Texas College for Judicial Studies

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E-Discovery Considerations For Texas Judges

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I. Why Should Litigants Care?

	State	Sin	Sanction
2004	NY[1]	Failed to produce e-mails Some lost, others produced two years late	Adverse Inference Instruction Fees & expenses for: motion & re-depositions
2004	DC[2]	For two years after the Court's preservation order, still failed to retain e-mails Didn't stop tape rotation Didn't print e-mails	Expert and eleven executives barred from testifying $2.75 million awarded, & expenses of motion
2005	FL[3]	Four months after Morgan Stanley falsely certified compliance with an agreed order requiring it to search its oldest full backup tapes for emails subject to certain parameters and certify compliance, Morgan Stanley found backup tapes that had not been searched.	Granted in part a motion for default judgment Jury instruction that facts in the complaint shall be "deemed established for all purposes" in the action. Statement read to the jury describing the court's findings regarding discovery misconduct by the company. Jury instructed that it may consider such information in deciding whether punitive damages should be assessed. Jury awarded $1.58 billion, including $850 million in punitive damages
2008	CA[4]	Failed to produce more than 46,000 emails and documents Didn't search the computers or email databases of the individuals who testified on Qualcomm's behalf at trial or	Even though Broadcom had already won at trial, Qualcomm ordered to pay $8,568,633.24 in attorneys' fees and costs. Each of the sanctioned attorneys

[1] *Zubulake v. UBS Warburg*, 2004 WL 1620866 (S.D.N.Y.), 94 Fair Empl.Prac.Cas. (BNA) 1, 85 Empl. Prac. Dec. P 41,728 (S.D.N.Y.).

[2] *United States. v. Philip Morris*, 327 F. Supp. 2d 21, 23-24 (D.D.C. 2004).

[3] *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co. Inc.*, 2005 Extra LEXIS 94 (Fla. Cir. Ct. 2005) (stating, "candor would have required MS & Co. to admit that it had not done a good faith search for the oldest full backup tapes, and that Riel's certificate of compliance was false"); *but see Morgan Stanley & Co., Inc. v. Coleman (Parent) Holdings Inc.*, No. CA4D05-2606, Fla. Ct. App., 4th Dist. (March 21, 2007) (reversed the $1.58 billion jury verdict, including $850 million in punitive damages for conspiracy and aiding and abetting fraud); *see also Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co. Inc., "Coleman II"*, No. SC07-1251 (Fla. S.Ct. Dec. 12, 2007) (denied review of the Court of Appeals decision, for lack of jurisdiction -- no conflict between that appellate court's decision and the decisions of other appellate courts).

[4] *Qualcomm Inc. v. Broadcom Corp.*, 2008 WL 66932 (S.D. Cal. 2008).

		in depositions as Qualcomm's most knowledgeable corporate witnesses "Lawyers chose not to look in the correct locations for the correct documents, to accept the unsubstantiated assurances of an important client that its search was sufficient, to ignore the warning signs that the document search and production were inadequate, not to press Qualcomm employees for the truth, and/or to encourage employees to provide the information … needed"	ordered to forward a copy of the sanction order to the California State Bar. Qualcomm and the six Sanctioned Attorneys ordered to participate in a comprehensive Case Review and Enforcement of Discovery Obligations ("CREDO") program The six Sanctioned Attorneys, and five in-house attorneys, ordered to meet three weeks later in the chambers of the Magistrate Judge to ensure compliance.
2008	TX	Harris County District Attorney Chuck Rosenthal told a federal judge that he deleted about 2,500 e-mails that had been subpoenaed, as part of a lawsuit brothers Erik and Sean Ibarra filed against Harris County Sheriff Tommy Thomas. Rosenthal claimed that he thought that the e-mails were backed up elsewhere.	He resigned.

II. Pertinent Texas Rules

Rule 166. Pre-Trial Conference

In an appropriate action, to assist in the disposition of the case without undue expense or burden to the parties, the court may in its discretion direct the attorneys for the parties and the parties or their duly authorized agents to appear before it for a conference to consider:

…

(c) A discovery schedule;

…

(p) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the pretrial conference, the amendments allowed to the pleadings, the time within which same may be filed, and the agreements made by the parties as to any of the matters

considered, and which limits the issues for trial to those not disposed of by admissions, agreements of counsel, or rulings of the court; and such order when issued shall control the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pretrial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or extend it to all actions.

192.3 Scope of Discovery.

(b) **Documents and tangible things.** A party may obtain discovery of the existence, description, nature, custody, condition, location, and contents of documents and tangible things (including papers, books, accounts, drawings, graphs, charts, photographs, electronic or videotape recordings, data, and data compilations) that constitute or contain matters relevant to the subject matter of the action. A person is required to produce a document or tangible thing that is within the person's possession, custody, or control.

1999 Comment #2:

2. The definition of documents and tangible things has been revised to clarify that things relevant to the subject matter of the action are within the scope of discovery regardless of their form.

192.6 Protective Order.

(b) **Order.** To protect the movant from undue burden, unnecessary expense, harassment, annoyance, or invasion of personal, constitutional, or property rights, the court may make any order in the interest of justice and may - among other things - order that:

(1) the requested discovery not be sought in whole or in part;
(2) the extent or subject matter of discovery be limited;
(3) the discovery not be undertaken at the time or place specified;
(4) the discovery be undertaken only by such method or upon such terms and conditions or at the time and place directed by the court;
(5) the results of discovery be sealed or otherwise protected, subject to the provisions of Rule 76a.

193.3 Asserting a Privilege

(d) Privilege not waived by production. A party who produces material or information without intending to waive a claim of privilege does not waive that claim under these rules or the Rules of Evidence if - within ten days or a shorter time ordered by the court, after the producing party actually discovers that such production was made - the producing party amends the response, identifying the material or information produced and stating the privilege asserted. If the

producing party thus amends the response to assert a privilege, the requesting party must promptly return the specified material or information and any copies pending any ruling by the court denying the privilege.

196.4 Electronic or Magnetic Data.

To obtain discovery of data or information that exists in electronic or magnetic form, the requesting party must specifically request production of electronic or magnetic data and specify the form in which the requesting party wants it produced. The responding party must produce the electronic or magnetic data that is responsive to the request and is reasonably available to the responding party in its ordinary course of business. If the responding party cannot - through reasonable efforts - retrieve the data or information requested or produce it in the form requested, the responding party must state an objection complying with these rules. If the court orders the responding party to comply with the request, the court must also order that the requesting party pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information.

1999 Comment #3:

> 3. A party requesting production of magnetic or electronic data must specifically request the data, specify the form in which it wants the data produced, and specify any extraordinary steps for retrieval and translation. Unless ordered otherwise, the responding party need only produce the data reasonably available in the ordinary course of business in reasonably usable form.

196.6 Expenses of Production.

Unless otherwise ordered by the court for good cause, the expense of producing items will be borne by the responding party and the expense of inspecting, sampling, testing, photographing, and copying items produced will be borne by the requesting party.

III. Comparison With The Federal Rules

Texas	Federal
	Rule 16. Pretrial Conferences; Scheduling; Management (b) Scheduling. (1) Scheduling Order. Except in categories of actions exempted by local rule, the district judge — or a magistrate judge when authorized by local rule — must issue a scheduling order: (3) Contents of the Order. (B) Permitted Contents. The scheduling order may: (i) modify the timing of disclosures under Rules 26(a) and 26(e)(1); (ii) modify the extent of discovery; (iii) provide for disclosure or discovery of **electronically stored information**; (iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced;
Rule 196.4 Electronic or Magnetic Data	**Rule 26** **(a) Required Disclosures** (1) *Initial Disclosures.* (A) *In General* … a party must, without awaiting a discovery request, provide to other parties: (ii) a copy — or a description by category and location — of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment
Rule 192.3 Scope of Discovery	**Rule 26** **(b) Discovery Scope and Limits** (2) Limitations. (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.
Rule 193.3 (d) Privilege not waived by production.	**Rule 26** **(5) Claiming Privilege or Protecting Trial- Preparation Materials.** (B) Information Produced. If information produced in

	discovery 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; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.
No requirement that counsel meet and confer **BUT** a trial court COULD set a **Rule 166** conference.	**Rule 26** **(f) Conference of the Parties; Planning for Discovery** (1) Conference Timing. … or when the court orders otherwise, the parties must confer as soon as practicable — and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b). (2) Conference Content; Parties' Responsibilities. In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan. (3) Discovery Plan. A discovery plan must state the parties' views and proposals on: (C) any issues about disclosure or discovery of **electronically stored information**, including the form or forms in which it should be produced;
	Rule 33. Interrogatories to Parties **(d) Option to Produce Business Records.** If the answer to an interrogatory may be determined by examining, auditing, compiling, abstracting, or summarizing a party's business records (including electronically stored information), and if the burden of deriving or ascertaining the answer will be substantially the same for either party, the responding party may answer by: (1) specifying the records that must be reviewed, in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could; and (2) giving the interrogating party a reasonable opportunity to examine and audit the records and to make copies, compilations, abstracts, or summaries.
Rule 192.6 Protective Order **Rule 196.6** Expenses of Production	**Rule 34.** Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes (a) In General. A party may serve on any other party a request within the scope of Rule 26(b):

	(1) to produce and permit the requesting party or its representative to inspect, copy, test, **or sample** the following items in the responding party's possession, custody, or control: (A) 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 either directly or, if necessary, after translation by the responding party into a reasonably usable form; or (b) Procedure. (1) Contents of the Request. The request: (C) may specify the form or forms in which **electronically stored information** is to be produced. (2) Responses and Objections. (B) Responding to Each Item. For each item or category, the response must either state that inspection and related activities will be permitted as requested or state an objection to the request, including the reasons. (C) Objections. An objection to part of a request must specify the part and permit inspection of the rest. (D) Responding to a Request for Production of **Electronically Stored Information**. The response may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form — or if no form was specified in the request — the party must state the form or forms it intends to use. (E) Producing the Documents or **Electronically Stored Information**. Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or **electronically stored information**: (i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request; (ii) If a request does not specify a form for producing **electronically stored information**, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and (iii) A party need not produce the same **electronically stored information** in more than one form.
	Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions **(e) Failure to Provide 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. **(f) Failure to Participate in Framing a Discovery Plan.** If a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f), the court may, after giving an opportunity to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.
	Rule 45. Subpoena (a) In General. (1) Form and Contents. (A) Requirements — In General. Every subpoena must: (i) state the court from which it issued; (ii) state the title of the action, the court in which it is pending, and its civil-action number; (iii) command each person to whom it is directed to do the following at a specified time and place: attend and testify; produce designated documents, **electronically stored information**, or tangible things in that person's possession, custody, or control; or permit the inspection of premises; (C) Combining or Separating a Command to Produce or to Permit Inspection; Specifying the Form for **Electronically Stored Information**. A command to produce documents, electronically stored information, or tangible things or to permit the inspection of premises may be included in a subpoena commanding attendance at a deposition, hearing, or trial, or may be set out in a separate subpoena. A subpoena may specify the form or forms in which **electronically stored information** is to be produced.
	(d) Duties in Responding to Subpoena (1) Producing Documents or **Electronically Stored Information.** These procedures apply to producing documents or **electronically stored information**: (A) Documents. A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand. (B) Form for Producing **Electronically Stored Information** Not Specified. If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms. (C) **Electronically Stored Information** Produced in Only One Form. The person responding need not produce the same electronically stored information in more than one form. (D) Inaccessible **Electronically Stored Information**. The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably

		accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding 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.

IV. 2007-2008 Federal Cases

All of the following cases were taken from the following LEXIS website on e-discovery:
http://www.lexisnexis.com/applieddiscovery/lawLibrary/default.asp

A. Rule 26(f)(3) Discovery Plan

In re Ebay Seller Antitrust Litigation, 2007 U.S. Dist. LEXIS 75498 (N.D. Cal. Oct. 2, 2007) (holding that the defendant was obligated to disclose which employees received copies of document retention notices sent to 600 of its employees, and what the employees had done in response to the notices).

In re Seroquel Products Liability Litigation, 244 F.R.D. 650; 2007 U.S. Dist. LEXIS 61287 (M.D. Fla. Aug. 21, 2007) (holding that failure to cooperate in the production of databases or to produce electronic discovery from 80 custodians was sanctionable conduct).

Rebman v. Follet Higher Education Group, Inc., 2007 U.S. Dist. LEXIS 32601 (M.D. Fla. May 3, 2007) (denying a motion to compel that would require defendant to create a special software program to search over 200 million sales transactions; ordering the parties to confer over a more narrow request and to discuss costs of production).

B. Rule 34 Requesting & Producing Electronically Stored Information

Auto Club Family Ins. Co. v. Ahner, 2007 U.S. Dist. LEXIS 63809 (E.D. La. Aug. 29, 2007) (holding that a mere statement by third party's lawyer that the electronic version was not reasonably accessible was not "evidence" of undue burden).

Butler v. Kmart Corp., 2007 U.S. Dist. LEXIS 61141 (M.D. Miss. Aug. 20, 2007) (ordering a thorough search by defendant of its computer systems, because

defendant did not describe efforts to search for ESI, but denying open access to defendant's systems by plaintiff's expert).

Calyon v. Mizuho Secs. USA Inc., 2007 U.S. Dist. LEXIS 36961 (S.D.N.Y. May 18, 2007) (holding that plaintiff's general assertion that its computer forensics expert was more motivated than defendants' expert did not entitle plaintiff to mirror images of hard drives on defendants' personal computers).

Columbia Pictures Industries v. Bunnell, 2007 U.S. Dist. LEXIS 46364 (C.D. Cal. June 19, 2007) (ordering defendants to begin preserving and producing RAM data in response to plaintiffs' discovery requests, but no sanctions for spoliation of evidence by not using a server logging function in the past to preserve the RAM data because there was no precedent for requiring retention of data in RAM and there had been no preservation request by plaintiffs specifically directed to RAM data).

DE Technologies, Inc. v. Dell, Inc., 2007 U.S. Dist. LEXIS 2769 (W.D. Va. Jan. 12, 2007) (modifying magistrate's discovery sanction, providing that defendant could not use 57 pages of documents at trial, to allow use at trial, even though they were not produced with a live electronic directory and in the identical format in which they were kept in the ordinary course of business).

D'Onofrio v. Sfx Sports Group, Inc., 247 F.R.D. 43, 2008 U.S. Dist. LEXIS 4252 (D.D.C. Jan. 23, 2008) (holding that a request for production of documents did not require production of electronic files in their original electronic form with metadata because the request did not specify the form of production of electronic data).

In re Payment Card Interchange Fee & Merchant Discount Antitrust Litigation, 2007 U.S. Dist. LEXIS 2650 (E.D.N.Y. Jan. 12, 2007) (requiring individual plaintiffs who declined to take part in a class in multidistrict litigation to include metadata with electronic documents only in future productions).

Lawson v. Sun Microsystems, Inc., 2007 U.S. Dist. LEXIS 65530 (S.D. Ind. Sept. 4, 2007) (ordering defendant to produce all responsive ESI in electronic form, pursuant to plaintiff's letter request).

Michigan First Credit Union v. Cumis Insurance Society, Inc., "Michigan II", 2007 U.S. Dist. LEXIS 84842 (E.D. Mich. Nov. 16, 2007) (holding that defendant not required to produce ESI with metadata or in native format).

Palgut v. City of Colorado Springs, 2007 U.S. Dist. LEXIS 91719 (D. Colo. Dec. 3, 2007) (holding that without a qualifying reason, plaintiff was no more entitled to access to electronic information than to paper documents).

Schmidt v. Levi Strauss & Co., 2007 U.S. Dist. LEXIS 69791 (N.D. Cal. Sept. 10, 2007) (denying plaintiffs' request for an order directing defendant to re-produce its

entire paper document production in native electronic format; plaintiffs had not originally specified production in electronic format pursuant).

Scotts Co. LLC v. Liberty Mutual Insurance Co., 2007 U.S. Dist. LEXIS 43005 (S.D. Ohio June 12, 2007) (holding that plaintiff not entitled to an order allowing its forensic expert to search defendant's computer systems and backup tapes without more than mere suspicion that defendant was withholding discoverable information).

C. Rule 37(f) Failure to Participate in Framing a Discovery Plan

Disability Rights Council of Greater Washington v. Washington Metropolitan Transit Authority, 2007 U.S. Dist. LEXIS 39605 (D.D.C. June 1, 2007) (ordering restoration and searches of defendant's backup tapes because defendant had failed to put a litigation hold on a program that automatically purged email every sixty days during the three years after the complaint was filed; parties ordered to prepare a stipulated protocol for a search of backup tapes with attention to "concept searching" rather than "keyword searching").

Doe v. Norwalk Community College, 2007 U.S. Dist. LEXIS 51084 (D. Conn. Jul. 16, 2007) (holding that plaintiff entitled to an adverse inference sanction regarding data that the college failed to preserve, when college failed to take affirmative steps to halt destruction of information once it was on notice of a potential sexual assault claim).

U & I Corp. v. Advanced Medical Design, Inc., 2007 U.S. Dist. LEXIS 86530 (M.D. Fla. Nov. 26, 2007) (deferring defendant's motion to compel inspection of plaintiff's "unloadable" hard drive pending 1) third party discovery that could produce copies of the email and 2) plaintiff's explanation of its efforts to retrieve the unloadable files).

United States v. Krause (In re Krause), 2007 Bankr. LEXIS 1937 (Bankr. D. Kan. June 4, 2007) (holding that continuing use of a computer security program that erased files was not within the "safe harbor" provision; debtor was threatened with incarceration if he did not comply with the court's discovery order).

D. Rule 45 Subpoenas

Guy Chemical Company, Inc. v. Romaco AG, 2007 U.S. Dist. LEXIS 37636 (N.D. Ind. May 22, 2007) (ordering defendant to pay for the discovery because it would be fundamentally unfair for the non-party to bear the estimated cost of $7,000).

Interscope Records v. Doe, 2007 U.S. Dist. LEXIS 73627 (D. Kan. Oct. 1, 2007) (granting ex parte application to issue a subpoena to a university to determine who used the university's computers to share music files).

Simon Property Group, Inc. v. Taubman Centers, Inc., 2008 U.S. Dist. LEXIS 5065 (E.D. Mich. Jan. 24, 2008) (holding that non-party waived its objection by failing to object within the time allowed, but the court ordered the parties to make a good faith attempt to narrow the scope of the subpoena).

V. Federal Cases Using Special Masters For Electronic Discovery

A. 2007 Vioxx MDL, D. La. 2007

1. The Problem

Merck had produced over two million documents, but had also asserted attorney-client privilege as to approximately 30,000 documents. In response to an order, Merck delivered 81 boxes to the court, containing approximately 30,000 documents, amounting to nearly 500,000 pages, as to which privilege was asserted. The documents were not categorized or grouped together in any logical or organized fashion. The court reviewed each document individually. Throughout April of 2006, the court went through each box and removed those documents that it felt were privileged and then instructed the parties to confer on the method to receive and/or copy the remaining non-privileged documents.

Merck sought review of the Court's privilege rulings via a petition for a writ of mandamus. The Fifth Circuit suggested that the Court (or its designee) re-examine 2,000 representative documents, that Merck would select, pursuant to a different review protocol. Pursuant to the Fifth Circuit's direction, Merck provided the Court with 10 additional boxes containing approximately 2,000 documents that Merck believed were representative of all the documents in question.

2. The Proposal

After giving notice and allowing the parties an opportunity to be heard, the Court appointed Professor Paul R. Rice of American University's Washington College of Law as Special Master pursuant to Rule 53 of the Federal Rules of Civil Procedure, to review the 2,000 representative documents, as well as approximately 600 additional documents believed to be relevant to upcoming trial preservation depositions, and make recommendations as to whether or not Merck's claims of privilege should be upheld.

The Court also appointed Mr. Brent B. Barriere of the firm Phelps Dunbar LLP as Special Counsel to assist the Special Master by providing logistical support and local facilities and by managing the Special Master's operating account.[5]

[5] *In re Vioxx Prods. Liab. Litig.*, 501 F. Supp. 2d 789, 791-792 (D. La. 2007).

Problems included inadequate descriptions in the privilege log, erroneous descriptions of e-mail threads in the privilege log, the need for documentation of the elements of each claim of privilege or work product immunity, issues of confidentiality and the need for internal corporate policies about preserving confidentiality plus an affidavit from a knowledgeable person that those confidentiality policies are communicated throughout the company and scrupulously followed, and the general absence of supporting affidavits for all privilege claims.

3. The Process

Approximately 2,000 sample documents (contained in 10 boxes) had been selected by Merck for review, and the plaintiffs were permitted to identify 600 additional documents to which immediate attention needed to be given. The Special Counsel examined the decisions of the Special Master. Differences of opinion were discussed over joint re-examinations of the documents and the Special Master made a final tentative decision. Paralegals entered the decisions and reasons in an excel spreadsheet created for this process. During the data entry process conflicts in decisions on the same or similar types of documents were identified and the Special Master re-examined those collective decisions still again.

When Merck disputed an initial assessment, the paralegals pulled the relevant documents and the Special Master reviewed them for the third or fourth time. When decisions were changed in light of the subsequent documentation and explanations from Merck, those documents were also examined again by the Special Counsel.[6]

B. 2006 MTBE MDL

In this consolidated multi-district litigation, the plaintiffs sought relief from contamination, or threatened contamination, of groundwater from various defendants' use of the gasoline additive methyl tertiary butyl ether ("MTBE") and/or tertiary butyl alcohol ("TBA"). Special Master Warner was appointed to resolve discovery disputes, including electronic discovery disputes, questions of privilege, work product, relevancy, scope, and burden.[7]

C. 2004 Medtronic

1. The Problem

The case involved a dispute between the parties over Medtronic's rights to intellectual property invented by Michelson in the field of spinal fusion technology. The parties had numerous disputes over discovery requests -- one being the production of Medtronic's electronic mail messages and data. Michelson had filed a motion to compel Medtronic to produce approximately 996 network backup tapes and an estimated 300

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[6] *Id.* at 793-794.

[7] *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 2006 U.S. Dist. LEXIS 49164 (D.N.Y. 2006).

gigabytes of other electronic data that was not in a backed-up format. Michelson had also argued that Medtronic, as the producing party, should bear the cost of the electronic production, and had asked the court to appoint a special master to review the production of the electronic material and to establish discovery protocol.

2. The Proposal

The court 1) ordered Michelson to bear part of the production costs, 2) appointed Special Master Alan Balaran to oversee the electronic discovery, and 3) directed the parties to comply with a detailed discovery plan regarding the production of electronic materials. (The discovery plan, however, never specifically addressed the inclusion of deleted electronic files.) The discovery plan established by the court essentially called for a two-phased production to occur on a rolling basis.

The court ordered that the duties of the special master would include "making decisions with regard to search terms; overseeing the design of searches and the scheduling of searches and production; coordinating deliveries between the parties and their vendors; and advising both parties, at either's request, on cost estimates and technical issues."

3. The Process

Medtronic produced over 42 million pages of information. Michelson contended that he did not have enough time "to determine conclusively whether the production did or did not contain 'deleted' files". Michelson's experts conducted a forensic analysis of the hard drives produced by Medtronic and determined that the hard drives did not contain any responsive deleted files. The Special Master denied Michelson's request for the deleted files without a detailed explanation for his finding.

Michelson filed objections, seeking an expedited resolution of the matter.[8] Because the Special Master was never assigned the duty of making determinations as to whether Medtronic could be compelled to produce deleted electronic files and e-mails, the Court reviewed the Special Master's order de novo. The Court found that Michelson had been dilatory in his efforts to compel the production of the deleted files. The trial date in the case was a little over a month away, and both parties were preparing for trial.

In overruling Michelson's objections, the Court found that 1) Michelson's request for the production of deleted electronic material was untimely, 2) the process of recovering deleted files at that late stage would place an undue burden on Medtronic, and 3) the request was based on mere speculation that relevant deleted files could be recovered.[9]

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[8] According to Rule 53 of the Federal Rules of Civil Procedure, any party may file objections to a special master's ruling. Fed. R. Civ. P. 53. The advisory committee notes to Rule 53(g)(3) indicate that when a special master makes determinations "that, when made by a trial court, would be treated as matters of procedural discretion", the proper standard of review if not otherwise established in the order of appointment is for abuse of discretion.

[9] *Medtronic Sofamor Danek, Inc. v. Michelson,* 2004 U.S. Dist. LEXIS 30607, 8-14 (D. Tenn. 2004).

VI. Guidelines From The Conference Of Chief Justices Of State Courts

This conference approved in August 2006 the following document: "Guidelines For State Trial Courts Regarding Discovery Of Electronically-Stored Information". This document is available at:
http://www.ncsconline.org/images/EDiscCCJGuidelinesFinal.pdf

The guidelines cover the following topics:

1. Responsibility of Counsel To Be Informed About Client's
2. Electronically-Stored Information
3. Agreements by Counsel; Pre-Conference Orders
4. Initial Discovery Hearing or Conference
5. The Scope of Electronic Discovery
6. Form of Production
7. Reallocation of Discovery Costs
8. Inadvertent Disclosure of Privileged Information
9. Preservation Orders
10. Sanctions

VII. The Sedona Principles For The Federal Rules

The Sedona Principles: Second Edition "Best Practices Recommendations & Principles for Addressing Electronic Document Production" (June, 2007) may be downloaded for free at the following link:

http://www.thesedonaconference.org/dltForm?did=TSC_PRINCP_2nd_ed_607.pdf

This document lists fourteen principles. The following are shortened versions of those principles. Be sure to look at the full statements of those principles on the website listed above.

1. ESI is discoverable; parties have a duty to preserve it.
2. Balance the costs: consider the feasibility and costs of preserving, retrieving, reviewing, and producing ESI.
3. Parties should confer early.
4. Discovery requests should be clear; responses should disclose scope and limits.
5. The obligation to preserve ESI requires reasonableness and good faith efforts.
6. The responding parties are best suited to evaluate the appropriateness of preserving and producing ESI.

7. The requesting party has the burden to show the inadequacy of the responding party's efforts.
8. The requesting party must demonstrate the need and the relevance of not-reasonably-accessible ESI.
9. Absent special need, the responding party should not be required to produce inactive ESI.
10. The responding party should follow reasonable procedures to protect privileges.
11. The responding party may satisfy its good faith obligations via data sampling and search criteria.
12. Production should be in the form ordinarily maintained; but metadata should be produced.
13. The responding party should bear the reasonable costs of retrieving and reviewing ESI.
14. A party should be sanctioned ONLY if the following existed: a) a clear duty, b) a culpable failure, and c) a reasonable probability of material prejudice.

VIII. Model Orders For Federal Cases

The following links came from the LEXIS website for e-discovery:
http://www.lexisnexis.com/applieddiscovery/lawLibrary/modelOrders.asp
More information can be found at: www.uscourts.gov/rules.

Model Order for Preservation of Electronic Data, from In re Initial Public Offering Securities Litigation, 21 MC 92 (SAS).

Model Order Concerning Electronic Discovery, from Prempro Products Liability MDL, 03-CV-1507 (E.D. Ark., November 17, 2003).

Model Order Regarding Discovery of Computerized Data, from Manual for Complex Litigation, Section 11.446

Model Order Regarding Preservation, described as a prototype of Form 40.25 in the Manual for Complex Litigation (4th Edition).

Model Order Requiring Underwriter Defendants to Complete Electronic Discovery, from WorldCom, Inc Securities Litigation, 02-Civ-3288 (S.D. New York, April 12, 2004).

Model Motion for Protective Order re Preservation of Electronic Data, from Genord et al. v. Blue Cross Blue Shield of Michigan, No. 03-72950 (E.D. Mich., March 2004).

IX. Sample Rule 16 Discovery Order From Federal Judge Randy Crane

A. Format of Production

1. [Defendant] shall produce all responsive hard copy and electronic documents in singlepage Tagged Image File Format ("TIFF") with an accompanying load file, an extracted text file of electronic documents that are unredacted, and an Optical Character Recognition ("OCR") text file of unredacted portions of redacted documents and hard copy documents.

2. Documents that present imaging or formatting problems shall be promptly identified and the Parties shall meet and confer to attempt to resolve the problems. The Parties are not required to produce exact duplicates of electronic documents stored in different electronic locations. The metadata for documents which have been "de-duplicated" across custodial files will indicate the names of the custodians in whose files the documents are located. The Plaintiffs shall produce documents on either DVD or CD and may produce fact sheets by email in ".pdf" format. [Defendant] will produce documents on DVD or hard drives.

3. Each page of a produced document shall have a legible, unique page identifier ("Bates Number") and confidentiality legend (where applicable) on the face of the image at a location that does not obliterate, conceal, or interfere with any information from the source document. No other legend or stamp will be placed on the document image other than the Bates Number, confidentiality legend (where applicable), and redactions addressed above.

4. For redacted documents not yet reviewed by [Defendant] as of the date of this order, the metadata for each document will indicate the basis for the redaction (e.g., "other [Defendant] product," "privacy," or "privilege") at the time the redacted document is produced.

B. Metadata

To the extent possible and practicable, [Defendant] will provide the following metadata fields:

(a) Electronic document type;
(b) Create date;
(c) File name
(d) File location;
(e) Source location;
(f) Starting production number;
(g) Ending production number;
(h) Custodian;
(i) Last date modified;

(j) Author;
(k) Recipient(s);
(l) Document date (if different from create date);
(m) cc(s);
(n) bcc(s);
(o) Subject;
(p) Title; and
(q) Attachment information (for e-mails).

If [Defendant] determines that it is impossible to produce certain metadata fields for a type or types of documents, [Defendant] shall so inform plaintiffs. If [Defendant] determines that the production of certain metadata fields for a type or types of documents would be impracticable, unduly burdensome or unduly expensive, [Defendant] shall so inform plaintiffs, and the parties shall promptly meet and confer on what should be done, without prejudice to [Defendant]'s right to object to production of such metadata fields or plaintiffs' right to move to compel such production.

C. Databases

1. [Defendant]'s identification of databases and its permitting plaintiffs to interview a person or persons who can speak knowledgeably and informatively about said databases may not be construed as an agreement to produce such databases. After plaintiffs have served [Defendant] with its Requests for Production, the Parties will confer regarding the discoverability and feasibility of any request for production of a database, including the form and scope of any such production.

2. The Court's assistance may be sought only after the Parties have failed to reach agreement after good faith discussions.

D. Costs

1. *Documents and readily accessible electronically stored information ("ESI"):* While each Party expressly reserves its rights to seek costs relating to this litigation, including the costs of producing documents and readily accessible ESI, initially each Party will bear the costs to process and review its own documents and readily accessible ESI.

2. *Inaccessible and/or legacy ESI:* To the extent that any Party requests data that is not readily accessible, the Parties shall comply with the Federal Rules of Civil Procedure in determining whether the inaccessible data is to be produced and which Party will bear what portion of the costs of production, if any, including the costs to process or review unique or nonstandard data. The Parties shall confer concerning inaccessible ESI prior to seeking the Court's assistance.

E. Privilege Log

[Defendant] will provide a privilege log in compliance with the Federal Rules of Civil Procedure as soon as practicable, but in no event more than 120 days after its first

production of documents for which privilege is asserted to apply and then continuing on a rolling basis thereafter. The privilege log will indicate the custodian from whom the privileged document was collected.

F. Preservation of Documents

All parties and their counsel shall preserve evidence that may be relevant to his action. The duty extends to document, data, and tangible things in possession, custody and control of the parties to this action, and any employees, agents, contractors, carriers bailees, or other non-parties who possess materials reasonably anticipated to be subject to discovery in this action. “Documents, data, and tangible things” is to be interpreted broadly to include writings, records, files, correspondence, reports, memoranda, calendars, diaries, minutes, electronic messages, voice mail (for [Defendant] only, to the extent practicable and to the extent a custodian utilized a program that allowed maintenance of such voicemail), E-mail, telephone message records or logs, computer and network activity logs, hard drives, backup data (excluding duplicative data maintained for purposes of disaster recovery), removable computer storage media such as tapes, discs and cards, printouts, document image files, Web pages, databases, spreadsheets, software, books, ledgers, journals, orders, invoices, bills, vouchers, checks statements, worksheets, summaries, compilations, computations, diagrams, graphic presentation, drawings, films, charts, digital or chemical process photographs, video, phonographic, tape or digital recordings or transcripts thereof, drafts, jottings and notes, studies or drafts of studies or other similar such material. Information that serves to identify, locate, or link such material, such as file inventories, filed folders, indices, and metadata, is also included in this definition. Each party shall take reasonable steps to preserve all documents, data and tangible things containing information potentially relevant to the subject matter of this litigation. Counsel is under an obligation to the Court to exercise all reasonable efforts to identify and notify parties and nonparties, including employees of corporate or institutional parties. The definition and scope of the term “nonparties” will be defined later.

The failure of any party to have preserved in the past every potentially relevant “document, data and tangible thing,” as defined above, shall not in and of itself mean that said party has engaged in spoliation of evidence. Any party who believes that another party has engaged in spoliation may move for any relief he/she/it thinks appropriate and the opposing party may respond to said motion on any basis that he/she/it thinks appropriate.

X. E-Discovery Acronyms & Vocabulary

Here are the definitions of just a few of the key terms that you will see a lot.

The following link offers a free download of an extensive glossary of terms:
http://www.thesedonaconference.org/dltForm?did=TSCGlossary_12_07.pdf

The following website links to other sources for e-discovery terms:
http://meetings.abanet.org/ltrc/index.cfm?data=20080109

De-Duplication	comparing electronic records based on their characteristics, and removing or marking duplicate records
ESI	Electronically stored information
Gigabyte	1,000 megabytes, which equals approximately: 64,782 pages of Microsoft Word documents 100,099 pages of emails files 165,791 pages of Excel spreadsheets
Legacy Data	Information created or stored by the use of software and/or hardware that has become obsolete or replaced.
Metadata	Information about information, including information about the electronic file such as dates of revision, authors, edits, macros, hidden text, formulas, and other present and historical information about the data. (Most computer users never see metadata.) The following articles about metadata published this year, available at the following links, are easy to understand, and give a lot of valuable information: http://technology.findlaw.com/articles/01223/011138.html http://gabar.org/public/pdf/GBJ/april08.pdf
Native file format	The format (for example, Microsoft Word) in which the document was originally created.
PST	The file format for Microsoft Outlook emails and contacts
RAM	random access memory
Sampling	testing a database for the existence or frequency of relevant information
Terabyte	1,000 gigabytes