Chapter 14

ELECTRONIC DISCOVERY: HOW DO COURTS DO IT? SHOULD WE DO IT THAT WAY, TOO?*

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Parties in employment litigation, be it in arbitration or in court, often are awash in oceans of electronic data. They face issues of retention, protection, exploration, production, and examination of the data that they have created, sent, stored, revised, and thought they deleted. But bit by bit or byte by byte the parties, counsel, courts, and arbitrators are finding the systems and legal tools to deal with these amazing stores of information. This paper outlines a few of the new developments in electronic discovery in the courts, because the processes being used in conventional litigation provide a foundation for approaches that may be useful (and the law that is likely to be cited) in employment arbitration.

Amendments to the Federal Rules of Civil Procedure

On December 1, 2006, new electronic-discovery provisions of the Federal Rules of Civil Procedure became effective. They provide us with systems that are fairly workable in the streamlined discovery found in employment arbitration, and they establish the vocabulary and central concepts with which counsel rapidly have become familiar.

The amended rules, found online at http://www.uscourts.gov/rules, use the term "electronically stored information," but the rules intentionally offer no formal definition of this term, leaving the concept open for expansion as new forms inevitably emerge with advancing technology.

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The drafters of the amendments understood, as the comments note, that electronically stored information is fundamentally different from hard copy documents, in part because of the far greater volume of information retained, the dynamic nature of the data, and the problems of accessibility if the information is separated from the system that created it. The amended rules and comments acknowledge these differences and establish processes and principles designed to deal with the special issues posed by discovery in this day of expansive electronic data.

The amendments address five major issues that relate to electronic discovery: (1) early attention to electronically stored data, making electronic discovery a required part of pre-trial planning, disclosure, and discussions among counsel (Rules 16, 26, and 34 and Form 35); (2) management of discovery of electronically stored data that is not reasonably accessible (Rule 26(b)(2)); (3) procedures for assertion of privilege and work-product protection after production (Rule 26(b)(5)); (4) requests for production information and use of interrogatories regarding information that is electronically stored (Rules 33 and 34(a) and (b)); and (5) sanctions and protection regarding loss of electronically stored data (Rule 37(f)).

Set forth below are a few provisions from the amended rules:

Rule 16. Pretrial Conferences; Scheduling; Management

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(b) Scheduling and Planning. Except in categories of actions exempted by district court rule as inappropriate, the district judge, or a magistrate judge when authorized by district court rule, shall, after receiving the report from the parties under Rule 26(f) or after consulting with the attorneys for the parties and any unrepresented parties by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time
(1) to join other parties and to amend the pleadings;
(2) to file motions; and
(3) to complete discovery.
The scheduling order also may include
(4) modifications of the times for disclosures under Rules 26(a) and 26(e)(1) and of the extent of discovery to be permitted;
(5) provisions for disclosure or discovery of electronically stored information;
(6) any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after production;

(7) the date or dates for conferences before trial, a final pretrial conference, and trial; and
(8) any other matters appropriate in the circumstances of the case.

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

(a) Required Disclosures; Methods to Discover Additional Matter.
(1) Initial Disclosures. Except in categories of proceedings specified in Rule 26(a)(1)(E), or to the extent otherwise stipulated or directed by order, a party must, without awaiting a discovery request, provide to other parties:
(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment, identifying the subjects of the information;
(B) a copy of, or a description by category and location of, all documents, electronically stored information, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment;

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(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

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(2) Limitations.
(A) By order, the court may alter the limits in these rules on the number of depositions and interrogatories or the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.
(B) 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 the discovery.
(C) The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumula-

tive or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Rule 26(c).

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(5) Claims of Privilege or Protection of Trial-Preparation Materials.

(A) Information Withheld. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial-preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(B) Information Produced. If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

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(f) Conference of Parties; Planning for Discovery. Except in categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(E) or when otherwise ordered, the parties must, as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), confer to consider the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required

by Rule 26(a)(1), to discuss any issues relating to preserving discoverable information, and to develop a proposed discovery plan that indicates the parties' views and proposals concerning:

(1) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement as to when disclosures under Rule 26(a)(1) were made or will be made;
(2) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;
(3) any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;
(4) any issues relating to claims of privilege or of protection as trial-preparation material, including—if the parties agree on a procedure to assert such claims after production—whether to ask the court to include their agreement in an order;
(5) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and
(6) any other orders that should be entered by the court under Rule 26(c) or under Rule 16(b) and (c).

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Rule 34. Production of Documents, Electronically Stored Information, and Things and Entry Upon Land for Inspection and Other Purposes

(a) Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect, copy, test, or sample any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained—translated, if necessary, by the respondent into reasonably usable form, or to inspect, copy, test, or sample any designated tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).
(b) Procedure. The request shall set forth, either by individual item or by category, the items to be inspected, and describe each with reasonable particularity. The request shall specify a reasonable

time, place, and manner of making the inspection and performing the related acts. The request may specify the form or forms in which electronically stored information is to be produced. Without leave of court or written stipulation, a request may not be served before the time specified in Rule 26(d).

The party upon whom the request is served shall serve a written response within 30 days after the service of the request. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties, subject to Rule 29. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, including an objection to the requested form or forms for producing electronically stored information, stating the reasons for the objection. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. If objection is made to the requested form or forms for producing electronically stored information—or if no form was specified in the request—the responding party must state the form or forms it intends to use. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

Unless the parties otherwise agree, or the court otherwise orders:

(i) a party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request;

(ii) if a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable; and

(iii) a party need not produce the same electronically stored information in more than one form.

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Rule 37. Failure to Make Disclosures or Cooperate in Discovery; Sanctions

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(f) Electronically Stored Information. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

Leading Case Law Regarding Cost Shifting

In some instances, the electronic nature of data makes searches and production easier than would have been the case with hard copies. More often, however, the expansiveness of the data, the level of accessibility, the complexity of searches, and the need to review information pose significant costs that are unparalleled in the world of paper. In such situations, the responding party, customarily responsible for the cost of production, sometimes seeks to have some or all of the costs assumed by the requesting party.

The federal rules anticipate the possibility of cost shifting, but they do not address it specifically. A few federal courts have developed thoughtful analyses and findings on this issue. From one of the leading cases, *Zubulake v. UBS Warburg LLC*,[1] a three-step/seven-factor analysis has emerged. In *Zubulake* (known as *Zubulake I*, because four additional discovery-related court decisions were issued in this matter), Judge Shira Scheindlin engaged in an extensive analysis of the purposes of discovery, the nature of electronic data, and the burden of production. *Zubulake* involved sex discrimination and retaliation claims, and the court noted the risks associated with cost reallocation in such cases, as follows:

> Courts must remember that cost-shifting may effectively end discovery, especially when private parties are engaged in litigation with large corporations. As large companies increasingly move to entirely paper-free environments, the frequent use of cost-shifting will have the effect of crippling discovery in discrimination and retaliation cases. This will both undermine the "strong public policy favoring resolving disputes on their merits," and may ultimately deter the filing of potentially meritorious claims.[2]

To this end, the court in *Zubulake I* held that to "maintain the presumption that the responding party pays, the cost-shifting analysis must be neutral; close calls should be resolved in favor of the presumptions." The court summarized its multi-step, multi-factor approach as follows:

> In summary, deciding disputes regarding the scope and cost of discovery of electronic data requires a three-step analysis:
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> First, it is necessary to thoroughly understand the responding party's computer system, both with respect to active and stored data. For data that is kept in an accessible format, the usual rules of discovery

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[1] 217 F.R. D. 309 (S.D.N.Y. 2003).

[2] *Id.* at 317, 318, quoting *Pecarsky v. Galaxiworld.com Inc.*, 249 F.3d 167, 172 (2d Cir. 2001).

apply: the responding party should pay the costs of producing responsive data. A court should consider cost-shifting only when electronic data is relatively inaccessible, such as in backup tapes.

Second, because the cost-shifting analysis is so fact-intensive, it is necessary 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.

Third, and finally, in conducting the cost-shifting analysis, the following factors should be considered, weighted more-or-less in the following order:

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.

Zubulake I has been the springboard from which other courts have analyzed the issue of cost allocation. For example, in *Hagemeyer North America, Inc. v. Gateway Data Science Corp.*,[3] the court endorsed the *Zubulake* analysis, while the court in *Wiginton v. CB Richard Ellis, Inc.*,[4] expanded the factors by adding, in a sexual harassment case, an eighth factor of proportionality, or the importance of the requested information in resolving the issues of the litigation. State rules of procedure and state-court precedent often differ substantially from the law that has evolved under the Federal Rules. For example, California Code of Civil Procedure Section 2031.280(b) provides that "[i]f necessary, the responding party at the reasonable expense of the demanding party shall, through detection devices, translate any data compilations included in the demand into reasonable useable form."

[3]222 F.R.D. 594 (E.D. Wis. 2004).
[4]229 F.R.D. 568 (N.D. Ill. 2004).

Electronic Discovery in Employment Arbitration

Preliminary Question: Is There Discovery in Employment Arbitration?

In the arbitration of employment claims, regardless of whether the arbitration arises from a condition-of-employment plan or an individual employment contract, it is clear that arbitrators have the authority to order and monitor discovery. The scope and nature of the discovery that will be allowed, however, may vary significantly depending upon the individual arbitrator's philosophy, the terms of the arbitration agreement, the rules of the provider, and the issues in dispute. In *Gilmer v. Interstate/Johnson Lane Corp.*,[5] the U.S. Supreme Court famously noted that parties to an arbitration trade "the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." The Court went on to acknowledge that discovery generally is more limited in arbitration, observing that "an important counterweight to the reduced discovery" often found in arbitration "is that arbitrators are not bound by the rules of evidence." In many employment arbitrations, however, the efficiency of the process may be enhanced not by forgoing discovery and broadening the range of admissibility but, rather, by allowing a carefully monitored process of pre-hearing discovery.

Indeed, the *Due Process Protocol for the Mediation and Arbitration of Statutory Claims Arising out of the Employment Relationship* provides, in Section B(3), Access to Information, as follows:

> One of the advantages of arbitration is that there is usually less time and money spent in pre-trial discovery. Adequate but limited pre-trial discovery is to be encouraged and employees should have access to all information reasonably relevant to mediation and/or arbitration of their claims. The employees' representative should also have reasonable pre-hearing and hearing access to all such information and documentation. Necessary pre-hearing depositions consistent with the expedited nature of arbitration should be available.

The *Due Process Protocol* also states, in Section C(5), Authority of the Arbitrator, as follows:

> The arbitrator should be bound by applicable agreements, statutes, regulations and rules of procedure of the designating agency, including the authority to determine the time and place of the hearing, permit reasonable discovery, issue subpoenas, decide arbitrability issues, preserve order and privacy in the hearings, rule on evidentiary mat-

[5] 500 U.S. 20, 30 (1991).

> ters, determine the close of the hearing and procedures for post-hearing submissions, and issue an award resolving the submitted dispute. The arbitrator should be empowered to award whatever relief would be available in court under the law. The arbitrator should issue an opinion and award setting forth a summary of the issues, including the type(s) of dispute(s), the damages and/or other relief requested and awarded, a statement of any other issues resolved, and a statement regarding the disposition of any statutory claim(s).

Rules applicable to most employment-arbitration processes provide for discovery or for some system of information exchange. For example, Rule 9 of the American Arbitration Association's *Employment Arbitration Rules and Mediation Procedures, Amended and Effective July 1, 2006*, provides in part as follows:

> The arbitrator shall have the authority to order such discovery, by way of deposition, interrogatory, document production, or otherwise, as the arbitrator considers necessary to a full and fair exploration of the issues in dispute, consistent with the expedited nature of arbitration.

Employment matters involving individual contracts occasionally proceed under general commercial arbitration rules, rather than those that are specific to the employment setting. The AAA's *Commercial Arbitration Rules* do not address discovery by name, but they provide in Rule R-21, as follows:

> Exchange of Information
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> (a) At the request of any party or at the discretion of the arbitrator, consistent with the expedited nature of arbitration, the arbitrator may direct:
> (i) the production of documents and other information, and
> (ii) the identification of any witnesses to be called.
> (b) At least five business days prior to the hearing, the parties shall exchange copies of all exhibits they intend to submit at the hearing.
> (c) The arbitrator is authorized to resolve any disputes concerning the exchange of information.

Some condition-of-employment arbitration plans contain provisions that limit discovery. The enforceability of such restrictions varies.[6] Although limitations on discovery, in general, may be con-

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[6] *See, e.g., Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465 (D.C. Cir. 1997) (employer-promulgated arbitration plan must provide for "more than minimal discovery"); *Geiger v. Ryan's Family Steak Houses,* 134 F. Supp. 2d 985, 995 (S.D. Ind. 2001) (limitations on discovery, controlled by a potentially biased panel of arbitrators, were held to be unfair and were found to contribute to unenforceability of plan); *Clary v. The Stanley Works*, 2003 US Dist LEXIS 12747 (D. Kan. 2003) (plan leaving scope of discovery to arbitrator's discretion was found to be fully adequate); *Armendariz v. Foundation Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 6 P.3d 669 (Cal. 2000) (plan must provide for "adequate discovery").

sistent with the goal of expedition in arbitration, some degree of discovery usually is needed to provide an opportunity for effective vindication of statutory employment rights. Careful use of discovery also often promotes settlement and makes the hearing process move more quickly and efficiently. In view of occasional overreaching in discovery and the temptation of counsel to slip into the broader discovery practice found in litigation, however, arbitrators often impose initial limits, with the understanding that the arbitrator will consider authorizing additional discovery upon discussion with counsel. They also work closely with the parties to oversee development of a discovery schedule, attempting to guide the parties toward consideration of more streamlined alternatives to the intricacies of interrogatories, motions to produce and preclude, and other highly formalized approaches.

How is Electronic Discovery Handled in Arbitration?

Discovery in arbitration is expected to be more limited and streamlined than in litigation, but, in certain areas, the process benefits from broader discovery. This often is the case when electronic data is involved, for movement to hearing without thorough exploration of sources and nature of electronically stored data may result in longer, less focused hearings and delays that arise from the need to address the technological issues that emerge mid-hearing. As AAA's rules provide, the arbitrator determines what is "necessary to a full and fair exploration of the issues in dispute, consistent with the expedited nature of arbitration." In many cases involving electronic data, discovery may enhance the expedition of the process.

Even when electronic data are at issue, the arbitrator often need not take an active role in discovery management if counsel are able to work with each other to develop and follow an appropriate discovery schedule, seeking the intervention of the arbitrator only in those instances in which disputes remain unresolved. Arbitrators still should require counsel to provide notice of the agreed dates and processes, so that the arbitrator may incorporate the schedule into a binding arbitral pre-hearing order and then monitor progress. When there is less than a superb level of cooperation displayed between counsel in the pre-hearing conferences, it will be necessary for the arbitrator to focus more pointedly on the specifics of the discovery effort, which, with electronic discovery, may involve working with counsel to help them reach agreement on

the amount and methods of discovery, the development of search terms, and the means by which the stages of the process may be managed. Regardless of the degree of cooperation between the parties, the arbitration should identify frequent checkpoints to ensure that electronic-discovery steps remain on track toward the designated close of discovery

The formal rules of procedure do not apply in arbitration, unless the arbitration provision states or the parties agree, as they sometimes do, that they will proceed in accordance with all or some of the rules that can be translated to the forum. Nonetheless, in this new world of electronic discovery, the amendments to the Federal Rules of Civil Procedure provide useful guidelines. This is especially so with regard to the underlying theme in the amendments to the FRCP that counsel are expected to confer and work together to formulate an approach to electronic discovery. Such efforts always form a pivotal element of expeditious and cost-effective arbitration, and such cooperation is even more essential when electronic discovery is involved. Creativity, too, is encouraged in arbitration, with the hope that counsel will explore ways in which the informality of the forum and other attributes of arbitration may be parlayed into a more streamlined and yet sufficient handling of electronic data.

With regard to the cost of electronic discovery, the arbitration contract or provider rules may have an effect on that assessment. If the arbitration agreement contains language regarding the allocation of discovery expenses, the arbitrator will be obligated to follow that provision unless it is superseded by provider rules, as sometimes is the case with AAA rules, or if it is contrary to established law of the jurisdiction. Fundamentally, however, it appears that, absent contract or rule provisions to the contrary, the principles that would apply in the courts of the jurisdiction will inform the approach taken by the arbitrator to the allocation of the costs of electronic discovery.