Slow to Act?

State Rulemaking and Electronic Discovery

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An examination of the development of state-specific rules in the area.

Following the adoption of the December 2006 amendments to the FEDERAL RULES OF CIVIL PROCEDURE, it seemed inevitable that individual states would follow suit and adopt rules on electronic discovery. Even if these rules were not identical to the federal amendments, a similar set of rules would provide a practical guide to state practitioners. Moreover, the adoption of uniform rules between the state and federal bars would promote efficiency and reduce collateral litigation over electronic discovery matters. It has become clear, however, that while some states were eager to adopt their own sets of rules on electronic discovery, others are following the "hurry up and wait" approach.

This article will examine the current trends in state rulemaking on electronic discovery, alternative formulations for state e-discovery rules, and the possible reasons why some states have been slow to act.

Current Trends in State Rules

As of this writing, 23 states and the District of Columbia have either adopted or are in the process of developing their own rules on electronic discovery. For a comprehensive list of current state rules *see* www.lexisnexis.com/applieddiscovery/LawLibrary/StateCourt.asp.

Two states adopted rules on electronic discovery prior to the 2006 amendments. Texas adopted RULE 196.4 in 1999 and Mississippi later adopted its own version of Texas' rule in 2003. Since the 2006 amendments, nine states, including Arizona, Indiana, Idaho, Louisiana, Minnesota, Montana, New Hampshire, New Jersey and Utah have amended their civil discovery rules or adopted new rules. Most of these states incorporated the federal amendments into their own rules. For example, Montana adopted all of the federal amendments except the meet and confer requirements. New Jersey was the first state to incorporate the 2006 amendments in full, effective September 1, 2006. Only three of these states, Idaho, Louisiana, and New Hampshire, adopted provisions unique to the states' own circumstances. Most notably, Idaho's new

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rules model TEXAS RULE 196.4. *See* http://www.isc.idaho.gov/rules/Discovery_Rule306.htm. These three states' rules, however, still incorporate many of the provisions of the federal amendments. While modeling the federal rules, some states, including New Mexico and Louisiana, have been slow to adopt the federal "safe harbor" provision found in RULE 37(f).

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Thirteen other jurisdictions, including Alaska, Florida, Illinois, Iowa, Kansas, Maryland, Nebraska, New Mexico, Ohio, Tennessee, Virginia, Washington, and the District of Columbia, are at various stages of developing and adopting electronic discovery amendments. While it appears that these states are exploring adopting rules identical or similar to the federal amendments, most of these states are only in the preliminary stages and it is unclear when any of these states' rules will take effect.

Texas Rule 196.4

Effective January 1, 1999, TEXAS RULE OF CIVIL PROCEDURE 196.4 states that a party seeking electronic or magnetic information may request it and specify the form in which it should be produced. The responding party must produce the data that is responsive and reasonably available to the responding party in the ordinary course of business. If the responding party is not able to retrieve the data through reasonable efforts, the responding party may state an objection. The rule also provides that if the court orders the responding party to retrieve the data, it must also order the requesting party to cover any expenses related to retrieval and production. *See* http://www.kenwithers.com/rulemaking/texas_rule.html.

Mississippi amended its RULE 26 in 2003 to allow for the discovery of electronic data. Mississippi's Rule 26 is virtually identical to Texas RULE 196.4. *See* https://www.lexisnexis.com/applieddiscovery/LawLibrary/StateCourt.asp#MS. Effective July 1, 2006, Idaho's RULE 34(b) was also modeled after the TEXAS RULE, permitting requests for "electronic or data storage devices in any medium" that are reasonably available in the ordinary course of business. Both the Mississippi and Idaho rules also provide that the requesting party can be ordered to pay the costs of retrieving and producing the data. Proponents of the Texas RULE argue that this approach has reduced excessive and abusive discovery requests.

Guidelines for State Trial Courts on Discovery of Electronically Stored Information

Recognizing the significant differences in volume and cost between the discovery of traditional paper documents and electronically stored information, the Conference of Chief Justices (CCJ) established a working group at its annual meeting in 2004 to develop a reference document to assist state courts in considering issues related to electronic discovery. A final draft of *The Guidelines for State Trial Courts on Discovery of Electronically Stored Information* was approved by the CCJ on August 2, 2006, to serve as a reference tool for state trial judges faced with an e-discovery dispute. CCJ makes clear that while these guidelines are intended to help identify issues and determine decision-making factors in certain circumstances, the guidelines are not intended to serve as a set of model rules or universally applicable standards.

The Guidelines covers a variety of e-discovery topics including responsibilities of counsel, meet and confer, forms of production, costs shifting, inadvertent disclosure, and sanctions. Although the guidelines are largely modeled off of the 2006 amendments, they also refer frequently to *The Sedona Principles* and the *Zubulake* decisions. *See generally* THE SEDONA PRINCIPLES: *Best Practice Recommendations & Principles for Addressing Electronic Document Production* (Sedona Conference Working Group Series, 2007 Version), http://www.thesedonaconference.org; *See also Zubulake v. UBS Warburg*, 217 F.R.D. 309 (S.D.N.Y. 2003) ("*Zubulake* I"); 230 F.R.D. 290 (S.D.N.Y. 2003) ("*Zubulake* II"); 216 F.R.D. 280 (S.D.N.Y. 2003) ("*Zubulake* III"); 220 F.R.D. 212 (S.D.N.Y. 2003) ("*Zubulake* IV"); 229 F.R.D. 422 (S.D.N.Y. 2004) ("*Zubulake* V"). A complete copy of *The Guidelines* may be found on the National Center for State Courts website. *See* http://www.ncsconline.org.

Institute for the Advancement of the American Legal System

Another set of guidelines for state courts has been developed by the Institute for the Advancement of the American Legal System, a non-partisan legal reform organization affiliated with the University of Denver. The Institute's manual is comprised of four parts: (1) a glossary and review of the technical aspects of e-discovery; (2) issues of interest to litigants such as the cost of production and preservation; (3) special challenges in electronic discovery such as forms of production and inadvertent waivers of privilege; and (4) issues of interest to the courts such as fairness and efficiency in dealing with e-discovery matters. The manual, which makes reference to *The Sedona Principles* and the *Zubulake* decisions, advocates early discussion of e-discovery issues, reliance on litigants to educate courts about technology, cooperative solutions designed by the parties, and the use of existing state rules to govern production of electronically stored information. A copy of the manual may be found at http://du.edu/legalinstitute/docs/ediscovery-final.pdf.

Uniform Rules Relating to the Discovery of Electronically Stored Information

Another alternative for state electronic discovery rules was developed by the National Conference for Commissioners on Uniform State Laws (NCCUSL). A copy of the NCCUSL UNIFORM RULES can be found at http://www.law.upenn.edu/bll/ulc/udoera/2007march_interimdraft.htm. Approved in July 2007, these "uniform rules" were directly modeled on the 2006 federal amendments. The NCCUSL recognized that "significant

issues relating to the discovery of information in electronic form had been vetted during the Federal Rules amendment process." As such, the uniform rules "mirror the spirit and direction of the recently adopted amendments." Moreover, the uniform rules were modified only where necessary to accommodate varying state procedures. Like the federal rules, the uniform rules encourage meet and confers, allow sanctions only under limited circumstances, and permit the courts to consider cost sharing and expense allocation for burdensome discovery requests.

Other Alternatives

Despite the multiple options upon which states can base their own rules on electronic discovery, more than half of the states still have yet to begin the process. One can only assume that some states are unconvinced of the need for amendments.

2006 Federal Amendments

The main reason why some states may be unconvinced of the need for amendments is their ability to rely on the 2006 federal amendments. The effort to amend the federal rules began with the formation of the Discovery Subcommittee of the Civil Rules Advisory Committee in 1999. The proposed amendments were developed by the Subcommittee over the next few years, and as noted by the NCCUSL, was "the work product of a six-year effort by the Committee." The Committee held public hearings, seventy-four witnesses testified, and another 180 written comments were submitted. As a result, the 2006 amendments provided clarification regarding the production of electronically stored information and sanctions, while also providing procedures for meet and confers, assertions of privilege, and better management of the discovery of electronic data. By all accounts, the federal amendments covered all major issues related to e-discovery and left nothing uncovered.

Federal Case Law

Another reliable reference for states is the body of federal case law that has developed on electronic discovery. Most notable is the set of decisions in the *Zubulake* case. *See Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003). There have been five decisions, four related to electronic discovery, in *Zubulake*. *See also Zubulake* II, 216 F.R.D. 280 (S.D.N.Y. 2003); *Zubulake* IV, 220 F.R.D. 212 (S.D.N.Y. 2003); *Zubulake* V, 229 F.R.D. 422 (S.D.N.Y. 2004). In *Zubulake* I, a former UBS employee filed a gender discrimination claim and requested production of all documents concerning any communications by and between UBS employees about the plaintiff. UBS objected to the request, claiming that it was unduly burdensome. The court considered the extent to which inaccessible data is discoverable and which party should bear the cost of production. *Id.* at 311. Citing *The Sedona Principles*, the court held that data, that must be de-fragmented, reconstructed, or is otherwise not readily usable is inaccessible. *Id.* at 320. Although the court held that the cost of production of accessible data should be borne by the producing party under the traditional rule, the court developed a seven-factor test to determine whether the cost should shift to the requesting party when the data is described as "inaccessible." *Id.*

In a subsequent opinion, the *Zubulake* court again considered whether inaccessible data, specifically backup tapes, should be preserved when litigation is reasonably anticipated. *Zubulake* IV, 220 F.R.D. at 217. Again relying on *The Sedona Principles*, the court held that "as a general rule… a party need not preserve all backup tapes even when it is reasonably anticipates litigation." *Id.* Since the decisions in *Zubulake*, dozens of other courts have cited or specifically followed its holding with respect to the production of backup tapes or the management of litigation holds. *See*, *e.g.*, *Consolidated Aluminum Corp. v. Alcoa, Inc.*, No. 03-1055-C-M2, 2006 U.S. Dist. LEXIS at *25 (M.D. La. July 19, 2006) (holding that a litigation hold was not so unreasonable as to demonstrate bad faith because "Alcoa was not required to preserve every shred of paper but only those documents of which it had 'actual knowledge' that they would be material to future claims."). The Institute for the Advancement of the American Legal System has noted that the *Zubulake* test for cost-shifting "has been celebrated by many as a reasonable approach to cost-shifting that emphasize[s] practical matters such as availability of the evidence and relative cost of production."

State Case Law

Although not as extensive as federal case law, a body of state court decisions dealing with issues of electronic discovery has developed in recent years. Much like the federal courts, state courts have dealt effectively with issues of spoliation and sanctions and cost shifting. In *Martinez v. General Motors Corp.*, Nos. 266112, 267218, 2007 Mich. App. LEXIS 1279 at *5 (Mich. App. May 15, 2007), the plaintiff was terminated for inappropriately using the company's e-mail system. The plaintiff alleged, however, that another employee used his password to access the computer and send e-mails. *Id.* at *6. The plaintiff then sought a motion to compel GM to permit the plaintiff's computer expert to examine the computer hard drive. *Id.* at *8. Before the plaintiff's expert could inspect the computers, GM's computers, leased from a third party, were erased and reformatted by the third party upon expiration of the lease. *Id.* at *19. The expert was permitted to inspect GM's e-mail server. *Id.* at 20. The plaintiff argued that the trial court erred in failing to sanction GM for the spoliation of relevant electronic evidence. *Id.* at * 17. The court held, however, that the contents of the hard drive were superfluous and irrelevant. And the plaintiff could not be prejudiced by the destruction or spoliation of irrelevant evidence. *Id.* at *21

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California and Massachusetts courts have also dealt with similar issues related to spoliation and sanctions. *See Covucci v. Keane Consulting Group, Inc.*, No. 03-3584, 2006 Mass. Super. LEXIS 313 (Mass. Supp. May 26, 2006) (dismissing the plaintiff's action for intentionally and in bad faith destroying

evidence related to the creation of an e-mail central to the issues of the plaintiff's claims); *Global Comp., Inc. v. Amer. Labor Law Co.*, Nos. B171017, B172497, B173706, B174697, 2006 Cal. App. Unpub. LEXIS 4157 at *56–57 (Cal. Ct. App. May 15, 2006) (upholding sanctions where a party failed to comply with a discovery order requiring documents to be produced on CD).

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Often relying on the *Zubulake* decisions and other federal case law, state courts have also addressed cost shifting. In *Toshiba America Elec. Components, Inc. v. Superior Court*, 21 Cal. Rptr. 3d 532, 535 (Cal. Ct. App. 2004), plaintiff Lexar requested the production of e-mail and other forms of electronically maintained information from Toshiba. After Toshiba produced more than 20,000 pages of documents, a dispute arose over which party should bear the costs of recovery of responsive documents on more than 800 backup tapes. *Id.* In reviewing a California statute on cost-shifting and the standards set forth in *Zubulake* I, the court held that a requesting party may be required to share in the expense of restoring backup media when costs are "beyond those typically involved in responding to routine discovery." *Id.* at 538, 541.

New York and North Carolina courts have also reached similar conclusions when applying the principles of *Zubulake*. *See Delta Fin. Corp. v. Morrison*, 819 N.YS.2d 908 (N.Y. Super. Ct. 2006) (following *Zubulake* I and requiring the requesting party to bear 100 percent of the costs of searching backup tapes); *see also Analog Devices, Inc. v. Michalski*, No. 01-CVS-10614, 2006 NCBC LEXIS 16 at *37 (N.C. Super. Ct. Nov. 1, 2006) (ordering the parties to share in the restoration and production of backup media); *but see Bank of America Corp. v. SR Int'l Bus. Ins. Co. Ltd.*, No. 05-CVS-5564, 2006 NCBC LEXIS 17 at *31 (N.C. Super. Ct. Nov. 1, 2006) (refusing to require restoration of backup media because of the likelihood that the e-mail could be obtained elsewhere and because the company was not a party to the litigation).

The ability of state courts to rely on federal case law, as well as the developing body of state case law on electronic discovery issues, may be yet another reason why some states are hesitant to propose discovery amendments.

Sedona Principles

The Sedona Principles were developed by a group of attorneys, technical consultants, members of the judiciary and other interested parties to address the discovery of electronic information. The Principles consist of fourteen "best practices, recommendations, and principles" addressing issues related to e-discovery in civil litigation. *The Sedona Principles* were originally intended to supplement the Federal Rules of Civil Procedure and ultimately shaped the legal environment in which the federal amendments were drafted and adopted. Prior to the 2006 amendments, U.S. federal and state courts tended to rely on persuasive authority in the absence of legal precedent or a clear rule of procedure. As such, *The Sedona Principles* became one of the factors, and sometimes the only factor, considered by a court when deciding an issue related to electronic discovery. Since their publication, *The Sedona Principles* have been cited by U.S. courts as authority for virtually every aspect of electronic discovery, including, preservation orders, the production of metadata, clawback agreements, and spoliation. As previously noted, other reference guides, manuals, uniform rules, or "best practices" have also been heavily influenced by *The Sedona Principles*.

One practical aspect of *The Sedona Principles* is its glossary of terms related to electronically stored information. *The Sedona Principles* supplies judges as well as litigators with definitions of various technical terms related to electronic discovery such as metadata and mirror image. Numerous courts have relied on *The Sedona Principles* to define these terms, particularly metadata, both before and after the 2006 amendments. *See The Scotts Co. LLC v. Liberty Mutual Insurance Co.*, No. 2:06-CV-899, 2007 U.S. Dist. LEXIS 43005 at *11 (S.D. Ohio June 12, 2007); *Lorraine v. Markel American Ins. Co.*, No. PWG-06-1893, 2007 U.S. Dist. LEXIS 33020 at *48–49 (D. Md. May 4, 2007); *In the Matter of the Search of 3817 W. West End*, 321 F. Supp. 2d 954, 956 (N.D. Ill. 2004) (relying on *The Sedona Principles* for the definition of "metadata"); *see also Balboa Threadworks, Inc. v. Stucky*, No. 05-1157-JTM-DWB, 2006 U.S. Dist LEXIS 29265 at *9 (D. Kan. March 24, 2006) (relying on *The Sedona Principles* for the definition of "mirror image"). One court has even held that a party should rely on *The Sedona Principles* for the definitions of terms used in a party's interrogatories. *Johnson v. Kraft Foods North America, Inc.*, 238 F.R.D. 648, 654 (D. Kan. 2006).

The Sedona Principles have had a major impact on both state and federal courts. The courts' treatment of *The Sedona Principles* suggest that the courts consider them to be both a practical guide for attorneys and judges as well as a "gap filler" for resolving issues not covered by the federal rules or case law. Although the number of cases referring to *The Sedona Principles* has declined since the 2006 amendments, it is likely indicative of some of the parallels between *The Sedona Principles* and the new rules. It is clear, however, that the effectiveness of *The Sedona Principles* in addressing e-discovery issues is yet another reason why some states have yet to develop their own rules on electronic discovery.

Conclusion

Despite the recent amendments to the federal rules, many states have been in no hurry to amend their current discovery rules to address issues related to the discovery of electronically stored information. It is unclear whether these states think local or state-specific amendments are needed despite the many resources available. Over the next few years, it will be interesting to see whether individual states continue to draw upon these resources as a reasonable means to deal with e-discovery issues or whether they will use these resources to develop their own unique set of rules. FD