# E-Discovery of Other-Acts Evidence: A Case Study in Procuring Critical Records in Employment and Other Civil Rights Cases

By Justin D. Cummins

## INTRODUCTION

In December 2006, newly adopted amendments to the Federal Rules of Civil Procedure expressly placed electronic documents on equal footing with paper records, and parties must now identify and produce responsive electronic data as part of their Fed.R.Civ.P. 26 Initial Disclosures and in response to discovery sought pursuant to Fed.R.Civ.P. 33-34, 37, and similar provisions.[1]

Although the Minnesota Rules of Civil Procedure have not been amended in this fashion – yet – plaintiffs in State Court should seek electronic records as they would in Federal Court because the electronic version of documents may contain invaluable evidence absent from the paper version. For example, the electronic version of a disciplinary or discharge memoranda will indicate when the documents were created, subsequently accessed, and altered – that is, data potentially probative of pretext as well as of discriminatory or retaliatory motive.

In addition, e-discovery may actually be easier to search and analyze, and it may uncover e-mails or other documents that have been "deleted," showing when the attempt to destroy records occurred. Such information may provide the basis for spoliation or other sanctions, including adverse-inference jury instructions or adverse judgments on the merits.

## I. KEY RECORDS IN EMPLOYMENT AND OTHER CIVIL RIGHTS CASES: OTHER-ACTS EVIDENCE

This article uses the discovery of other-acts evidence to outline the law and related tactical approach to extracting necessary documents from recalcitrant employers and other defendants. The analysis has this focus because evidence that a defendant has treated others besides plaintiff(s) in a discriminatory, harassing, and/or retaliatory fashion bolsters the underlying claims of discrimination, harassment, and/or retaliation. Such evidence is also directly relevant to pretext. In short, plaintiffs are much better positioned to defeat summary judgment motions and to prevail at trial when possessing other-acts evidence.

Despite the relevancy of such evidence, employers and other defendants may oppose this discovery and require plaintiffs to compel the data. Fortunately, the Eighth Circuit has repeatedly reaffirmed that other-acts evidence is plainly discoverable because its exclusion at trial would be reversible error.[2] Other-acts evidence is especially relevant when the record suggests the existence of a pattern or practice.[3]

## II. E-DISCOVERY OF OTHER-ACTS EVIDENCE

Plaintiff counsel should send a letter to defendants or, if defendants are already represented, to defendants' counsel as soon as strategically appropriate after plaintiffs first contemplate legal action. This document-preservation letter should identify the data categories and sources that may be subject to discovery as well as request preservation of back-up tapes and other storage media; in so doing, the letter puts defendants on notice that they must suspend their document-destruction procedures and affirmatively retain all material that could be discoverable in the contemplated litigation.

As set forth more fully below in Part III, a defendant's destruction or alteration of records and/or the underlying storage media – even if inadvertent – after receipt of the preservation letter opens the way for severe sanctions against defendants and even their counsel.

Plaintiff counsel should not rush to send the document-preservation letter, however, if that would compromise the value of the pre-suit investigation and/or agency processes.[4] Federal courts have held that a defendant's obligation to suspend its document-destruction procedures and to preserve affirmatively records may begin even before receipt of a document-preservation letter from plaintiff counsel: "[o]nce a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents."[5]

During the Fed.R.Civ.P. 26(f) meet-and-confer sessions with defense counsel as well as the Fed.R.Civ.P. 16 conferences with the Court, plaintiff counsel should be clear that plaintiffs want production of electronic records in their native and word-searchable format[6] from all data sources, including without limitation, the following:

- Desktops (office and, if used for work purposes, personal);
- Laptops (office and, if used for work purposes, personal);
- Smartphones (office and, if used for work purposes, personal);
- Personal digital assistants (e.g., BlackBerries);
- Digital media (e.g., DVDs and CDs);
- External storage devices (e.g., removable media and MP3 players);
- Mail servers (because data not stored on local hard drives may be there);

- File servers (because data not stored on local hard drives may be there); and
- Voice-mail message storage systems for land and cellular lines (office and, if used for work purposes, personal).

Prior to the Fed.R.Civ.P. 26(f) and 16 conferences, plaintiff counsel must independently assess which defendant documents, if any, are not "reasonably accessible," so that defense counsel cannot unnecessarily restrict the scope of e-discovery through unwarranted claims of inaccessibility. Indeed, a court could rule that a plaintiff cannot obtain certain documents, or that plaintiff will have to pay the potentially prohibitive costs of production, if the records sought are deemed inaccessible.[7]

Given the high stakes of this analysis, plaintiff counsel should seriously consider consulting with a computer forensics expert along with plaintiffs about data accessibility at the outset. Consultation with a computer forensics expert and plaintiffs will also make the Fed.R.Civ.P. 30(b)(6) deposition of defendants' information-technology personnel more effective.

To identify where and how most cost-effectively to obtain e-discovery, plaintiff counsel should procure key structural information in the early stages of litigation via Fed.R.Civ.P. 30(b)(6) depositions of information-technology personnel and others; this background information includes the following:

- A defendant's document retention and destruction policies, procedures, and practices concerning all electronically stored data, such as the handling of data on back-up tapes and the programs used in that regard during the relevant time period;
- A defendant's policies, procedures, and practices regarding the use of electronic data, such as file-naming, location-saving, and disc-labeling protocols during the relevant time period;
- The layout of a defendant's computer systems, such as the name, version, location, and time-period for use of the operating systems, shareware, and other software applications used during the relevant time period;
- The specifics of a defendant's computer networks, such as the quantity and configuration of servers and workstations as well as the communications capability, including the download and/or upload capacity to the mainframe computer system during the relevant time period;
- The identity and training of those responsible for the creation, operation, maintenance, modification, and/or other systems operations of a defendant's computer systems and the data stored therein during the relevant time period;
- The specifics on the interconnectivity between computer systems at a defendant's headquarters and offsite workstations, such as the methods of transmission, the types of data transmitted, and the identity of those who are authorized outside users as well as other personnel with the capacity to transmit data in that fashion during the relevant time period;
- The nature and capacity of a defendant's mechanisms for storing voice-mail messages during the relevant time period; and
- The most likely location of electronic records that might be discoverable and whether the deponent believes those records are reasonably accessible (as well as the basis for the deponent's opinion on accessibility).

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## III. OVERCOMING OBSTRUCTIONIST TACTICS

Even if defendants agree to produce other-acts data, they may attempt to limit the scope of other-acts data produced on the theory that the discovery seeks information covered by the attorney-client privilege or the work-product doctrine. As a threshold matter, the fact that others may also have experienced discrimination, harassment, and/or retaliation is not subject to a privilege.[8] In addition, documents generated in the ordinary course of business should not be work product or otherwise privileged – particularly if defendants defend the claims by asserting that they took timely and effective action regarding complaints about discrimination, harassment, and/or retaliation.[9] Importantly, the Federal Rules of Civil Procedure and the Eighth Circuit have long required litigants to supplement regularly their discovery responses throughout litigation and up to trial.[10] Therefore, plaintiffs should insist on production of records regarding pre- and post-suit evidence of discrimination, harassment, and/or retaliation throughout the discovery process.

Defendants may further attempt to circumscribe discovery by asserting that plaintiffs seek records that are not "reasonably accessible." This tactic underscores the importance of the Fed.R.Civ.P. 26(f) and Fed.R.Civ.P. 16 conferences as well as plaintiff counsels' ability to respond to unwarranted claims of inaccessibility. In any case, defendants have the burden of proving that the documents sought are, in fact, inaccessible.[11]

Even if the records requested are not "reasonably accessible," a plaintiff may still be able to obtain the data. Indeed, even material that has been "deleted" has long been discoverable under Fed.R.Civ.P. 34.[12] Whether such discovery will occur turns on consideration of the following:

(1) The specificity of the discovery request;
(2) The quantity of information available from other and more easily accessed sources;
(3) The failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed

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sources;

(4) The likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources;

(5) Predictions as to the importance and usefulness of the further information;

(6) The importance of the issues at stake in the litigation; and

(7) The parties' comparative resources.[13]

In some cases, plaintiff counsel may need to file motions to compel a "mirror image" of computer hard drives with potentially responsive information. As set forth more fully below, federal courts have compelled such in-depth discovery and required defendants to pay the fees and costs of the computer vendor in procuring the electronic data as a well as the fees and costs of plaintiff counsel in prosecuting the discovery motions. Such powerful remedies can be imposed pursuant to the inherent authority of the courts or under Fed.R.Civ.P. 37.[14] As the Supreme Court has long observed, conduct beyond the scope of Fed.R.Civ.P.37 can be nonetheless be remedied by courts' inherent power to "levy sanctions in response to abusive litigation practices."[15]

To obtain defendants' hard drives, plaintiff counsel must be prepared to show that a defendant's failure to produce requested discovery has been willful and has materially prejudiced a plaintiff's ability to prepare his or her case.[16] A plaintiff may be able to show willful non-compliance when a defendant has used lay personnel rather than a computer expert to review electronic data for responsiveness or when a defendant failed to suspend its document destruction practices after notice of potential litigation.[17] A plaintiff should be able to demonstrate prejudice when, for example, the discovery sought concerns other-acts evidence or additional highly probative information.[18]

To enhance the likelihood of a favorable ruling on a motion to compel the production of hard drives, plaintiff counsel should propose the use of a third-party computer forensics expert with protocols to ensure legitimate privilege and work-product claims, if any, can be asserted and evaluated before production of material to plaintiffs. In addition, plaintiff counsel should propose search terms for review of the hard drives that are reasonable in substance and scope, such as the names of plaintiffs, the names of the personnel engaged in apparent unlawful activity, "discriminat," "harass," "retaliat," "abuse," "abusive," "complain," "pattern," "incident," and "incidence."

Notably, even before the recent amendments to the Federal Rules of Civil Procedure, federal courts in Minnesota and nationwide have repeatedly allowed plaintiffs to make a copy of defendants' hard drives.[19] In ordering such production, federal courts have reiterated that the "removal of the hard drives is not an undue expense for a large corporation."[20]

Moreover, federal courts in Minnesota impose sanctions on defendants – including the costs of production, substantial financial penalties, and adverse-inference jury instructions – for failure to preserve and produce electronically stored information.[21] Judge Kyle succinctly explained why Minnesota courts will not tolerate gamesmanship and other discovery abuses related to electronic data: the "destruction of potentially relevant evidence [] prejudice[s] the plaintiffs in presenting their case. . . ."[22]

In addition, numerous federal courts across the country have repeatedly imposed an array of sanctions on defendants that obstruct e-discovery.[23] Significantly, these sanctions include default judgment against defendants for failing to preserve and produce electronic material.[24]

## CONCLUSION

The amendments to Fed.R.Civ.P. 16, 26, 34, and 37 substantially strengthen plaintiffs' position, both in Federal and State Court, in seeking vital evidence that may be unavailable anywhere else – that is, evidence found in electronic records. Plaintiff counsel should have a clear idea of what categories of records and data sources are accessible prior to commencing suit as well as use the litigation-hold process strategically to maximize the effectiveness of depositions and written discovery. In addition, Plaintiffs must not allow defendants to narrow the scope of discovery based on unwarranted claims of data inaccessibility or privilege. Indeed, courts have repeatedly sanctioned defendants severely for improperly obstructing discovery in this fashion.

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*E-Discovery of Other-Acts Evidence - Cont.*

[1] *See* Report of the Judicial Committee on Rules of Practice and Procedure, C-64 (Sept. 2005), available at http://www.uscourts.gov/rules/Reports/ST09-2005.pdf ("Judicial Conference Report").

[2] *Hawkins v. Hennepin Technical Ctr.*, 900 F.2d 153, 155-56 (8th Cir. 1990), cert. denied 498 U.S. 854 (1990); *see also Phillip v. ANR Freight Sys., Inc.*, 945 F.2d 1054, 1056 (8th Cir. 1991), cert. denied 506 U.S. 825 (1992); *Marquez v. Omaha Dist. Sales Office*, 440 F.2d 1157, 1160-61 (8th Cir. 1971).

[3] *See id.; Nat'l Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 118 (2002) (observing that other-acts of sex harassment are probative of a civil rights claim even when they occurred outside of the limitations period); *Jensen v. Henderson*, 315 F.3d 854, 859 (8th Cir. 2002) (same).

[4] Plaintiff counsel may be able to gather critical information and better position the case for litigation by not making a formal appearance until litigation commences.

[5] *Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003).

[6] This refers to production of the records in the original form in which a defendant created them, making the data more readily accessible and containing key information not found in subsequent versions of the documents.

[7] *See, e.g., Zubulake v. UBS Warburg, LLC*, 217 F.R.D. 309, 320-22 (S.D.N.Y. 2003).

[8] The fact of other complaints is both discoverable and admissible at trial. *Phillip*, 945 F.2d at 1056; *Hawkins*, 900 F.2d at 155-56; *Marquez*, 440 F.2d at 1160-61; *see also Morgan*, 536 U.S. at 118; *Jensen*, 315 F.3d at 859.

[9] *See, e.g., Long v. Anderson Univ.*, 204 F.R.D. 129, 136 (S.D. Ind. 2001).

[10] *See, e.g., Havenfield Corp. v. H & R Block, Inc.*, 509 F.2d 1263, 1272 (8th Cir. 1975), cert. denied 421 U.S. 999 (1975) ("The duty imposed by [Fed.R.Civ.P. 26] requires a party to disclose newly discovered facts which render a prior answer either incorrect or incomplete.").

[11] *Best Buy Stores, L.P. v. Developers Diversified Realty Corp.*, 2007 WL 333987, *1 (D.Minn. 2007) (ruling that the defendants failed to satisfy their burden of establishing the information sought was not reasonably accessible); Judicial Conference Report, C-48 (confirming the evidentiary burden remains with the non-moving party); *see also Ameriwood Industries, Inc. v. Liberman*, 2006 WL 3825291, *2 (E.D. Mo. 2006) (citing Fed.R.Civ.P. 26(b)(2)) ("On a motion to compel discovery . . ., the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost.").

[12] *Antioch Co. v. Scrapbook Borders, Inc.*, 210 F.R.D. 645, 652 (D.Minn. 2002) (ordering the defendants to allow the plaintiff's computer expert to make a mirror image of the defendants' hard drives); *see also Crown Life Insurance Co. v. Craig*, 995 F.2d 1376, 1382-84 (7th Cir. 1993) (ruling that electronic records are "documents" within the meaning of Fed.R.Civ.P. 34 and affirming the sanctioning of the defendant for failure to produce the requested data).

[13] *See* Fed.R.Civ.P. 26, Advisory Committee Note, 2006 Amendment, Subdivision (b)(2).

[14] *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991) (citations omitted) ("[I]t is firmly established that '[t]he power to punish for contempts is inherent in all courts.' This power reaches both conduct before the court and that beyond the court 's confines, for '[t]he underlying concern that gave rise to the contempt power was not . . . merely the disruption of court proceedings. Rather, it was disobedience to the orders of the Judiciary, regardless of whether such disobedience interfered with the conduct of trial.'"); *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 765 (1980) (reiterating that any conduct outside the express terms of Fed.R.Civ.P. 37 can be remedied by exercise of the Court's inherent powers); *Laclede Gas Co. v. G.W. Warnecke Corp.*, 604 F.2d 561, 565 (8th Cir. 1979) (approving sanctions against parties who violate the "letter and spirit" of the court's pretrial discovery orders); Fed.R.Civ.P. 37, Advisory Committee Note, 1970 Amendment, Subdivision (b) ("Rule 37(b)(2) should provide comprehensively for enforcement of all [discovery] orders.").

[15] *Roadway Express*, 447 U.S. at 765.

[16] *See, e.g., 3M v. Tomar Elec.*, 2006 WL 2670038, *11 (D.Minn. 2006) (MJD/AJB) (imposing the cost of current and future discovery, monetary sanctions, and adverse-inference jury instructions against the defendants for failing to impose "a litigation hold after being notified of this litigation.").

[17] *Id.*

[18] *Phillip*, 945 F.2d at 1056; *Hawkins*, 900

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F.2d at 155-56; *Marquez*, 440 F.2d at 1160-61; *see also Morgan*, 536 U.S. at 118; *Jensen*, 315 F.3d at 859.

[19] *Antioch* 210 F.R.D. at 652-53 (ordering the production of the defendant's hard drives because data could be lost through the ordinary use of those computers over time); *see also Ameriwood Industries*, 2006 WL 3825291 at *5 (ordering a mirror image of the defendant's hard drives for failure to produce requested e-mails); *Warner Bros. Records, Inc. v. Souther*, 2006 WL 1549689, *3-*4 (W.D.N.C. 2006) (ordering the production of the defendant's hard drive because the defendant failed to provide electronic copies of the computer's desktop and registry files in response discovery requests); *Physicians Interactive v. Lathian Sys., Inc.*, 2003 WL 23018270, *10 (E.D. Va. 2003) (ordering a mirror image of the defendant's hard drives in the ordinary course of discovery in that case); *Simon Prop. Group L.P. v. mySimon, Inc.*, 194 F.R.D. 639, 641 (S.D.Ind. 2000) (ordering the production of the defendant's hard drive because of "troubling discrepancies with respect to defendant's document production."); *Playboy Enters., Inc. v. Welles*, 60 F.Supp.2d 1050, 1054 (S.D. Cal. 1999) (ordering a mirror image of the defendant's hard drive because the need for the requested information outweighed the burden on the defendant).

[20] *Yancey v. General Motors Corp.*, 2006 WL 2045894, *2, *4 (N.D. Ohio 2006).

[21] *E*Trade Securities LLC v. Deutsche Bank AG*, 230 F.R.D. 582, 592-95 (D.Minn. 2005) (imposing an adverse-inference jury instruction and monetary sanctions against the defendants for the loss of electronic data); *see also Tomar Elec.*, 2006 WL 2670038 at *11.

[22] *E*Trade Securities*, 230 F.R.D. at 592.

[23] *Quantum Communications Corp. v. Star Broad., Inc.*, 473 F.Supp.2d 1249, 1271-79 (S.D. Fla. 2007) (entering default judgment and imposing monetary sanctions against the defendant because of discovery misconduct, including the withholding of e-mails); *Arista Records, LLC v. Tschirhart*, 241 F.R.D. 462, 465-66 (W.D. Tex. 2006) (entering default judgment against the defendant for deleting key electronic records); *Broccoli v. Echostar Communications Corp.*, 229 F.R.D. 506, 512 (D.Md. 2005). ("[The defendant] clearly acted in bad faith in its failure to suspend its email and data destruction policy or preserve essential personnel documents in order to fulfill its duty to preserve the relevantdocumentation for purposes of potential litigation. These bad faith actions prejudiced [the plaintiff] in his attempts to litigate his claims and measurably increased the costs for him to do so.");*Zubulake*, 217 F.R.D. at 322-24 (analyzing the seven factors for shifting the cost of electronic document production and ruling that the defendant must produce – at its own expense – all responsive e-mail on optical disks, active servers, and five backup tapes as selected by the plaintiff); *Wm. T. Thompson Co. v. General Nutrition Corp., Inc.*, 593 F. Supp. 1443, 1456-57 (C.D. Cal. 1984) (entering default judgment and imposing nearly $500,000 sanctions against the defendant because it deleted electronic documents that were not otherwise available); *see also PML North American, LLC. v. Hartford Underwriters Ins. Co.*, 2006 WL 3759914, *6-*9 (E.D. Mich. 2006) (entering default judgment for the failure to preserve electronic evidence and the bad-faith destruction of documents); *Yancey*, 2006 WL 2045894 at *2, *4 (requiring the defendant to produce – at its own expense "computer hardware, software, e-mails and 'computer forensics '"); *Phoenix Four, Inc. v. Strategic Resources Corp.*, 2006 WL 1409413, *9 (S.D.N.Y. 2006) (imposing monetary sanctions on the defendants and their counsel for discovery misconduct, including delayed document production and spoliation); *Cabinetware Inc., v. Sullivan*, 1991 WL 327959, *5 (E.D. Cal. 1991) (entering a default judgment as a sanction for the spoliation of electronic evidence).

[24] *Id.*

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perform a "retroactive" appraisal on the house, given the defects, at the time of sale.

**Exhibits**. Decide ahead of time which exhibits you will want to introduce. You no doubt have one hundred or more photographs of the damage, but select ten that really tell the story. Have the real estate documents—especially the disclosure statement—handy and, perhaps, pre-marked. A good way to publish photographs and documents to the jury is to have them pre-loaded on a laptop computer with a projector. That way, once your evidence is admitted, you can display it on a screen for the jury, rather than pass it around the jury box.

**Summary**. The bad house case is like all civil cases in these respects: the trial lawyer must know the facts, learn the law, and be prepared for trial. Although such a case may be "small," it can teach valuable litigation skills that we will have for the rest of our career as trial lawyers.

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[1] Minn. Stat. § 513.57, Subd. 2.

[2] When drafting the complaint, remember that fraud claims must be stated with particularity. Minn. R. Civ. P. 9.02.

[3] *Florenzano v. Olson,* 387 N.W.2d 168, 173-74 (Minn. 1986)

[4] *Id.* at 174 (citing Restatement (Second) of Torts § 552).

[5] Minn. Stat. § 513.57, Subd. 3.

[6] *Baker v. Surman*, 361 N.W.2d 108, 111 (Minn. Ct. App. 1985).

[7] *Berryman v. Riegert*, 175 N.W.2d 438, 443 (Minn. 1970).

[8] *Peterson v. Johnston*, 254 N.W.2d 360, 362 (Minn. 1997).

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