain the requested documents'. The requesting party has to identify the documents 'in sufficient detail and state why such documents are relevant and material to the outcome of the case'. The tribunal then decides the request and 'shall take the necessary steps if in its discretion it determines that the documents would be relevant and material'.

Under Article 3.9, the tribunal has the right to ask a party to produce 'any documents that it believes to be relevant and material to the outcome of the case'. A producing party may object based on any of the reasons set forth in Article 9.2. The tribunal then must decide whether to order production for the reasons set forth in Article 3.6 using, if the tribunal considers it appropriate, the procedures set forth in Article 3.7.

Article 3.10 allows parties to submit additional documents 'which they believe have become relevant and material' as a consequence of the issues raised in documents, witness statements, or expert reports or in other submissions of the parties.

If copies are submitted or produced, under Article 3.11, 'they must conform fully to the originals'. In addition, the tribunal may request that 'any original must be presented for inspection'.

Article 9.4 addresses the adverse inference. If a party 'fails without satisfactory explanation to produce any document requested' in a request for production 'to which it has not objected in due time', or if a party 'fails to produce any document ordered to be produced' by the tribunal, the tribunal 'may infer that such document would be adverse to the interest of that party'.⁵

⁵ Article 9.5 parallels Article 9.4, but it applies to failures by a party without satisfactory explanation to make available 'any other relevant evidence, including testimony' requested by another party or ordered by the tribunal to be produced where there are no objections in due time. I do not discuss Article 9.5 separately because I have assumed that electronically stored information would be covered by the use of 'document' in Article 9.4 or the result would be the same under Article 9.5 if electronically stored information qualifies as 'any other relevant evidence'.

Electronically stored information versus paper

The digital world materially differs from the paper world.

Everyone is a file keeper

In the paper world, documents usually are given to members of staff for filing. In the digital world, every computer user who sends or receives e-mail, creates word-processed documents, prepares spreadsheets or information slides, or maintains databases decides whether to store files and has the ability to modify or delete a file. Even if the digital file keeper takes no action, eventually e-mail will likely move to backup tape and usually that backup tape will be overwritten after a period of time and the file may be lost for ever.⁶

In the paper world, when an employee leaves employment, the employee's documents, already archived, may remain in that state until record-retention schedules call for their destruction. In the digital world, when an employee leaves employment, the employee's desktop or laptop hard drive (or both) may be reformatted destroying all data on the drive(s) unless someone decides that there are litigation or business reasons to maintain that employee's digital status quo.⁷

In the paper world, when, say, a major construction project was completed, the paper associated with the project might be boxed and stored in a warehouse. In the digital world, the desktop and laptop computers used by everyone in the field will be moved to the next job and file management will be a function of project organisation or perhaps serendipity depending upon the individual file-keeping habits of each person on the job.

6 An individual user can archive an e-mail in local storage media and that may be the only place to find a document. See *Hynix Semiconductor Inc et al. v Rambus Inc*, 2006 US Dist LEXIS 30690, *27-8 (ND Calif 5 January 2006) (explaining that Rambus changed to a backup recycling schedule of three months and that employees should create their own archive copies of documents; for e-mail that meant printing them or keeping them 'on your hard drive').

7 See, eg, *Cache La Poudre Feeds, LLC v Land O'Lakes, Inc et al.*, 2007 US Dist LEXIS 15277 (D Colo 2 March 2007) (wiping clean the computer hard drives of former employees, among other conduct, was sanctionable in the circumstances, but since the prejudice was not substantial, sanctions were limited to US\$5,000 and reimbursement of certain court-reporting costs).

Metadata

A second key difference is the existence of 'metadata'. The Sedona Glossary⁸ defines metadata as 'information about a particular data set or document which describes how, when and by whom it was collected, created, accessed, modified and how it is formatted'. A pocket guide provided to federal judges in the United States by the US Judicial Conference gives this definition of metadata:

'Metadata, which most computer users never see, provide information about an electronic file, such as the date it was created, its author, when and by whom it was edited, what edits were made, and, in the case of e-mail, the history of its transmission.'⁹

Yet another description appears in *Williams v Sprint/United Mgmt Comp*, 230 FRD 640, 646 (D Kan 2005) (footnotes omitted):

'Some examples of metadata for electronic documents include: a file's name, a file's location (eg, directory structure or pathname), file format or file type, file size, file dates (eg, creation date, date of last data modification, date of last data access, and date of last metadata modification), and file permissions (eg, who can read the data, who can write to it, who can run it). Some metadata, such as file dates and sizes, can easily be seen by users; other metadata can be hidden or embedded and unavailable to computer users who are not technically adept.'

Deleted data that do not die

A third key difference is that digital data can survive deletion, while paper that is discarded is not likely to be found again. The Sedona Glossary (p 14) gives this definition of 'deleted data':

8 This definition comes from *The Sedona Conference Glossary: E-Discovery & Digital Information Management*, p 33 (December 2007) available at www.sedonaconference.org/dltForm?did=TSCGlossary_12_07.pdf (Sedona Glossary). The Sedona Glossary continues by explaining that metadata can be 'altered intentionally or inadvertently'. It can be 'extracted when native files are converted to image'. Some metadata, such as file dates and sizes, 'can easily be seen by users'; other metadata 'can be hidden or embedded and unavailable to computer users who are not technically adept. Metadata is generally not reproduced in full form when a document is printed'. The Sedona Conference working group series 'is a series of think-tanks consisting of leading jurists, lawyers, experts and consultants brought together by a desire to address various "tipping point" issues in each area under consideration'. See www.thesedonaconference.org/. The Sedona Conference Working Group on Electronic Document Retention and Production has also published the second edition of *Best Practices Recommendations & Principles for Addressing Electronic Document Production* (June 2007). The document can be downloaded by going to the Sedona Conference website. See www.thesedonaconference.org/dltForm?did=TSC_PRINCP_2nd_ed_607.pdf.

9 *Managing Discovery of Electronic Information: A Pocket Guide for Judges* (Federal Judicial Center, 2007), p 3. The document is available at www.uscourts.gov/rules/eldscpkt.pdf.

'Deleted Data is data that existed on the computer as live data and which have been deleted by the computer system or end-user activity. Deleted data may remain on storage media in whole or in part until they are overwritten or "wiped." Even after the data itself has been wiped, directory entries, pointers or other information relating to the deleted data may remain on the computer. "Soft deletions" are data marked as deleted (and not generally available to the end-user after such marking), but not yet physically removed or overwritten. Soft-deleted data can be restored with complete integrity.'

So, for example, a computer user moves data to 'trash' or the 'recycle bin'. Until the trash or bin is emptied, the data remain fully restorable. Once the trash or bin is emptied, the data may be restored by forensic experts who may be able to reconstruct data fragments to recreate the deleted file, unless the storage media in question has been 'wiped', typically by software designed to achieve this aim.¹⁰

Multiple sources of data

A fourth key difference is the proliferation of data sources over paper. A 'key player' in a particular dispute may have information stored in a number of places. Consider these possibilities:

- Office desktop storage media
- Office backup storage media
- Office laptop storage media
- Optical discs like CDs (compact discs) or DVDs (digital video disc or digital

¹⁰ See, eg, *Kucala Enterprises, Ltd v Auto Wax Co, Inc*, 2003 US Dist LEXIS 8833 (ND Ill 2003). In the course of this patent infringement case, Kucala installed and used Evidence Eliminator™ software on a computer, just hours before it was to be examined by Auto Wax's computer specialist. The magistrate judge explained that 'Evidence Eliminator' is a program designed to clean computer hard drives of data that may have been deleted by the user but still remain on the hard drive. Kucala also threw two other computers away during the litigation. He did so, he said, because they had crashed and were of no use to him. Kucala also admitted destroying documents, contrary to his attorney's advice, because he was afraid the defendant would not honour a protective order that was in place. Auto Wax's computer specialist inspected the computer on which Kucala had installed Evidence Eliminator and confirmed that the software had been used to delete and overwrite more than 14,000 files. Auto Wax filed a motion for sanctions alleging prejudice as a result of Kucala's destruction of one computer and deletion of relevant discovery from two others. Auto Wax sought a default judgment, attorneys' fees, expert fees and costs. The magistrate judge found that Kucala had acted unreasonably, with gross negligence, and in flagrant disregard of the district court's order by deleting files just hours before Auto Wax's computer specialist was to inspect his computer. The magistrate judge recommended that the district court dismiss the action and require Kucala to pay the costs and attorney fees incurred by Auto Wax from the time Kucala deleted the files until the hearing.

versatile discs)

- Floppy discs
- Flash or 'thumb' drives
- Home computer storage media, including external hard drives and portable drives
- Personal laptop storage media
- Office or home voice mail
- Cellphone voice mail
- Personal digital assistants
- Web-based storage
- Home or personal e-mail systems
- Devices that send or receive instant messages
- Printers, scanners and copiers with computer memory
- Memory cards (eg, from cameras)
- In appropriate cases, global positioning devices

Backup tapes

Another key difference between the paper and electronic worlds is the existence of backup tapes,¹¹ typically used for disaster recovery purposes. Backup tapes contain extraordinary amounts of information. To illustrate, consider this explanation from the US Judicial Center's *Manual for Complex Litigation* on the volume of electronic information:

'The sheer volume of such data, when compared with conventional paper documentation, can be staggering. A floppy disk, with 1.44 megabytes, is the equivalent of 720 typewritten pages of plain text. A CD-ROM, with 650 megabytes, can hold up to 325,000 typewritten pages. One gigabyte is the equivalent of 500,000 typewritten pages. Large corporate computer networks create backup data measured in terabytes, or 1,000,000 megabytes: each terabyte¹² represents the

11 The Sedona Glossary (p 5) defines 'backup tape' as follows: 'Magnetic tape used to store copies of ESI [electronically stored information], for use when restoration or recovery ESI is required. ESI on backup tape is generally recorded and stored sequentially, rather than randomly, meaning in order to locate and access a specific file or data set, all ESI on the tape preceding the target must first be read, a time-consuming and inefficient process. Backup tapes typically use data compression, which increases restoration time and expense, given the lack of uniform standards governing data compression.'

12 A 'byte' is the basic measurement of 'most computer data and consists of 8 bits.' A 'bit' is a 'binary digit'. A bit consists of either a 0 or 1. Generalising, in computer code, for a word processing system, 0s and 1s (electronically switched off or on) are strung together to represent letters, numbers, and punctuation. There are eight bits in a byte. There are 1,024 bytes in a kilobyte, 1,048,576 bytes in a megabyte, 1,073,741,824 bytes in a gigabyte, and 1,099,511,627,776 bytes in a terabyte. See <http://kb.iu.edu/data/ackw.html>.

equivalent of 500 billion typewritten pages of plain text.' (*Manual for Complex Litigation (4th)*, ss 11.446.)¹³

One of the reasons backup tapes contain so much data is duplication. An entity that backs up daily, weekly and monthly will have 30 daily tapes, four or five weekly tapes and one monthly tape after a 30-day month. The tapes will contain all of the information stored as of the time of backup. Hence, a daily backup on a Tuesday will contain Monday and Tuesday's information. A weekly backup on a Friday will contain whatever information is stored since the last weekly backup plus all of the information contained on the prior weekly backup tape. The monthly tape will contain whatever has been stored since the prior month's backup tape and will duplicate much of the information on the daily and weekly backup tapes. Backup tapes are recycled after a period of time as well.

Backup tapes are typically not reasonably accessible, as compared to 'active data' which can be easily accessed by a user.¹⁴

Perhaps as significant as volume, backup tapes may be the only place that certain documents reside. Unless they were printed, prior versions of a document may only exist on backup because they would be overwritten each time a computer user edits the file contained in active data storage. An individual that does not archive an e-mail on his or her individual hard drive will lose that e-mail to backup after a period of time. Backup tapes may also reveal whether an individual has deleted an e-mail. For example, backup

¹³ See www.fjc.gov/public/home.nsf/autoframe?openform&url_l=/public/home.nsf/inavgeneral?openpage&url_r=/public/home.nsf/pages/470.

¹⁴ One court has described the difference between data that are 'accessible' and data which are 'inaccessible'. Data which are (1) 'online' or archived on current computer systems (such as hard drives); (2) 'near-line' such as that stored on optical disks or magnetic tape that is stored in a robotic storage library from which records can be retrieved in two minutes or less; or (3) 'off-line' but in storage or archives, such as removable optical disk (eg, CD-ROM or Digital Versatile Disc (DVD)) or magnetic tape media (eg, Digital Linear Tape (DLT) tape), are readily accessible using standard search engines because the data are retained in machine readable format. *Zubulake v UBS Warburg LLC*, 217 FRD 309, 318-20 (SDNY 2003). On the other hand, (4) routine disaster recovery backup tapes that save information in compressed, sequential, and nonindexed format; and (5) erased, fragmented, or damaged data, are generally inaccessible, because a time-consuming, expensive restoration process is required to obtain information (*ibid* at 319-20).

tapes will not capture an e-mail received by an individual and deleted the same day.¹⁵

Retrieval of information from backup tapes can also be costly. There are the costs of restoration, retrieval and review. Illustratively, in *Zubulake v UBS Warburg LLC*, 216 FRD 280 (SDNY 2003),¹⁶ there was a battle over the production of 77 backup tapes. The district court ordered UBS Warburg to restore at its expense five tapes to give the district court an idea of both the cost to restore and the relevance of the information contained on the backup tapes. The cost to restore five backup tapes was US\$19,003.43 which resulted in the production of 600 e-mails responsive to the plaintiff's request for production. UBS Warburg estimated that the cost to restore the remaining 72 tapes was US\$273,649.39 and the cost to review the data before production would be US\$107,694.72.

One of the many reasons that review costs can be so great is that backup data do not easily distinguish attorney-client privileged information. In-house counsel communications, where they have privileged status, as well as outside counsel communications with a client can be buried among millions of pages of documents on a backup tape. To identify privileged documents is both time-consuming and costly.

15 To illustrate, in *Zubulake v UBS Warburg LLC*, 217 FRD 309 (SDNY 2003), the district court explained UBS Warburg's electronic storage architecture: 'UBS backed up its e-mails at three intervals: (1) daily, at the end of each day, (2) weekly, on Friday nights, and (3) monthly, on the last business day of the month. Nightly backup tapes were kept for twenty working days, weekly tapes for one year, and monthly tapes for three years. After the relevant time period elapsed, the tapes were recycled' (*ibid* at 314). The district court also explained why backup tapes might not contain certain e-mails: 'Of course, periodic backups such as UBS's necessarily entails [sic] the loss of certain e-mails. Because backups were conducted only intermittently, some e-mails that were deleted from the server were never backed up. For example, if a user both received and deleted an e-mail on the same day, it would not reside on any backup tape. Similarly, an e-mail received and deleted within the span of one month would not exist on the monthly backup, although it might exist on a weekly or daily backup, if those tapes still exist' (*ibid* at 314, n 25).

16 Ms Zubulake alleged she was a victim of gender discrimination and was eventually terminated and then filed an additional claim that she was retaliated against for complaining about the employment practices of her supervisor (216 FRD at 281). The district court explained that under the Federal Rules of Civil Procedure, the presumption is that the producing party pays for production of accessible data. In addition, the district court held that the cost to review should always be borne by the producing party. With respect to the cost to retrieve, the district court evaluated each of seven factors identified by the district court as relevant to the determination of who should pay this cost, and decided to shift 25 per cent of the cost to the requesting party, Ms Zubulake (216 FRD at 283-90).

Key players

In the paper world, there is not necessarily a premium placed on the correct identification of persons with knowledge or information about a claim – ‘key players’ – because paper is kept for a long time by many companies. In the electronic world, the identification of key players is much more significant because delayed identification of key players can result in the loss of relevant information.

For example, in *Consolidated Aluminum Co v Alcoa*, 2006 US Dist LEXIS 66642 (ED La 19 July 2006), four key players initially were identified in November 2002 when Alcoa sent a demand letter to Conalco for costs associated with an environmental clean-up. Conalco then decided to sue in 2003 seeking a declaration of non-liability. In 2005, Conalco issued a request for production which prompted Alcoa to identify eleven more key players. In the interim, however, the e-mails of these eleven individuals had been erased because of Alcoa’s e-mail backup retention protocol.¹⁷ Conalco moved for sanctions. The district court refused punitive sanctions demands but required Alcoa to pay the reasonable costs and fees Conalco incurred to bring the motion for sanctions and also to pay the cost of redepositing up to 13 people, in addition to allowing Conalco to serve certain additional discovery requests.

Similarly, in *E*Trade Sec LLC v Deutsche Bank AG*, 2005 US Dist LEXIS 3021 (D Minn 17 Feb 2005), a defendant, NSI, in 2001, put a litigation hold on backup tapes but not e-mail messages because all e-mail messages were backed up. However, the backup tapes were recycled after three years, a policy that was never changed even though the litigation had continued more than three years beyond the date of the litigation hold. When it became clear in 2004 that additional e-mail boxes needed to be searched beyond those of the initial ‘key’ players, the e-mails were no longer available because of the three-year overwrite policy. An adverse inference instruction was approved as a sanction. --

¹⁷ Alcoa submitted an affidavit describing the protocol: ‘Once every week, all messages older than (30) days in a user’s Exchange mailbox are moved to a “System Cleanup” folder. At the same time, all messages older than fifteen (15) days (forty-five (45) days total) in a user’s System cleanup folder are deleted and are no longer directly recoverable by the user. ... In addition, Alcoa’s disaster recovery system retains email for the trailing six (6) months’ (2006 US Dist LEXIS at *19, n 12). That prompted the magistrate judge to say: ‘Thus, it is possible that relevant emails for the six (6) months prior to November 2002 could have been retrieved, had Alcoa properly suspended its routine document destruction policy when it became aware of potential litigation with Consolidated in November 2002’ (*ibid* at *19).

Forms of production

In the world of electronically stored information, there are also choices on the form of production. A requesting party may seek production in 'native' format: the file as it exists on the storage media on which it is stored with its associated metadata. A producing party may prefer to produce documents in 'Tagged Image File Format' (TIFF)¹⁸ or 'Portable Document Format' (PDF)¹⁹ in order to, among other reasons, bates-label the documents. Vendors should be able to link meaningful metadata to an associated TIFF or PDF image depending upon the agreement of parties or the scope of a court's order on production of electronically stored information.²⁰

Of course, there is always paper. Electronic files might be printed for production in paper format.

Parties that want to be able to perform electronic searches will want data in a searchable format. In addition, there may be reasons to obtain electronically stored information in different formats. For example, word-processed documents could be imaged with word search capabilities while spreadsheets may be produced in native format to view the formulae used in the spreadsheet.

Against this windshield survey of the differences between paper and electronically stored information, the rules governing e-discovery in US federal courts were created.

The US e-discovery rules

Taking into account many of the differences between paper and electronically stored information, the US e-discovery rules emphasise the importance of communication between counsel and client, between counsel for opposing parties and between counsel and the court.

18 The Sedona Glossary (p 51) defines TIFF as: 'A widely used and supported graphic file formats for storing bit-mapped images, with many different compression formats and resolutions. File name has .TIF extension. Can be black and white, gray-scaled, or color. Images are stored in tagged fields, and programs use the tags to accept or ignore fields, depending on the application.'

19 The Sedona Glossary (p 39) defines PDF as: 'An imaging file format technology developed by Adobe Systems. PDF captures formatting information from a variety of applications in such a way that they can be viewed and printed as they were intended in their original application by practically any computer, on multiple platforms, regardless of the specific application in which the original was created. PDF files may be text-searchable or image-only. Adobe® Reader, a free application distributed by Adobe Systems, is required to view a file in PDF format. Adobe® Acrobat, an application marketed by Adobe Systems, is required to edit, capture text, or otherwise manipulate a file in PDF format.'

20 According to the Sedona Glossary definition of 'native format' (p 35), 'static' formats such as TIFF or PDF 'are designed to retain an image of the document as it would look viewed in the original creating application but do not allow metadata to be viewed or the document information to be manipulated'.

Meet and confer

Rule 26 requires that counsel confer shortly after a lawsuit is filed to map out a discovery plan and otherwise agree on a pre-trial schedule that the district court can consider at the conference with the district court required under Rule 16. Rule 26(f) requires counsel to discuss: (1) 'any issues' relating to 'disclosure' of electronically stored information, 'including the form or forms in which it should be produced'; and (2) any issues relating to claims of privilege including assertion of privilege *after* production.²¹

The first change is critical because the lack of communication or miscommunication by counsel is a common cause of e-discovery controversy among parties. The requirement that lawyers discuss e-discovery issues upfront is intended to minimise the potential for later disputes.²²

Dealing with privileged documents

The second change is critical because privilege review may be prohibitively expensive in a preproduction electronic document setting. Hence, the change in the rule contemplates the use of what are referred to as 'quick peek' and 'clawback' agreements where a producing party can produce electronic documents including privileged documents for a 'quick peek' by one's opponent, review files selected for copying by the requesting party and clawback privileged documents²³ under an order that provides that no

21 Proceeding sequentially to the Rule 16 scheduling order, paragraphs (b) (3) (iii) and (iv) in Rule 16 permit the district court's scheduling order to include in parallel provisions for 'disclosure or discovery of electronically stored information' and any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced'.

22 Lawyers in US courts who fail to comprehend a client's electronic information system over the period of time relevant to the claims in question are treading in perilous waters. See, eg, *Evolution, Inc v The Suntrust Bank et al.*, 2004 US Dist LEXIS 20490 (D Ks 2004), where a special master had to be appointed to straighten out the parties' e-discovery disputes, generating a bill of US\$52,140 which was allocated 70 per cent to the defendant, in part, because of defendant's lack of digital cooperation. See also *Tracy v Financial Ins Mngmnt Corp*, 2005 WL 2100261 (SD Ind 22 August 2005) (sanctioning a defendant for a belated electronic production that was 'not substantially justified'; the defendant had physically upgraded its computer system and had failed to produce e-mails in a timely manner because, due to the upgrades, the e-mails were stored in a different location that was not initially searched).

23 See, eg, *JC Assocs v Fidelity & Guaranty Ins Co*, 2005 WL 1570140 (DDC July 2005) (where the plaintiff sought claims files that the defendant estimated might total 1.3 million files, and the plaintiff then focused on a geographic subset of 448 files, the magistrate judge proposed a quick peek and clawback protective order and gave the defendant ten days to determine whether it would surrender the files on this basis).

waiver of the privilege has occurred despite the 'quick peek'.²⁴

Subsection (B) in Rule 26(b) (5) addresses what a party who inadvertently produced privileged documents in the absence of a clawback agreement must do to attempt to protect the privilege. It must give notice and preserve the information until the claim of privilege is resolved. Once notice is received by the recipient of the documents, the recipient must, among other things, promptly return, sequester or destroy the information and any copies and not use or disclose the information until the claim of waiver of the privilege is addressed.

Documents not reasonably accessible because of undue burden or cost

Rule 26(b) (2) (B) addresses the distinction between 'accessible' and 'inaccessible' documents. It 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. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b) (2) (C). The court may specify conditions for such discovery.'

The Civil Rules Advisory Committee's Report gives examples of sources of electronically stored information that may qualify under this standard: backup tapes intended for disaster recovery purposes 'that are often not

²⁴ The astute reader will immediately ask: what of privilege-waiver claims by third parties, such as government agencies, seeking the same documents? Without a court order this is a genuine risk. See *Hopson v Mayor and City Council of Baltimore et al.*, 232 FRD 228, 244 (D Md 2005) (an order preserving the privilege was essential to avoid waiver *vis-à-vis* third parties, but no such order would be issued until the producing party had first undertaken a preproduction privilege review that is reasonable under the circumstances unless 'it can be demonstrated with particularity that it would be unduly burdensome or expensive to do so' based on the cost-benefit balancing factors in current Rule 26(b) (2) (*ibid* at 244). In May 2007, the United States Advisory Committee on the Federal Rules of Evidence proposed new Rule 502 which would protect the privilege and preclude waiver claims by third parties if production is made to an opponent in litigation under a 'quick peek' or 'clawback' agreement as long as there is a court order providing such protection. See www.uscourts.gov/rules/Reports/EV05-2007.pdf. The new Rule must be approved by the Congress of the United States before it can go into effect (*ibid*). S 2450 was introduced in the United States Senate to adopt Rule 502. See www.govtrack.us/congress/bill?bill=s110-2450.

indexed, organized, or susceptible to electronic searching'; 'legacy data' from 'obsolete systems and is unintelligible on the successor systems'; data that was deleted 'but remains in fragmented form, requiring a modern version of forensics to restore and retrieve'; and 'databases that were designed to create certain information in certain ways and that cannot readily create very different kinds or forms of information'.²⁵

The producing party must 'identify' the sources of inaccessible electronically stored information because of 'undue burden or cost'. What does 'identify' mean? The Advisory Committee Note to 26(b)(2) provides that in response to a Rule 34 request for documents, a responding party 'must' identify:

'by category or type the sources containing potentially responsive information that it is neither searching nor producing. The identification should, to the extent possible, provide enough detail to enable the requesting party to evaluate the burdens and costs of providing the discovery and the likelihood of finding responsive information on the identified sources'.

An 'undue' burden is one determined by reference to the 'proportionality' limitations contained in Rule 26(b)(2)(C). If electronically stored information is inaccessible because of undue burden or cost, to evaluate good cause and to specify conditions for such discovery (eg, limits on the amount, type, or sources of information, cost-shifting, privilege protocols), Rule 26(b)(2)(C) provides this guidance to the district court:

'On motion or on its own, the court must limit the frequency or extent of the discovery otherwise allowed by these rules or by local rule if it determines that:

- (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
- (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
- (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.'

The Advisory Committee Note to Rule 26(b)(2) lists other 'appropriate considerations' that the district court may consider in evaluating whether the burdens and costs of discovery of electronically stored information that is not

²⁵ www.uscourts.gov/rules/Reports/CV5-2005.pdf, p 42.

reasonably accessible 'can be justified in the circumstances of the case':

- the specificity of the discovery request;
- the quantity of information available from other and more easily accessed sources;
- the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources;
- the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources;
- predictions as to the importance and usefulness of the further information;
- the importance of the issues at stake in the litigation; and
- the party's resources.²⁶

Answering written questions with electronically stored information

Existing Rule 33(d) discusses the option to produce business records in lieu of answering an interrogatory, where the answer to the interrogatory may be derived or ascertained from business records and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served. Rule 33(d) now defines business records as 'including electronically stored information'. Access to hardware, software, technical support, passwords, source code or other assistance may have to be provided by the responding party, limiting, perhaps, the utility of this change.

The definition of documents

A significant change in Rule 34 is the distinction made between 'documents' and 'electronically stored information'. Rule 34 now provides that a party

²⁶ In the end, an 'undue burden', of course, is whatever a tribunal decides it is. Counsel must comprehend a client's inaccessible sources of information early and thoroughly to be in the best position to educate a judge who will decide what is 'undue'. Marginal utility will be the focus of the balancing process: does the burden 'tilt' in favour of the requesting party (eg, because there is a strong likelihood that material information is located only on the inaccessible storage media) or the producing party (eg, if the overbreadth of the request for information is blatant) relative to the cost to obtain the information? Cf *In Re: Priceline.Com Inc*, 2005 US Dist LEXIS 33636, *11 (D Conn 8 December 2005) (where the district court set forth nine directives to manage e-discovery including one requiring that restoration of 223 backup tapes (estimated to cost US\$200 to US\$800 per tape in addition to the cost of searching the files, culling for duplicate files, and converting responsive files for production), the court saying discovery 'shall proceed on a measured basis, with cost-shifting determinations made at each step of the process').

