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## Rules 26, 33, and/or 34: Burdens of Production: Locating and Accessing Electronically Stored Data

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## Rules 26, 33, and/or 34: Burdens of Production: Locating and Accessing Electronically Stored Data

### Cover Page Footnote

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**CONFERENCE ON ELECTRONIC DISCOVERY**

**PANEL THREE: RULES 26, 33, AND/OR 34:  
BURDENS OF PRODUCTION: LOCATING AND  
ACCESSING ELECTRONICALLY STORED  
DATA**

MODERATOR

*Robert G. Heim\**

PANELISTS

*Hon. John M. Facciola\*\**

*Robert M. Hollis\*\*\**

*Gregory S. McCurdy†*

*Joseph M. Sellers‡*

MR. HEIM: This topic is “Burdens of Production: Locating and Accessing Electronically Stored Data.” We have a panel that deals with this subject in different kinds of ways.

Greg, since you actually deal with this subject all the time, what actually is the burden of searching backup tapes, for example, for deleted data, or these other kinds of data? Is it cost? Is it time? Is it business interruption? Is it other things? The topic is burden. What is the burden?

MR. McCURDY: Thank you, Bob.

The biggest burden is the one that is not really at issue here today, and that is the cost of the lawyers’ time to review everything once you find it.

But the burden we need to focus on today is the technology burden of how do you even get access to the data that’s on these tapes so that you can review it.

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We have to start out by really remembering what backup tapes are and what they are for. I brought a couple of examples of them along which I would like to show you. They are basically cheap media in which you dump large amounts of data indiscriminately every day in order to keep it around somewhere in case the house burns down or there is an earthquake, which is actually a real possibility in Seattle. If you have an emergency like that, then you can go somewhere and get it back.

It is not to go look for a file or look for an e-mail. That is never what it is used for in the business purpose. You can use it for that, but it is very, very difficult and rarely done.

One of the earliest forms of backup tapes is this gem, which is probably from the 1970s and 1980s. This one in particular was recorded in 1986. It is from the reel-to-reel variety. You have probably seen things like this in the movies. It holds a lot of data that is indiscriminately saved from large amounts of servers.

In the 1980s you got to something a little more practical, which was a moderation of the Sony camcorder cassette, which, believe it or not, holds more data than this thing.

Then you came to this variety, which was even larger volumes.

And today we have this one, and helpfully they are bar coded—they didn't used to be bar coded—so it helps keep track of them, which is a challenge in and of itself.

But today a backup tape is created. It's a pretty good copy of what was on the servers. It is not a perfect copy. There are things that are missing, but that is another topic.

As these tapes age, it gets harder and harder to figure out what is on them and get it back.

Now, in most cases, these things are recycled. On a daily, weekly, or monthly basis, they are overwritten because it is very expensive to have large numbers of tapes that you have to buy and store someplace. But occasionally they get stored for long periods of time, and that is why you end up with things like this from 1986, which is a real dinosaur.

Well, not many companies still have the hardware lying around, the machines that are used to record this, so when you find it, you have to find that either in a computer junkyard or in a museum or something like that, you have to get the software from that era to run it, and you have to find people who are trained and knowledgeable how to operate that, which is quite a challenge and can be expensive. I'm sure for a price there might be some vendor somewhere who can do it, but it is a pretty high price. In some cases, it is just impossible.

The other factor is these things are not well catalogued, when they were recorded and what was on them, which servers, and which files from which people are on the servers, so it gets very complicated the

more back in time you go. And that is where really a lot of the expense is.

There was mention of a case earlier today with—I don't know—of 10,000 or 20,000 backup tapes. I mean that's huge amounts of time and effort that have to be spent in restoring them just so that they are on a live server and can then be searched. Then you can do electronic searches to try to find relevant things, and then you can have lawyers review them to see if they are responsive and privileged and all that.

So it is really a very big deal in terms of cost.

MR. HEIM: One question that seemed to come up earlier today was whether when you are dealing with subjects like backup tapes or deleted data, things of that sort, data that is ordinarily not used or accessed by the producing party, should that be subject to discovery at all, or should there be some kind of special showing in view of the burden that is involved, some special showing like cause or good cause or great cause or some variant of cause? Bob, do you have a view on that?

MR. HOLLIS: Yes. Let me address that.

But first let me just put a little disclaimer, obvious to everybody who has litigated sooner or later with the Department of Justice. I am not speaking on behalf of the Department of Justice here.

There are probably 10,000 differing views on this very issue. So I am going to be speaking from the perspective of a lawyer who has spent twenty years principally as a producing lawyer, that is as a defense lawyer on behalf of federal agencies.

I think the one given that everybody in the Department will agree on is nothing is sacrosanct from discovery. In other words, everything should be discoverable in the right case.

Once you move past that, I think from the trenches there has to be some kind of standard to apply to limit what needs to be produced, at least in the first instance. And again, speaking from the trenches of having conducted lots of discovery, I've got to tell you that in most cases where we've been involved in one form or another with electronic discovery beyond what is readily producible from active computers or from paper files, for the most part, there really isn't a lot of useful stuff that in a typical case will come out of heroic efforts.

Now, I have to emphasize "typical case." Clearly, there are cases—certainly my agency has cases—where we would be very interested in metadata and deleted documents and embedded documents, and we ought to be able to get discovery of that.

But at least in the first instance, for the most part, it really is either marginally relevant or marginally material even if it is relevant. And so there needs to be some kind of standard, some kind of threshold that has to be met, before you reach some of these heroic discovery requests.

I might just drop a real world example here, a case from some years ago. It was the *Armstrong* case,<sup>1</sup> a discovery request on the White House for e-mail relating to certain topics. This required us to bring back lots of backup tapes where e-mails were recorded, considerable expense to find them, enormous expense to restore them, even more expense to retrieve them and review them. I must tell you at the end of the day the process cost, as I understand, \$25 million and nothing came out of that exercise. Now, I put aside whether it should have taken place or not taken place in that case. I assume that proper showings were made so that discovery should go forward.

But the only point I am making is that this is very costly, and in the typical case it is not sufficiently material, it doesn't advance the case sufficiently, to warrant that cost.

Maybe the standard should be something like, "data that's obtainable only at great cost and burden." In that regard, I think, whatever the standard is, it needs to be a very general standard because technologies are going to change, and certainly what is burdensome and costly for the United States Government might be very different from what is burdensome and costly for an individual bringing, let's say, a Title VII suit.

And so, whatever the standard is, it has got to be sufficiently general to allow the technologies to change and allow the courts to have the flexibility to address, in particular, whether that case warrants meeting that standard.

MR. SELLERS: Can I say a word about that?

MR. HEIM: Yes.

MR. SELLERS: I am struck that we have heard this morning how much the parties who maintain the data may have some control over the format in which it is maintained and the accessibility with which it is maintained. As the technology develops going forward, I think one thing we might want to consider is that the ability of the party who retains the electronically readable data, whether it is generally readable or not, bears some responsibility of demonstrating that it couldn't have maintained this in a more accessible format, because it is after all the party who is controlling the data that has the means of establishing the format in which it is maintained and collected.

I might add that one thing to consider—I know that there is another panel dealing with safe havens—but that it might be worth considering that if a party that retained the electronically readable data has done so in a fashion that makes it readily computer-readable—that is, searchable—so that other parties can search it, that that might end its obligation with respect to the cost of production. At that point you create an incentive for parties to maintain the data in a readable fashion.

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1. *Armstrong v. Executive Office of the President*, 1 F.3d 1274 (D.C. Cir. 1993).

MR. HEIM: The question occurs to me, without getting into safe havens or safe harbors, or whatever term we are going to use—and I direct this question to the panel but the second part of the question to Judge Facciola—is there anyone on the panel that thinks that certain kinds of electronic discovery, the truly inaccessible data—and I know we could argue about what “inaccessible” means, but we could at least say deleted data, or maybe backup tapes—should be categorically excluded from discovery?

If no one on the panel wants to jump up and say “yes” to that, although I encourage you to do that, the next part of the question is, if there is going to be a presumption that some of this really inaccessible data—a presumption only, Judge Scheindlin—is to be excluded from discovery, what would the standard be for overcoming the presumption?

JUDGE FACCIOLA: I can’t imagine one. I mean the point, it seems to me, is you’re dealing with two different situations. If we look at the problem dynamically, as we are as the Rules’ draftsmen, we are looking to the future. The problem is judges look to the past. In *Zubulake*<sup>2</sup> and in *McPeek*,<sup>3</sup> the simple reality is that there were instruments, documents—whatever you want to call them, and tapes, on which there was a possibility that relevant evidence existed. I know of no provision in the Federal Rules that would tell me as a judge that I can simply pretend that is not so.

So then the question becomes, how do we assess the likelihood that that document does contain something? In the *McPeek* case, I tried sampling, so that we did an initial sampling of the documents. On the basis of that, we made second decisions.

I think two of the more interesting decisions in the area are Judge Scheindlin’s fourth opinion in *Zubulake*<sup>4</sup> (“*Zubulake IV*”) and my second opinion in *McPeek*<sup>5</sup> (“*McPeek II*”), because that’s when the rubber met the road. That is where the two of us had to decide how likely was it that on this tape there was something that somebody should be made to search for.

So as long as backup tapes exist in some place, judges cannot run away from the reality of grappling with Rule 26 and burdensomeness to require someone to search them.

So to answer your question, no, I don’t know how, when these things are now on a table, someone can say, “You are relieved, Judge, of forcing anybody to get them.” I think it is impossible to overcome that presumption.

MR. HEIM: Greg, then Bob.

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2. *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003).

3. *McPeek v. Ashcroft*, 212 F.R.D. 33 (D.D.C. 2003).

4. 220 F.R.D. at 212.

5. 202 F.R.D. 332, 333 (D.D.C. 2001).

MR. McCURDY: I agree with Bob that there is nothing you can categorically exclude from discovery, but you do have to weigh the burdens.

To Joe's comment about maybe the responding parties should have an obligation or an incentive to maintain things in ways that are easily retrievable, that sort of presumes that companies or the government maintain data for the purpose of litigation rather than for our business. The purpose of a backup tape like this is business continuance, it's not for litigation.

Of course there are many forms in which data is maintained. They are maintained on the PC and on the server. There they are readily searchable and those are other copies of what is on the backup tape.

So I would suggest it would be good if one could exclude presumptively these difficult and inaccessible sources and focus first on the readily accessible and readily searchable sources of documents, and only if for some reason those are not sufficient you consider going to the difficult ones.

And then weigh the burdens. I mean is it fair to burden the government with \$20 million of expense to go hunt for an e-mail that either doesn't exist or might have just been a second copy of what was already on the PC of the person who wrote it?

MR. HEIM: Bob, do you want to comment?

MR. HOLLIS: You might want to take notes. The Department of Justice agrees with Microsoft. I do agree that, at least at the threshold, one needs to look at what is the particular question before the court. What is this data source that you need to look at? If it is something that is extremely costly and extremely burdensome, then yes, indeed, there needs to be at least a threshold that at the end of the day what you are going to find will in some way materially advance the litigation.

What is relevant is the criterion, but I think you need to apply to the relevance question some degree of materiality when it comes to very expensive processes.

And what that expensive process is will change with time. That is where I get back to whatever it is that comes out of this conference has to be sufficiently generalized that it doesn't become technologically specific, because it may well be that software is going to be generated that makes backup tapes completely transparent.

But at the threshold I do think that if in the facts of a given case to even do the sampling requires inordinate expense, then I do think there ought to be some rebuttable presumption, and that rebuttable presumption should at least bring into the fore the question of materiality in addition to just the possibility that something of marginal relevance is going to be found.

MR. HEIM: Joe?



MR. SELLERS: I certainly agree that the first step ought to be to look at the readily accessible material. But if the readily accessible material isn't sufficient or leaves questions open, I really think the Rules—and, indeed, our jurisprudence—recognize that the burden rests with the party seeking to resist the discovery to demonstrate why it should be resisted.

I must add that, lest it be thought that only the large companies and government are worried about cost, the plaintiffs are terribly afraid of these costs. Indeed, just to get to the issue of cost shifting, which seems like a preliminary inquiry, often involves a lot of discovery on the part of the plaintiffs, who are generally people of limited means and often forgo the discovery altogether for that reason.

So part of the reason why I was suggesting that there be some incentive for entities which maintain electronically-readable data to maintain it in a readable form, is because I believe ultimately it will make it more transparent and it will reduce the amount of burden that we are all complaining about today.

JUDGE FACCIOLA: Again, I don't know how you square the circle. I mean how do you make the decision it's not material unless you make an initial inquiry of how likely there is something on it?

Please bear in mind in *Zubulake* and *McPeek*, Judge Scheindlin and I focused on what we called "key players," people who seemed to have something to do with the decision at issue.<sup>6</sup> We certainly didn't search the entire Department of Justice for backup tapes. We searched the backup tapes on the people who made the decision, in my case specifically with the people who made the decision that he claimed was a pretense for retaliation. So having made that initial determination, the search was as narrow as possible.

Isn't it more permissible to do that narrow a search as possible with the existing document than try to say in advance "backup tapes are not searchable"? The question is: why aren't they searchable?

MR. McCURDY: One thing is that *Zubulake* and *McPeek* are both employment discrimination cases with a single plaintiff, and so there is not going to be a lot of volume.<sup>7</sup> It is not a commercial litigation with two large companies with products, that have hundreds and thousands of people at those companies working on those products, creating documents about them. So you just don't have that volume, hundreds and thousands of backup tapes, and knowing which servers are on which for what time and who saved what, where, is quite extraordinary to have to figure out, especially after the passage of some time. I mean in the near term, soon after the event, it is on the backup tape but it's all on the live servers anyway, so it is kind of

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6. See *Zubulake*, 220 F.R.D. at 228.

7. See *id.* at 212; *McPeek*, 212 F.R.D. at 33.

irrelevant, which is why most companies recycle them, because they don't need to keep it for a very long time.

MR. HEIM: But it would be very hard to write a rule that distinguished between the employment case setting and the antitrust and securities litigation that you and I are frequently involved with. How do you do that? I think *Zubulake* and *McPeek* gave us a process that seemed to work, that process works, but what do you do with the kind of cases that you have or that your firm has, Joe?

MR. SELLERS: Right. And indeed, I think there is some serious question as to whether you need a new rule. As I understand it, both *McPeek* and *Zubulake* are derived from the present version of Rule 26.<sup>8</sup> It seems to me that 26(b)(2) really does set forth the factors that have now been worked with in a couple cases, and we see that those same factors can lead to different results and different kinds of cost-shifting if the parties generally have comparable resources or there are other things that would suggest that there are large entities that can bear the expense more equitably.

MR. HEIM: Yes. Somebody mentioned the *Thompson* case,<sup>9</sup> you know, that there is already enough guidance in the Rules to be able to figure these things out without trying to import into the Rules issues that may be in the long run more confusing than they are helpful.

I wanted to ask Judge Facciola: What is your view of that as somebody who is on the spot all the time dealing with that?

JUDGE FACCIOLA: This falls particularly to the Magistrate Judges because we supervise so much of the discovery.

The reasoning that I used in *McPeek* was not that different than the reasoning I use in every discovery dispute, which is: if we turn the world upside down, will we find a pearl or something else?<sup>10</sup> The reason I thought about marginal utility and why it made sense to me in the context is because it captured exactly what I was thinking, which is, as I said in the opinion, we cannot live in a society where we are going to pay \$1 million to produce a single e-mail, that the difference is at the margin. Therefore, I read into 26 that obligation, to make the economic determination: how likely is it that if we do this sorting, the wisdom of doing it will benefit us in some way?

Did I feel that I had a lack of guidance in the case law and in the Rule? I sure did. But in my reasoning I didn't do anything quite different from what I did in other cases.

In my own defense I should tell you—I'm going to make a damaging admission here—all I remember about marginal utility from college was a friend of mine who was dating two girls. He came to me

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8. Fed. R. Civ. P. 26.

9. *Thompson v. United States Dep't of Hous. and Urban Dev.*, 219 F.R.D. 93 (D. Md. 2003).

10. *McPeek*, 212 F.R.D. at 33.

one night and over a beer he said, “You know, my marginal utility for Priscilla is really going up, but after last weekend Jane is on the floor.” That’s all I remembered. Since it had to do with women and beer, it stuck in my mind.

But I cannot tell you that that was the product of a lot of rationalization. It is the way I do things every day, the way Jim Francis does things, the way Judge Scheindlin does things all the time. It is unquestionably true that, like the Rolling Stones, lawyers always ask for everything they want, but they have to be satisfied with what they need. What I was trying to do was to find out what they needed.

MR. SELLERS: I’d just add one thing. I think, lest we focus only on the amount of money that is at issue in these cases as a measure of what justified the expense, I’m not suggesting that constitutional cases get blank checks, but I think we ought to appreciate that there are other kinds of rights and issues in some of these cases that may not lend themselves readily to measures of monetary damages and that nonetheless may justify some significant discovery.

MR. HOLLIS: I might just add that if I had Judge Facciola or Judge Scheindlin as the judge before whom I am practicing in every case, then I suspect there is no need for Rules changes because those two judges bring an incredible sophistication to the analysis. But the truth is that there isn’t that kind of uniformity. The problems are abound.

We and the Department of Justice—I’m sure everyone here—practice in lots of different courts before judges with lots of different levels of sophistication. That is why I think there ought to be some presumptions that we can look to that create at least a uniformity across the federal judiciary that I can rely on to some extent.

MR. HEIM: Judge, your comment really made me think about whether there is, or whether there should be, a distinction, whether we should draw any kind of a distinction between the obligation to preserve data that is not used on a daily basis and the obligation to search data that actually exists in the active files of the particular company. Roughly speaking, the current preservation standard is something like you have an obligation to preserve if you reasonably anticipate that there is going to be litigation on that subject, or some formulation like that.

How do those two things work together, or don’t they?

JUDGE FACCIOLA: I don’t know. I keep wondering where we got the words “anticipation of litigation.”<sup>11</sup> I assume we borrowed them from another portion of Rule 26 that talks about the work product privilege. I am not sure that’s a very good fit because the work product privilege deals with the lawyer working in his office. It doesn’t deal, God help us, with Microsoft, which has divisions all over

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11. Fed. R. Civ. P. 26(b)(3).

the world and I imagine can anticipate litigation every time the sun rises and goes down again.

So to answer your question, if we are going to borrow that, it is a very liberal standard. In my circuit, for example, just about any consideration in an employment context that this one is going to be troublesome yields the conclusion they can anticipate litigation.

Again harkening back to what Judge Scheindlin did in *Zubulake*, the way this is working now—and this is discussed in Cohen’s book<sup>12</sup>—is that as soon as plaintiff’s counsel becomes aware of the possibility, he or she fires off the letter.<sup>13</sup> In fact, there is one in Cohen’s book you can use.<sup>14</sup> The theory is as soon as that letter hits the other side’s door, they can anticipate litigation.

It is common practice in our circuit that those letters are going out to federal agencies on a daily basis as soon as there is a promotion or other decision, as the person makes her way down to the EEOC counselor and speaks to a lawyer.

In *McPeek*, for example, if you remember the part in the opinion, there was a seven-page letter from plaintiff’s counsel.<sup>15</sup> I said obviously that was an anticipation of litigation.<sup>16</sup>

To answer your question, I don’t know what the standard should be, but given the proclivity of people to sue corporations, maybe “anticipating litigation” doesn’t really speak to the reality with which they deal, and maybe we have to come up with time lines or more definite rules, which, if nothing else, would have the advantage of being clear and understandable by everyone involved.

But to answer your question more particularly, most preservation orders that I think are issued now, if they are issued at all, are requiring that the process of deleting matters from the tape end, and that a snapshot be taken of that system as of that day, and that those backup tapes be preserved.

The problem you are having, of course, in any case, but particularly in employment cases, is if you take a snapshot in 2003, what does that tell you about what happened in 1998? We constantly confront the problem where the data as to 1998 is no longer readable because nobody can figure out how to do that.

And of course when the woman complains that she was fired in 2003 and claims that was the culmination of a process of firing African-Americans that began in 1998, you see how impossible the situation becomes merely because you have taken a snapshot in 2003.

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12. See Adam Cohen & David J. Lender, *Electronic Discovery: Law and Practice* (2003).

13. See *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 215 n.4 (S.D.N.Y. 2003).

14. See Cohen & Lender, *supra* note 12.

15. *McPeek v. Ashcroft*, 202 F.R.D. 332, 338-41 (D.D.C. 2001).

16. *Id.*

MR. HEIM: I was going to ask you, Joe, and it seemed to me that I should ask both you and Greg. Some people have suggested one possibility of dealing with this as kind of a compromise situation, since the Judge referred to a snapshot. Does it work if you just—I don't know whether you would put it in the Rule or not, but let's say for a minute that you do put it in the Rule that the responding party or the party to whom the discovery request is made or will be made has a requirement to preserve a single day's full set of backup data, the snapshot, a single day's full set of backup data.

Would that satisfy you, Joe, rather than try to have the full panoply of discovery available on inaccessible data?

MR. SELLERS: I think the key question is the duration for which they keep the snapshot data—that is, if you keep it for some period of time. With all due respect to Judge Scheindlin, I'm not sure that the standard perhaps ought to be the issue of anticipating litigation. Perhaps you look to what the entity has done with respect to other kinds of documents, how it treats personnel records if the analogy is in the employment record. It certainly keeps them for longer than twenty-four hours or forty-eight hours.

But I think if you have some duration by which you can measure the reasonableness of its retention practice with this kind of snapshot information, I think that may be a reasonable solution.

MR. HEIM: Greg, is there ever a day when you wouldn't be making a snapshot of your backup tapes?

MR. McCURDY: We make backup tapes every day and on a regular basis they are recycled. That is a big, cumbersome process that is designed to help us recover if there is a terrorist attack.

We also keep everything that is required by law to be kept in the relevant files in the HR Department. And the individual business people have their files, and those are kept on servers as well as on their hard drive. When we receive notice of a litigation, we take steps to preserve that, as is our obligation.

I think the idea of backup tape snapshots as a panacea is really misplaced because they are way over-inclusive as well as under-inclusive. They are under-inclusive in that it is going to be that day that the lawsuit was filed and not the three years prior—and God help us if we have to keep backup tapes for every day for the three years prior, because then we are really inundated by the tsunami. So it is under-inclusive in that way.

It is over-inclusive in that so many people and so many different servers are backed up in one single tape and there are so many tapes for every day. And so the obligation to store those and keep them and keep track of what it all is will be quite large.

MR. SELLERS: May I say one thing?

MR. HEIM: Sure.

MR. SELLERS: I am sympathetic to what you are saying, Greg, but my concern is that if you have overwriting that occurs every two weeks or three weeks or month or so, you won't even have the information going back to the beginning of the statute of limitations. I don't know how people can make a case.

Historically, of course, companies kept paper records and they kept them for substantial periods of time and you had some degree of confidence that they were there, or most of them were there, and you could look backwards. But if you have overwriting that is very frequent, there will be no record from which to be able to evaluate the claims.

MR. McCURDY: You see, your assumption is that in the electronic world we are keeping less than in the paper world. In fact the opposite is the case. In the electronic world it is so easy to keep things on hard drives and servers that vast amounts of that accumulate. The backup tapes are just an extra copy of all of that.

It is not the obligation of a business to keep everything for every possible statute of limitations for every possible claim. The business must keep things for its business needs and whatever specific legal requirements there are. When there is a lawsuit, there is a new legal requirement, and then one has to stop and focus on keeping that.

But always keep in mind that the backup tapes are just an extra copy of what is already there.

MR. HEIM: I just want to clarify one thing. Because there has been this suggestion of taking the snapshot, a single day's full set of backup data on the day the lawsuit was filed—

MR. McCURDY: Of the whole company, of all 50,000 employees and 10,000 servers?

MR. HEIM: Let's assume that is the case. It is an antitrust case, it ranges across all your business practices, it is some form that any one of your various divisions could somehow be involved in the alleged conspiracy, even though we know it is not true. What do you get if you preserve one day, a single day's full set of backup data? Is Joe right, you're not getting anything that happened three years ago?

MR. McCURDY: Sure, you can get stuff that happened three years ago if it is on the person's mailbox on their server or some other storage.

MR. HEIM: Okay.

MR. McCURDY: A lot of the stuff on there will be quite old. Some of it will be very new.

MR. HEIM: But you don't know what you're getting essentially?

MR. McCURDY: The point about these things is you don't really know what is on it until you go through the painstaking process of searching through the haystack.

MR. SELLERS: My point is that that approach is haphazard,

because some people's hard drives may be—they may save a lot of material; other people do not.

I think we have an opportunity here to set some standards, even if it is through Advisory Committee notes, that make clear what is expected for the future. I think something more should be expected than kind of daily or weekly overwriting systems.

JUDGE FACCIOLA: Something that I have seen written—I don't know where I saw it, maybe in the Sedona Principles—but the theory is if there is a clearly defined methodology as to how you are doing this, certain arguments could flow.

The interesting thing about the backup cases we have seen is there is no rhyme or reason. If you remember the decisions again that we grappled with, there was a backup tape for August 11th, November 9th, and October 3rd, and no one ever explained to me why that was. Well, no one had to explain it to me. I could understand perfectly. The technician who was doing that didn't really care what was on the backup tape because his job was to "make sure when you go home tonight this system is backed up so if we have another hurricane we can open the court tomorrow morning."

MR. McCURDY: It is not archival purposes.

JUDGE FACCIOLA: It is not archival purposes, I understand.

So one of the strange things about this case is that very haphazardness, and that of course makes doing this extremely consumptive of judicial resources because there is no rhyme or reason.

Again if you go back to those decisions, you will watch Judge Scheindlin and me struggling with: How is this going to work? How likely is it that on August 8th this particular person wrote an e-mail about this particular topic? If there had been some rhyme or reason as to how these had been treated, I think the analysis would be different. But the present analysis is quite chaotic.

MR. HOLLIS: I think this conversation has been very useful in that it underscores that perhaps the answer is a case-by-case analysis, that you get into a very slippery slope if you set a requirement that it be a one-day snapshot or thirty-day snapshot or whatever, because what needs to be preserved in any given case is going to be case-specific.

Let me give you just two sides of the spectrum. Suppose I have a case that is purely historical, that is what did my client do three years ago, on the one hand? And suppose I have a case that is, does my agency that I am defending have an ongoing Title VII violation? Well, certainly in the one case, the historical case, it is relatively easy to set a requirement that any backup tape that would deal with the requisite period of time ought to be pulled out of the queue.

MR. McCURDY: That still exists.

MR. HOLLIS: That still exists. Pull it out of the queue and don't overwrite it.

But if you are talking about a prospective case where every single day that I write something on my computer and it goes into a backup tape and we have to preserve it, let me tell you that is extraordinarily expensive. I had one case where that was the requirement, and it was for just a small segment of an agency, just to buy these pieces of plastic here, was close to \$665,000 a year. The case was filed in 1998 and it is still pending, so just do the arithmetic.

That just augurs for the risk of a "one size fits all" answer. There has got to be some judicial flexibility with the recognition that there are things in a given case that might be appropriate for the parties to agree upon, or the court to facilitate the parties agreeing upon, which could preserve for a future discussion data and the question of whether you actually want to reproduce them and review them.

MR. HEIM: I have a follow-up question for you, but first I want Joe to comment.

MR. SELLERS: One very quick point. I completely agree with you that flexibility is an essential hallmark of this system. My only concern is that if the system—again, going forward, not historically, but what is proposed for the future—is one that permits regular overwriting so that the data does not exist in any organized, accessible way, then when you get to the case you are going to end up with the unpleasant litigation over whether there ought to be a spoliation inference.

Frankly, that is not the way I like to see cases resolved. I don't think anybody likes to see them resolved that way. It is a last resort. So I am just suggesting that we want to try in our effort here to come up with a plan that avoids that as much as possible.

MR. HEIM: When you said "one size fits all" is not going to be useful to us—and I understood what you meant—I did not take your comment to mean that a rule should not provide some guidance with regard to how a responding party should have to deal with the subject of inaccessible data. Am I right or wrong about that?

MR. HOLLIS: You're correct. I do think that there needs to be some guidance. I think everything that we have heard today in all the various panels tells us that you have a confluence of two things going on. You've got the forensic computer experts sending out literature that I get every week, and every bar journal I ever read talks about that cornucopia of good stuff that is out there.

MR. McCURDY: Which they are well paid to go dig up.

MR. HOLLIS: Right. You have that on the one hand, and then you have what I think is unfortunate, a very few number of polestar cases. Certainly the two judges here give us some polestars to look at.

But I do think that it leaves most practitioners in sort of a quandary as to: What really must I do? How do I deal with my cranky IT



people? How do I convince them that there is a reason why they have to do X? And they tell me, “It can’t be done, it’s impossible, never could be done, contrary to technology.”

Well, if I have some guidance, either in the nature of a rule or a Committee Advisory Note, or maybe we’re really talking about best practices that perhaps lawyers—some ABA, Sedona Principles if you agree with them, whatever—developed to allow me to have the vocabulary to use vis-à-vis my client, and also to make sure that I don’t get trapped by the spoliation issues that nobody wants to be involved with.

MR. McCURDY: Could I just respond briefly to a comment that Joe made about whether it may not be appropriate to allow companies or government agencies to recycle backup tapes on a regular basis?

I think we might want to draw an analogy to the paper world, where paper piles up on your desk, multiple copies of it, and you dutifully file away that which you need to keep for your business or for legal reasons, and at the end of the day what you don’t need to keep for any of those you put in the trash can, and every night the janitor comes and takes the trash out.

It seems to me that your suggestion is sort of like, “don’t take out the trash anymore and hold on to all the trash,” because the backup tapes are just this extra copy of what everybody already has for business or legal reasons. It is very important for the operation of the IT systems to take out the trash on a regular basis, or else you get inundated with it.

MR. SELLERS: I certainly don’t want to stop you from taking out the trash. My concern, though, is that over a period of time if you don’t keep the other data, the more readily accessible data, that there be some means of reconstructing things. That is my only point.

If you keep it all, then of course the backup tapes can be recycled, as they should be. But if it is the only backup that exists, then I think there is a problem.

MR. HOLLIS: If I could say, I think Joe has hit a really important point, and that is the obligation—this goes back to the best practices—to set up some kind of viable record retention system. When a case comes in, you ought to have some viable mechanism to preserve relevant data that is on active computers. If you do that, then there really is no reason to keep the backup tape. After all, the backup tape is nothing more than a copy of what is already on your active system. So if you set up a well-policed, well-articulated, well-defined document preservation policy off of the active computers, then that may resolve the economic questions of “At what cost should we go to the trash?” Thankfully, Microsoft doesn’t throw out all its trash, but that is another lawsuit.

MR. McCURDY: We keep a lot of trash.

MR. HEIM: I want to ask all of you this question. If you look at the *Manual for Complex Litigation, Fourth*,<sup>17</sup> at Section 40.25(3)(d), there is a reference in there that says, in effect, that “[i]f the business practices of any party involve the routine destruction, recycling, relocation, or mutation of such materials, the party must, to the extent practicable for the pendency of this order”<sup>18</sup>—a party can always make an application to the court—do one of the following: “(1) halt such business processes; (2) sequester or remove such material from the business process; or (3) arrange for the preservation of complete and accurate duplicates or copies of such material, suitable for later discovery if requested.”<sup>19</sup> Now, that is the guidance that is provided from the *Manual for Complex Litigation, Fourth*.

Do you have a reaction to that?

MR. McCURDY: That means stop taking out the trash and take a snapshot every day and keep it in a gigantic warehouse on the off chance that someday somebody might order you to look at it to find something that might not be on one of the active systems.

MR. HEIM: So I gather, Greg, you would be in front of the judge very quickly.

Bob, do you have a reaction?

MR. HOLLIS: I wouldn’t read it that harshly. I think it does invite just what I was saying, and that is the development of a best practice for the preservation. It doesn’t require you to save backup tapes.

But I think the real problem is in the real world the best-laid plan will not be 100 percent carried out. I mean the Department of Justice has 122,000 people. I can’t police 122,000 people to the extent that I was a defendant in a lawsuit. So the real question is, how far from perfection a party needs to establish before you now implicate the backup tapes? I would hope the answer is “not 100 percent perfection.”

MR. McCURDY: A reasonable—

MR. HOLLIS: I hope the answer is “reasonableness, materiality,” some of these other vague questions which give the judges the flexibility they need will be brought to bear so that we don’t have to save the trash every day, but that we can do something that is a reasonable compromise.

MR. HEIM: Joe?

MR. SELLERS: I again think that it is important to have flexibility here. I want to draw a distinction, though, between the time period at the point at which a party receives notice of a lawsuit, at which point I think, as I understand it, that provision kicks in, from which the party that may have an obligation to keep this material can try to get relief

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17. *Manual for Complex Litigation (Fourth)* § 40.25(3)(d) (2004).

18. *Id.*

19. *Id.*

from the court at an early occasion, by perhaps discussing with the requesting party what is really at issue and find ways to unfreeze things very rapidly.

The other question, though, is, what do you do with retaining information when you have no notice of lawsuit if you are going to be overwriting it? That does not deal with that.

JUDGE FACCIOLA: I would not want to narrow the problem simply to backup tapes. It is to everything in that computer. The argument is made—and I think again is in the Sedona Principles<sup>20</sup>—which is if your company has a policy of deleting old files, wherever they are, even on your own hard drive, and you follow that policy, that would be demonstrable evidence that it is inappropriate to say that you had some reason to destroy them.

So the question then, I suppose, a judge confronts is, if such a policy is in existence and it is neutral, should it continue to operate while this litigation is going? The answer may be it may be able to operate except as to certain persons, because while we all live in a nice little world, we all saw an e-mail not too long ago about “Christmas is coming, let’s purge our files.”

I’m a judge but I am no fool. I have to realize that there is a tremendous temptation when litigation starts for people to go in there and unsay those damaging things they said in e-mails. My experience has been informed as a judge by e-mails I have seen in litigation that I still don’t believe existed. I saw an e-mail with a swastika. I saw an e-mail in which one genius sent a Playboy centerfold to another genius suggesting she be compared to the receptionist.

So, having presided over cases like that, I plead guilty as a judge to attempting to preserve that evidence until I can get my hands into that case and see what really is going on.

Now they are selling a hard drive that you can fit on your key chain, so don’t give me a lot of baloney about how tough it is to preserve stuff. We saw this morning the capability of these systems to keep more information than you and I can imagine. Since that is so, I want to hear much better arguments from counsel as to why they should continue this regular process of cleaning up their files.

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20. See Jonathan M. Redgrave, *The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production*, 4 Sedona Conf. J. 197 (2003).

*Notes & Observations*