Bytes, Bits, and Bucks: Cost-Shifting and Sanctions in E-Discovery

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INTRODUCTION

Electronic discovery remains a hot litigation topic. Cost-shifting and sanctions dominate the case law. This paper discusses the current landscape of cost-shifting first under the *Zubulake* test, which redefined the cost-shifting debate in the federal courts in 2003, and then under the *Rowe* rubric which did the same a year earlier, finally under *Wigonton*, which offered a modified *Zubulake* test in 2004. It then presents a selection of e-discovery cases where sanctions were sought or awarded in state or federal courts in 2002-2004. It also offers practical guidelines for lawyers to reduce the costs of e-discovery compliance and avoid arguments over sanctions that frequently accompany it.

COST-SHIFTING

Who pays for electronic document production: the requesting party or the producing party? In those cases where the dollars at stake are large, the answer to this question going forward will likely begin with Judge Scheindlin's decisions in *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003) (*Zubulake I*) and *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280 (S.D.N.Y. 2003) (*Zubulake III*).[1]

Zubulake I

Zubulake I held that the responding party generally bears the cost of production of electronic evidence, including e-mail. The issue arose in the context of Zubulake's request for responsive e-mail from her former employer, UBS, in her gender-discrimination case in which she claimed a failure to promote her and retaliation for filing an EEOC charge.

Zubulake I held that cost-shifting was a function of whether electronic data is "accessible" or "inaccessible." If electronic data is accessible, it must be produced at the responding party's cost. If it is "inaccessible," a cost-shifting analysis is required. Both Zubulake and UBS had agreed that the

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[1] Judge Scheindlin has herself characterized yet a third opinion as "*Zubulake II*." This case is reported at 2003 WL 21087136 (S.D.N.Y. May 13, 2003) and involved an effort by Zubulake to reveal the contents of a deposition designated as confidential. Zubulake argued that the deposition contained evidence of securities' law violations and that she had a duty as a member of the New York Stock Exchange or the National Association of Securities Dealers to report the evidence. The district court held that she was not a member of either and, therefore, there was no reporting obligation, and further that the only reason to seek to remove the designation was to gain leverage over UBS which was not a reason to lift it. *Id.* at *3. All quotations in this paper omit footnote references except where otherwise noted.

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eight-factor cost-shifting test for electronic discovery articulated in *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421 (S.D.N.Y. 2002)[2] should be used to determine whether cost-shifting was appropriate. 217 F.R.D. at 316. However, the district court rejected the *Rowe* analysis in formulating the components of the cost-shifting equation.

By way of factual background, in discovery, UBS had produced 100 pages of e-mail. In contrast, Zubulake produced approximately 450 pages of e-mail correspondence she had retained from her employment. Understandably, Zubulake claimed that UBS either had additional responsive e-mails, or had improperly deleted them. 217 F.R.D. at 313.

UBS conceded that responsive e-mail existed on optical storage media[3] and that indexes of its magnetic backup tapes revealed that responsive e-mails were contained on a total of 94 tapes.[4] 214 F.R.D. at 314. After an initial discovery conference, UBS agreed to produce responsive e-mails from five individuals named by Zubulake for a sixteen-month period from the date of her hire to one month after her termination "if retrieval is possible." Despite this agreement, UBS did not try to retrieve e-mail from optical media or magnetic backup tapes. 217 F.R.D. at 313. Instead, UBS contended its initial production was sufficient, and that further efforts would be too costly.[5] Zubulake then filed a Motion to Compel Production and sought sanctions.

In addressing the merits, because Zubulake had herself produced approximately 450 pages of e-mail correspondence, Judge Scheindlin agreed that UBS either had additional responsive e-mails, or had deleted them. 217 F.R.D. at 317. Judge Scheindlin also noted that Zubulake had already produced an e-mail that might qualify as a "smoking gun" in support of her case.[6]

Judge Scheindlin explained that under Fed. R. Civ. Proc. 34, electronic documents, including e-mails, are indistinguishable from paper documents with respect to production obligations, even if the electronic documents in question "may have been deleted and now reside only on backup disks." 217 F.R.D. at 317. In paper discovery, the "presumption is that the responding party must bear the expense of complying with discovery requests."[7] "Any principled approach to electronic evidence must respect this presumption," the district court held. *Id.*

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[2] The eight factors in *Rowe* are: "(1) the specificity of the discovery requests; (2) the likelihood of discovering critical information; (3) the availability of such information from other sources; (4) the purposes for which the responding party maintains the requested data; (5) the relative benefits to the parties of obtaining the information; (6) the total cost associated with production; (7) the relative ability of each party to control costs and its incentive to do so; and (8) the resources available to each party." 205 F.R.D. at 429. *Rowe* is discussed below.

[3] UBS complied with SEC regulations by immediately preserving all e-mail for stockbrokers and dealers on easily searchable and restorable optical media. 217 F.R.D. at 314.

[4] UBS created daily, weekly, and monthly "snapshots" of other e-mail on not-so-easily searchable or restorable magnetic tape. The daily backup tapes were kept for twenty working days; weekly tapes were kept for one year; and monthly backup tapes were kept for three years. After each period, the tapes were recycled. 217 F.R.D. at 314.

[5] In objecting to Zubulake's Motion to Compel Discovery, UBS claimed the cost of producing e-mails on backup tapes would be prohibitive—approximately $300,000, exclusive of attorney time to review the e-mails. Later, in oral argument on the Motion to Compel, UBS counsel estimated the cost would be $175,000. 217 F.R.D. at 313.

[6] The e-mail suggested that Zubulake "be fired 'ASAP' after her EEOC charge was filed, in part so she would not be eligible for year-end bonuses." 217 F.R.D. at 312, n.8.

[7] *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978), a case dealing with traditional printed document discovery was cited for the proposition that "[u]nder [the discovery] rules, the presumption is that the responding party must bear the expense of complying with discovery requests, but [it] may invoke the district court's discretion under Rule 26(c) to grant orders protecting [it] from 'undue burden or expense' in doing so, including orders conditioning discovery on the requesting party's payment of the costs of discovery."

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Judge Scheindlin then explained that Rule 26(c)'s provision of an order protecting a party from "undue" burden or expense in discovery is appropriate only when the burden or expense "'outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.'" 217 F.R.D. at 318 (quoting from Fed. R. Civ. Proc. 26(b)(2)(iii)).[8]

According to Judge Scheindlin, the question of whether production of electronic evidence is unduly burdensome or expensive turns primarily on whether it is kept in an accessible or inaccessible format. 217 F.R.D. at 318. And whether electronic data is accessible or inaccessible depends on which of five types of media it is stored.[9]

Data which is (1) "online" or archived on current computer systems (such as hard drives), (2) "near-line" such as that stored on optical disks[10] or magnetic tape that is stored in a robotic storage library from which records can be retrieved in two minutes or less, or (3) "off-line" but in storage or archives, such as removable optical disk (e.g., CD-ROM or Digital Versatile Disc (DVD)) or magnetic tape media (e.g., Digital Linear Tape (DLT) tape), are readily accessible using standard search engines because the data are retained in machine readable format. 217 F.R.D. at 318-320.

On the other hand, (4) routine disaster recovery backup tapes that save information in compressed, sequential, and nonindexed format, and (5) erased, fragmented, or damaged data, are generally inaccessible, because a time-consuming, expensive restoration process is required to obtain information. 217 F.R.D. at 319-320.

In deciding whether to permit cost-shifting, Judge Scheindlin first concluded that the *Rowe* test was improper because it generally favors cost-shifting, and it had been uniformly applied to make cost-shifting the rule, not the exception. 217 F.R.D. at 320. Judge Scheindlin found that as applied, the *Rowe* test improperly undercuts the presumption that the producing party pay by failing to include all the cost-shifting criteria in Fed. Rule Civ. Proc. 26(b)(2), by weighting all factors equally, and by not developing a full factual record. *Id.*

Instead, Judge Scheindlin held, "the cost-shifting analysis must be neutral; close calls should be resolved in favor of the presumption" that the responding party pays. 217 F.R.D. at 320. Judge Scheindlin crafted a three-step analysis for resolving disputes regarding the scope and cost of discovery of electronic data. First, the district court must "thoroughly understand the responding party's computer system, both with respect to active and stored data." For data stored in accessible data format, "the usual rules of discovery apply: the responding party should pay the cost of producing

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[8] The district court had earlier noted that since virtually every case will involve electronic evidence, "undue burden or expense" does not automatically arise simply because electronic evidence is involved. 217 F.R.D. at 317. Indeed, Judge Scheindlin made this observation: "Many courts have automatically assumed that an undue burden or expense may arise simply because electronic evidence is involved. This makes no sense. Electronic evidence is frequently cheaper and easier to produce than paper evidence because it can be searched automatically, key words can be run for privilege checks, and the production can be made in electronic form obviating the need for mass photocopying." *Id.* at 318.

[9] At note 61, Judge Scheindlin cites the work of the Sedona Conference, as drawing a similar distinction between "active" and "inactive" data. See The Sedona Conference, The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production (March 2003), Principles 8 and 9, pp. 29-32, available at www.thesedonaconference.org/publications_html. The Sedona Conference's final report on this subject is due to be published early in 2004.

[10] Judge Scheindlin explained that optical disks "are easily searchable using a program called Tumbleweed. Using Tumbleweed, a user can simply log into the system with the proper credentials and create a plain language search. Search criteria can include not just 'header' information, such as the date or the name of the sender or recipient, but can also include terms within the text of the e-mail itself." 214 F.R.D. at 315.

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responsive data." A court should limit cost-shifting "*only*" to situations where electronic data is "relatively inaccessible, such as in backup tapes." 217 F.R.D. at 324. (Emphasis in original).

Second, "because the cost-shifting analysis is so fact-intensive, it is necessary to determine what data may be found on the inaccessible media." The district court thought that a sensible approach in most cases is to require the responding party to restore and produce responsive documents from a representative sample of such inaccessible media. 217 F.R.D. at 324.

Third, to remedy the imbalance in the *Rowe* test,[11] Judge Scheindlin concluded that in conducting any cost-shifting analysis, the following seven factors should be considered, "weighted in more-or-less the following order":

1. The extent to which the request is specifically tailored to discover relevant information.
2. The availability of such information from other sources.
3. The total cost of production, compared with 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.
7. The relative benefits to the parties of obtaining the information.

217 F.R.D. at 324.

In applying this framework to Zubulake's request for responsive e-mail from UBS, the district court found that e-mail on UBS active user e-mail files and archival optical media were very accessible and easy to retrieve. Accordingly, Judge Scheindlin ordered UBS to produce all responsive e-mail from active user e-mail files and optical media, at UBS's cost. 217 F.R.D. at 324.

However, the district court recognized that the information on the 94 magnetic backup tapes was not easily accessible. Adopting a backup tape "sampling" approach first embraced in *McPeek v. Ashcroft*, 202 F.R.D. 31, 34 (D.D.C. 2001), the district court ordered UBS to produce, at its expense, responsive e-mails from any 5 of the 94 backup tapes selected by Zubulake. UBS was to file an affidavit thereafter with the results of the search, and of the time and money spent in restoring this "sample" of e-mail backup tapes. After reviewing the contents of the UBS backup tape sample, and its certification, Judge Scheindlin said she would conduct the appropriate cost-shifting analysis. 217 F.R.D. at 324.

Zubulake III

Zubulake III contains Judge Scheindlin's cost-shifting analysis in which she ruled that UBS should pay 75 percent of the cost of production and Zubulake should pay the remaining 25 percent. This ruling followed the results of an initial analysis of five out of what turned out to be 77, not 94, backup tapes. 216 F.R.D. at 282. This restoration resulted in 6,203 unique e-mails. After filtering for references to plaintiff, 1,075 unique e-mails remained. Following a privilege review by defendant's

[11] Judge Scheindlin held that the *Rowe* test failed to consider "the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues," which are all factors in evaluating whether a burden or expense is "undue" under Fed. R. Civ. P. 26(b)(2)(iii). Judge Scheindlin also felt that *Rowe's* emphasis on the resources available to each party improperly focused the inquiry on the absolute wealth of each party rather than on "the total cost of production as compared to the resources available to each party." 217 F.R.D. at 321. Hence, she combined *Rowe* factors (n.2 *supra)* one and two and eliminated the fourth factor in addition to adding factors tied to Rule 26(b(2)(iii)'s undue burden or expense analysis.

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outside counsel, defendant produced approximately 600 e-mails deemed responsive to Zubulake, six times the number of e-mails initially produced. 216 F.R.D. at 282.

The district court then applied its seven-factor test from *Zubulake I.* The district court reiterated that the first two factors of its cost-shifting test -- together known as the "marginal utility test" first announced in *McPeek v. Ashcroft, supra* -- should be given the greatest weight: "The more likely it is that the backup tape contains information that is relevant to a claim or defense, the fairer it is that the [responding party] search at its own expense. The less likely it is, the more unjust it would be to make the [responding party] search at its own expense. The difference is 'at the margin.'" 202 F.R.D. at 34.

As to the first factor, the district court determined that the e-mails located on the backup tapes did not contain direct evidence of gender discrimination, but that they were relevant and demonstrated that "the discovery request was narrowly tailored to discover relevant information."[12] 216 F.R.D. at 285-286.

As to the second factor addressing availability of information from other sources, Judge Scheindlin found that a significant number of responsive e-mails, including some particularly damaging to defendant, had not been preserved, and only existed on backup tapes. While the district court acknowledged that some of the substance of the 600 e-mails was available from other sources (*e.g.*, printed copies), a good deal of it could be found only on backup tapes. 216 F.R.D. at 286-287.

Judge Scheindlin concluded that direct evidence of discrimination "may only be available through restoration" of the backup tapes but recognized that "the existence of that evidence is still speculative." 216 F.R.D. at 287. As a result, the district court held that Zubulake had demonstrated that the marginal utility of additional restoration is "*potentially* high." *Id.* "All-in-all," because defendant bears the burden of proving that cost-shifting is warranted, Judge Scheindlin concluded that "the marginal utility test tips slightly against cost-shifting." *Id.*

As to the third factor, based on responses from both sides on what a jury would award if liability were found, Judge Scheindlin determined that Zubulake's claims had the potential for a multimillion-dollar recovery, especially given that Zubulake had earned $650,000 per year while employed.[13] Therefore, the estimated cost of restoration was not significantly disproportionate to the value of the case. The district court concluded this factor weighed against cost-shifting. 216 F.R.D. at 287-88.

Applying the fourth factor, the district court recognized that defendant had more economic resources than plaintiff. It also acknowledged the amount of plaintiff's claim ($19 million), and the possibility that her attorneys could advance expenses. "Thus, while this factor weighs against cost-shifting, it does not rule it out." 216 F.R.D. at 288.

Next, the district court found that because a vendor was required for restoration, neither party had the ability to control restoration costs. As such, the district court found this factor to be neutral toward cost-shifting. 216 F.R.D. at 288.

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[12] At oral argument in support of her motion for an order compelling UBS to produce all remaining backup e-mails at its expense, plaintiff proffered 68 e-mails (of the 600 received), several of which had not previously been produced. 216 F.R.D. at 285. According to Judge Scheindlin, these e-mails were relevant ("they tell a compelling story of the dysfunctional atmosphere surrounding UBS's U.S. Asian Equities Sales Desk") and "presumably" they "are reasonably representative of the seventy-seven backup tapes." *Id.*

[13] The district court noted as a result: "If Zubulake prevails, her damages award undoubtedly will be higher than that of the vast majority of Title VII plaintiffs." 216 F.R.D. at 288.

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With respect to the sixth factor, Judge Scheindlin determined that there was nothing unique about the discrimination claims in the case. Therefore, this factor was neutral. 216 F.R.D. at 289.

Finally, Judge Scheindlin explained that "there can be no question" that the relative benefits to plaintiff of restoration of this data outweighed the benefits to defendant.[14] "Accordingly, this factor weights in favor of cost-shifting." 216 F.R.D. at 289.

Weighing all seven factors, the district court concluded that some degree of cost-shifting was warranted because of the possibility that the continued production could produce valuable new information. In determining the extent of cost-shifting, Judge Scheindlin concluded that defendant should pay the "lion's share" of the costs, but that given the somewhat speculative nature of plaintiff's additional discovery, plaintiff should bear some measure of the cost. Explaining that "precise allocation is a matter of judgment and fairness rather than a mathematical consequence" of the seven factors, the district court held:

> *Because the seven factor test requires that UBS pay the lion's share, the percentage assigned to Zubulake must be less than fifty percent. A share that is too costly may chill the rights of litigants to pursue meritorious claims. However, because the success of this search is somewhat speculative, any cost that fairly can be assigned to Zubulake is appropriate and ensures that UBS's expenses will not be unduly burdensome. A twenty-five percent assignment to Zubulake meets these goals.*

216 F.R.D. at 289-90.

In determining if this result should apply to the entire cost of the production, the district court explained that the cost of *restoring and searching* the remaining backup tapes was estimated to be $165,954.67, while the estimated cost of *producing* them (adding attorney and paralegal costs) was $273,649.39. The district court stated that, as a general rule, "where cost-shifting is appropriate, only the costs of restoration and searching should be shifted." On the other hand, the responding party "should *always* bear the cost of reviewing and producing electronic data once it has been converted to an accessible form." [15] 216 F.R.D. at 290. (Emphasis in the original.) This is because (1) the producing party has the exclusive ability to control the cost of reviewing the documents; and (2) once the data have been restored to an accessible format, "cost-shifting is no longer appropriate." 216 F.R.D. at 290-91. Accordingly, Judge Scheindlin ordered restoration and searching of the remaining 72 backup tapes with defendant bearing 75 percent and plaintiff bearing 25 percent of the estimated cost of $165,954.67. [16] Defendant would solely bear the $107,694.72 cost of production review.[17]

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[14] "Although Zubulake argues that there are potential benefits to UBS in undertaking the restoration of these backup tapes--in particular, the opportunity to obtain evidence that may be useful at summary judgment or trial--there can be no question that Zubulake stands to gain far more than does UBS, as will typically be the case. Certainly, absent an order, UBS would not restore any of this data of its own volition." 216 F.R.D. at 289.

[15] Judge Scheindlin compared the e-mail on defendant's backup tapes to paper records locked in a sophisticated safe to which no one has the key or combination. In such cases, reasoned Judge Scheindlin, the parties should sometimes share the cost of breaking into the safe to access these documents, but once having done so, the usual rules of discovery apply.

[16] Judge Scheindlin noted that the parties could avoid substantial review costs by entering into a "clawback" agreement to forego privilege review altogether in exchange for the return of any inadvertently produced documents.

[17] Judge Scheindlin posited that defendant could choose to reduce these costs by employing contract attorneys or a first-year associate to review the documents, rather than choosing to use a senior associate at a "top New York City law firm" at $410 per hour, although she acknowledged these surrogates might not do the job as well.

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In closing, Judge Scheindlin noted that if defendant felt aggrieved by having to pay the bulk of the cost of restoration and searching of its e-mail backup tapes, it had a remedy: defendant could attempt to shift such costs, together with attorney's fees, back to plaintiff, by using the "confession of judgment" provisions of Fed. R. Civ. P. 68.[18] 216 F.R.D. at 291.

Judge Scheindlin had another opportunity to consider the application of her cost-shifting factors in *Xpedior Creditor Trust v. Credit Suisse First Boston (USA), Inc.*, 2003 U.S. Dist. LEXIS 17497 (S.D. N.Y. October 1, 2003). In this case, plaintiff argued that defendant, as a successor to Donaldson Lufkin & Jenrette Securities Corp. (DLJ), breached its underwriting contracts with class members "by requiring extra payments from investors in return for receiving allocations of IPOs that it was underwriting." *Id.* at *1. The documents sought by plaintiffs were "inaccessible" in Judge Scheindlin's parlance. Some of the documents were stored on optical disks but the retrieval system for these disks had been decommissioned in connection with an earlier merger. Other documents were stored on digital linear tapes. However, there was no "baseline system or complete backup on which to restore" the documents on the tapes. Defendant had spent "hundreds of thousands of dollars" to restore the former systems but, "as a factual matter, the DLJ records were inaccessible at the time this litigation commenced." *Id.* at *14. Because of their inaccessibility, the district court turned to the Zubulake cost-shifting factors. The district court found that the first four factors weighed against cost-shifting: (1) requests were appropriately tailored; (2) the documents being sought were otherwise unavailable; (3) the cost of production ($400,000) was insignificant in comparison to the damage claims ($7 billion for the class or $68.7 million for plaintiff alone); and (4) CSFB had net revenues of $5.7 billion while plaintiff was bankrupt.

The district court found the remaining factors neutral: (5) the task of restoring servers to retrieve the documents was essentially done and plaintiff had agreed to work with defendant to minimize costs; (6) the case did not involve public policy issues that might affect cost-shifting; and (7) both parties would benefit from the production since defendant had to restore many of its systems in connection with production obligations in another matter. Based on this analysis, cost-shifting was not ordered. *Id.* at *16-19.

The Rowe Test

While *Zubulake*'s "accessibility" and "inaccessibility" standard will likely govern much of the cost-shifting case law going forward, a result not dissimilar from the cost-shifting outcome in *Zubulake III* was reached under the *Rowe* standard by Magistrate Judge Vescovo in *Medtronic Sofamor Danek, Inc. v. Sofamor Danek Holdings, Inc.*, 2003 U.S. Dist. LEXIS 8587 (W.D. Tenn. May 13, 2003). The case involved "trade secrets, patents, and trade information" in the field of spinal fusion medical technology. *Id.* at 4. At issue was the production of approximately 993 computer network backup tapes with 61 terabytes of data and electronic files of individuals that contained 300 gigabytes of data.

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[18] "See Fed.R.Civ.P. 68 ('At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued. . . . If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer'); *see also Lyte v. Sara Lee Corp.*, 950 F.2d 101, 103 (2d Cir. 1991) (holding Rule 68 "costs" include attorney's fees, in the Title VII context) (citing *Marek v. Chesny*, 473 U.S. 1, 9, 105 S.Ct. 3012, 87 L.Ed.2d 1 (1985))." 216 F.R.D. at 291, n.85.

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The magistrate judge focused on the *Rowe* question of whether the cost of responding to an electronic discovery request is "undue": "The inquiry in a cost-shifting analysis is not necessarily whether the cost is substantial but where it is 'undue.'" *Id.* at *10. The magistrate judge then evaluated the facts under *Rowe's* balancing test of eight factors:

> *(1) the specificity of the discovery requests; (2) the likelihood of discovering critical information; (3) the availability of such information from other sources; (4) the purposes for which the responding party maintains the requested data; (5) the relative benefit to the parties of obtaining the information; (6) the total cost associated with the production; (7) the relative ability of each party to control costs and its incentive to do so; (8) the resources available to each party.*

Id. at *11 (citing *Rowe Entertainment*, 205 F.R.D. at 428-29).

Here, the requesting party (the defendant) "has done little to narrow" its requests for electronic discovery (Factor (1)) which favored cost-shifting. Defendant also rejected a proposal by Medtronic to assess the relevance of backup tapes by restoring sample tapes. Defendant "offers little evidentiary support for his position that Medtronic's e-mail archives are seething with relevant communications." *Id. at *15-16.* (Factor (2).) Factor (4) also favored cost-shifting because defendant had made no showing that "the entire spectrum of backup tapes will contain information relevant [to] the cause's claims or defenses." *Id.* at *23. The cost of production also favored cost-shifting. The magistrate judge estimated the costs of restoring 996 tapes at between $597,000 and $1.1 million and the cost of searching the tapes may be in the range of $3.2 million. These costs were about 2 percent of the amount being claimed but were "undue" "primarily due to the requesting party's decision not to limit the scope of production." *Id.* at *28. For the same reason factor (7) favored cost-shifting because the requesting party had not limited the scope of his discovery requests. Only factor (3) weighed against cost-shifting (information was not available from any other source). The magistrate judge regarded factors (5) and (8) as neutral.

The magistrate judge then set forth a detailed protocol that would govern electronic document production with respect to individual users' files and backup tapes as well as searches to be conducted and the costs of producing hard copy or electronic copies of the documents to be produced. *Id.* at *32-52. The magistrate judge required 30 percent cost-shifting of the costs of restoring year-end backup tapes 1997-2002 plus all backup tapes for the 30 days preceding the date of the order. The costs would cover extraction of data for 40 individuals identified by the magistrate judge, searching the data using keywords identified in an Appendix A to the magistrate judge's order, and de-duplicating[19] the remaining data. "All data that remains after this search will be converted to standard images and isolated." *Id.* at *40-41. To assist the parties, the magistrate judge also ordered them to retain a neutral computer expert and to equally pay for the costs of the services of this expert. *Id.* at *50-51.

In yet another cost-shifting decision decided under *Rowe's* eight-factor, not *Zubulake's* seven-factor, test, *Computer Associates International, Inc. v. Quest Software, Inc.*, 2003 WL 21277129 (N.D. Ill. June 3, 2003), the district court denied a motion by defendants to require plaintiffs to pay certain consulting costs estimated at between $28,000 and $40,000. The case involved copyright

[19] "De-duplication" or "de-duping" is "the process of comparing electronic records based on their characteristics and removing duplicate records from the data set." The Sedona Principles for Electronic Document Production, p. 41 (see n.9 *supra*).

infringement and misappropriation of trade secrets relating to plaintiff's Enterprise Database Administration software source code.

Plaintiff had requested that defendants make available for electronic imaging "the work and home computer hard drives" of six employees. Defendants gathered 11 hard drives in response to the request and imaged the hard drives. Defendants, however, concluded that 8 of the 11 drives "contain privileged information relating directly to this litigation." They objected to the production until the privileged information "could be located and permanently deleted." Defendant Quest contacted a third-party computer consultant to copy the 8 images and search for privileged communications. Payment for the cost of this work then came into controversy.

The district court cited *Rowe's* eight-factor test but denied the request for cost-shifting by analogizing the cost to that of a privilege review of paper documents which would not be shifted to a requesting party:

> *Plaintiff's requests were as specific as possible--it asked only for images of the hard drives that it has a reasonable belief contained information relevant to the use of the EDBA source code. Defendants do not dispute that they had the source code in their possession, making it likely that a thorough search of the drives will lead to the discovery of some relevant information. The search will likely reveal what uses defendants made of the source code and whether they disclosed it to other parties. Defendants are clearly in the best position to control the costs and scope of the consultation and have the incentive to do so. The review is largely for defendants' protection and benefit, and shifting the costs of the consultation would remove all incentive for them to narrowly tailor the review of the drives.*
>
> *In* Byers *and* Rowe, *courts decided to shift some costs of discovery requests when the actual physical disclosure of the information would prove very costly.* Byers, *2002 WL 1264004 at *11;* Rowe, *205 F.R.D. at 431. Defendants here seek to recover the costs of their preventive measures undertaken before the actual disclosure of the information to plaintiff. These costs are analogous to the review of documents for privileged information and should not be shifted to the requesting party. See* Byers, *2002 WL 1264004 at *12.*

Id. at *1-2 (Citations omitted).

This journey through the recent cost-shifting case law will end with a discussion of the two cases relied upon in *Quest Software: Byers* and, the place where it all began, *Rowe*, and then examines the newest entrant into the cost-shifting factor field, *Wiginton et al. v. CB. Richard Ellis, Inc.*, 2004 U.S. Dist. LEXIS 15722 (N.D. Ill. August 9, 2004).

Byers et al. v. Illinois State Police et al., 53 Fed. R. Serv. 3d 740, 2002 WL 1264004 (N.D. Ill. June 3, 2002) was an employment discrimination case brought against the Illinois State Police. Plaintiffs sought archived e-mails. Defendants claimed it would be unduly burdensome for them to search backup tapes that contained archived e-mail. The costs to search were estimated to be between $20,000 and $30,000.

The district court heard testimony from the Public Service Administrator with Information Services for the State Police who explained that the department had switched e-mail programs to Lotus Notes which "cannot read the e-mails contained on the backup tapes." To search the backup tapes, the

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department "would have to license the old e-mail program at a cost of $8000 per month." It would also be time-consuming. "One backup tape exists for each day of the year. To search the tapes for the previous eight years, an ISP systems programmer would have to download a batch of tapes to computer disks and then run a search of the downloaded information. Due to disk-space constraints, a programmer can download only about ten tapes at one time. It would take at least four weeks to download all of the backup tapes from 1994 to the present. It would take additional time to search the downloaded information for responsive e-mails." Given the costs, the district court concluded that the plaintiffs' e-mail request "would impose a significant financial burden on the defendants." 2002 WL 1264004 at *11. (Citation omitted.) The district court also considered the "marginal utility" test from *McPeek v. Ashcroft, supra*: "The more likely it is that the archived e-mails contain relevant information, the fairer it is that the responding party bear the cost of production; the less likely it is, the more unjust it is to make that party bear the cost." *Id.* (citing 202 F.R.D. at 34).

Plaintiffs argued that the archived e-mail included one that referred to Byers as a "dyke" and to her supervisor as a "nigger." Defendants disputed the e-mail existed and challenged plaintiffs to provide proof of the existence of the alleged e-mail. Byers provided an affidavit stating she learned of the derogatory e-mail from one of three individuals. So the district court permitted plaintiffs to depose the three individuals.

> *None of these individuals confirmed the existence of the e-mail. Two of the individuals denied any knowledge about any derogatory e-mails. The remaining individual stated that although he remembers talking to Byers about "inflammatory e- mails," he never observed the e-mails himself. He also did not remember if those inflammatory e-mails referred to Byers as a "dyke" and her supervisor as a "nigger." Most importantly, he did not know whether he told Byers about the e-mails or whether Byers told him. The Court concludes that the plaintiffs have not establish (sic) that this e-mail ever existed. Thus, the plaintiffs have not shown that a search of the archived e-mails would likely result in the discovery of relevant information.*

Id. The district court then concluded that if plaintiffs wanted the archived e-mails they would have to pay the cost of production.

> *If the plaintiffs wish to have the archived e-mails produced, they will have to pay the cost of licensing the old e-mail program. In addition to the reasons stated above, shifting part of the cost of production is warranted because the plaintiffs are in the best position to control the total cost of production. In this case, the plaintiffs contend that they were passed over for promotions in favor of less qualified male candidates. The plaintiffs believe that the requested e-mails may reveal the "real" reasons that they were not promoted. But rather than limit their request to the months leading up to each time that they were allegedly passed over for a promotion-the time periods most likely to have e-mails pertaining to the promotional decisions-the plaintiffs requested e-mails from every day for the last eight years. Mr. Phillips testified that the most significant factor contributing to the expense of the proposed search is the plaintiffs' insistence that the defendants search backup tapes for every day from 1994 to the present. Requiring the plaintiffs to pay part of the cost of producing the e-mails will provide them with an incentive to focus their requests. Accordingly, this portion of the plaintiffs' motion is granted to the extent that they bear the cost of licensing the*

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