Electronic Discovery In Arbitration:

Privilege Issues and Spoliation of Evidence

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When discovery of electronic information (ediscovery) is permitted in arbitration, will arbitrators impose sanctions for lost emails or other electronic files? This article discusses how arbitrators could respond to demands for email and backup tapes, and claims that the attorney-client privilege has been waived through the inadvertent production of edocuments.

"Electronic documents are no less subject to disclosure than paper records." So said the U.S. District Court for the Southern District of New York in *Rowe Entertainment v. William Morris Agency*.[1] Unlike paper records, which require most companies to rent storage space, electronic documents take up no additional space and the cost of storing them is negligible.

Because there is little or no need to discard electronic files, a massive amount of electronic data, including email is now being retained. Much of the retained data is on backup tapes created for emergency uploading in case data is lost accidentally or otherwise.

Backup data is usually not easily searched. It tends to be stored on a daily or weekly basis, so it is not indexed by subject matter. The enormous amount of retained electronic data and the difficulty of

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searching it makes it very expensive and time-consuming to find documents sought to be produced for litigation or arbitration, and then review them to see if they can be withheld from production based on attorney-client and/or work-product protections. Using shortcuts to conduct a manual review of edocuments to meet discovery and hearing deadlines can lead to an inadvertent waiver of these protections. Spoliation of evidence may also occur through routine recycling of backup tapes, deletion of emails and changes in documents caused by automatic computer operations (metadata).[2] This can give rise to requests for the imposition of sanctions.

These issues must be dealt with by arbitrators while still preserving the speedier results, limited discovery and cost effectiveness of arbitration. This article will discuss recent court decisions on the discovery of electronic records (ediscovery) to help guide arbitrators and advocates on (1) inadvertent waivers of the protections afforded by the attorney-client privilege and the work-product doctrine, and (2) spoliation of evidence. It does not address the extent of ediscovery that might be appropriate to any particular arbitration.

The massive amount of electronic documents potentially subject to discovery enormously increases the number of documents that must be reviewed for privilege and makes the inadvertent production of a privileged document more likely.

Discovery Protections in Arbitration

The attorney-client privilege and the attorney work-product doctrine protect certain documents from discovery in litigation. These privileges are also generally recognized in arbitration. For example, Rule R-31 of the American Arbitration Association's Commercial Arbitration Rules, which governs the introduction of evidence at arbitral hearings, provides in subpart (c) that "[t]he arbitrator shall take into account applicable principles of legal privilege, such as those involving the confidentiality of communications between a lawyer and client."[3]

Accordingly, counsel may assert these privileges during discovery in arbitration and during the attempt to use privileged material as evidence at the arbitral hearing.

In order to assert one of the legal privileges, the document at issue must be protected by the privilege and the privilege must not have been waived. A waiver can occur by producing the document to an adversary or another person not covered by the privilege. Waiver can occur from intentional disclosure or inadvertent production of a protected document.

Waiver of Legal Privileges

One standard used by courts to determine whether or not a legal privilege has been waived is set forth in *United States v. Rigas*.[4] In *Rigas*, the court evaluated:

> (1) the reasonableness of the precautions taken by the producing party to prevent inadvertent disclosure of privileged documents; (2) the volume of discovery versus the extent of the specific disclosure issue; (3) the length of time taken by the producing party to rectify the disclosure; and (4) the overarching issue of fairness.

In *Atronic International GMBH v. SAI Semispecialists of America*,[5] the court applied the *Rigas* standard to two privileged emails between a party and its international counsel that were inadvertently produced because the attorney handling discovery for the producing party did not recognize the name of international counsel. The court found that the inadvertent production waived any privilege attached to the emails. The court said the precautions taken by the producing party were not reasonable because the emails, which went directly to the heart of the issues, did not state that they were "privileged" or "confidential."

The breadth of a waiver of a legal privilege varies by jurisdiction. Inadvertent production of a privileged document may waive the privilege only for that document or for all privileged documents on that subject or on all subjects. Arbitrators will look to the law designated by the parties in the arbitration agreement, but if the agreement is silent, they may look to the law of the jurisdiction in which they are sitting or to that jurisdiction's conflicts-of-law rules to determine the applicable law of waiver. The federal circuits have different controlling law on the effect of inadvertent production of privileged documents:

1. The "strict accountability" rule holds that an inadvertent production waives the privilege. This rule is followed by the Federal and 1st Circuits.[6]

2. The "to err is human" approach. This approach requires the waiver to be knowing and intentional. The 8th Circuit follows this rule.
3. The "balancing test." This approach is often used by district courts in the 2nd and 4th Circuits.[7]

Development of "Claw-back" Agreements

As suggested above, the massive amount of electronic documents potentially subject to discovery greatly increases the number of documents that must be reviewed for privilege. It also makes the inadvertent production of a privileged document more likely.

As a result, it has become increasingly common to see parties enter into agreements to disclose privileged materials provided the disclosure is not taken to entail a waiver as to all privileged matters. Because courts will give effect to such agreements, the parties by contract, so to speak, can avoid the general rule that partial disclosure on a given subject matter will bring in its wake total disclosure.[8]

Over the years, attorneys have also entered into agreements with opposing counsel to protect against waiver of the privilege. This agreement usually states that a party who inadvertently produces a privileged document may take it back once the inadvertent production is discovered. The time and cost involved in reviewing electronic documents for privilege has expanded the use of these "claw-back" agreements. An expansive version of these agreements permits a party to produce all of its relevant documents for review and selection by the requesting party without waiving the privilege. Once the requesting party selects the documents it wants, the producing party reviews those documents for privilege.

District courts in the 2nd Circuit have approved the use of claw-back agreements.[9] In the third of four "ediscovery" decisions in an employment discrimination suit captioned *Zubulake v. Warburg*, Judge Shira Scheindlin explained:

> [T]he producing party unilaterally decides on the review protocol. When reviewing electronic data, that review may range from reading every word of every single document to conducting a series of targeted key word searches. Indeed, many parties to document-intensive litigation enter into so-called "claw-back" agreements that allow the parties to forego privilege review altogether in favor of an agreement to return inadvertently produced privileged documents.

Court approval of such agreements varies. One commentator noted that some district courts in New Jersey refused to enforce claw-back agreements.[10] In one case, a privileged memo was inadvertently disclosed "in the mistaken belief that the database from which it was produced contained only nonprivileged documents."[11] According to this commentator, "the court held that the privilege was waived, despite a claw-back agreement formalized by a trial court order." The court reasoned that "a claw-back order cannot preserve privilege when parties hand over documents without privilege review" and that, "even if disclosure is unintentional, waiver is avoided only if reasonable precautions are taken to avoid inadvertent production."[12]

Use of Claw-Back Agreements in Arbitration

Parties to arbitration can avoid this problem by presenting the proposed claw-back agreement to the arbitrators at an early preliminary hearing, with a request for an order approving their use prior to relying upon them in the production of documents. Without advance approval, the panel may not recognize the legitimacy of a claw-back agreement and hold that the privilege has been waived.

Should the question arise in a subsequent proceeding, the decision maker, whether another arbitration panel or a court, is much more likely to respect the privilege if the arbitration panel has entered an order approving a claw-back agreement.

Effect of Change in FRCP Rule 26(b)(5)

The Federal Rules of Civil Procedure (FRCP) have been amended to specifically address ediscovery. Although these rules do not apply to arbitration absent the parties' agreement to the contrary, the reasons for the amendment should be of interest to arbitrators and parties appearing before them.

The amendment to FRCP Rule 26(b)(5) (which with other amendments was approved without comment by the U.S. Supreme Court on April 12, 2006, and takes effect Dec. 1, 2006[13]) recognizes the exponential increase in problems of inadvertent production of privileged material caused by ediscovery. The Report to the Standing Committee on Rules of Practice and Procedure, Judicial Conference of the United States by the Advisory Committee on the Federal Rules of Civil Procedure, September 2005, stated:

> The problems that can result from efforts to guard against privilege waiver often become more acute when discovery of electronically stored information is sought. The volume of the information and the forms in which it is stored make privilege determinations more difficult and privilege review correspondingly more expensive and time-consuming yet less likely to detect all privileged information.

Inadvertent production is increasingly likely to occur. Because the failure to screen out even one privileged item may result in an argument that there has been a waiver as to all other privileged materials related to the same subject matter, early attention to this problem is more important as electronic discovery becomes more common. Under the proposed amendments to Rules 26(f) and 16, if the parties are able to reach an agreement to adopt protocols for asserting privilege and work-product protection claims that will facilitate discovery that is faster and at lower cost, they may ask the court to include such arrangements in a case-management or other order.[14]

Rule 26(b)(5)[15] as amended permits a party claiming that privileged information has been inadvertently produced to notify the other party of the claim and the reason for it. After notification, the opposing party is required to return the document, or segregate and protect the document or destroy it; that party may not use the document in any way until the claim of privilege is resolved. In effect, the amendment recognizes claw-back agreements.

But the amendment may not protect against a waiver for inadvertently produced edocuments. *Hopson v. Baltimore*, a recent decision by a district court in Maryland, though it recognized the reasons for claw-back agreements and the proposal to amend Rule 26, seriously questioned the effectiveness of such agreements in preserving attorney-client and work-product protections.[16]

Hopson involved a request "designed to discover the nature, extent and location of electronically stored records, the Defendants' IT capabilities, the nature of archived data, e-mail, and records retention policies."[17] In ruling on a motion to compel answers to interrogatories, the district court recognized that one major concern "was the cost and burden of pre-production privilege review of the records sought." It also noted the commentary that accompanied the proposal to amend FRCP Rule 26, which stated that the proposed amendment "does not address whether the privilege or protection that is asserted after production was waived by the production."[18]

When amended Rule 26(b)(5) takes effect in December 2006, parties will be able to raise the attorney-client privilege and the work-product doctrine *after* production of electronic records. But, as noted by the *Hopson* court and the commentary to the rule, the rule does not say that documents produced in accordance with its terms are protected from waiver of these privileges. For this reason, the *Hopson* court warned that "[a]though the use of 'non-waiver' agreements presently may be growing," their use is "certainly ... not risk-free." The court pointed out that some commentators are "openly skeptical of the parties' ability to insulate themselves from waiver as against third-parties,[19] even if [nonwaiver agreements] are enforceable as between themselves."[20] The court concluded, "Absent a definitive ruling on the waiver issue, no prudent party would agree to follow the procedures recommended in the proposed rule."

Arbitration provides an advantage to parties concerned about waiver of privileges resulting from ediscovery, as arbitrators are particularly attuned to the concerns of the parties before them.

Avoiding Waiver in Arbitration

Arbitration provides an advantage to parties concerned about waiver of privileges resulting from ediscovery, as arbitrators are particularly attuned to the concerns of the parties before them, and they are not required to analyze and conform to the latest court decision on the issue. Thus, it is vital for arbitrating parties to obtain an order from the arbitration panel (1) relieving them of the obligation to conduct a pre-production review of all edocuments for privilege, and (2) specifically ordering that the attorney-client and work-product privileges are not waived by the production of such documents.

The fact that arbitrations are private proceedings is also beneficial.

Parties should still be concerned whenever privileged material is produced to an adversary. While the adversary may not be able to use the privileged documents, knowledge of what they contain may assist in the prosecution or defense of the adversary's case.

Spoliation of Evidence and Metadata

"Spoliation is the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation."[21] This generally means that parties have an obligation to preserve evidence that may be relevant to matters at issue in an arbitration as well as a litigation.

Judge Scheindlin, in the fourth ediscovery decision in *Zubulake*, characterized this obligation as having to put a "litigation hold" in place to ensure the preservation of relevant documents.[22] In the fifth discovery decision in *Zubulake*, Judge Scheindlin held counsel to the same requirement, saying that counsel should "issue a 'litigation hold' at the outset of litigation or whenever litigation is reasonably anticipated."[23] She also found that the litigation hold should be "periodically re-issued so that new employees are aware of it, and so that it is fresh in the minds of all employees." In addition, counsel must "communicate directly with 'key players' in the litigation" and periodically remind them of the preservation duty. In carrying out these duties, counsel should become familiar with the client's computer system, take affirmative steps to monitor and coordinate the client's discovery efforts, and monitor compliance.[24] According to Judge Scheindlin, "[c]ounsel must also make sure that all backup media which the party is required to retain is identified and stored in a safe place." For example, counsel could choose to take physical possession of relevant backup tapes or segregate them and place them in storage. Judge Scheindlin explained that "[b]y taking possession of, or otherwise safeguarding, all potentially relevant backup tapes, counsel eliminates the possibility that such tapes will be inadvertently recycled."

The spoliation rule has led to uncertainty about the obligation to preserve electronic data, given "electronic document retention policies that often include automatic deletion of certain data after a set period of time (particularly for email)."[25] But courts are addressing these issues. Judge Scheindlin discussed them in her ediscovery decisions. Based on her decisions, one commentator concluded that the litigation hold includes the duty to stop "any routine recycling of backup tapes as well as routine email deletion."[26]

Electronic documents also involve something called "metadata," which may not be accessible by the average computer user.[27] Metadata was defined in the Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records in an Electronic Age as:

> information about a document or file that is recorded by the computer to assist the computer and often the user in storing and retrieving the document or file at a later date. The information may also be useful for system administration as it reflects data regarding the generation, handling, transfer, and storage of the data within the computer system.[28]

Metadata is further defined as: "all of the contextual, processing, and use of information needed to identify and certify the scope, authenticity, and integrity of active or archival electronic information or records."[29]

Metadata includes the computer system's automatic alteration of documents. Thus, information can be lost or changed. And when that happens in a litigation or arbitration, a claim for spoliation can result.[30] Deletion or changes to metadata, as well as scrubbing metadata to avoid disclosure of such information, can be deemed spoliation.

Not only that, because of its hidden nature, "metadata … has the potential for inadvertent disclosure of confidential or privileged information."[31] This can result in a waiver of the attorney- client privilege or the work-product protection or both.

How courts have treated the discovery of metadata and its spoliation can provide guidance to arbitrators and parties. A federal court in California enforced an order to discover electronic data, including metadata. It did not deem the difficulty of redacting privileged information to be a reason not to sustain the order.[32] A federal court in Louisiana held that parties have an obligation to preserve metadata as part of their obligation to preserve evidence.[33]

The rules described above with regard to the identification, preservation and production of evidence and metadata should provide guidance in arbitration, even though arbitral discovery is more curtailed. Thus, parties to an arbitration (and their counsel) should have the same concern about preventing spoliation of evidence.

Sanctions for Spoliation in Litigation

The case law on spoliation was largely developed prior to ediscovery. The usual sanction for spoliation was drawing "a negative inference concerning the content of the missing evidence against a party that has intentionally, and for an improper purpose, destroyed, mutilated, lost, altered, or concealed evidence."[34] That means inferring that the spoliated evidence was unfavorable to the interests of the party who destroyed it. This remedy punishes the spoliator by giving the party seeking discovery the benefit of the evidence had it not been destroyed.

Judge Scheindlin has commented on the *in terrorum* effect of an adverse inference: "When a jury is instructed that it may 'infer that the party who destroyed the potentially relevant evidence did so "out of a realization that the [evidence was] unfavorable," the party suffering this instruction will be hard-pressed to prevail on the merits.'"[35]

Judge Scheindlin has also set forth the burden of proof in order to obtain an adverse inference based on spoliation: The party seeking this sanction "must establish:

> (1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a "culpable state of mind" and (3) that the destroyed evidence was "relevant" to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.[36]

The 2nd Circuit has reasoned that "[t]he sanction of an adverse inference may be appropriate in some cases involving the negligent destruction of evidence because each party should bear the risk of its own negligence."[37]

Judge Scheindlin found that the plaintiff in *Zubulake* had not established that the content of the defendant's destroyed backup tapes was "relevant," something much harder to do with lost computer data than with physical evidence of an accident. Nevertheless, she granted plaintiff's motion to instruct the jury to draw an adverse inference as to emails deleted after a particular date and emails that were lost when defendant's "backup tapes were recycled."[38]

Judge Scheindlin found that the defendant and its employees had been derelict in the duty to preserve edocuments. She also found that counsel (1) failed to communicate the direction not to destroy emails to employees with knowledge of the litigation, (2) failed to request files from a knowledgeable employee, and (3) failed to protect backup tapes.

Judge Scheindlin's quote on the previous page about the draconian effect of an adverse inference proved prophetic when the jury awarded the plaintiff in *Zubulake* $9.1 million dollars in compensatory damages and $20.1 million in punitive damages.

Other sanctions that courts have imposed for spoliation of evidence include an assessment of monetary damages and precluding the culpable party's witness from testifying. In *United States v. Philip Morris USA*,[39] the court precluded several corporate witnesses from testifying and imposed $2,750,000 in monetary sanctions against a company that deleted emails in violation of a preservation order.

According to one commentator, one court went so far as to enter a default judgment against a defendant for its "destruction or failure to preserve electronically stored data including metadata in violation of a discovery source."[40]

But in another case, the 2nd Circuit vacated the dismissal of a complaint as a sanction against a personal injury plaintiff who destroyed physical evidence (a tire and a tire-changing machine), finding that the lower court abused its discretion.[41] The 2nd Circuit stated that "the applicable sanction should be molded to serve the prophylactic, punitive, and remedial rationales underlying the spoliation doctrine." It continued:

> The sanction should be designed to: (1) deter parties from engaging in spoliation; (2) place the risk of an erroneous judgment on the party who wrongfully created the risk; and (3) restore "the prejudiced party to the same position he would have been in absent the wrongful destruction of evidence by the opposing party."

Sanctions for Spoliation in Arbitration

Arbitration is clearly different from litigation. But an adverse inference can be drawn in arbitration for spoliation of evidence and it can be just as draconian because the arbitrators hearing the evidence of spoliation are the ones who will be deciding the merits of the case.

In addition to drawing an adverse inference, arbitrators can shift to the spoliator the cost of additional discovery required because of the spoliation.

It is unlikely that arbitrators would sanction a party for spoliation by precluding testimony from witnesses. But arbitrators are the judges of the credibility of witness testimony and they decide the weight given to that testimony.

It would also be highly unusual for arbitrators to issue a default judgment against a party who fails to produce edocuments or metadata.

What arbitrators can be expected to do and should do is apply appropriate sanctions for spoliation of evidence while still assuring that all parties receive a fair hearing.

Effect of Change to FRCP Rule 37(f)

The amendment to FRCP Rule 37(f), also approved by the Supreme Court and effective Dec. 1, 2006, authorizes court-ordered sanctions for spoliation of electronic evidence as follows:[42] "Absent exceptional circumstances, a court may not impose sanctions on a party under this rule for failing to provide electronically stored information that is lost as a result of the routine, good-faith operation of an electronic information system."

The ability to issue sanctions under the amended rule does not apply to a failure to produce edocuments in good faith. The Committee Note states that "good faith in the routine operation of an information system may involve a party's intervention to modify or suspend certain features of that routine operation to prevent the loss of information, if that information is subject to a preservation obligation."

Thus, putting a litigation hold on routine recycling or destruction may be required. Nonetheless, the Sedona Guidelines state that "it is unreasonable to expect parties to take every conceivable step to preserve all potentially relevant data."[43] While courts respect the Sedona Guidelines, they are not required to follow them.

Conclusion

Extra care needs to be taken to preserve electronic data for anticipated or pending arbitration and to avoid spoliation of electronic evidence.

The law concerning waiver of privileges in ediscovery and spoliation of evidence is developing. The best protection against a waiver of legal privileges in arbitration is for partie.s to agree to a claw-back agreement and have it approved by the arbitral panel with a specific statement that the privilege is not waived as to parties and nonparties to the arbitration. In the absence of a claw-back agreement, parties can ask the panel to enter an order providing for the same protection. ■

ENDNOTES

1 205 F.R.D. 421, 428 (S.D.N.Y. 2002).

2 The term "metadata" is defined *infra* in the text at ns. 27 & 28.

3 The issues in this article are discussed under the Commercial Arbitration Rules of the American Arbitration Association. These rules are available on the AAA website at www.adr.org.

4 281 F. Supp. 2d 733, 735 (S.D.N.Y. 2003).

5 232 F.R.D. 160 (E.D.N.Y. 2005).

6 Edna Selan Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine*, 309 (4th ed. 2001).

7 *Id.* at 310-11.

8 Selan Epstein, *supra* n. 6, at 287-88.

9 *Zubulake v. Warburg*, 216 F.R.D. 280, 290 (2003) [Zubulake III]. See also *Eutectic Corp. v. Metco*, 61 F.R.D. 35, 42 (E.D.NY. 1973).

10 Andrew Rhys Davies, "'Claw-back' Agreements Lose Their Grip in Court," *National L.J.*, July 24, 2006, citing *Ciba-Geigy Corp. v. Sandoz Ltd.*, 916 F. Supp. 404 (D. N.J. 1995), and *Koch Materials Co. v. Shore Slurry Seal Inc.*, 208 F.R.D. 109, 118 (D. N.J. 2002).

11 *Ciba-Geigy Corp.*, *supra* n. 10.

12 Rhys Davies, *supra* n. 10.

13 U.S. Order No. 20, Court Rules, Administrative Office of the U.S. Courts, Federal Rules of Civil Procedure, Adoption and Amendments to Civil Rules.

14 For a general discussion of issues concerning electronic discovery, see The Sedona Conference, The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production (March 2003), available at www.thesedonaconference. org/publications_html.

15 The amendment to FRCP 26(b)(5) that concerns us here would add new subparagraph B. This subparagraph states:

> Information Produced. If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

16 *Hopson v. Baltimore*, 232 F.R.D. 228 (D. Md. 2005).

17 *Id.* at 230.

18 The commentary states, "[T]he proposed amendment does not address the substantive questions whether privilege or work product protection has been waived or forfeited" by following the procedures set forth in the amended rule.

19 *Hopson. supra* n. 16, 232 F.R.D. at 235.

20 For this proposition the *Hopson* court cited *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1426-27 (3d Cir. 1991) (holding that an agreement between a litigant and the Department of Justice providing that documents produced in response to a DOJ investigation would not waive the privilege, does not preserve the privilege as against a different entity in an unrelated civil proceeding). It also cited *Bowne v. AmBase Corp.*, 150 F.R.D. 465, 478-79 (S.D.N.Y. 1993) (nonwaiver agreement between producing party in one case not applicable to third party in another civil case).

21 *West v. Goodyear Tire & Rubber Co.*, 168 F.3d 776, 779 (2d Cir. 1999).

22 *Zubulake v. USB Warburg*, 220 F.R.D. 212, 218 (S.D.N.Y. 2004) (*Zubulake* IV).

23 *Zubulake v. USB Warburg*, 229 F.R.D. 422, 433-34 (S.D.N.Y. 2004) (*Zubulake* V) (motion for sanctions for failure to produce and tardy production of relevant evidence; decision addressed counsel's obligation to ensure that relevant information is preserved by giving clear instructions to the client to preserve such information and, perhaps more importantly, a client's obligation to heed those instructions). See also Steven A. Weiss, "Do Not Delete: Sanctions for Spoliation of Electronic Evidence," 13(2) *pp&d The Committee on Pretrial Practice & Discovery* 6 (ABA Section of Litigation Spring 2005).

24 *Zubulake* V, *supra* n. 23.

25 Weiss, *supra* n. 23, at 6.

26 *Id.*

27 Sedona Conference, *supra* n. 14, at 5.

28 *Id.* at 5. Thus, metadata could be the computer's automatic alteration of data, such as the insertion of the date of a revision of a letter, as opposed to its original date.

29 Sedona Conference, *supra* n. 14, at Technical Appendix E.

30 See generally, Marjorie A. Shields, "Discoverability of Metadata," 2006 *A.L.R.* 6th at 6.

31 *Id.*

32 *In re Verisign, Inc. Securities Litigation*, 2004 WL 2445243 (N.D. Cal. 2006).

33 *In re Vioxx Products Liability Litigation*, 2005 WL 756743 (E.D. La. 2005).

34 *Bronson v. Umphries*, 138 S.W.3d 844, 854 (Tenn. Ct. App. 2003).

35 *Zubulake* IV, *supra* n. 22, at 219-20.

36 *Zubulake* V, *supra* n 23.

37 *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99 (2d Cir. 2002).

38 *Zubulake* V, *supra* n. 23, at 436.

39 327 F. Supp. 2d 21 (D.D.C. 2004).

40 Weiss, *supra* n. 23 at 9.

41 *West*, *supra* n. 21, 168 F.3d at 779.

42 As noted above the Federal Rules of Civil Procedure do not apply in arbitration but can provide helpful guidance if issues covered by the rules or case law interpreting them arise.

43 Sedona Conference, *supra* n. 14, at 7.