



**Insights on E-Discovery**  
**The Honorable Ronald Hedges**  
**US District Court - Newark, New Jersey**

Last February, Judge Hedges presented *Discovery of Digital Information* as part of the Civil Practice and Litigation Techniques in the Federal and State Courts Conference for the American Law Institute-American Bar Association meeting in Scottsdale, AZ where Sam Solomon, CEO was co-presenter. Judge Hedges' presentation offered a comprehensive review of the rules governing e-evidence use in federal and state courts and when to begin to consider digital evidence in preparing a case. Visit [www.doar.com/resource](http://www.doar.com/resource) to read the entire presentation. As procedures for handling electronic evidence continue to evolve, Judge Hedges offers insight into some of the issues commonly found in requesting and producing this type of evidence. For example, the costs associated with the retrieval of archived data (from back-up tapes) have been reported to be significant in most complex cases.

We recently interviewed Judge Hedges to gain insights into his most recent thinking on the subject. Here are our questions and his thoughtful answers:

**Q.** How does the court validate the cost estimates created by the producing party?

**Judge Hedges:** Rule 706 of the [Federal Rules of Evidence](#) allows courts to appoint experts. Rule 53 of the [Federal Rules of Civil Procedure](#) allows the appointment of special masters. Thus, either can be appointed when appropriate with the costs borne by a party or parties as the court directs. As a general rule, however, courts address 'cost estimates' through submission of affidavits or experts' reports from parties.

**Q.** When electronic files are requested, what does the court expect as to the parameters for uncovering this information?

**Judge Hedges:** In the first instance, a party seeking discovery of e-files must demonstrate that the information sought is discoverable under Rule 26(b)(1) of the Federal Rules of Civil Procedure. Also, the party seeking discovery should make specific requests for e-information. "Specificity" was one of several factors used in the leading decisions in the area of e-discovery ("Rowe Entertainment" and "Zubulake I") in addressing cost-shifting. Whenever discovery requests are made (for paper or electronic format) the requesting party should consider reasonable "temporal" and "geographic" limits to the requests. The former limit is, in a sense, derived from what [Magistrate Judge Facciola](#) identified as a "marginal utility" test in "McPeek I." The later limit is intended to focus discovery requests to, for example, appropriate units and levels of authority of a corporate entity. I have limited or stricken discovery requests that do not include such limits.

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**Q.** Do you encourage the use of data sampling to see if relevant evidence exists?

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**Judge Hedges:** Yes, I encourage data sampling. The use of sampling enables a requesting party to secure information which the party might either be satisfied with or which would allow the party to seek more sampling or a broader production of information. Data sampling is also a reasonable alternative to cost-shifting.

**Q.** At the present time, can the producing party be held accountable if their archived files are so poorly stored that retrieval is impossible? If so, what are the consequences?

**Judge Hedges:** There may be two separate matters here. First, a party has a duty to preserve evidence when litigation commences or when the party reasonably knows that litigation may be commenced. Thus, loss of archived information may lead to sanctions if the information is not preserved. Second, if storage is so poorly done that retrieval becomes "impossible," I would expect there would be a dispute between the parties as to whether retrieval is truly impossible or, instead, very expensive. If the latter, I would also expect to see a cost-shifting application. If the information cannot be retrieved, I assume the requesting party would seek sanctions of some kind, perhaps the imposition of liability on the producing party (as in "Metropolitan Opera") or an adverse instruction (as in "Residential Funding"). In other words, business entities should adopt reasonable records retention (i.e., destruction) policies.

**Q.** DOAR's Paul Neale provided expert testimony in US v. Rigas with regard to avoiding the inadvertent exchange of privileged documents. Yet in this and other similar opinions, courts seem to be sympathetic to this type of mishap. Do you expect this to continue?

**Judge Hedges:** In "Rigas", Judge Sands noted several approaches to waiver. Disputes involving inadvertent production of privileged materials are fact-sensitive, so I do not think one can think of any court as being "sympathetic" or not to inadvertent production of e-information on a global basis. I do think, however, that parties should consider entering into agreements intended to allow the return of inadvertently produced materials and deem such production not to constitute a waiver. That being said, I expect we will see case law developing on what reasonable steps should be taken by an attorney in reviewing and thereafter producing e-materials to protect against waiver by inadvertent production.

**Q.** Down the road, do you believe that the court's current views on cost-sharing (Zubulake IV) will inhibit individuals who are contemplating legal action against large corporations?

**Judge Hedges:** One criticism of "Rowe Entertainment" is that it appears to favor the producing party. However, both Rowe and the 'Zubulake' opinions consider the public interest as one factor in cost-shifting analysis. I think it fair to assume that courts will continue to be concerned when individual litigants seek to vindicate rights derived from the Constitution and law and will not act so as to deter such litigants. However, as in many areas of

what judges do, there may be a need to balance the rights of those litigants against the rights of corporate adversaries. I would also note that discovery can be an expensive process whether or not e-information is being sought and that it benefits all parties to make reasonable discovery requests and attempt to resolve discovery-related disputes without judicial intervention. This saves the resources of the parties and the court.

**Q.** What part do magistrate judges play in the whole e-discovery process?

**Judge Hedges:** There are 94 district courts in the federal judicial system. Under the Federal Magistrates Act, there is a menu if you will of what magistrate judges are allowed to do. Each district court selects whatever it chooses from that menu for the district court's magistrate judges to do. For example, in the District of New Jersey, we conduct pretrial management (including supervision of discovery) in most civil actions. So, what a particular magistrate does in the e-discovery practice depends on which district court he or she sits in.

**Q.** Finally, how important is it for attorneys to be well versed in the technical as well as legal aspects of electronic evidence?

**Judge Hedges:** Certainly by 2004, attorneys need to be at least familiar with technical aspects, if for no other reason than to communicate with their clients about preservation and production of e-information. In this regard, I would note Local Civil Rule 26.1 of our Court, which was amended last year to require attorneys to, among other things, learn about their clients' information storage and retrieval systems and to identify a client representative knowledgeable thereon. Further, if there is a dispute involving the production of e-information, I would expect a court to want to hear from attorneys who can discuss to some degree technical issues if these arise. Of course, this does not mean that an attorney should become an IT expert. Indeed, the fourth edition of the "Manual for Complex Litigation," which was just published by the Federal Judicial Center, notes that there may be circumstances when expert assistance becomes necessary.

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[Go to top](#)

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