

The Legis Report

Winter 2004

DIGITAL DISCOVERY

The acquisition and review of documentary evidence in litigation has changed dramatically as the use of document and software systems for this purpose has become more prevalent. It is difficult to imagine, as a member of a litigation support team, sitting in a document warehouse facing dozens of file boxes containing thousands of pages waiting for review. Now, the team is just as likely to be accessing an electronic document repository and utilizing software developed to assist in managing and organizing a litigation project. While the role of technology in litigation is not new, the more specific issue of evidence in digital form requires increasing understanding and management by the litigation team. In this article, we will review some aspects of electronic discovery.

In the best of circumstances, all of the data from the disclosing party is clean and accessible. Perhaps the data has been recorded on compact disks by the disclosing party and is ready to be uploaded to the document repository made available to the litigation team. In this case, the discovery of electronic media appears uncomplicated. Governed by Federal Rules of Civil Procedure 26 through 37, discovery should proceed as usual. Rule 26(a) provides for initial disclosures of "all documents, data compilations, and tangible things that the disclosing party may use to support its claims or defenses." Rule 34 broadly defines "documents" as including electronic data.

However, the litigation team may confront data spoliation, the intentional destruction, mutilation, alteration, or concealment of evidence¹. The team may also face deletion of data in the normal course of business or deletion in keeping with corporate policy. The acquisition of inaccessible data may be called technology forensics. This includes forensic efforts covering any network systems, embedded systems² or any modern electronic equipment. Technology forensics in litigation is a highly specialized area combining focused technical

training with knowledge of the rules of evidence and should, therefore, only be undertaken by qualified professionals. So, the acquisition of inaccessible data can be costly.

In the case of *Zubulake v. UBS Warburg*³, the court considered cost-shifting in the discovery of electronic data. In its conclusion, the court outlined a three-step analysis for determining the shifting of cost between parties.

The first question is whether the electronic data is relatively inaccessible, such as in backup tapes. If not, the usual rules of discovery apply.⁴ Next, to determine what data may be found on the inaccessible media, "requiring the responding party to restore and produce responsive documents from a small sample of the requested backup tapes is a sensible approach in most cases."⁵ For the final part of the analysis, the court listed the following seven factors weighted in descending order:⁶

1. The extent to which the request is specifically tailored to discover relevant information;
2. The availability of such information from other sources;
3. The total cost of production, compared to the amount in controversy;
4. The total cost of production, compared to the resources available to each party;
5. The relative ability of each party to control costs and its incentive to do so;
6. The importance of the issues at stake in the litigation; and
7. The relative benefits to the parties of obtaining the information.

The court in the *Zubulake* decision recognized the limitations of broad discovery.

As individuals and corporations increasingly do business electronically—using computers to create and store documents, make deals, and exchange emails—the universe

of discoverable material has expanded exponentially. The more information there is to discover, the more expensive it is to discover all the relevant information until, in the end, "discovery is not just about uncovering the truth, but also about how much of the truth the parties can afford to disinter."⁷

Indeed, according to a recent study, more than 92 percent of all new documents are in digital form, more than 7 billion office documents are produced each year, and about 610 billion emails are sent.⁸ As the prevalence of discoverable material in digital form continues to grow, it is critical that the litigation team understand the importance of communications with their technology experts and the importance of organizing research efforts prior to beginning the document review phase. Often, a communication canyon exists between traditional litigation teams and technology experts. The primary reason for this problem is that litigation professionals and technology professionals approach issues from different conceptual standpoints. It is no surprise that these two types of professional use different nomenclature to sometimes express the same general ideas. For larger disputes, many law concerns find themselves attempting to manage retained, multi-disciplinary teams that may include technology forensic experts, subject matter experts, and analysts.

Specialty consulting firms are emerging that exist for the primary purpose of managing electronic discovery. Some of these firms possess the multi-disciplinary skill required to ease the communication and management issues related to more complex litigations. It is through enhanced communications between the different types of professionals that the entire litigation team brings deeper understanding of the tools available to them and how best to utilize them. Further, this understanding should lead to better organization of electronic resources.

The development of true multi-disciplinary talent within the litigation law firms and the litigation consulting firms is the most natural solution to this growing issue. The resulting litigation teams will not only be more efficient but also more powerful.

Special thanks to David J. Sergio, Sergio & Associates, P.C., for his editorial contributions to the Winter 2004 *Legis Report*.

Footnotes

¹Black's Law Dictionary 1409 (Bryan A. Garner ed., 7th ed., West 1990).

² (an embedded system is located entirely on a processor. All logic is contained in a single chip and has a single purpose.)

³*Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (2003).

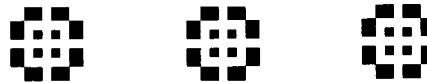
⁴*Id.* at 323.

⁵*Id.*

⁶*Id.*

⁷*Id.* at 311.

⁸ *How Much Information? 2003* (Peter Lyman, Hal R. Varian, University of Southern California-Berkeley 2003), 12 (2003).



UNIQUE CONSTRUCTION CLAIMS SEMINAR

The Association for the Advancement of Cost Engineering [AACE International] will hold its annual meeting in New Orleans, LA, June 26 through 29, 2005. At the conference, the Association's Claims and Dispute Resolution [CDR] Committee will host the presentation of approximately 14 papers on the subject of construction claims. In past years, papers presented at the CDR sessions have proved very informative. For more information see the Association's website at www.AACEI.org.



RECENT ASSIGNMENT ON POWER PLANT DISPUTE

Recently, Legis Consultancy, Inc. assisted a client in a dispute involving the construction and commissioning of a large power plant. The case involved a dispute between the plant's owners and the engineering, procurement and construction (EPC) contractor. Legis senior staff members, Michael C. Ray, PE, CCE, PSP, PMP; Thomas J. Meyers, PE, PMP; David R. Smart, JD, PMP; and Patrick S. Ray, CCC, PMP, reviewed contract documents, project communications, and other related documents to create an "issues timeline" in support of the actions filed by the clients' attorneys.

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