

# abtl REPORT

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## *E-Discovery in the Routine Case*

**M**alpractice, spoliation, and sanction cases based on e-discovery shortcomings attract significant attention. *TIG Ins. Co. v. Giffin Winning Coben & Bodewes, P.C.*, 444 F.3d 587 (7th Cir. 2006); *Coleman (Parent) Holdings Inc. v. Morgan Stanley, Inc.*, 2005 WL 674885 (Fla. Cir. Ct. 2005) (\$1.4 billion judgment, rev'd on other grounds, based on discovery misconduct); *Wall Street Journal*, May 16, 2005 p.A.1 ("In court, Morgan Stanley said it is considering a malpractice suit against the law firm that represented it..."). But while such cases cannot be ignored, they represent the extremes. Ultimately, every litigator is concerned about handling routine discovery of electronic data on a daily basis, in a cost effective manner, without being overwhelmed by hyperbole or expense. As e-discovery gradually becomes the norm, we should evaluate how it has been incorporated into routine litigation and how organizations can assist their members

in the process.

### Core Concepts of Discovery Remain the Same

Recent amendments to the Federal Rules of Civil Pro-

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## *Choosing Federal or State Court in Consumer Class Actions*

**A** key decision to be made early in many business cases, whether by the plaintiff on where to file or by the defendant on whether to remove, is whether to have the case heard in state or federal court. The one-two punch of Proposition 64 — requiring class certification for cases under California Business & Professions Code sections 17200 and 17500 *et seq.* — and the Class Action Fairness Act ("CAFA") — authorizing federal court jurisdiction based on minimal diversity in any case with \$5 million in dispute and a defendant corporation outside California — means that more business litigators than ever before need to address this decision. This article describes some of the strategic considerations that go into making that choice.

### Judicial Assignments

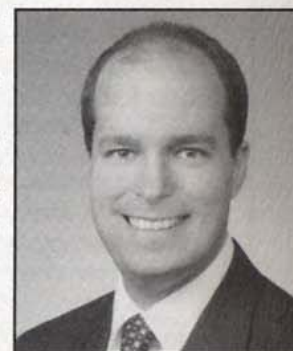
The traditional analysis of federal versus state court forum choice often turns on a perception about state court judicial reluctance to grant summary judgment.

Historically, California state courts have utilized a master calendar system. Unlike federal court, which uses a single assignment system (one judge hears all matters relating to the case, with the possible exception of discovery matters which some federal judges refer out to a magistrate judge), the master calendar system allocates tasks in the case to different departments. Motions — demurrers, summary judgment motions, and class certification motions — are heard by the judge who presides over the law and motion department. Discovery motions may be heard by the same judge or by a discovery commissioner or separate discovery motion department. The judge who will preside over the case for trial is not assigned until

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Hon. Richard E. Best (Ret.)



Thomas Mayhew

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cedure concerning electronic discovery have focused attention on the issue. The concepts in the new rules, however, are not new. Judges applying California state law — with the significant exception of the initial disclosure requirement — will in most cases reach the same result using the basic rules of discovery that predate specific electronic discovery rules. Decisions in the discovery context are not driven by the medium or technical aspects of the issue (e.g., metadata, flash memory, or back-up tapes) but instead by the core principles that have always governed discovery disputes: preservation duties and orders, spoliation, discovery plans, case management conferences and orders, the concepts of “undue burden” and “not reasonably accessible data,” cost-benefit analyses, and cost-shifting.

Lawyers awaiting a set of e-discovery rules to chart their courses and resolve issues may be disappointed. Discovery rules and case law provide a framework but will never answer specific questions requiring analysis of unique facts and technology and the application of existing discovery concepts. In the *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421 (S.D.N.Y. 2002), and *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003), cases, courts were faced with requests to produce relevant communications, but the estimated costs of extracting e-mail from back-up tapes varied widely and were substantial. Both courts recognized that discovery of e-data raised new issues and that high costs required analysis beyond the normal discovery clichés and established practices. Both courts resorted to the well-established practice of cost-shifting based on protective order concepts and trial court discretion. Such factors are reflected in the California Discovery Act and case law. Code Civ. Proc. § 2017.020 (burden, expense, intrusiveness versus likelihood of discovery of admissible evidence); § 2019.030 (unreasonably cumulative/duplicative, alternative sources, less burdensome or expensive or more convenient, undue burden or expense; consider needs of case, amount in controversy, importance of issue to which relevant); § 2031.060 (unwarranted annoyance, embarrassment, oppression, undue burden and expense); *Toshiba America Electronics Components, Inc. v. Superior Court (Lexar Media, Inc.)*, 124 Cal. App. 4th 762, 769, 772, 773 (2004); *San Diego Unified Port Dist. v. Douglas E. Barnhart, Inc.*, 95 Cal. App. 4th 1400, 1404 (2002) (court’s power to exercise reasonable control over discovery did not permit ordering one party to pay for discovery it did not wish to pursue).

In *Toshiba America*, for instance, the Court of Appeal reviewed a trial court decision on cost-shifting of \$1.8 million for review of back-up tapes. The Court emphasized that such decisions turn on issues of reasonableness and the necessity for obtaining the documents. It did not mandate cost-shifting in all e-discovery and left most issues unresolved even when Code Civ. Proc. § 2031.280(b) (shifting cost of obtaining information from back-up tapes to demanding party) applies.

While *Zubulake* suggests a hierarchy and underscored

the qualitative approach, both *Rowe* and *Zubulake* pointed to a multitude of factors to consider in determining whether and in what proportions costs should be allocated. The factors are those normally considered in any cost/benefit or undue burden analysis. Those factors are not equal, may not apply to every case and do not provide a structure for a mathematical calculation or application. In *Rowe* the court noted that its eight factors were suggestions and that counsel may determine other factors are more important in that case. In both cases, and in subsequent cases throughout the country, courts have emphasized that facts and analysis provided by the parties are essential. Factors critical in one case may be of little or no importance in another or new factors may be more important. More recent cases illustrate how all factors can be trumped e.g., by a failure of a party to instigate a litigation hold which inaction results in the elimination of accessible sources leaving only more costly sources such as backup tapes. See *Quinby v. WestLB AG*, 2006 WL 2597900 (S.D.N.Y. Sept. 5, 2006); *Disability Rights Council of Greater Wash. v. Wash. Metro. Area Transit Auth.*, 2007 WL 1585452 (D.D.C. June 1, 2007).

Similarly, in *Capricorn Power Co. v. Siemens Westinghouse Power Corp.*, 220 F.R.D. 429, 432-33 (W.D. Pa. 2004), the court rejected routine orders “preserving the status quo” in view of the impact of such orders in an e-data world where a broad preservation order could be cost prohibitive, compliance impossible, or operations terminable. It suggested a three-factor balancing test including consideration of “the capability...to maintain the evidence sought to be preserved, not only as to the evidence’s original form, condition or contents, but also the physical, spatial and financial burdens created by ordering evidence preservation.” Cf. *Dodge, Warren & Peters Ins. Services v. Riley*, 105 Cal. App. 4th 1414 (2003) (affirming trial court injunction for court-appointed expert to copy computer hard-drives, recover lost or deleted files, and perform automated searches of the data; discussing factors to guide trial court discretion). Again, the court wanted facts and not conjecture or rhetoric to support the decision.

As reflected in *Rowe*, *Zubulake*, and *Capricorn Power*, e-discovery requires that we revisit and reconsider basic discovery concepts and theory to properly apply the rules to the media and technology as well as the facts of the particular case. It requires an understanding of both basic discovery concepts and the technology. For the lawyer’s analysis and argument it may be appropriate to revisit concepts like good cause, reasonable particularity, reasonable search, cost versus benefit, and relevancy versus burden. Even with the omnibus all-inclusive requests that seem to be the norm, no one should expect heroic efforts to find every conceivable bit and byte of e-data. Generally, and as reflected in Code Civ. Proc. § 2031.230, only a “diligent search and a reasonable inquiry” are required and that standard must be applied in context.

#### E-Discovery Advocacy

While e-discovery issues have changed, the fundamen-

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tal lessons from the early cases remain. Presentations made by lawyers make a big difference. Generalities and rhetoric, no matter how eloquent, are not enough. Overly optimistic or uneducated commitments by counsel can result in a loss of credibility and sanctions even when made in the utmost good faith. Courts are increasingly intolerant of conduct that resembles ignorance, evasiveness and "purposeful sluggishness." *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d Cir. 2002). Discovery concepts and rules are flexible enough to handle, and in fact have been used in recent years to handle any new discovery issues arising from new technology or electronic media. Facts, obtained through discovery or elsewhere, must be presented. Educating the court through a well-written and relevant expert declaration may be the determining factor.

While e-discovery has been included in judges' continuing education curricula for many years, it is unlikely that the issue of "who pays how much for the e-mail" is at the top of anyone's list of major social issues. Some judges, particular those who have an interest and background in complex civil litigation, will have more knowledge and interest in the subject, but they may not have sufficient time to devote to adequately handle many e-discovery issues when they arise. Courts want to make informed and fair decisions, but they need sufficient information to do so. A common observation of judges hearing e-discovery motions is that counsel failed to provide sufficient facts or information or to relate them to the issues before the court to enable them to make a proper decision. Judges who recognize the inadequacy may request further briefing, evidence, or meet and confer efforts; others may make decisions based on the burden of proof; some may even make improper decisions based on the inadequate information provided.

A critical aspect of a lawyer's presentation is the educational component. In some cases, it may be in the interest of all parties to prepare jointly a tutorial on the e-discovery problems and technology affecting the case as a whole or the particular issues anticipated in the case. Even so, that presentation must be supplemented with the educational component of each issue when a dispute arises. Lawyers should not rely on personal knowledge of e-data in making presentations since they do not want to be witnesses and may not be qualified. Often the expert's presentation, usually by declaration, is the most critical and determinative aspect. Demonstrate the expert's familiarity with the subject, case, and particular issues. Discovery regarding the opponent's system and practices may be a prerequisite. Then provide a detailed explanation of the party's position with all conclusions fully supported by facts, figures and explanations of technology. Consider bringing your expert to any conference or hearing, or having him or her available by phone.

While courts are required to resolve many issues of significance, they expect compliance with rules that require

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## *Effective Use Of Rule 11 in Civil Litigation*

**S**ome legal rules are like certain celebrities, immediately recognizable by a single, shorthand name. For example, every litigator has heard of Rule 11. Like single-name celebrities, however, Rule 11 is not an ordinary acquaintance of most litigators. Indeed, most of us have (thankfully) never met the rule, nor had occasion to invoke it. Nevertheless, it is helpful to know a little something about Rule 11 (by which I mean of course Rule 11 of the Federal Rules of Civil Procedure), and its place and purpose among the federal rules, for the rare occasion when you might encounter or, better yet, make use of it.

Although Rule 11 is potentially applicable to any paper signed and submitted to a federal district court, this article will focus on a situation in which you believe you are defending against a frivolous complaint. ("The word 'frivolous' does not appear anywhere in the text of the Rule; rather it is a shorthand that [the Ninth Circuit] has used to denote a filing that is both baseless and made without a reasonable and competent inquiry." *In re Keegan Mgmt. Co. Securities Litig.*, 78 F.3d 431, 434 (9th Cir. 1996) (emphasis removed).) What is the role of Rule 11 in a toolbox that also includes a Rule 12(b) motion to dismiss, a Rule 12(c) motion for judgment on the pleadings, and a Rule 56 motion for summary judgment?



Don Gagliardi

### The Significance of a Signature

Rule 11 requires the signature of an attorney on every pleading, which amounts to a certificate that to the best of the attorney's "knowledge, information and belief, formed after an inquiry reasonable under the circumstances," (1) the pleading "is not being presented for an improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation"; (2) "the claims, defenses, and other legal contentions therein are warranted by existing law or by nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law"; and (3) "the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after reasonable opportunity for further investigation or discovery." Fed. R. Civ. P. 11(b). Sanctions are authorized pursuant to Rule 11(c) for violation of any of the provisions of Rule 11(b).

As the Ninth Circuit has observed, in view of Rule 11, "[f]iling a complaint in federal court is no trifling under-

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## Effective Use Of Rule 11

doubt on the quality of the pre-suit attorney investigation, thereby warranting a Rule 11 motion.

In the rare case where there exists both *disputed* evidence that a suit is baseless and evidence of the lack of a reasonable attorney investigation, Rule 11 might present an attractive alternative to a summary judgment motion, or even a motion to dismiss for failure to state a claim upon which relief can be granted. The moving party bears the burden of proof on the Rule 11 motion, but the nature of the burden is dramatically different from either a Rule 12(b)(6) motion to dismiss or Rule 56 motion for summary judgment. The material facts suggesting a violation of the rule need not be undisputed, nor need the allegations on the face of the complaint be accepted as true. The evidence of a violation of Rule 11 need merely satisfy the district court that a violation has occurred. Provided the court can be further convinced that appropriate sanctions include striking the offending complaint and reimbursement of the moving party's attorneys' fees and costs, a Rule 11 motion can serve in the rare case as a tremendously effective substitute for a dispositive motion.

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good faith efforts to resolve issues and do not favor evasive or abusive conduct in the meet and confer process. With some e-discovery issues, the adversary process may not even work. In contesting a preservation order, advocates tend to argue at the two extremes, neither of which is a satisfactory or even viable solution. Negotiation or mediation conducted by knowledgeable and practical lawyers is more likely to identify and resolve issues in a satisfactory manner. The lawyer's knowledge of e-data may be invaluable in protecting the client and obtaining strategic advantages during any resolution process. Of course, a backup position is required when it appears Plan A is failing. See *Hartbrodt v. Burke*, 42 Cal.App. 4th 168, 173 (1996) ("Appellant had the opportunity to review the transcript, to identify issues susceptible to preclusion, and to fashion and propose the orders he now divines would resolve his dilemma, but he nonetheless failed to take those steps. It was not the task of the trial court to extricate appellant by inventing solutions which were not proposed and not obviously available or acceptable."). Considering the less extreme position before the court forces the issue may be the place to start a good faith effort to resolve matters.

### Early Attention

Ideally, e-discovery preparation starts years before potential litigation with a comprehensive records manage-

ment policy and program, including training, monitoring and enforcing compliance. A suspension of document destruction pursuant to otherwise valid practices may be required to preserve evidence when litigation appears reasonably probable. Each case requires an early assessment of litigation readiness including data mapping, access evaluation, collection strategies, and a clear assignment of responsibilities. Such efforts may be subjects of discovery. When lawyers are involved in the counseling on data preservation before or during the litigation, issues may arise as to attorney-client privilege and work product and, if claims of spoliation arise, the crime/fraud exception to the privilege is a probable issue. See e.g., *Samsung Electronics Co., Ltd. v. Rambus, Inc.* 2006 WL 2038417 (E.D. Va. 2006). It may be desirable to resolve such issues without risking a court finding that the exception applies.

Discovery disputes rarely improve with age especially with e-discovery where costs can spiral out of control. Despite concerns raised by the new federal rules about incurring excess or unnecessary costs early in the litigation, experience teaches that such early attention can be cost-effective and provide strategic advantages to counsel and parties who are well informed and prepared. Early actions and negotiations or lack thereof may impact the way issues such as spoliation, cost allocation or sanctions are subsequently viewed and resolved.

One result of the federal rule amendments has been the emphasis on early attention to e-discovery issues required at the parties' conference and the case management conference pursuant to Rule 26. Cal. Rules of Court Rule 3.721 *et seq.* contain the same requirements as Federal Rule of Civil Procedure 26(a) (other than mandatory initial disclosures).

Recent e-discovery programs for judges have emphasized the value of early and continual attention to such issues as part of the case management process. While opinions and practices differ on what and how matters are addressed in the case management process, lawyers can seize the opportunity to resolve issues informally, to provide notice to court and counsel of their intentions and their expectations of opponents, and to seek judicial guidance or rulings. Even if it is premature for agreements at the initial conference of counsel, serious discussions should occur where concerns, expectations and issues can be set forth for resolution at the next conference. Similarly, continuances or subsequent status conferences with the court may be necessary. California Rule of Court Rule 3.723 expressly authorizes additional case management conferences at a party's request or by court order.

Few if any e-discovery issues will be resolved by any binding case or rule. It may be necessary to seek court guidance in any given case, more in the form of clarifications than rulings. The case management process can be effective for such guidance. If available, an informal procedure of calling the judge to discuss issues informally often resolves matters immediately, inexpensively, without formal rulings and before they become major issues. Many lawyers seem to fear that judges will be irritated by discovery disputes. That may be true when the disputes

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