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Proactive on Backups

Recognizing a Significant Source of Discoverable Data

BY ROBERT ALAN EISENBERG

One of the most vexatious questions in the realm of electronic discovery is: How, in the course of pretrial discovery, should a respondent treat the production of data from backup tapes (also referred to as disaster recovery tapes)?

The question is rendered even more problematic when a discovery demand specifically requests such “backup” data (as it usually does) and the respondent cannot reasonably deny some likelihood that relevant evidence may be found on such tapes (as is usually the scenario).

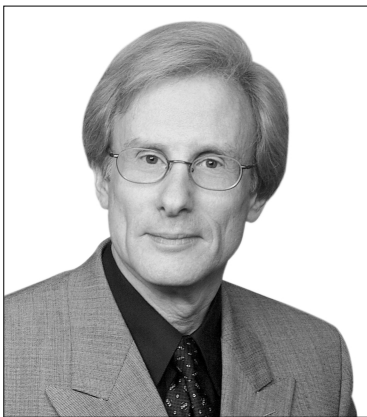
The seminal case in defining electronic data accessibility and addressing the production of data on backup tapes is *Zubulake v. UBS Warburg LLC* (*Zubulake I*) 217 F.R.D. 309 (S.D.N.Y. 2003). *Zubulake* sets forth a practical methodology for addressing the recovery of data from backup tapes by requiring the responding party to restore and produce responsive documents from a small sample set of the requested tapes. Then, using seven factors,¹ *Zubulake* provides a roadmap for calculating the proportion of the costs of such recovery that should be shifted to the proponent of discovery.

Zubulake is probably most noteworthy for its bold recitation of the computer-generated material that fall within the critically defining “accessible” and “inaccessible” categories. In *Zubulake*, data stored on a backup tape is categorized as inaccessible data and may permit the respondent to withhold production upon the ground of “undue burden,” pursuant to Federal Rules of Civil Procedure 26(b) (2).²

Under *Zubulake*, there are actually two categories

Robert Alan Eisenberg, an attorney and litigation consultant with DOAR Litigation Consulting, is a member of the Sedona Working Group on Electronic Document Retention and Production.

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of inaccessible data, the discovery of which can be resisted utilizing an “undue burden” argument: data on “backup tapes” and “erased, fragmented or damaged data,” also known as “residual data.”

Zubulake also specifies three categories of

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accessible data, for which, according to its logic, an attempt at non-production upon the basis of undue burden should not be entertained by a court: these categories are: (1) active, online data; (2) near-line data; and (3) offline archives.³

Such data stores are routinely accessed in the ordinary course of business or located

within archives (whether online, near-line or offline) that are not unreasonably problematic for typical system users to use for the search and retrieval of information.

It is important to note though, how the actions of respondent may transform the status of backup data normally classified as “inaccessible” to “accessible” and, therefore, no longer shielded from discovery by a claim of undue burden. If the responding organization typically treats its backup tapes as routine data archives in a manner that can be construed as in “the ordinary course of business,” then the requester may be able to successfully argue that the backed up information is subject to routine production in discovery.⁴

Therefore, it is essential for a prospective respondent's counsel to make certain, on a going-forward basis and as part of an established electronic record management policy, that backup tapes are strictly used for disaster recovery purposes only and cannot be construed as archival in any sense.

More typically, in addressing a demand for data on backup tapes, responding counsel confronts the following primary choices of strategy: (1) the data found on backups are not accessible, so the strategy should be to secure and preserve such tapes, originate no steps with which to determine what evidence may be found on the media and resist the production of such data or (2) even though backup data is inaccessible, it is in the best interests of the client and justice itself to be proactive, even aggressive, in addressing the sometimes difficult issue of the restoration and harvesting of data from backup tapes.

Assuming the tapes themselves are uncorrupted and capable of restoration, should counsel hold fast to this argument of inaccessibility and maintain a “hard line” on the recovery of data from backup tapes? What guidance does the case law and rules provide in reference to backup media? In the real world of trial practice, what is the most efficacious

approach in addressing backup tapes?

In general, with large stores of randomly stored backup tapes, it is reasonable to assume that relevant information will be found on the backup media—much of it in the form of previously deleted material no longer in “active files”—and without evidence to the contrary, counsel is compelled to make that assumption.

Decisional law indicates that under the current Federal Rules and most local rules, a party has an obligation of (1) preservation and (2) of reasonable efforts to investigate.⁵

While preservation is mandatory, reasonable efforts to investigate is subject to analysis. However, to make the case that an investigation of the tapes by way of restoration and data analysis constitutes an undue burden and should not be compelled, the respondent must invest some time and money.

One needs hard data to bring before the court on cost and burden, as well as benefit, derived from a sample recovery of data from the backup tapes. The trend of case law is that, as litigation proceeds deeper into the discovery process and the respondent has not conducted a sampling itself, the court will direct it.

The purpose of this sampling is to determine costs, burden and the likelihood of finding relevant discoverable information. The cases on the subject indicate that the sampling test need not be “scientifically valid” or meet formal statistical analysis guidelines (which can be prohibitively expensive), because the test results themselves will not be formal evidence of anything beyond representing “costs,” “burdens” and “likelihoods.”

Accordingly, restoring a small number of tapes representing different time periods and reflecting any differences in tape format or the systems backed up should be adequate. Thereafter, the respondent will apply a reasonable list of search terms against this small sample set to locate relevant, non-privileged evidence and carefully document the process, costs and results. Upon completion, the respondent crafts a judgment it feels comfortable defending before the court and presents it to its adversary.

It may be that the respondent may have nothing to lose and much to gain by conducting a small-scale sampling. It is likely that sooner or later such a sampling will be compelled, so it may as well be executed upon the respondent’s terms at the outset and shift the burden to the requester.

In the event the requester insists on more sampling, it will have to fully justify such a request.

With the above in mind, however, it should be further noted that it is commonly perceived that backup tapes exist to restore electronic files that are

lost due to system failures and the tapes contents are, by definition, duplicative of the contents of active computer systems.

Thus, employing proper preservation procedures with respect to the active system should render preservation of backup tapes basically redundant. Furthermore, because backup tapes generally are not retained for substantial periods, but are instead periodically overwritten when new backups are made, preserving backup tapes would entail the time-consuming and costly process of reprogramming backup systems, manually exchanging backup tapes and purchasing new tape or hardware.

In fact, there is no case law that requires immediate restoration of backup tapes where there is no indication that discoverable data that cannot be collected elsewhere has been backed up to the tapes. However, the only basis one has to avoid the almost inevitable performance of some sort of sampling is solid evidence that the data on the

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backup tapes is either completely irrelevant or completely redundant. But without comprehensive and closely adhered to formal records management and backup policies to be demonstrated to the court and with little or no cataloguing system used in the unstructured storage of backup tapes (which is usually the case), the respondent is in an extremely poor position to make the necessary showing to avoid any tape restoration whatsoever.

Although the data found on backup tapes may be duplicative of electronic evidence already within active archives; falls within the category of “inaccessible” and may be enormously expensive to maintain, a respondent should be proactive in addressing the disposition of backup tapes in a manner that recognizes their potential significance as a source of discoverable data.

Since the best practice will often require the continued preservation of a vast store of backup tapes, with its attendant significant expense, a dynamic approach that expedites the reduction of the volume of tapes in storage can result in a notable cost saving.

In addition, such a “take charge” posture will permit the respondent to set the rules of the game, demonstrate to the court a reasonable and

good faith mind set toward the production of electronic evidence and, in general, permit the party maintaining this often barely organized and potentially problematic storage media to extricate itself from beneath the sword of Damocles that is too often created by the continued failure to address and dispose of backup tapes.

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1. The 7 factors, weighted in diminishing order of importance, are:

1. The extent to which the request is specifically tailored to discover relevant inform;
2. The availability of such information from other sources;
3. The total cost of production, compared to the amount in controversy;
4. The total cost of production compared to the resources available to each party;
5. The relative ability of each party to control costs and its incentive to do so;
6. The importance of the issues at stake in the litigation; and
7. The relative benefits to the parties of obtaining the information.

2. The authoritative impact of Judge Scheindlin’s decision in *Zubulake* is reflected in a proposed amendment to FRCP 26 (b) (2) recently approved by the Civil Rules Advisory Committee and en route to adoption in the Federal Rules by the close of 2006. The amendment has incorporated the concept of accessibility into the procedural law (and, evidently, in doing so has, to some extent, “re-leveled” the field, that had been “graded” to the requester’s advantage in the shifting of costs in *Zubulake*, back to the respondent’s advantage.)

The rules amendment speaks to the issue of accessibility and in doing so shifts a definitive burden to the requester and, in the process, undermines the traditional presumption of the respondent’s responsibility, at its own cost, to produce discoverable data. The rule change sets forth that upon a demand for production of electronic evidence, the respondent can fail to produce data on the ground that the material is “not reasonably accessible.” It, thereafter, falls to the requester to move affirmatively and compel discovery by attacking the respondent’s claims of inaccessibility and prove no undue burden.

3. *Zubulake*, 217 F.R.D. at 22, 23.

4. *In re Cheyenne Software Inc. Securities Litig.*, No. CV-94-2771 (NG), 1997 WL 714891 (E.D.N.Y. Aug. 18, 1997).

5. *Zubulake v. UBS Warburg*, (*Zubulake I*) 217 F.R.D. 309 (S.D.N.Y. 2003); *Zubulake v. UBS Warburg* (*Zubulake II*) No. 02 Civ. 1243, 2003 WL 21087136 (S.D.N.Y. May 13, 2003); *Zubulake v. UBS Warburg*, (*Zubulake III*) 216 F.R.D. 20 (S.D.N.Y. 2003); *Zubulake v. UBS Warburg* (*Zubulake IV*) 220 F.R.D. 212 (S.D.N.Y.2003); *Zubulake v. UBS Warburg* (*Zubulake V*), No. 02 Civ. 1243, 2004 U.S. Dist. LEXIS 13574 (S.D.N.Y. July 20, 2004); *Residential Funding Corp v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d Cir. 2002); *McPeck v. Ashcroft* (*McPeck I*) 202 F.R.D. 31 (D.D.C. 2001); *McPeck v. Ashcroft* (*McPeck II*) 212 F.R.D. 33 (D.D.C. 2003).

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