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

[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

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[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*).

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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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old e-mail program, though the defendants shall continue to bear the expense of any review for responsive documents, as well as for privileged or confidential material.

Id. at *12 (Internal citations omitted).

Rowe Entertainment, Inc. v. The William Morris Agency, Inc et al., 205 F.R.D. 421 (S.D.N.Y. 2002) (Francis, M.J.) *aff'd* 2002 U.S. Dist. LEXIS 8308 (S.D. N.Y. May 8, 2002) also resulted in cost-shifting to the requesting party. Plaintiffs were black concert promoters "who contend that they have been frozen out of the market for promoting events with white bands by the discriminatory and anti-competitive practices of the defendants." Defendants were either booking agencies that represented white artists or promoters like the plaintiffs. The electronic discovery questions focused on five defendants, the William Morris Agency (WMA), Creative Artists Agency, LLC (CAA), Monterey Peninsula Artists (Monterrey), SFX Entertainment Inc. (SFX) and QBQ Entertainment (QBQ).

Plaintiffs sought the following:

1. A sample of eight sessions of archive tapes for 30 e-mail accounts at William Morris Agency, at a cost estimated by plaintiffs to be between $24,000 and $87,000 "depending upon assumptions about the volume of e-mail and the amount of duplication";
2. Creation of a mirror image of the hard drive of each personal computer at Monterey after which plaintiffs would "identify potentially responsive directories and files, convert them to a common format, and create a single database that could be searched for privilege and responsiveness." Plaintiffs estimated the cost at $10,000-$15,000.
3. Utilizing a sampling process to review pre-1999 e-mails at CAA at a cost of $20,000, and reviewing quarterly samples for 30 e-mail accounts for 1999 e-mails at a cost of $40,000-$50,000.
4. At SFX and QBQ, reviewing the hard drives of approximately 60 users who store e-mail on their individual computers. Plaintiffs planned to take an image of the hard drive and create a database of potentially responsive files at an estimated cost of $64,000.

Id. at 427-428. Applying its eight-factor test, the district court concluded to shift these costs.

Six of the eight factors favored cost-shifting, according to the district court: (1) Plaintiffs' demands were "extremely broad." (2) There was "no showing that the e-mails are likely to be a gold mine. No witness has testified, for example, about any e-mail communications that allegedly reflect discriminatory or anti-competitive practices. Thus, the marginal value of searching the e-mails is modest at best, and this factor, too, militates in favor of imposing the costs of discovery on the plaintiffs." (4) There was "no showing that the defendants access either their back-up tapes or their deleted e-mails in the normal course of business." (5) The computer data at issue "is not regularly used by the defendants," so "cataloguing or searching it would have little business value to them." Recovery of e-mail "will not benefit the defendants in this litigation since the e-mails are not relevant to any issue on which the defendants bear the burden of proof." (6) The "magnitude" of the cost "favors cost-shifting." (7) Where the discovery process is going to be "incremental," it is "more efficient to place the burden on the party that will decide how expansive the discovery will be." "The plaintiffs here will be able to calibrate their discovery based on the information obtained from initial sampling. They are in the best position to decide whether further searches would be justified." *Id.* at 429-32.

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Factor 3 weighed against cost-shifting. There was no showing "that the defendants' e-mails are generally available other than by a search of the defendants' hard drives or back-up tapes." The representations by defendants "that 'important' e-mails were probably printed out are entirely speculative. Accordingly, this consideration favors requiring the defendants to produce the e-mails at their own expense." *Id.* at 430. And factor 8 was regarded as neutral: "Although the plaintiffs argue that the defendants are some of the most powerful players in the concert promotion business, the plaintiffs purport to be able to compete with them in the marketplace. The relative financial strength of the parties, then, is at most a neutral factor." *Id.* at 432.

But what of privileged documents? How were the defendants to protect against their disclosure under the district court's ruling? The district court observed:

> *Apparently, the defendants retained privileged or confidential documents in electronic form but failed to designate them to specific files. This situation is analogous to one in which a company fails to shred its confidential paper documents and instead leaves them intermingled with non-confidential, discoverable papers. The expense of sorting such documents is properly borne by the responding party, and the same principle applies to electronic data. Accordingly, if any defendant elects to conduct a full privilege review of its e-mails prior to production, it shall do so at its own expense.*

Id. at 432. This holding may have created a Hobson's choice for defendants, as the district court then announced this protocol, which the parties were permitted to modify by agreement:

1. Plaintiffs "shall designate one or more experts who shall be responsible for isolating each defendant's e-mails and preparing them for review." Defendants "shall have the opportunity to object to any expert so designated. The expert shall be bound by the terms of this order as well as any confidentiality order entered in the case."
2. Plaintiffs' expert "shall then obtain a mirror image of any hard drive containing e-mails as well as a copy of any back-up tape. The plaintiffs may choose to review a sample of hard drives and tapes in lieu of all such devices." Defendants' technical personnel were to render "assistance and cooperation."
3. "Plaintiffs' counsel shall formulate a search procedure for identifying responsive e-mails and shall notify each defendant's counsel of the procedure chosen, including any specific word searches. Defendants' counsel may object to any search proposed by the plaintiffs."
4. "Once an appropriate search method has been established, it shall be implemented by the plaintiffs' expert. Plaintiffs' counsel may then review the documents elicited by the search on an attorneys'-eyes-only basis. The plaintiffs may choose the format for this review; they may, for example, view the documents on a computer screen or print out hard copy." Once the plaintiffs identified material e-mails, "they shall provide those documents to defendants' counsel in hard copy form with Bates stamps. The plaintiffs shall bear all costs associated with the production described thus far. However, the defendants shall pay for any procedures beyond those adopted by the plaintiffs, such as the creation of TIFF files."
5. "Defendants' counsel shall then have the opportunity to review the documents produced in order to designate those that are confidential and assert any privilege. Any purportedly confidential or privileged document shall be retained on an attorneys'-eyes-only basis until any dispute about the

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designation is resolved. The fact that such a document has been reviewed by counsel or by the expert shall not constitute a waiver of any claim of privilege or confidentiality."[20]

6. "Should any defendant elect to review its database prior to production, it shall do so at its own expense. In that event, the defendant shall review those hard drives and back-up tapes selected by the plaintiffs and shall create copies from which privileged or confidential and unresponsive material has been deleted. The defendant shall then provide plaintiffs' counsel with each "redacted" hard drive or tape, together with a privilege log identifying the documents removed. The process would then continue as described above."

Id. at 432-33.

The Wiginton Test

Wiginton et al. v. CB Richard Ellis, Inc., 2004 U.S. Dist. LEXIS 15722 (N.D. Ill. August 10, 2004)[21] has weighed in with yet another cost-shifting test. This was a class action alleging a nationwide pattern and practice of sexual harassment at defendant's real estate offices. Plaintiffs were seeking discovery of pornographic material that they claimed was distributed by e-mail on computers throughout the offices. Defendant produced 94 monthly e-mail backup tapes from 11 offices. An electronic discovery vendor that was retained by plaintiffs to restore and extract the user e-mails from the tapes, perform searches for keywords and file attachment types, and load the results onto a data viewer. *Id.* at *3.

The following steps were taken with the attendant results:

1. Kroll processed one monthly tape from each of three offices and recovered over 200,000 documents.
2. Kroll searched the documents for "a 92 pornographic term and six disciplinary term search list using a processing engine which is able to search in the text of the documents and in metadata."[22]
3. The processing engine was able to find terms at the beginning, middle, or end of a word or a series of symbols.
4. This review discovered that e-mail received from outside the company or sent solely to someone outside the company was contained on the tapes.

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[20] The Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States has proposed revisions to the Federal Rules to address electronic discovery issues. See http://www.uscourts.gov/rules/Reports/ST09-2005.pdf (hereafter "Revised Rule"). In so doing, the Standing Committee approved on the Report of the Advisory Committee on the Federal Rules of Civil Procedure dated May 27, 2005 (revised July 25, 2005). The Advisory Committee Report can be found at Appendix C the above link (page 86 of 332) and is cited here as "Rules App. C-_." The Supreme Court has until May 1, 2006 to act on the revisions. Assuming they are accepted, Congress then has seven months within which to act as provided by law or the revised rule shall take effect December 1. 28 U.S.C. §2074. See, generally, http://www.uscourts.gov/rules/#standing0106. One of the proposals is to change Rule 26(f) (addressing the conference of the parties before the Rule 16 scheduling conference) to provide that the parties state their views on "(3) any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;" and "(4) any issues relating to claims of privilege or of protection as trial-preparation material, including – if the parties agree on a procedure to assert such claims after production20 – whether to ask the court to include their agreement in an order." Rules App. C-39.

[21] This is the second *Wiginton* case. The initial decision is reported as a report and recommendation from the magistrate judge on plaintiff's request for sanctions relating to the destruction of electronic documents. 2003 U.S. Dist. LEXIS 19128 (N.D. Ill. October 24, 2003). The magistrate judge determined that defendant failed to preserve relevant information after a duty to preserve came into effect and had acted in bad faith. However, the magistrate judge determined that the sanctions motion should be denied without prejudice pending a determination of the effect of defendant's actions on the plaintiff's case by a review of backup tapes that defendant had preserved, which might provide an indication of the evidence that was destroyed. "If Plaintiff's expert is able to discover relevant documents on the backup tapes then Plaintiff should be allowed to renew its motion for appropriate sanctions based on the destroyed evidence."

[22] "Metadata" is "embedded data in an electronic document." 2004 U.S. Dist. LEXIS 15722 at *4.

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5. The documents were processed again to remove these e-mails so that the resulting data set contained only e-mails from one of defendant's employees to at least one other of defendant's employees.
6. Kroll also "removed documents that did not contain a search term but that would otherwise be counted as a hit due to family cascading—a phenomenon where a document related to a document containing a hit are counted as two separate hits even if the related document does not contain a search term."

Id. at *3-5. This process resulted in a total of 17,375 documents. Kroll then estimated that to search the tapes for the eleven offices would cost "up to $249,000." *Id.*

Kroll then conducted a search based on four terms selected by plaintiffs and four selected by defendant pursuant to a court order. After de-duplication to remove copies of the same document, the search based on these eight terms resulted in 8,660 documents.[23]

After further evaluation of duplications and family cascading, the parties reviewed 2,667 of the 8.660 documents, agreeing that the remaining documents were not responsive to plaintiff's discovery requests. Then the parties "manipulated" the numbers to support their positions.

> *Plaintiffs claim that 567 of the documents are responsive, i.e., are pornographic or are documents reflecting CBRE policies and procedures. Therefore they calculate that 567 of the 2,667 documents were responsive, for a 21.3% responsive rate. This is technically accurate -- 21.3% of the documents that the parties reviewed were responsive. By agreeing that the remaining unreviewed documents were non-responsive, the parties effectively agreed, however, that the pertinent number for the denominator was the 8,660 documents. Therefore, (567/8,660) equals a 6.5% responsive rate. Defendants of course have calculated a much smaller responsive rate, and claim that the parties have identified only (142/8,660) documents as responsive, for a 1.64% responsive rate.*

2004 U.S. Dist. LEXIS 15722 at *8-9.

The magistrate judge then evaluated the appropriate tests to determine whether costs should be shifted. Magistrate Judge Ashman regarded the "marginal utility test" from *McPeek* to be "the most important factor" in evaluating a request to shift costs to the requesting party. The magistrate judge, however, felt that the "proportionality test set forth in Rule 26(b)(2)(iii)[24] must shape the test." Hence, the magistrate judge modified the *Zubulake* factors by adding an eighth factor "that considers the importance of the requested discovery in resolving the issues of the litigation."

> *Therefore, we will consider the following factors: 1) the likelihood of discovering critical information; 2) the availability of such information from other sources; 3) the amount in controversy as compared to the total cost of production; 4) the parties'*

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[23] The magistrate noted that an e-mail containing a search term that exists in a user's outbox and also exists in another user's inbox was counted as two hits, not one.

[24] Rule 26(b)(2)(iii) provides that the district court may limit discovery if it determines that the burden of the discovery outweighs its likely benefit considering the following factors ("the proportionality test"): the needs of the case, the amount in controversy, the resources of the parties, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. It is this last factor that *Wiginton* added to the cost-shifting equation.

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> *resources as compared to the total cost of production; 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 importance of the requested discovery in resolving the issues at stake in the litigation; and 8) the relative benefits to the parties of obtaining the information. At all times we keep in mind that because the presumption is that the responding party pays for discovery requests, the burden remains with CBRE to demonstrate that costs should be shifted to Plaintiffs. See* Zubulake (III), *216 F.R.D. at 283.*

2004 U.S. Dist. LEXIS 15722 at *14-15.[25]

Astute readers will ask where the *Wiginton* test addresses the specificity of the discovery request to ensure that it is tailored to discover relevant information. The magistrate judge did not overlook this issue. After stating the eight-factor test, he explained:

> *When the matter is initially brought to the court's attention, the extent to which the request appears to be specifically tailored to discover relevant information may help the court weigh this factor.* Zubulake I, *217 F.R.D. at 323 (first factor); Rowe, 205 F.R.D. at 429 (first factor); Byers, 2002 U.S. Dist. LEXIS 9861, 2002 WL 1264004, at *12 (shifting costs to requesting party where it was unlikely the search would uncover relevant information). If a test run is ordered, as in this case, the actual results of the test run will be indicative of how likely it is that critical information will be discovered.*

2004 U.S. Dist. LEXIS 15722 at *15-16.

Applying this test, the magistrate judge first addressed the discovery of "critical information." Plaintiffs identified documents that included "graphic pornographic images, sexual correspondence and jokes, and CBRE policies and procedures regarding the circulation of inappropriate e-mail and the visitation of inappropriate websites, as well policies relating to sexual harassment." Plaintiffs also claimed that "they recovered documents demonstrating the demeaning attitude of CBRE towards its female employees pervading the work environment." The magistrate judge noted that "some of these documents appeared in multiple user accounts which supports Plaintiffs' theory that these types of documents were being spread throughout the offices." But the district court also explained that "some of these documents were sent from a single user to another single user" and there was "nothing to indicate that any CBRE employee indicated that these e-mails were offensive or that any employee refused any future such e-mails. Furthermore, Plaintiffs do not explain how one-to-one e-mails support their theory of a hostile work environment." 2004 U.S. Dist. LEXIS 15722 at *16-17. (Footnote omitted.)

Defendant argued that many of the documents in issue were not relevant, that many of the e-mails "were not considered offensive to the women who received them" or were sent "from men to men."

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[25] The major differences between the *Zubulake* test and the *Wiginton* test are in first factor and the last two factors. The first *Zubulake* factor is "1. The extent to which the request is specifically tailored to discover relevant information." The first *Wiginton* factor is borrowed instead from the second factor in *Rowe*: "1) the likelihood of discovering critical information." Factors 2-6 are the same in both tests. The seventh and final factor in *Zubulake* is "7. The relative benefits to the parties of obtaining the information." The seventh and eight factors in *Wiginton* are: 7) the importance of the requested discovery in resolving the issues at stake in the litigation; and 8) the relative benefits to the parties of obtaining the information." See the chart at the end of this paper comparing the various tests.

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Id. at *18. The magistrate judge did not seem impressed by these arguments: "CBRE's interpretation of the women's tolerance to sexually explicit e-mails, however, is necessarily slanted in its own favor, and there is no information regarding whether women routinely viewed other people's e-mails, such as secretaries who accessed their bosses' e-mails as part of their job requirements." *Id.* Excluding male-to-mail e-mails, and including e-mails on defendant's policies, the magistrate judge calculated that there were 386 responsive e-mails out of 8,660, or a 4.5% response rate.

As to second factor, the availability of information from other sources, the magistrate judge said that the search produced relevant documents not previously produced by defendant including policy documents and e-mails containing pornographic material. The district court declined to determine "at this juncture exactly what percentage of documents on the e-mail system would prove a hostile environment." Explaining that the search results were derived from plaintiff's search terms, "the Court is of the opinion that the percentage of sexually objectionable e-mails is substantially lower than 4.5%." While plaintiff maintained the burden of proof on the existence of a hostile environment, "in the meantime they are entitled to relevant information as long as it is reasonably calculated to lead to the discovery of admissible evidence. Fed. R. Civ. P. 26(b)(1). Nevertheless, because the search also revealed a significant number of unresponsive documents, we find that the marginal utility test weighs slightly in favor of cost-shifting." *Id.* *22-23. (Footnote omitted.)

As to the amount in controversy relative to the total cost of production (*Wiginton* factor three), the magistrate judge weighed the cost of production, estimated at $185,00 to $249,900, against the claims made saying it cannot accept plaintiffs' speculative estimate of what is at stake but it also cannot decide that the claims are worthless. *Id.* at *24. The district court also acknowledged defendant's argument that the estimate of cost related to a few of its hundreds of offices. Defendant suggested the costs would run into the millions of dollars. In the end the magistrate judge concluded that "several hundred thousand dollars" for "one limited part of discovery" is a "substantial amount" to pay and, thus, this factor weighed in favor of cost-shifting. *Id.* at *26.

With respect to the relative resources of the parties as compared to the total cost of production (factor four), the magistrate judge determined that defendant's resources are "large compared to the total cost of production" so that this factor weighed against cost-shifting. *Id.* at *26.

As to factor five, the relative ability of each party to control costs and its incentive to do so, the magistrate judge explained that the costs of the search are driven "to some extent by the scope of the search" as selected by plaintiffs. However, the magistrate judge recognized that plaintiffs' search "must necessarily be broad, due to the nature of the information for which they are searching." Hence, this factor "slightly weighed in favor of cost-shifting." *Id.* at *27-28.

The magistrate judge determined that the sixth factor (the importance of the issues at stake in the litigation) was neutral since discrimination claims are not unique. *Id.* at *29.

With respect to the importance of the requested discovery in resolving the issues at stake in the litigation (the seventh factor and the one added by *Wiginton)*, the magistrate judge determined that "there is reason to believe that the requested discovery would assist in resolving the issues at stake in this case, but because there is also other evidence to support Plaintiffs' claims, we find that this factor weighs slightly in favor of cost-shifting." *Id.* at *30

Finally, as to the relative benefits to the parties of obtaining the information (factor eight), the magistrate judge said this was the least important factor because the requesting party is always most

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likely to benefit. Concluding that plaintiffs would benefit more than defendant here, the magistrate judge, nonetheless determined that this factor was neutral. *Id.* at *30-31.

In reconciling the cost-shifting debits and credits, the magistrate judge said factors one and two, the most important, weighed slightly in favor of cost-shifting. Factor three weighed in favor of cost shifting. Factors five and seven slightly weighed in favor of cost-shifting. Factor four weighed against cost-shifting. Factors six and eight were neutral. The magistrate judge then concluded that the factors favored cost shifting but that defendant should pay 25% of the costs because of the presumption that the producing party should pay for document production:

> *Therefore, because the factors favor cost-shifting, but the presumption is that the responding party pays for discovery costs, we find that CBRE should bear 25% and Plaintiffs 75% of the discovery costs of restoring the tapes, searching the data, and transferring it to an electronic data viewer. Each party will bear their own costs of reviewing the data and printing documents, where necessary.*

Id. at *31-32.

COST-SHIFTING PRACTICE TIPS

These decisions demonstrate the evolution of fairness standards in cost-shifting analysis that can begin to be translated into practice tips.

1. Accessibility may well end the cost-shifting inquiry. In the *Zubulake* model, if electronic documents are "accessible," the producing party will pay the costs of production just as is the case with paper records.
2. Where data is "inaccessible" – generally, it must be restored or retrieved out of the ordinary course at an expense to the producing party – the cost-shifting analysis will likely focus on the scope of the discovery request and the ability of the requesting party to show that relevant information is contained in the inaccessible electronic storage media.[26] Based on *Wiginton*, the presumption that the producing party pays for production can still weave its way into the cost-shifting equation even for inaccessible documents.
3. Whatever the status of accessibility, parties can expect courts to look at the specificity of e-discovery requests. Tailoring requests in an objectively reasonably way has value in this area of the law.
4. *Byers* and *Wiginton* highlight the importance of "marginal utility." The stronger the showing that electronic records contain relevant information, the more advantaged a requesting party will be in the cost-shifting equation.
5. *Zubulake* explicitly, and *Medtronic* implicitly, strongly endorse the concept of "sampling" of backup tapes and other media that are difficult to access. This suggests that early identification of

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[26] Revised rule 26(b)(2)(B) accounts for electronically stored information that is not reasonably accessible. Assuming it becomes effective in December 2006, it provides, "A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for such discovery." Rules App. C-51-52. The first sentence of current Rule 26(b)(2) is the new Rule 26(b)(2)(A). The rest of the current Rule 26(b)(2) becomes Rule 26(b)(2)(C).

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a representative sample of backup tapes and a protocol for retrieval and review of the contents of such tapes, may significantly reduce time and costs of this process.[27]

6. Both cases highlight the importance of a court's and counsel's understanding of a responding party's computer systems and warehouse of data sources,[28] including data sources that are not routinely accessed, in order to conduct a cost-shifting analysis.
7. In complex e-discovery cases, more and more state and federal courts will likely require assistance from neutrals or special masters to monitor or control e-discovery within the framework of the technology in question.
8. Privileged documents pose a problem for responding parties seeking cost-shifting. As in *Rowe*, a responding party can win the cost-shifting battle, but if privileged documents are intermingled in the electronic files, the responding party will pay the costs of production if it is not willing to give the requesting party a non-waiver review. Mechanisms to segregate and distinguish privileged documents may become important cost-savers in future litigation, as long as the mechanisms are effective and are followed.
9. In analyzing e-discovery cost-shifting, analyze outcomes within the "undue burden and expense" construct. Common sense has value in this area. Parties can expect judges to exercise their discretion equitably against the backdrop of what is at stake.[29]
10. Courts will favor a proactive rather than reactive approach to the issue of electronic discovery. Where it appears that e-discovery issues are going to be challenging, counsel should evaluate the merits of designing a plan for electronic discovery for inclusion in initial disclosure statements.[30]

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[27] *See Hagenmeyer North America, Inc. v. Gateway Data Sciences Corporation et al.*, 2004 WL 1810273 (E.D. Wis. August 12, 2004) (following *Zubulake*, the district court ordered Gateway to restore a sample of backup tapes and then required the parties to make an additional submission to address whether the burden or expense of satisfying plaintiff's document request "is proportionate to the likely benefit." The district court "will then further address the search of Gateway's backup tapes.")

[28] Apart from backup tapes or other storage media used for disaster recovery or other purposes, consider individual party hard drives, laptop computers, voice mail, personal digital assistant, or other wireless devices (like a Blackberry), floppy disks, flash drives, zip drives, DVDs, or CDs, and third party internet repositories of data.

[29] *See Multitechnology Services, L.P. v. Verizon Southwest*, 2004 U.S. Dist. LEXIS 12957 (N.D. Tx. July 12, 2004). Plaintiff was seeking information about Verizon's past and present customers which was available in electronic form in Verizon's computer databases or archives. The expense to develop the information was $60,000. The damages sought were $1.6 million. The information was relevant and not available from other sources. Verizon would not otherwise be gathering the information sought and derived no benefit from the task. Magistrate Judge Bleil issued this order to justify an earlier protective order that each side should bear 50 percent of the costs of developing the information and the costs would be taxable at the end of the case in favor of the prevailing party. The magistrate judge held that requiring "the parties to shoulder the expense is the most effective resolution because it balances the benefit of the discovery for MTS and provides Verizon with incentive to manage the costs it incurs in answering MTS's interrogatories."

[30] In many cases, both sides to a controversy will be facing the same or similar e-discovery hurdles.

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When appropriate, attempts should be made to negotiate the issue of electronic discovery early in the discovery process and to memorialize such agreements in a Stipulated Protective Order.[31]

SANCTIONS

Sanctions for e-discovery conduct are proliferating. Three decisions are discussed in detail below followed by a table with digests of recent selected sanctions-related decisions.

Zubulake IV

First, there is *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003) (*Zubulake IV*). In this decision, Judge Scheindlin addressed the duty to preserve documents and the appropriate sanction for the failure to preserve electronic evidence.

The district court began its analysis by quoting this standard from *Fujitsu Ltd. v. Federal Express Corp.*, 247 F.3d 423 (2d Cir. 2001):

> *The obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation.*

212 F.R.D. at 216. It was very easy for the district court to conclude that a duty to preserve arose "at the latest" when Zubulake filed her EEOC charge in August 2001. And, in fact, UBS's in-house attorneys at that time "cautioned employees to retain all documents, including e-mails and backup tapes, that could potentially be relevant to the litigation." *Id.*

Ominously for UBS, Zubulake argued that UBS should have known that electronic documents were relevant to future litigation by April 2001, and, thus, the duty to preserve arose then for two reasons.

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[31] The ABA publishes Civil Discovery Standards. Amendments to the Civil Discovery Standards to address electronic discovery issues were adopted in August 2004. The final amendments go beyond the *Zubulake* and Wiginton cost-shifting factors, and can be found at http://www.abanet.org/litigation/documents/hod/ABA%20Final%20Revised%202004%20Amendments%20Civil%20Discovery%20Standards.doc. Standard 29 is entitled, "Preserving and Producing Electronic Information." Standard 29.b.iii. was amended to provide that factors courts should consider "to allocate the costs" of electronic discovery (and not just to resolve motions to compel or for protective orders) include the following: (A) The burden and expense of the discovery, considering among other factors the total cost of production in absolute terms and as compared to the amount in controversy; (B) The need for the discovery, including the benefit to the requesting party and the availability of the information from other sources; (C) The complexity of the case and the importance of the issues; (D) The need to protect the attorney-client privilege or attorney work product, including the burden and expense of a privilege review by the producing party and the risk of inadvertent disclosure of privileged or protected information despite reasonable diligence on the part of the producing party; (E) The need to protect trade secrets, and proprietary or confidential information; (F) Whether the information or the software needed to access it is proprietary or constitutes confidential business information; (G) The breadth of the discovery request; (H) Whether efforts have been made to confine initial production to tranches or subsets of potentially responsive data; (I) The extent to which production would disrupt the normal operations and processing routines of the responding party; (J) Whether the requesting party has offered to pay some or all of the discovery expenses; (K) The relative ability of each party to control costs and its incentive to do so; (L) The resources of each party as compared to the total cost of production; (M) Whether responding to the request would impose the burden or expense of acquiring or creating software to retrieve potentially responsive electronic data or otherwise require the responding party to render inaccessible electronic information accessible, where the responding party would not do so in the ordinary course of its day-to-day use of the information; (N) Whether responding to the request would impose the burden or expense of converting electronic information into hard copies, or converting hard copies into electronic format; (O) Whether the responding party stores electronic information in a manner that is designed to make discovery impracticable or needlessly costly or burdensome in pending or future litigation, and not justified by any legitimate personal, business, or other non-litigation related reason; and (P) Whether the responding party has deleted, discarded or erased electronic information after litigation was commenced or after the responding party was aware that litigation was probable and, if so, the responding party's state of mind in doing so." If the case is complex or involves large volumes of electronic information, "the court may want to consider using an expert to aid or advise the court on technology issues." Appendix I contains a comparison of the *Rowe, Zubulake, and revised Standard 29* factors.

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First, e-mails pertaining to Zubulake were labeled "UBS Attorney Client Privilege" four months before the EEOC charge was filed, "notwithstanding the fact that no attorney was copied on the e-mail and the substance of the e-mail was not legal in nature." *Id.* at 216-217 Second, Zubulake's supervisor, Chapin, "admitted in his deposition that he feared litigation from as early as April 2001" when he was asked if he thought that Ms. Zubulake was going to sue UBS in late April 2001, and he said, "'Certainly it was something that was in the back of my head.'" *Id.* at 217. The arguments were persuasive:

> *Merely because one or two employees contemplate the possibility that a fellow employee might sue does not generally impose a firm-wide duty to preserve. But in this case, it appears that almost everyone associated with Zubulake recognized the possibility that she might sue.*

Id. The district court gave one illustration to prove its point. An e-mail that was titled "'UBS attorney client priviladge (sic)'" was distributed to Chapin and others in late April 2001. It "essentially called for Zubulake's termination." It read:

> *"Our biggest strength as a firm and as a desk is our ability to share information and relationships. Any person who threatens this in any way should be firmly dealt with... [Believe] me that a lot of other [similar] instances have occurred earlier."*

Id. While perhaps a termination should lead a firm to conclude that it was going to be sued, not every termination results in litigation. Nonetheless, the district court then concluded:

> *Thus, the relevant people at UBS anticipated litigation in April 2001. The duty to preserve attached at the time that litigation was reasonably anticipated.*

Id.

The district court cautioned that this conclusion does not mean that a corporation must preserve "every shred of paper, every e-mail or electronic document." *Id.* The district court recognized that such a rule "would cripple large corporations, like UBS, that are almost always involved in litigation. As a general rule, then, a party need not preserve all backup tapes even when it reasonably anticipates litigation." *Id.*

However, the district court was quick to add that one who anticipates being a party or is a party to a lawsuit "must not destroy unique, relevant evidence that might be useful to an adversary." *Id.* To support this proposition, the district court cited a quote in *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 72 (S.D.N.Y. 1991) which was itself a quote from *William T. Thompson Co. v. General Nutrition Corp.*, 593 F. Supp. 1443, 1455 (C.D. Cal. 1984):

> *"'While a litigant is under no duty to keep or retain every document in its possession ... it is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request.'"*

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Id.[32]

The district court then attempted to answer the question, "Whose Documents Must Be Retained?" It answered this question first by outlining the "broad contours" of the duty to preserve:

> *That duty should certainly extend to any documents or tangible things (as defined by Rule 34a) made by individuals "likely to have discoverable information that the disclosing party may use to support its claims or defenses." The duty also includes documents prepared* for *those individuals, to the extent those documents can be readily identified* (e.g., *from the "to" field in e-mails). The duty also extends to information that is relevant to the claims or defenses of* any *party, or which is "relevant to the subject matter involved in the action." Thus, the duty to preserve extends to those employees likely to have relevant information – the "key players" whose backup tapes were lost (Chapin, Hardisty, Tong, Datta, and Clarke) fall into this category.*

Id. at 217-218. (Emphasis in original.)

Proceeding methodically from the initial premise that a duty to preserve arose in April 2001 when Zubulake's termination was imminent, the district court then asked, "What Must Be Retained?" This was the district court's answer:

> *A party or anticipated party must retain all relevant documents (but not multiple identical copies) in existence at the time the duty to preserve attaches, and any relevant documents created thereafter. In recognition of the fact that there are many ways to manage electronic data, litigants are free to choose how this task is accomplished. For example, a litigant could choose to retain all then-existing backup tapes for the relevant personnel (if such tapes store data by individual or the contents can be identified in good faith and through reasonable effort), and to catalog any later-created documents in a separate electronic file. That, along with a mirror-image of the computer system taken at the time the duty to preserve attaches (to preserve documents in the state they existed at the time), creates a complete set of relevant documents. Presumably there are a multitude of other ways to achieve the same result.*

Id. 218. The district court then summarized a litigant's preservation obligations:

> *The scope of a party's preservation obligation can be described as follows: Once a party reasonably anticipates litigation, it must suspend its routine document*

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[32] *Turner* involved a claim of personal injuries arising from a bus accident. The district court rejected an adverse inference instruction as a sanction for destruction of bus brake maintenance records which the defendant knew or should have known were relevant as of the time of filing of the complaint, because there was insufficient evidence to show the destruction was willful (as opposed to negligent) or that the brakes of the bus were not in working order. 142 F.R.D. at 76-77. It instead imposed the costs of discovery related to the fate of the documents. *Id.* at 78. *Turner* did not involve pre-litigation notice questions, 142 F.R.D. at 73, although *Turner* does contain this statement: "Finally, the obligation to preserve evidence even arises prior to the filing of a complaint where a party is on notice that litigation is likely to be commenced." 142 F.R.D. at 73 (citations omitted). The *Thompson* decision involved antitrust issues where defendant intentionally destroyed records it knew to be relevant even after document preservation orders were entered by the district court and orders to produce documents were entered by a special master. Based on extensive findings of fact including ones on the prejudice to the plaintiff, defendant's answer was stricken and a default judgment was entered as a sanction, in addition to the awarding of costs related to the discovery on the destruction issues. 593 F. Supp. at 1455-56. The district court found that notice of the relevance of the documents in question was, in part, "provided by the pre-litigation correspondence between counsel for the parties." *Id.* at 1446.

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retention/destruction policy and put in place a "litigation hold" to ensure the preservation of relevant documents. As a general rule, that litigation hold does not apply to inaccessible backup tapes (e.g., *those typically maintained solely for the purpose of disaster recovery),which may continue to be recycled on the schedule set forth in the company's policy. On the other hand, if backup tapes are accessible* (i.e., *actively used for information retrieval), then such tapes* would *likely be subject to the litigation hold.*

However, it does make sense to create one exception to this general rule. If a company can identify where particular employee documents are stored on backup tapes, then the tapes storing the documents of "key players" to the existing or threatened litigation should be preserved if the information contained on those tapes is not otherwise available. This exception applies to all *backup tapes.*

Id. (Emphasis in original.)

Against this backdrop, the district court then examined the facts. UBS's domestic document retention policy required retention of monthly backup tapes for three years. Despite this policy, there were six monthly backup tapes and part of a seventh missing. *Id.* at 218-219.

Three backup tapes contained the e-mail files of Chapin, Hardisty, Clarke, and Datta created after April 2001. Contrary to the document retention policy, and despite the August 2001 directive from counsel to preserve documents, these backup tapes were deleted between October 2001 and February 2002, "after UBS staff were warned to retain documents, but before they were told specifically to preserve backup tapes." *Id.* at 219, n. 30.

Two backup tapes were for the time period after Zubulake filed her EEOC complaint and contained e-mails of Rose Tong, a human resources employee.[33] UBS was unable to explain the disappearance of these tapes which, at a minimum, should have been subject to the preservation directive issued by UBS in August 2001, the district court determined. *Id.* at 219.

Given that all of the backup tapes in issue should have been in existence after the preservation directive was issued in August 2001 or were deleted after this directive was issued, it is not clear why the district court felt compelled to discuss when the duty to preserve was first triggered.[34] Without relating the duty to a particular trigger date, the district court made the unsurprising finding that the duty to preserve existed. *Id.* at 219.

Having found that a duty to preserve existed but that evidence was lost, the district court then considered remedies. The district court rejected an effort to reshift the 25 percent allocation charged to Zubulake for defendant's cost of producing the backup tapes saying it had already accounted for UBS's missing e-documents in *Zubulake III. Id.*

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[33] The other two tapes apparently related to a period before Zubulake filed her EEOC complaint and contained e-mails of Rose Tong as well.

[34] As noted in the prior footnote, the tapes that contained Ms. Tong's e-mails for June 2001 and July 2001 were missing. Ms. Tong was working in UBS's Hong Kong officewhere a one-month, not three-year, retention policy existed. Arguably, the June 2001 backup tape would have survived only had the duty to preserve been communicated within UBS as of late April 2001 when the district court found that litigation was reasonably anticipated.

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It also rejected Zubulake's request for an adverse inference instruction to the jury that the destroyed evidence "would have been favorable to Zubulake and harmful to UBS." *Id.* Calling this an "extreme sanction" that "should not be lightly given," the district court explained that Zubulake had to satisfy three elements: (1) that there was a duty to preserve the evidence, (2) the records in question were destroyed with a "culpable state of mind," and (3) the "destroyed evidence was 'relevant' to the party's claim or defense such that a treasonable trier of fact could find that it would support that claim or defense." *Id.* at 220.

As to (1), the duty issue had already been favorably determined in Zubulake's favor.

As to (2), the district court determined that the disappearance or deletion of the backup tapes was negligent and possibly reckless but not intentional or willful. The district court explained that once UBS had a duty to preserve – here in late April 2001 based on the e-mail traffic discussing her termination – "any destruction of documents is, at a minimum, negligent." *Id*

With respect to the backup tapes that were overwritten, the district court was forgiving:

> *Whether a company's duty to preserve extends to backup tapes has been a grey area. As a result, it is not terribly surprising that a company would think that it did* not *have a duty to preserve all of its backup tapes, even when it reasonably anticipated the onset of litigation. Thus, UBS's failure to preserve all potentially relevant backup tapes was merely negligent, as opposed to grossly negligent or reckless.*

Id. (Emphasis in original.) The district court, however, warned litigants that its largesse would not be available to others: "Litigants are now on notice, at least in this Court, that backup tapes that can be identified as storing information created by or for 'key players' must be preserved." *Id., n.47.*

The district court was less forgiving with respect to Tong's backup tapes:

> *UBS failed to include these backup tapes in its preservation directive in this case, notwithstanding the fact that Tong was the human resources employee directly responsible for Zubulake and who engaged in continuous correspondence regarding the case. Moreover, the lost tapes covered the time period* after *Zubulake filed her EEOC charge, when UBS was* unquestionably *on notice of its duty to preserve. Indeed, Tong herself took part in much of the correspondence over Zubulake's charge of discrimination. Thus, UBS was grossly negligent, if not reckless, in not preserving those backup tapes.*

Id. at 221. (Emphasis in original.)

But being grossly negligent does not represent "willful" conduct, so "relevance" had to be proven and could not be presumed. *Id.* at *7. While the district court had earlier found that the e-mails that were produced from existing backup tapes bore on issues in the litigation, it also had found that nowhere in these e-mails was "'there evidence that Chapin's dislike of Zubulake related to her gender.'" *Id.* (quoting from *Zubulake I*, 217 F.R.D. at 286). Hence, "There is no reason to believe that the lost e-mails would be any more likely to support her claims." *Id.* The district court added that Tong's August 2001 e-mail correspondence – relevant to the retaliation claim – was preserved on the September 2001 backup tape. "Thus, there is no reason to believe that peculiarly unfavorable evidence resides solely on that missing tape. Accordingly, Zubulake has not sufficiently demonstrated that the lost tapes contained relevant information." *Id.*

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In the end, the district court decided that the appropriate remedy was to grant Zubulake's request to require UBS to pay the costs of re-deposing certain witnesses "for the limited purpose of inquiring into issues raised by the destruction of evidence and any newly discovered e-mails." *Id.* at 222.

Zubulake V

UBS was not as fortunate after the retaking of several depositions. In *Zubulake v. UBS Warburg LLC*, 2004 U.S. Dist. LEXIS 13574 (S.D.N.Y. July 20, 2004) (*Zubulake V*), Judge Scheindlin approved a request to issue an adverse inference instruction, in large part because of communications failures.

UBS's in-house and outside counsel had issued document preservation instructions to UBS personnel. But certain UBS employees deleted relevant e-mails anyway. *Id.* at *2. Other employees "never produced relevant information to counsel." When this information was discovered, it was produced – about two years after it was requested and after discovery had been concluded. *Id.* at *2. UBS's counsel

> *failed to request retained information from one key employee and to give the litigation hold instructions to another. They also failed to adequately communicate with another employee about how she maintained her computer files. Counsel also failed to safeguard backup tapes that might have contained some of the deleted e-mails, and which would have mitigated the damage done by UBS's destruction of those e-mails.*

Id. at *3. All of this information came out in re-depositions of UBS employees that resulted from *Zubulake IV* – not the way any litigant already in sanctions' hot water wants to demonstrate discovery good faith.

Let me break down each of the electronic discovery miscues.

The EEOC charge was filed in August 2001 and the complaint was filed on February 22, 2002. UBS employees were advised orally in August 2001 to maintain material potentially relevant to Ms. Zubulake's claims. Specifically, they were told to preserve and to provide to counsel "all files, records, or other written memoranda or documents" concerning the allegations raised in Ms. Zubulake's EEOC charge or any aspect of her employment. *Id.* at *6. This oral preservation order separately covered electronic documents but did not specifically mention backup tapes. *Id.* at *5-6. Outside counsel separately met with "a number of key players" also in August 2001 and reminded them to preserve documents, including e-mails. *Id.* at *6. A written preservation order was issued in February 2002 after the complaint was filed, and a second written preservation order was issued in September 2002. It was after Ms. Zubulake specifically sought backup tapes in a discovery request in August 2002 that UBS's outside counsel instructed the information technology personnel to stop recycling backup tapes. In other words, the first time that backup tapes were the subject of preservation was one year after the EEOC charge was filed and nearly 16 months after Ms. Zubulake's termination. *Id.* at *5-6.

The key players at UBS were Orgill, Hardisty, Holland, Chapin, Varsano, Amone, and Davies. All but Davies received the preservation orders by e-mail or in person. Chapin was the alleged "primary discriminator." *Id.* at *7, *12.

Lost and Deleted E-Mail. Chapin sent an employee named Kim an e-mail on September 21, 2001, asking Kim to send him a "document" recounting a conversation between Zubulake and a co-worker.

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The time on the e-mail was 10:47 AM. About 45 minutes later, Chapin sent an e-mail to his boss and human resources personnel handling Zubulake's case. The e-mail purported "to contain a verbatim recitation of a conversation between Zubulake and her co-worker, as overhead by Kim." *Id.* at *12. The conversation allegedly took place on September 18, 2001, at 10:58 AM, three days before Chapin's e-mail asking Kim for the "document" recounting the conversation. The district court explained:

> *There is reason to believe that immediately after that conversation, Kim sent Chapin an e-mail that contained the verbatim quotation that appears in Chapin's September 21 e-mail – the "document" that Chapin sought from Kim just prior to sending that e-mail – and that Chapin deleted it. That e-mail, however, has never been recovered, and is apparently lost.*

In other words, Kim did not have a copy of what she sent, Chapin did not have a copy of what he received, and the e-mail was not found on any backup tape. But by Chapin's e-mail to Kim and Chapin's e-mail to his boss and the human resources personnel, the district court knew that Kim's response existed at one time in electronic form. And to make matters worse for UBS, an e-mail written by Kim on September 18 at 11:19 AM, 21 minutes after the alleged conversation, was preserved and this e-mail contained a *"different"* verbatim quotation from Zubulake than appeared in Chapin's September 21 e-mail that purportedly contained a quote from Kim's e-mail of that date which could not be located. *Id.* at 13, n.29. (Emphasis in original.)

Backup tapes that were located contained the only copies of e-mails of UBS personnel written in some cases after the first oral preservation order was issued in August 2001. To the district court, that meant that UBS employees "were deleting relevant e-mails." *Id.* at 14. Because relevant e-mails were found on backup tapes, UBS's inability to locate backup tapes[35] for Tong in the months of June-September 2001;[36] for Hardisty in the months of May, June, and August 2001; for two others in the months of April and September 2001; and for Chapin for April 2001[37] predictably led the district court to conclude that it is "impossible to know just how many relevant e-mails have been lost in their entirety." *Id.* at 14.

The deletions were easy to prove. Illustratively, a July 23, 2001, e-mail from Hardisty to Holland, copied to Chapin, was recovered on Hardisty's backup tape for August 2001, which meant it had to be on his active server at the end of August when the backup was generated. But the document was found only on the backup tape meaning that it had to have been deleted after the August oral preservation order. *Id.* at 16.[38]

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[35] UBS's retention policies called for the preservation of backup tapes for three years. The district court had earlier held that the destruction of backup tapes by UBS was negligent, not willful, because whether the duty to preserve extended to backup tapes was "a grey area." 220 F.R.D. at 221. After the *Zubulake* opinions, it is no longer a grey area for "key players."

[36] The EEOC charge was filed in August 2001 so this time period was significant.

[37] April 2001 was significant because that was the month when the duty to preserve was triggered because UBS knew of the likelihood of litigation. 220 F.R.D. at 217.

[38] Chapin and Holland's copies were not located which suggested to the district court that they deleted their copies before the backup of their e-mails occurred in July and before counsel's preservation warning in August but after the duty to preserve attached in April 2001. 2004 U.S. Dist. LEXIS 13574, at *16, n.34..

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Zubulake's complaints to Kim about the way women were treated at UBS and the Hardisty September 1, 2001 e-mail to Varsano and Orgill. *Id.* at 21-22.

Tong, another employee, had earlier told UBS that she kept a separate archive file on her computer with documents pertaining to Zubulake, but UBS said it thought this reference to archiving related to backup tapes. *Id.* at *22. It was not until the second deposition of Tong that UBS figured out that Tong was referring to e-mails archived on the hard drive of her office computer. *Id.* Those e-mails were then produced. In both cases, the district court concluded that neither witness had theretofore been asked to produce e-mails. *Id.* at *21-22.

One of the e-mails produced from Tong's computer demonstrated that (a) another witness, Davies, who had testified he was unaware of Zubulake's EEOC charge when he had spoken with Orgill, in fact, knew of the EEOC charge before he spoke with Orgill and (b) that Orgill knew of Ms. Zubulake's charge before she was terminated. The e-mail in question was dated August 21, 2001, at 11:06 AM from Davies to Tong. It read: "received thanks mike." It was in response to an email sent by Tong eleven minutes earlier that read, "Mike, I have just faxed over to you the 7 pages of Laura's [EEOC] charge against the bank." *Id.* at *23.

The district court explained the significance of Davies' three-word e-mail. Three hours later, Davies sent an e-mail to Tong with the subject line "Laura Zubulake." This is what the e-mail said:

> *I spoke to Brad [Orgill] — he's looking to exit her asap [by the end of month], and looking for guidance from us following letter? we sent her re her performance [or does he mean PMM]*
>
> *I said you were on call with US yesterday and that we need US legal advise etc, but be aware he's looking o finalise quickly! — said if off by end August then no bonus consideration, but if still employed after aug consideration should be given?"*

Id. at *24. Davies had testified that he was unaware of Zubulake's EEOC charge when he spoke with Orgill. But the timing of his e-mails, especially the newly produced e-mail that acknowledged that he received Zubulake's EEOC charge three hours before he wrote an e-mail that said he had spoken to Orgill,

> *strongly undercuts this claim. The new e-mail, therefore, is circumstantial evidence that could support the inference that Davies knew about the EEOC charge when he spoke with Orgill, and suggests that Orgill knew about the EEOC charge when the decision was made to terminate Zubulake. Its relevance to Zubulake's retaliation claim is unquestionable, and yet it was not produced until April 20, 2004.*

Id. at 24. (Footnote omitted.)

On this record, Ms. Zubulake again sought an adverse inference instruction. The district court first repeated from *Zubulake IV* the legal standard in the Second Circuit that Ms. Zubulake had to satisfy.

> *A party seeking an adverse inference instruction (or other sanctions) based on the spoliation of evidence must establish the following three elements: (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.*

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Id. at *27. (Footnote omitted.)

To demonstrate a "culpable state of mind" under this standard, Ms. Zubulake had to prove that UBS was guilty of, at least "ordinary negligence." If Ms. Zubulake could show that UBS acted "in bad faith (*i.e.*, intentionally or willfully)," relevance would be presumed. However, if UBS was negligent, grossly negligent, or reckless, Ms. Zubulake had to prove that the missing documents were relevant, meaning not just that they were probative but that they were favorable to her. *Id.* at *27 (citing *Residential Funding Corporation v. DeGeorge Financial Corp.* 306 F.3d 99, 108-109 (2[d] Cir. 2002).[42]

In applying the test, Judge Scheindlin had no difficulty finding a duty to preserve. In *Zubulake IV*, she had held that UBS had such a duty as early as April 2001 when UBS anticipated litigation. Hence, the first prong was satisfied. 2004 U.S. Dist. LEXIS 13574 at *30.

With respect to the characterization of UBS's conduct (willful on the one had, or negligent, grossly negligent, or reckless on the other), the district court outlined counsel's obligations *after* a "litigation hold" is placed on documents. Judge Scheindlin explained that:

1. Counsel must oversee compliance with the litigation hold, "monitoring the party's efforts to retain and produce the relevant documents." *Id.* at 32.
2. Counsel and the client "must make certain all sources of potentially relevant information are identified and placed 'on hold,' to the extent required by *Zubulake (IV)*." *Id.* at 33.
3. To identify all sources, counsel "must become fully familiar" with the client's "data retention architecture." This task will "invariably involve speaking with information technology personnel, who can explain system-wide backup procedures and the actual (as opposed to theoretical) implementation of the firm's recycling policy. It will also involve communicating with 'key players' in the litigation in order to understand how they stored information." *Id.* (Footnote omitted.)
4. Where it is not feasible for counsel to speak with every key player (because of the size of the company or the scope of the lawsuit, for example), "counsel must be more creative." Judge Scheindlin offered this suggestion.

> *It may be possible to run a system-wide keyword search; counsel could then preserve a copy of each "hit." Although this sounds burdensome, it need not be. Counsel does not have to review these documents, only see that they are retained. For example, counsel could create a broad list of search terms, run a search for a limited time frame, and then segregate responsive documents. When the opposing party propounds its document requests, the parties could negotiate a list of search terms to be used in identifying responsive documents, and counsel would only be obliged to review documents that came up as "hits" on the second, more restrictive search. The initial broad cut merely guarantees that relevant documents are not lost.*

5. Once the potentially relevant sources of information have been identified, counsel and the client are "under a duty to retain that information" and have a duty under Fed.R.Civ.P. 26 to "supplement" responses to discovery requests. The duty to supplement is a "continuing" duty

[42] *Residential Funding* is described in the table of sanctions cases at the end of this discussion.

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which typically falls on counsel, Judge Scheindlin noted.[43] Judge Scheindlin reasoned that if counsel has a continuing duty to supplement then counsel has a "duty to make sure that discoverable information is not lost." *Id.* at *37.

6. To satisfy this continuing duty, the obligations imposed on counsel must be reasonable. *Id.* at * 38. Judge Scheindlin set forth these steps as guidelines in the "typical" case.

   a. Counsel must issue a "litigation hold" "at the outset of litigation or whenever litigation is reasonably anticipated. 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." *Id.* at 39. (Footnote omitted.)
   b. Counsel "should communicate directly with the 'key players' in the litigation, *i.e.*, the people identified in a party's initial disclosure and any subsequent supplementation thereto. Because these 'key players' are the 'employees likely to have relevant information,' it is particularly important that the preservation duty be communicated clearly to them. As with the litigation hold, the key players should be periodically reminded that the preservation duty is still in place." *Id.* at 39-40. (Footnotes omitted.)
   c. Counsel "should instruct all employees to produce electronic copies of their relevant active files.[44] Counsel must also make sure that all backup media which the party is required to retain is identified and stored in a safe place. In cases involving a small number of relevant backup tapes, counsel might be advised to take physical possession of backup tapes. In other cases, it might make sense for relevant backup tapes to be segregated and placed in storage. Regardless of what particular arrangement counsel chooses to employ, the point is to separate relevant backup tapes from others. One of the primary reasons that electronic data is lost is ineffective communication with information technology personnel. By taking possession of, or otherwise safeguarding, all potentially relevant backup tapes, counsel eliminates the possibility that such tapes will be inadvertently recycled." *Id.* at 40-41.

Judge Scheindlin then analyzed how counsel and UBS measured up against these requirements.

The district court acknowledged that litigation holds on documents were issued several times between August 2001 and September 2002. *Id.* at *45. Yet UBS personnel "failed to preserve plainly relevant e-mails," a "failing" for which UBS was still responsible. *Id.* at 46.

Counsel was faulted by the district court on a number of fronts:

> *In this case, counsel failed to properly oversee UBS in a number of important ways, both in terms of its duty to locate relevant information and its duty to preserve and timely produce that information.*

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[43] "Although the Rule 26 duty to supplement is nominally the party's, it really falls on counsel. As the Advisory Committee explains, 'Although the party signs the answers, it is his lawyer who understands their significance and bears the responsibility to bring answers up to date. In a complex case all sorts of information reaches the party, who little understands its bearing on answers previously given to interrogatories. In practice, therefore, the lawyer under a continuing burden must periodically recheck all interrogatories and canvass all new information.'" 2004 U.S. Dist. LEXIS 13574 at *36-37 quoting 1966 Advisory Committee Note to Fed.R.Civ.P. 26(e).

[44] As a practical matter, employees may not know how to produce electronic copies of "their relevant active files," assuming that employees can determine what files are "relevant." But Judge Scheindlin was emphasizing the critical role that communication must play in the preservation process. Employees must understand what is "relevant," and counsel and the client must be able to assist employees in identifying what is relevant so that the documents can be preserved, all within the rubric of reasonableness.

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With respect to locating relevant information, counsel failed to adequately communicate with Tong about how she stored data. Although counsel determined that Tong kept her files on Zubulake in an "archive," they apparently made no effort to learn what that meant. A few simple questions — like the ones that Zubulake's counsel asked at Tong's re-deposition — would have revealed that she kept those files in a separate active *file on her computer.*

With respect to making sure that relevant data was retained, counsel failed in a number of important respects. First, *neither in-house nor outside counsel communicated the litigation hold instructions to Mike Davies, a senior human resources employee who was intimately involved in Zubulake's termination.* Second, *even though the litigation hold instructions were communicated to Kim, no one ever asked her to produce her files. And* third, *counsel failed to protect relevant backup tapes; had they done so, Zubulake might have been able to recover some of the e-mails that UBS employees deleted.*

In addition, if Varsano's deposition testimony is to be credited, he turned over "all of the e-mails that [he] received concerning Ms. Zubulake." If Varsano turned over these e-mails, then counsel must have failed to produce some of them.

In sum, while UBS personnel deleted e-mails, copies of many of these e-mails were lost or belatedly produced as a result of counsel's failures.

Id. at *46-47. (Footnotes omitted.)

The die was cast. Counsel failed to communicate the litigation hold order to all key players and failed to learn the document management habits of the key players. UBS employees ignored instructions to preserve for reasons not determinable by the district court. UBS, thus, was on notice of its obligations and, when e-mails were destroyed by its employees, acted "at its own peril." *Id.* at 48. The district court also explained that the effect of late production of documents "cannot be underestimated."[45] The district court found that UBS acted willfully, and relevance was presumed.

I therefore conclude that UBS acted willfully in destroying potentially relevant information, which resulted either in the absence of such information or its tardy production (because duplicates were recovered from Kim or Tong's active files, or restored from backup tapes). Because UBS's spoliation was willful, the lost information is presumed to be relevant.

Id. at *50. (Footnote omitted.)

[45] The district court explained that UBS produced documents it should have located earlier, months after the discovery cutoff resulting in Ms. Zubulake's sanctions motion. UBS characterized Ms. Zubulake as "overly litigious" but the pot should never call the kettle black. "With the discovery deadline long past, UBS 'was under an obligation to be *as cooperative as possible.*' Instead, the extent of UBS's spoliation was uncovered by Zubulake during court-ordered re-depositions." 2004 U.S. Dist. LEXIS 13574 at *49-50 (quoting from *Residential Funding*, 306 F.3d at 112). (Footnote omitted.)

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The remedy provided to Ms. Zubulake was firm, costly, and likely outcome-determinative.[46] It consisted of four components to attempt to put Ms. Zubulake in the position she would have been in had the discovery misconduct not occurred.

> First, *the jury empanelled to hear this case will be given an adverse inference instruction with respect to e-mails deleted after August 2001, and in particular, with respect to e-mails that were irretrievably lost when UBS's backup tapes were recycled. No one can ever know precisely what was on those tapes, but the content of e-mails recovered from other sources — along with the fact that UBS employees willfully deleted e-mails — is sufficiently favorable to Zubulake that I am convinced that the contents of the lost tapes would have been similarly, if not more, favorable.*
>
> Second, *Zubulake argues that the e-mails that* were *produced, albeit late, "are brand new and very significant to Ms. Zubulake's retaliation claim and would have affected [her] examination of every witness . . . in this case." Likewise, Zubulake claims, with respect to the newly produced e-mails from Kim and Tong's active files, that UBS's "failure to produce these e-mails in a timely fashion precluded [her] from questioning any witness about them." These arguments stand unrebutted and are therefore adopted in full by the Court. Accordingly, UBS is ordered to pay the costs of any depositions or re-depositions required by the late production.*
>
> Third, *UBS is ordered to pay the costs of this motion.*
>
> *Finally, I note that UBS's belated production has resulted in a self-executing sanction. Not only was Zubulake unable to question UBS's witnesses using the newly produced e-mails, but UBS was unable to prepare those witnesses with the aid of those e-mails. Some of UBS's witnesses, not having seen these emails, have already given deposition testimony that seems to contradict the newly discovered evidence. For example, if Zubulake's version of the evidence is credited, the e-mail from Davies acknowledging receipt of Zubulake's EEOC charge at 11:06 AM on August 21, 2001, puts the lie to Davies' testimony that he had not seen the charge when he spoke to Orgill — a conversation that was reflected in an e-mail sent at 2:02 PM. Zubulake is, of course, free to use this testimony at trial.*

Id. at 52-54. (Footnotes omitted.)

Stevenson

The same result – an adverse inference instruction -- was reached in *Stevenson v. Union Pacific Railroad Company*, 354 F. 3d 739 (8th Cir. 2004). The case involved a car-train grade-crossing accident in which Mr. Stevenson was injured, and his wife was killed. Union Pacific did not retain the voice tape of conversations between the train crew and dispatch at the time of the accident. It also failed to maintain track maintenance records from before the accident. The district court sanctioned

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[46] See *Zubulake IV*, 220 F.R.D. at 219-220 (footnote omitted): "In practice, an adverse inference instruction often ends litigation--it is too difficult a hurdle for the spoliator to overcome. The *in terrorem* effect of an adverse inference is obvious. When a jury is instructed that it may "infer that the party who destroyed 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."

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Union Pacific for this conduct by giving the jury an adverse inference instruction[47] and awarded plaintiff $164,410.25 in costs and attorneys' fees incurred as a result of the spoliation. The jury returned a $2 million verdict in plaintiff's favor.

This was the sequence of events. The accident occurred on November 6, 1998. Within 90 days thereafter the voice tape was "destroyed" by "recording over it in accordance with the company's routine procedure of keeping voice tapes for 90 days and then reusing the tapes." Suit was filed on September 20, 1999. The request for production of the voice tape was mailed on October 25, 1999. The district court found no fault with the tape-retention policy in the abstract, but found "it was unreasonable and amounted to bad faith conduct for Union Pacific to adhere to the principle in the circumstances of this case." The district court reasoned that Union Pacific had been involved in many grade-crossing accidents and "knew that the taped conversations would be relevant in any potential litigation." There was evidence that a claims representative for Union Pacific "had received notice of the accident shortly after it occurred" and that he "immediately began his investigation by calling the Railroad's Risk Management Communications Center to get details about the accident. He also called the Harriman Dispatching Center in Omaha to request copies of the train orders and warrants, the train consist,[48] and a dispatcher's record of the train's movement. He did not, however, request a copy of the voice tape. The district court listened to available samples of this type of voice tape and found that they generally contain evidence that is discoverable and useful in developing a case. Additionally, the district court found that Union Pacific had preserved such tapes in cases where it was helpful to Union Pacific's position. The district court also found that the plaintiffs were prejudiced by the destruction of this tape because there are no other records of comments between the train crew and dispatch contemporaneous to the accident." 354 F.3d at 747.

The court of appeals first had to clarify circuit law on the appropriate legal standard:

> *We have never approved of giving an adverse inference instruction on the basis of prelitigation destruction of evidence through a routine document retention policy on the basis of negligence alone. Where a routine document retention policy has been followed in this context, we now clarify that there must be some indication of an intent to destroy the evidence for the purpose of obstructing or suppressing the truth in order to impose the sanction of an adverse inference instruction.*

Id. (Footnote omitted).

Saying that this case "tests the limits of what we are able to uphold as bad faith," the court of appeals held that the district court did not abuse its discretion "by sanctioning Union Pacific's prelitigation conduct of destroying the voice tape." *Id.* at 748. The court of appeals held:

> *The district court's bad faith determination is supported by Union Pacific's act of destroying the voice tape pursuant to its routine policy in circumstances where Union Pacific had general knowledge that such tapes would be important to any litigation over an accident that resulted in serious injury or death, and its knowledge that litigation is frequent when there has been an accident involving death or serious*

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[47] "You may, but are not required to, assume that the contents of the voice tape and track inspection records would have been adverse, or detrimental" to the defendant." 354 F.3d at 743.

[48] A train consist is a list of the cars by classes, types, or arrangement.

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injury. While these are quite general considerations, an important factor here is that a voice tape that is the only contemporaneous recording of conversations at the time of the accident will always be highly relevant to potential litigation over the accident. We conclude that this weighs heavier in this case than the lack of actual knowledge that litigation was imminent at the time of the destruction. Additionally, the record indicates that Union Pacific made an immediate effort to preserve other types of evidence but not the voice tape, and the district court noted that Union Pacific was careful to preserve a voice tape in other cases where the tape proved to be beneficial to Union Pacific. The prelitigation destruction of the voice tape in this combination of circumstances, though done pursuant to a routine retention policy, creates a sufficiently strong inference of an intent to destroy it for the purpose of suppressing evidence of the facts surrounding the operation of the train at the time of the accident.

Id.

The court of appeals also determined that "the requisite element of prejudice" was met: "While there is no indication that the voice tape destroyed contained evidence that could be classified as a smoking-gun, the very fact that it is the only recording of conversations between the engineer and dispatch contemporaneous with the accident renders its loss prejudicial to the plaintiffs." *Id.*

With respect to the track maintenance inspection records, the court of appeals concluded that there was no bad faith in connection with their disposition:

There is no showing here that Union Pacific knew that litigation was imminent when, prior to any litigation, it destroyed track maintenance records from up to two years prior to the accident pursuant to its document retention policy. Additionally, maintenance records would only be relevant to potential litigation to the extent that they were relatively close in time to the accident and defective track maintenance was alleged to be the cause of the accident. Even then, track maintenance records are of limited use. While they may reveal defects in the track that existed at the time of the last inspection, they do not show the exact condition of the track at the time of the collision. The district court weighed heavily the fact that the Union Pacific knew that litigation is possible when there has been a serious accident but did not consider whether, when the prelitigation destruction was occurring, there had been any notice in this case of potential litigation or that the track maintenance would be an issue or an alleged cause of the accident. It appears that Union Pacific was not on notice that the track maintenance records should be preserved until it received the October 1999 request for production of documents, and the condition of the track was not formally put into issue until the second amendment to the complaint in May 2000. Thus, any bad faith determination regarding the prelitigation destruction of the track maintenance records is not supported by the record, and any adverse inference instruction based on any prelitigation destruction of track maintenance records would have been given in error.

354 F.3d at 749.

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However, Union Pacific still obtained a reversal. It was successful in persuading the court of appeals that the district court's failure to give Union Pacific the opportunity to rebut the adverse inference was an abuse of discretion requiring reversal and a new trial:

> *While the district court need not permit a complete retrial of the sanctions hearing during trial, unfair prejudice should be avoided by permitting the defendant to put on some evidence of its document retention policy and how it affected the destruction of the requested records as an innocent explanation for its conduct. Absent this opportunity, the jury is deprived of sufficient information on which to base a rational decision of whether to apply the adverse inference, and an otherwise permissive inference easily becomes an irrebuttable presumption.*

Id. at 750.[49]

The court of appeals' holding on the award of attorneys fees is also instructive for litigants. The district court sat in diversity but cited no Arkansas law to support the fee award. Hence, the court of appeals reviewed the award "under the federal court's inherent powers." The court of appeals explained that the inherent power to sanction "reaches conduct both before and during litigation as long as that conduct abuses the judicial process in some manner. A bad faith finding is specifically required in order to assess attorney's fees." *Id* at 751. Since it found no abuse of discretion in the district court's finding that "the prelitigation destruction of the voice tape amounted to bad faith conduct," this condition was satisfied. However, it also determined that the failure to maintain the track maintenance records was not supported by a bad faith finding. "Because part of the existing award might be based upon prelitigation conduct that does not amount to bad faith, we vacate the award of attorneys' fees and remand for recalculation under the bad faith standard." 354 F.3d at 751.

These are two in a series of sanctions cases that have been decided in state and federal courts in the past two years that illustrate the need for lawyers to pay close attention to e-discovery requirements. The following table provides a selection of decisions that thoughtful litigators will study to protect themselves and their clients from e-discovery sanctions' motions.

Sanctions Case Law Table

Topic	Citation	Discussion
Delay in Production		
Residential Funding Corporation v. DeGeorge Financial Corp.	306 F.3d 99 (2d Cir. 2002)	RFC had delayed in the production of e-mails during discovery until just before trial started. In August 2001 it produced a number of e-mails but none from a critical October – December 1998 time period. DeGeorge asked for backup tapes to search for e-mails itself. RFC agreed to produce the backup tapes on the condition

[49] The court of appeals also was concerned about the "timing of the instruction." The district court informed the jury at the outset of the trial that "the Railroad had destroyed evidence that should have been preserved," and the plaintiff "referred to this destruction throughout the trial." The court of appeals saw "no need to unduly emphasize the adverse inference at the outset of trial, especially where there is no finding that the evidence destroyed was crucial to the case." The court of appeals acknowledged that the evidence was relevant and that "its destruction prejudiced the plaintiffs' discovery efforts." However, it observed that in prior cases where evidence preclusion or facts were taken as true as sanctions, "the offending party had destroyed the one piece of crucial physical evidence in the case. (Citations omitted.) No such finding exists here." 354 F.3d at 750.

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Topic	Citation	Discussion
(plaintiff won a $96 million jury verdict) Refusal to sanction plaintiff order vacated and remanded for hearing based on sluggish production.		that any e-mails identified by DeGeorge's consultant be sent to RFC for review first. Jury selection was starting at this time. RFC turned over the backup tapes. It refused to answer questions about what type of tapes had been produced and their technical characteristics, which would have assisted DeGeorge in reading the tapes. This was brought to the district court's attention and RFC agreed to answer the questions. Within four days, DeGeorge's contractor found 950,000 e-mails in the relevant time period. Of these, 4,000 were printed out in the limited time available (trial was ongoing) and 30 of these were determined to be responsive to discovery requests, "though none appear to be damaging to RFC." DeGeorge moved for sanctions seeking a presumption that the e-mails from October to December 1998 which had not been produced "would have disproved RFC's theory of the case." After hearing argument, the district court denied the motion. The jury returned a $96.4 million verdict four days later. The court of appeals first noted that an adverse inference instruction usually is employed when spoliation occurs. Here, this was not the case; rather RFC failed to produce the e-mails or backup tapes in time for trial. The Second Circuit said that RFC's acts (failing to produce e-mails from the critical time period, missing a Federal Express deadline for sending backup tapes so they could be forwarded to DeGeorge's vendors, and resistance in responding to technical questions) – "purposeful sluggishness" as it was called by the district court – could support a claim that the e-mails were likely harmful to RFC (just as a finding that destruction of evidence occurred in bad faith or gross negligence would have). The point of the case is that intentional or grossly negligent acts that hinder discovery can now support an inference that the evidence not produced is harmful even if those acts are not ultimately responsible for the unavailability of the evidence. "Thus if any of RFC's acts that hindered DeGeorge's attempts to obtain the emails was grossly negligent or taken in bad faith, then it could support an inference that the missing e-mails are harmful to RFC." In reviewing the evidence on bad faith or gross negligence, the court of appeals said that the district court did not consider whether the late retention of a consultant by RFC in relation to RFC's internal determination that it could not retrieve e-mails with its own resources, supported a finding of bad faith or gross negligence. Continued reliance on its outside vendor for months when the efforts to retrieve documents were fruitless and careless, if not intentionally misleading, and statements by RFC to DeGeorge and to the district court, also should be studied by the district court on remand, the court of appeals said. The court of appeals also suggested that the timing of RFC's sluggish action – on the eve of trial – created an obligation

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Topic	Citation	Discussion
		"to be as cooperative as possible." That conduct may be sanctionable in its own right, the court of appeals said. On remand, DeGeorge was permitted to renew its motion for sanctions with the benefit of discovery, including reexamination of the backup tapes and depositions and, if appropriate, an evidentiary hearing. The judgment should be vacated if the district court determines that RFC acted with a sufficiently culpable state of mind and that DeGeorge was prejudiced by the failure to produce the e-mails, the court of appeals said. If there is a culpable state of mind found, but no prejudice, the district court should consider awarding lesser sanctions, including awarding DeGeorge the costs of its motion for sanctions and this appeal, the Second Circuit added. The district court was also told to consider whether as a sanction for discovery abuse, RFC should forfeit postjudgment interest for the time period from the date of the entry of judgment until the entry of the district court's decision on remand. Finally, the Second Circuit said that if there was no culpable state of mind, it should still consider whether the purposeful sluggishness warrants the imposition of sanctions.
Lakewood Engineering and Manufacturing v. Lasko Products, Inc. (patent infringement action) Motion to compel e-mail discovery granted but costs were not awarded.	2003 U.S. Dist. LEXIS 3867 (N.D. Ill. 2003)	In this patent-infringement matter, Lakewood produced a number of documents and e-mails between an inventor and the company, in electronic form, after the close of discovery. The district court viewed the late production as an indication that Lakewood was not acting in a good-faith effort to produce documents. It declined, however, to require Lakewood to reimburse Lasko for the costs of requesting production of the late documents because the costs of adding this request for relief to its other discovery requests was negligible. On the other hand, to the extent that Lakewood had not produced all e-mails generated or received by the inventor related to the patent, it ordered Lakewood to produce the e-mails.
Williams v. Saint – Gobain Corporation (employment termination claim) Motion for sanction (adverse inference instruction) rejected	53 Fed. R. Serv. 3d 360; 2002 WL 1477618 (W.D.N.Y. 2002)	Plaintiff Williams was terminated by defendant Saint-Gobain. A 1998 reorganization was material to plaintiff's claims. Saint-Gobain had switched to a new e-mail software in late 1998 rendering old e-mails – including those related to the reorganization – irretrievable. Five days before trial was scheduled to start (but it was postponed), Saint-Gobain produced 1998 e-mails obtained from the personal computer of Gregory Silvestri, a former vice president. These e-mails had not previously been produced because Mr. Silvestri thought that Saint-Gobain had them. (He had given his former employer a copy of his hard drive on a CD-ROM and thought the e-mails were on the CD-ROM, but they were not.) In the course of preparing for Mr. Silvestri's deposition which was to be taken on the eve of trial, Saint-Gobain learned of the e-mails and immediately produced them. Plaintiff sought an evidence

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Topic	Citation	Discussion
		preclusion sanction against Saint-Gobain for delayed production of e-mails, destruction of e-mails, and selective retrieval and production of e-mails. The district court denied the motion. It held that defendant produced the e-mails "as soon as it received them – albeit on the eve of trial – and there is no evidence of any bad faith as to any withholding or destruction of the same. In any event, late production of the 1998 e-mails provides no basis for precluding testimony concerning the 1998 reorganization especially inasmuch as plaintiff could have deposed Silvestri on this topic before the initial discovery deadline but chose not to. Finally, there is no basis for an adverse inference with respect to the 1998 e-mails to the extent that they have been produced." (Footnotes omitted.) 2002 WL 1477618, *2. In a footnote the district court noted that the parties have had ample time since the production to prepare for trial. Saint-Gobain was ordered to produce the CD-ROM. Williams was ordered to produce to Saint-Gobain documents in his possession. The district court noted that Williams had what apparently were hard copies of e-mails which he had failed to produce.
Eichman v. McKeon (negligence action by a tenant against a landlord and a furnace repairman for fire damage) Trial court's refusal to sanction defendant for late production of a "computer log" affirmed.	824 A.2d 305 (Pa. Super. Ct. 2003)	Hartford Insurance Co. had lost a file that related to first-party benefits paid to landlords following a fire that damaged tenants' leaseholds. During trial, tenants learned that Hartford had a computer log of activity pertaining to the first-party claim. A Hartford claim consultant was deposed over a lunchtime recess of the trial to discuss the log. The log was provided to counsel for tenants later that day. It turned out the landlords' counsel had had a copy of the log in his possession for over a year. Tenants claimed that the failure to produce the log earlier constituted a violation of a previous discovery order. They asked for an adverse inference jury instruction and requested a continuance of one day to investigate the substance of the computer logs (tenants thought they would show a change in opinion by one of landlords' experts on the cause of the fire). The trial court "reviewed the contents of the logs" and "found no continuance was necessary" because there was no new information in the logs. Tenants did not make the logs part of the record so they were not before the appellate court. Hence, the appellate court held that tenants waived any argument related to the contents of the logs. In any event, the appellate court said that the trial court reviewed the logs and found nothing new which would warrant a sanction, and there was no showing that this decision represented an abuse of discretion.
Tracy v. Financial Ins. Mgmnt. Corp.	2005 WL 2100261	Subsequent to plaintiff's termination of employment with Defendant but prior to the receipt of plaintiff's letter demanding retention of

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Topic	Citation	Discussion
Motion for sanctions granted in part	(S.D.Ind. Aug. 2005)	relevant information, defendant upgraded its computer system. During the upgrade some existing e-mail was stored in another location. Late in the discovery process, during out-of-state depositions, the e-mail was discovered and produced. When the e-mail was produced, defendant offered to hold depositions open until the e-mail could be reviewed by plaintiff. Plaintiff sought Rule 37 sanctions because of the late production relying on *Zubulake*. The district court distinguished *Zubulake*, finding that in this case defendant had preserved relevant documents after the receipt of the retention letter. It just had not located them in a timely manner as part of the collection process. However, the district court found that the production of the e-mail was tardy without sufficient justification: "Presumably, the Defendant was aware of the physical upgrades to its own computer system and was in a position to know, or should have known, that responsive electronic data may have been stored elsewhere than in the new system." Because the e-mail had been produced on the last day of interstate depositions, the district court found prejudice to the plaintiff. The district court then denied the motion for sanctions in part and granted it in part. As to the portion of sanctions that were granted, the district court ordered the defendant to pay the costs of the re-deposition of any of the out-of-state witnesses via telephone or, if the plaintiff preferred in-person depositions, that the parties would split the costs equally, including travel and lodging. All other sanction requests were denied except that if the plaintiff obtained a judgment, the district court said that plaintiff could then request payment of fees associated with the motion for sanctions.
Third Party Database		
The Proctor & Gamble Co. v. Haugen	427 F.3d 727 (10th Cir. 2005)	Proctor & Gamble (P&G) sued various entities due to their dissemination of messages associating P&G with the Church of Satan. P&G subscribed to a comprehensive market share database from an unrelated company. The information for the database is collected by the third party directly from retail outlets. None of the data was provided by P&G. The third-party database was maintained on a rolling basis, meaning that it contained only the prior 30 months of monthly data and the prior 65 weeks of weekly data. As new data is added the old data is simultaneously purged. P&G accessed the database to determine what evidence of damages the database might provide by examining reduced sales of certain P&G products. P&G ordered a circumscribed set of archived data for use by its expert. The archived data received by P&G was produced to the defendants but defendants wanted more, particularly older data not used by P&G's expert. However, P&G

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Topic	Citation	Discussion
		did not possess or own the third-party database and accessed it only by paying a fee. P&G could not have produced the data sought by defendants reasonably, the court of appeals explained. The older data was no longer available because of the "rolling" nature of the database. P&G could not have downloaded the data since it was uncontroverted that it lacked the computer capacity to do so and would have had to acquire a mainframe computer to do so. And purchasing the full archival data from the third party, when it still existed, would have cost around thirty million dollars. Under these circumstances, the district court sanctioned P&G for the failure to preserve "relevant electronic data." However, the Tenth Circuit said that the district court never offered an explanation of what it meant by "relevant electronic data" or what steps P&G "could and should have taken to preserve such data." P&G also received no warning of a dismissal sanction. The court of appeals explained that a prior order requiring P&G to produce data it "possessed" "arguably failed to address the unique circumstances of this case." The district court also failed to consider the requisite factors before imposition of dismissal as a sanction. The five factors used in the Tenth Circuit are: 1) the degree of actual prejudice to the other party; 2) the amount of interference with the judicial process; 3) the culpability of the litigant; 4) whether the court warned the party in advance that dismissal of the action would be a likely sanction for noncompliance; and 5) the efficacy of lesser sanctions. The Tenth Circuit concluded that the finding of prejudice was erroneous and was unsupported by any detailed explanation. It agreed with P&G that the other factors would also not justify dismissal either on the record before the court of appeals.
Spoliation		
United States v. Philip Morris USA Inc. (suit for damages against tobacco companies) Motion for evidentiary and monetary sanctions granted in part.	2004 WL 1627252 (D.D.C. July 21, 2004)	Philip Morris USA Inc. was ordered to pay $2.75 million into the registry of the district court because "employees at the highest corporate level in Philip Morris, with significant responsibilities pertaining to issues in this lawsuit, failed to follow Order #1, the document retention policies of their own employer, and, in particular, the 'print and retain' policy, which, if followed, would have ensured the preservation of emails which have been irretrievably lost." Order #1 was the first case management order in the matter and required preservation of documents which were "potentially relevant" to the subject matter of the litigation. The district court also precluded every employee who failed to comply with Philip Morris' internal document program from testifying at trial.
Morris v. Union	373 F.3d 896	Plaintiff owned a wrecking company. He was called to the scene of

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Topic	Citation	Discussion
Pacific Railroad (Appeal from jury veridct for plaintiff in personal injury action) Trial court issued an adverse inference instruction because of the destruction of a voice tape.	(8th Cir. 2004)	a collision between a Union Pacific train and a tractor-trailer truck. In making an inspection of the vehicles, the train car suddenly moved forward and caused him injury. He sued and received a judgment of $8 million from the jury. Union Pacific routinely tapes communications between its train crews and the railroad's dispatcher and recycles the tapes after 90 days. By the time Morris filed suit in this action, the recording related to this particular event "had long since been destroyed." Before trial, Morris moved for sanctions based on the destruction of the tape. After four days of evidentiary hearings, the trial court awarded plaintiff an adverse inference instruction as a sanction but also held that the document retention policy was reasonable on its face and Union Pacific "'did not intentionally destroy the tape.'" Relying on its decision in *Stevenson v. Union Pacific R.R. Co.*, 354 F.3d 739 (8th Cir. 2004), the court of appeals explained that there must be a finding of "intentional destruction indicating a desire to suppress the truth" before an adverse inference instruction could be issued. Because the district court had made a specific finding of no such intent, the court of appeals vacated the judgment and ordered a new trial.
Wiginton v. CB Richard Ellis (class action alleging a pattern and practice of sexual harassment) Magistrate's report and recommendation finding spoliation and bad faith but denying a motion for sanctions without prejudice pending review of records that are contained on backup tapes.	2003 U.S. Dist. LEXIS 19128 (N.D. Ill. October 24, 2003) (Magistrate Report and Rec.)	Plaintiff Amy Wiginton filed a class action complaint against CB Richard Ellis, Inc. (CBRE) claiming a pattern and practice of sexual harassment at defendant's offices. Suit was filed on September 25. Plaintiff's counsel wrote to CBRE on September 27 asking that CBRE not destroy electronic data that relates to the subject matter of the litigation or any information which could lead to the discovery of admissible evidence. The letter described electronic data and storage media which would be subject to discovery requests including the types of files, on-line data storage, off-line data storage, data storage devices that were replaced, fixed drives on personal computers and work stations, programs and utilities, system modification logs, personal computers, and evidence created subsequent to the letter. Plaintiff's counsel specifically instructed CBRE, among other things, to preserve e-mails, word processed files and spreadsheets (including drafts), databases, presentation data or slide shows, all Internet and Web-browser-generated history files, caches, and "cookies" files generated at the work station of each employee, logs of network use, all backup tapes and software needed to reconstruct the tapes, and image copies of all hard drives retained but no longer in service for a certain time period. On September 30, defendant sent out a preservation e-mail instructing employees not to destroy any records of any type that pertain to Amy Wiginton. In February 2003, the first request for production was served by plaintiff. On May 30, the parties agreed on a joint preservation communication which was transmitted to all CBRE

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Topic	Citation	Discussion
		employees. CBRE also agreed to produce June, August, and September 2002 backup tapes from select offices. On June 18, 2003, the district court entered an agreed preservation order which required CBRE to retain month-end backup tapes, or data storage devices or fixed drives on personal computers of any employee accused of sexual harassment. Prior to this date, CBRE continued its normal document retention policies and did not inform its information technology director that any electronic information should be retained and failed to inform its employees about the need to retain any documents that might be relevant to the lawsuit, as opposed to documents dealing specifically with Ms. Wiginton. As a result, backup tapes of CBRE's e-mail system were destroyed and former employees' hard drives, including that of Ms. Wiginton's supervisor, were not saved. After discussing the architecture of CBRE's network infrastructure, the magistrate judge first determined that there was a duty to preserve relevant information dating to the filing of an administrative charge of discrimination before suit was filed and, given the scope of the charge, the class action complaint, and plaintiff's counsel's September 27 letter, an initial preservation e-mail limited to documents relating to Ms. Wiginton "lacked the appropriate scope." The magistrate judge identified what CBRE should have done, rejected its arguments over cost, and concluded that CBRE had knowledge of its duty to preserve, and "willfully and intentionally did not fulfill this duty." As for sanctions, the magistrate judge rejected a default judgment as a sanction. On the issue of an adverse inference instruction, the magistrate judge determined that "bad faith" had to be shown and then proceeded to conclude that CBRE engaged in bad faith because it failed to change its normal retention policy knowing that relevant documents would be destroyed, and it failed to search for relevant documents before destroying nonrelevant documents. "But its complete failure to perform any search rises above the level of mere negligence, and this willful blindness in the context of the facts surrounding the destruction of the documents, leads us to find that the documents were destroyed in bad faith." However, the magistrate judge determined that the sanctions motion should be denied without prejudice pending a determination of the effect of CBRE's actions on the plaintiff's case by a review of backup tapes that CBRE had preserved, which might provide an indication of the evidence that was destroyed. "If Plaintiff's expert is able to discover relevant documents on the backup tapes then Plaintiff should be allowed to renew its motion for appropriate sanctions based on the destroyed evidence."

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Landmark Legal Foundation v. Environmental Protection Agency (Freedom of Information Act (FOIA) action) Motion for civil contempt granted in part.	2003 WL 21715678 (D.D.C. July 24, 2003)	Plaintiff had filed an FOIA request with EPA on September 7, 2000, seeking "[i]dentification of all rules or regulations for which public notice has not been given, but which public notice is planned by the EPA between September 7, 2000 and January 20, 2001, including but not limited to the rules or regulations referenced in the attached news article" and various types of documents relating to those rules and regulations. The news article indicated that EPA was attempting to push through certain regulations before the administration change. EPA did not readily respond, so plaintiff sued on September 29, 2000, and sought a preliminary injunction to "prevent the destruction of responsive materials" that might occur with the change in administrations. The district court granted the preliminary injunction, ordering "that Environmental Protection Agency and its agents and employees are enjoined from transporting, removing or in any way tampering with information potentially responsive to Landmark Legal Foundation's September 7, 2000, Freedom of Information Act request." Nevertheless, "the hard drives of several EPA officials were reformatted, email backup tapes were erased and reused, and individuals deleted emails received after that date." After the district court and plaintiff were advised of this conduct by counsel for EPA, plaintiff moved to hold EPA and several individuals in contempt. The district court found that EPA acted in contempt of the injunction order. While disappointed that the United States Attorney's Office (USAO) failed to give prompt notice to EPA of the injunction order, since the order did not so require, it did not find the USAO in contempt. It also elected not to find any individuals in contempt because the order was not specific enough to give each individual notice of its requirements and, in one case, because it was not specific enough to require issuance of a document preservation memorandum. As a sanction, the district court awarded plaintiff attorneys' fees and costs "incurred as a result of EPA's contumacious conduct."
Kucala Enterprises, Ltd v. Auto Wax Co., Inc. (patent validity/infringement litigation) Magistrate's report and recommendation to	2003 U.S. Dist. LEXIS 8833 (N.D. Ill. 2003) (Magistrate Report and Rec.)	In the course of this patent infringement case, Kucala installed and used software called "Evidence Eliminator" on a computer, just hours before it was to be examined by Auto Wax's computer specialist. Evidence Eliminator is a program designed to clean computer hard drives of data that may have been deleted by the user but still remain on the hard drive. Kucala also threw two other computers away during the litigation. He did so because they crashed and were of no use to him. Kucala also admitted destroying documents, contrary to his attorney's advice, because he was afraid the defendant would not honor a protective order that was in place. Auto Wax's computer specialist inspected the computer on which

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impose the sanction of dismissal for Kucala's destruction of data.		Kucala had installed "Evidence Eliminator" and confirmed that the software had been used to delete and overwrite more than 14,000 files. Auto Wax filed a motion for sanctions alleging prejudice as a result of Kucala's destruction of one computer and deletion of relevant discovery from two others. Auto Wax sought a default judgment, attorneys' fees, expert fees, and costs. The Magistrate found that Kucala had acted unreasonably, with gross negligence, and in flagrant disregard of the district court's order by deleting files just hours before Auto Wax's computer specialist was to inspect his computer. The magistrate recommended that the district court dismiss the action and require Kucala to pay the costs and attorney fees incurred by Auto Wax from the time Kucala deleted the files until the hearing. The magistrate's summary of the evidence was telling: "The case law in this circuit is clear that Kucala's subjective state of mind is of no consequence to the issue of fault. The Court finds that Kucala was at fault by acting unreasonably as well as acting with gross negligence and in flagrant disregard of the court order by speciously deleting files, in 'the wee hours' of the morning, hours before Auto Wax's computer specialist was to take an image of Kucala's computer - and likely even before this time. Kucala entreats the Court to believe him - that he provided all the relevant information to Auto Wax. But, given all of the evidence before the Court, how is the Court to substantiate the veracity of his claim? Like in *Methe* (1999 U.S. Dist. LEXIS 10702 (N.D. Ill. July 2, 1999)), the Court may never find out what files were deleted. The possible prejudice to Auto Wax is enormous, or perhaps inconsequential. Kucala's actions have all but prevented adequate discovery in this case, and severely limited the fact finder's ability to do its job. Kucala argues that a default judgment would serve as a windfall to Auto Wax, but the opposite result, allowing Kucala to proceed with his case, would benefit him and would result in a slippery slope of future egregious behavior by litigants. Kucala cannot now claim that he would be prejudiced - he is represented by counsel and went against counsel's advice by using Evidence Eliminator on his computer. Why he strayed from his attorney's opinion perplexes the Court, but he should be sanctioned for destroying evidence."
Katt v. Titan Acquisitions, Inc. (Securities Exchange	2003 WL 131700 (M.D. Tenn.) January 10,	The district court granted defendants' summary judgment motion. Apparently in response to the motion for summary judgment, plaintiffs had filed a motion for sanctions because of spoliation of electronic evidence. The district court reserved judgment on the motion even though it granted the motion for summary judgment. The alleged destruction could not defeat the summary judgment

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Act class action) Motion for sanctions does defeat a summary judgment.	2003	motion because it did not undercut the "many grounds supporting the summary judgment." It cited a Second Circuit opinion to the effect that destruction of evidence is not enough to allow a party who has produced no evidence or inadequate evidence in support of a claim to survive summary judgment on that claim. On the motion for sanctions, the district court explained that it has the power to hear a collateral matter that is incidental to the underlying claim even after a judgment on the merits.
Trigon Insurance Company v. United States (case involved a tax-refund claim) Fee award made.	234 F. Supp. 2d (E.D. Va. 2002) December 17, 2002	The government had erased computer-generated communications between a litigation coordinator for the United States and the United States. The district court earlier had directed the United States to retain an expert to recover the evidence "which ostensibly had been destroyed by erasure." Deloitte & Touche was retained and was able to recover a "goodly amount of erased evidence." The case on the merits is apparently reported at 215 F. Supp. 2d 687 (E.D. Va. 2002). The district court also had directed Trigon to receive its attorney fees and costs as a result of spoliation. That was the purpose of this decision. Trigon sought and received $179,725.70 after the district court rejected arguments that Trigon should not recover for the cost of documenting the spoliation and seeking judicial redress; the record was insufficient to show the fees and expenses incurred; and the fees and costs were not excessive. The district court also held that whether the retrieved documents were used at trial "is not particularly significant in assessing the cost to Trigon of uncovering the spoliation, bringing it to the district court's attention, and securing relief from it." "The value of having disclosed the spoliation and having recovered some of that evidence transcends use of the evidence to cross examine the experts at trial."
Liafail, Inc. v. Learning 2000, Inc. et al. (contract action and trademark action) Motion for sanction in the form of an adverse inference jury instruction tentatively granted if plaintiff failed to comply with	2002 U.S. Dist. LEXIS 24803 (D. Del. 2002)	Two incidents of laptop spoliation are involved in this order. Liafail's vice president purged all the files from the laptop used by the company's national sales manager, who had been identified as a person with relevant information concerning the litigation. The sales manager had given the laptop to the vice president in response to discovery requests. L2K alleged that no effort was made to preserve the files on this laptop before they were purged. L2K was able to reconstruct some but not all of the files and argued that incriminating information was contained on the files, including e-mails with a person named Frank Stucki. Stucki was then deposed. He testified that he "trashed" two laptops (dropping one and having the other one slip out of his hands) within the past seven months. He said all of the data on the laptops was lost. In response to a sanctions motion, Liafail claimed that all of the relevant information was removed from the three laptops, saved, and

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production order.		produced. The district court noted that Liafail had previously taken the position that data was inadvertently destroyed and no longer available. It characterized Liafail's "current position" by saying Liafail "may have engaged in questionable discovery tactics." Because the record before the district court was unclear on what existed and was produced, the district court declined to immediately award sanctions. Instead, it allowed Liafail "to correct or clarify the discovery record by producing the requested documents which it has claimed are available, or by producing the Bates numbers of documents which it claims it has already produced." If Liafail failed to comply with this order, the district court said it "will order sanctions against" Liafail "in the form of an adverse inference jury instruction." The district court justified this determination by explaining that Liafail's prior versions of events "tend to demonstrate bad faith on its part."
Kormendi v. Computer Associates Int'l, Inc. (gender discrimination termination claim) Order clarifying discovery rulings including one relating to e-mail production	2002 U.S. Dist LEXIS 20768 (S.D.N.Y. 2002) (Magistrate order)	A Magistrate's discovery order required: (1) defendant to produce all e-mail messages that were created during a specified time-period and mentioned the plaintiff and (2) the plaintiff to pay for the search. Defendant explained in its request for reconsideration that it had no method to locate and reconstruct e-mails mentioning the plaintiff for the listed time period, and that its document retention policy called for employees to retain e-mails for only 30 days. Further defendant explained that it had sought to collect e-mails from persons involved in the termination and had produced what it had found. The Magistrate said that plaintiff could ask for the names of the persons from whom e-mails were sought and was free to suggest others who might have saved relevant e-mails. Plaintiff asked the district court to hold that if defendant did not produce the requested e-mails, the defendant would be precluded from using them in evidence at a trial "as well as a missing evidence charge." The Magistrate determined that if defendant "should seek to offer testimony describing the contents of a destroyed e-mail," plaintiff could apply then to the district court for "whatever relief she seeks."
Hildredth Mfg. LLC v. Semco, Inc. (misappropriation of trade secrets) Motion for contempt denied.	2003 WL 359309 (Ohio App. 3d Dist.) Feb. 20, 2003	This matter involved a claim that defendant had taken trade secrets on a computer file. A TRO was in place to preserve all evidence. Plaintiff wanted to image defendant's computers. Defendant permitted the imaging for desktop computers but not for "Mazak" drives (that operated the lathe equipment) because it feared that imaging them could damage them, which may lead to injury of employees operating the lathe equipment. The trial court was made aware of this concern. But prior to resolving the issue, the manufacturer of the drives removed them and replaced them with different ones without any protest by defendant. The manufacturer

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		then erased the drives and redistributed them to other customers. A "motion for contempt and sanctions" was brought but denied and that order was affirmed. The Mazak drives were purchased *after* the lawsuit was brought. The appellate court reasoned that it was nonsensical to believe that Hildreth would put purloined information on a drive obtained after the TRO knowing that Semco was seeking to image the hard drives.
Lombardo v. Broadway Stores, Inc. (suit over a failure to pay accrued vacation benefits to a class of employees) Sanctions' order requiring compilation or records and payment of attorneys' fees affirmed.	2002 WL 86810 (Cal. App. 4th Dist.) January 22, 2002 (not for publication under Cal. Rules of Court 977(a))	Lombardo filed suit in 1995 in federal court (which was later "remanded" to state court in May 1996). In January 1995 and in July 1995, Lombardo had sent Broadway letters requesting that Broadway preserve all writings that had an effect on the conduct of Broadway's business. In February 1996, Broadway ceased business operations. It copied its data processing company's payroll records on storage devices and shipped them to a data center in Georgia and later moved them to another storage facility. In late spring or summer of 1996, it took some of the devices out of storage. It was determined that they could not be read because they were damaged or the software to read them no longer could be obtained. So they were destroyed. All of this occurred before Lombardo sought formal discovery in January 1997 in the state court. Broadway did not, however, tell Lombardo about the destruction until July 1999 after Broadway had promised Lombardo on several prior occasions that it was working on her discovery requests related to information on the payroll records and had been ordered to produce the information. When it finally told Lombardo what happened, it offered five-million hard-copy records for review. Lombardo moved for sanctions in the amount of $31,250 in attorneys' fees and an order requiring Broadway to recompile the records. While the motion was pending, Broadway informed Lombardo it had found a data conversion company to convert the hard-copy records into electronic records at a cost of $100,000 which it was spending and that it would have the project completed within a month. The discovery referee recommended that Broadway recompile the records as planned and pay the attorney fee sanction. The trial judge accepted the recommendation. On appeal, the Fourth District held that spoliation occurred even if hard copies are available. The Fourth District noted that Lombardo had put Broadway on notice in 1995 that she wanted the evidence preserved and that after litigation commenced and knowing Lombardo wanted the data, "Broadway intentionally destroyed it." And it was virtually impossible to extract the relevant data from five-million pages of records, the Fourth District said. Broadway's (a) numerous agreements to produce the records and (b) its statement that it had produced all of them and (c) later that it would produce them when it knew they

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		had been destroyed and (d) then still later claiming it was having problems compiling the data and (e) then saying they were lost or misplaced and (f) then it did not know where they were, "smacks of an intentional destruction of evidence followed by a cover up." In response to an argument that it did not destroy evidence in anticipation of or in response to a discovery request, the Fourth District emphasized again that Lombardo had written Broadway twice in 1995 advising it "under federal law to preserve relevant evidence."
Scope of Electronic Discovery		
Portis et al. v. City of Chicago et al. Claims under Section 1983 for violation of federal civil rights) Motion to compel production of a database generated by plaintiff's attorneys	2004 WL 1535854 (N.D. Ill. July 7, 2004)	Plaintiffs' counsel had prepared a database of selected data from the City's arrest reports to support its claim that plaintiffs' civil rights had been violated by the City. Plaintiffs had proposed that the parties jointly undertake the project originally. The City had refused. Plaintiffs had spent $90,000 to prepare the database. They opposed the motion claiming the database was work product. The district court held that the database was fact work product, not opinion work product, that the City had a substantial need for access to the database and could not replicate it without undue hardship (expending extensive, duplicative resources), and ordered production of the database. However, the City was ordered to pay one-half of the past expenses plaintiffs incurred to compile the database. The district court did give the City a credit of $5,000 representing one-half of the $10,000 expenses the City had occurred in special computer programming costs to obtain information in the first instance to provide to the plaintiffs. Each side was required to pay one-half of future expenses as well.
In re Ford Motor Company (personal injury action) Writ of mandamus seeking relief from an order granting a motion to compel access to Ford's databases. Ford's petition was granted.	345 F. 3d 1315 (11th Cir. 2003)	In this personal injury action, plaintiff was given access by court order to Ford's Master Owner Relations Systems I, II, and III ("MORS") and Common Quality Indicator System ("CQIS") databases. Plaintiff sought such access to conduct searches for claims related to inertial unlatching of the RCF-67 seatbelt buckle, the basis of plaintiff's claim. "MORS records all customer contacts with Ford, and CQIS records contacts by dealers, personnel, and other sources." Ford petitioned the court of appeals to vacate the order. The court of appeals relied on the Advisory Committee Notes to Rule 34(a) in granting the writ. Those Notes explain that where data "can be made usable by the discovering party only through respondent's devices, respondent may be required to use his devices to translate the data into usable form. In many instances, this means that respondent will have to supply a print-out of computer data." 2003 WL 22171712 at *2 (quoting Fed. R. Civ. P.

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		immediate access following this procedure: "First, Antioch will select an expert of its choice, in the field of computer forensics ("the Expert"), to produce the "mirror image" of the Defendants' computer equipment. Once the Expert is chosen, Antioch will notify the Defendants, and the Defendants will make available to the Expert, at their place of business, and at a mutually agreeable time, all of their computer equipment. The Expert will use its best efforts to avoid unnecessarily disrupting the normal activities or business operations of the Defendants while inspecting, copying, and imaging, the Defendants' computer equipment, up to and including the retention of the computer equipment on the Defendants' premises. Moreover, the only persons authorized to inspect, or otherwise handle such equipment, shall be employees of the Expert assigned to this project. No employee of Antioch, or its counsel, will inspect or otherwise handle the equipment produced. The Expert will also maintain all information in the strictest confidence." "Within ten days of its inspection, copying, and imaging, of the computer equipment produced by the Defendants, the Expert shall provide the parties with a report as to what computer equipment was produced by the Defendants, and the actions taken by the Expert with respect to each piece of computer equipment. This report shall include a detailed description of each piece of computer equipment inspected, copied, or imaged, by the Expert, including the name of the manufacturer of the equipment and its model number and serial number; the name of the hard drive manufacturer and its model number and serial number; and the name of any network card manufacturer and its model number, serial number, and MAC address wherever possible. The Expert shall document the chain of custody for any copies and images drawn from the equipment. These reports shall be produced to both of the parties." "Once the Expert has created copies and images of the Defendants' hard drives, it will produce two copies of the resulting data. One copy will be transmitted to the Court, and the other copy will be transmitted to the Defendants. Thereafter, once Antioch propounds any document requests, the Defendants will sift through the data provided by the Expert to locate any relevant documents. The Defendants shall then produce to Antioch all responsive documents that are properly discoverable, as well as a privilege log, which describes the nature of any privileged documents or communications, in a manner that, without revealing information that is privileged or protected, will enable Antioch to assess the applicability of the privilege or protection claimed. At that time, the

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		Defendants shall also forward the privilege log to the Court for potential in camera review." "Once it has reviewed the documents produced by the Defendants, as well as the privilege log, if the Plaintiff raises a dispute as to any of the documents, by providing a cogent basis for doubting the claim of privilege, or for believing that there are further relevant documents, the Court will conduct an in camera review, limited to the issues raised. This procedure will govern the recovery of deleted information from the Defendants' computers unless and until modified by a Court of competent jurisdiction." "With this procedure in mind, we direct the parties to meet and confer on an appropriate time for the Expert to access the Defendants' computer equipment, keeping in mind our directive to minimize the burden and inconvenience caused to the Defendants. To that extent, we grant the Plaintiff's Motion to Compel, and to Appoint a Neutral Expert in Computer Forensics."
Tulip Computers International B.V. v. Dell Computer Corporation (patent infringement action) Sanctions not granted but discovery obligations were imposed on Dell.	52 Fed. R. Serv. 3d 1420, 2002 WL 818061 (D. Del. 2002)	In response to a motion to compel and for sanctions, the district court held that Dell failed to fulfill many of its basic discovery obligations in the case and Tulip seeks relief that is too broad. It held as follows. (1) With respect to a data warehouse, Tulip and its consultant, before the motion was ruled on, were given access to the Dell database and working with Dell's in house data warehouse manager, were able to conduct searches appropriate for Tulip's discovery purposes. Thus the district court said it did not have to impose this solution (which it would have imposed). (2) Tulip wanted e-mail discovery on a number of persons. Dell limited e-mail discovery to certain persons. The district court ordered Dell to provide e-mails from the hard disks of identified executives in electronic form to Tulip's consultant. That consultant would search them based on an agreed upon list of search terms. Tulip will give Dell a list of the e-mails that contain those search terms. Dell will then produce them subject to its own review for privilege and confidentiality designations, the district court held. (3) As for Michael Dell, the district court held he could be excluded from this search effort unless Tulip obtains additional information that leads it to believe that a search of Michael Dell's e-mail will produce responsive documents in which case it could come back to the district court. (While not related to electronic documents, certain documents contained in one box were destroyed pursuant to Dell's document retention policy, *after* suit was brought. There was no evidence of bad faith, the district court found. Dell was ordered to try to

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		recreate the contents of the box and to make the person knowledgeable of the documents available to testify about the contents. It also had to give notice to Tulip before destroying other documents.)
Corbell v. Norton (mismanagement of funds held by the Department of the Interior in trust for Indian tribes) Attorneys' fees awarded.	206 F.R.D. 324 (D.D.C. 2002)	Defendants file a motion to clarify its duties to produce e-mail records. They wanted to produce e-mail from paper records of e-mail messages rather than from backup tapes and wanted to overwrite backup tapes in accordance with Department of Interior directives. However, this was the third time that the defendants had sought this relief, having lost similar motions the first two times. The special master hearing the motion initially, therefore, recommended that it be denied and that defendants pay plaintiffs' reasonable expenses, including attorneys' fees. The district court accepted the recommendation.
Commissioner of Labor of North Carolina v. Ward et al. (wage and hour litigation) Sanction of default judgment affirmed.	2003 N.C. App. LEXIS 1099 (N.C. App. 2003)	A trial court order required defendant to allow plaintiff to examine, inspect, and copy all information stored on computers and computer storage systems, and to remove the systems off-site, to be downloaded and deciphered. Defendant initially would not let the plaintiff take any of its computer equipment, "DAT" tapes, or other storage system off-site to be accessed. Ultimately, some of the materials were produced pursuant to a second court order but, even after they were produced, the plaintiff could not access the information on the DAT tapes. In his deposition, defendant Ward refused to answer most of the questions about the software used to create the DAT tapes. None of the information on the DAT tapes could be copied in an accessible way before trial. Plaintiff then filed a motion for sanctions or for compliance with the trial court's discovery orders and a continuance. Defendants claimed they had complied with all discovery orders. The trial court then found that defendants had "intentionally and willfully refused to comply" with prior discovery orders "by failing to provide plaintiff with copies of electronically stored information and by failing to answer deposition questions regarding the method of access to information stored on the DAT tapes." Default judgment was entered against the defendants on Wage and Hour Act claims and defendants were prohibited from defending against the proof of unpaid wages, liquidated damages, and interest offered in plaintiff's claims. The appellate court affirmed saying, in part, that defendants' conduct to thwart plaintiff's efforts to obtain records was willful, deliberate and egregious, and that there was no evidence that defendants were ordered to produce information that they could not provide.
Getty Properties Corp. v. Raceway Petroleum,	2005 WL 1412134	Plaintiff sought sanctions because defendant did not create certain types of reports from a computerized alarm system. The reports

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Inc., Motion to sanctions denied	(D.N.J. June 2005)	sought by plaintiff were not ones that defendant needed as part of its ordinary business operations. Plaintiff nonetheless sought an adverse inference instruction claiming that had the reports been generated and preserved they would have been relevant and useful to plaintiff's case. The district court denied plaintiff's motion for sanctions. The district court agreed with defendant that defendant was not responsible to create records not kept within the normal course of its business. The district court distinguished this case from those cases dealing with the active deletion of data, explaining that defendant's failure to create more reports than it used in the daily activities of its business was "not the kind of willful action that discovery sanctions are intended to redress."
Fabrication		
Premier Homes and Land Corporation v. Cheswell, Inc. (summary process to evict a tenant removed to federal court) Fees granted as part of unopposed motion to dismiss.	240 F. Supp. 2d 97 (D. Mass. 2002) December 19, 2002	A request was made by defendant to image Premier's hard drives, backup tapes, and other data storage devices. The district court permitted this work. After it was begun, Premier's counsel disclosed that Mr. Kenney of Premier admitted that the lease addendum was not in existence on the date the ground lease was signed, and the e-mail was fabricated. The motion to dismiss that followed was not opposed and the only issue was recovery of fees and costs which were permitted for defendant's attorneys (about $18,000 with a $760 reduction for spending two days watching the imaging) and $5,650 for the computer consultants charges reducing their rate to $100 per hour from $200 per hour.
Jimenez v. Madison Area Technical College (employment discrimination claim) Sanction of dismissal affirmed.	321 F.3d 652 (7th Cir. 2003)	This was a Section 1981 and 1983 case in which Jimenez was found to have fabricated e-mails containing derogatory statements about her. Jimenez denied that the communications were fraudulent and her lawyer supported those denials. After a hearing, the district court found otherwise. (The statements were quite blatant and the district court found that persons holding professional positions in human resources would make them and write them down.) Citing Rule 11, the district court dismissed the case and awarded defendants $16,473 against Jimenez and her lawyer. The 7th Circuit affirmed. Jimenez did not challenge the factual finding but sought reversal based on the severity of the sanction. The 7th Circuit was unsympathetic, calling her claim "so unmeritorious and her behavior so deceptive that the filing of her baseless claim amounted to a veritable attack on our system of justice." It also awarded sanctions on appeal under F. R. App. P. 38. The court of appeals did require counsel to submit better documentation of time, however, before permitting recovery for 125 hours of time allegedly spent on the appeal. (The court of appeals noted that appellant's brief

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		contained only one page of legal argument.)
Nartron Corp. v. General Motors, Corp. (breach of contract claim) Sanction of dismissal affirmed.	2003 Mich. App. LEXIS 1059 (Mich. App. 2003) (unpublished)	The case arose out of a claim that General Motors owed plaintiff money for research and development costs associated with a device that plaintiff produced for General Motor's Delco division. Plaintiff claimed that General Motors discontinued use of the device before it could recoup its costs and sought damages. The key to plaintiff's damages claim was its research and development payroll. Plaintiff calculated its damages from hard-copy time sheets where available and otherwise from wage projections. Defendant argued the hard-copy time sheets were backdated and unreliable. General Motors further argued that plaintiff used the fabricated timesheets and hid, altered, or destroyed corroborating or contradictory evidence such as computer data. During a four-day evidentiary hearing on a motion for sanctions, the debate between the parties centered on three versions of a database produced by plaintiff during discovery: a printout, a diskette, and a backup tape. Defendant argued that the multiple versions established that data in the FoxPro software that was being used had been deliberately altered or removed. General Motors also complained about the failure of plaintiff to produce the "original" FoxPro backup tape, which plaintiff claimed could not be located. At a later oral argument on the sanctions motion, plaintiff produced "a supposed original backup tape." The trial court ordered an independent examination of the tapes to determine "their authenticity in light of the questions concerning evidence tampering." The trial court found that the database as produced "contained alterations and/or deletions." The appellate court found no error in this conclusion or in the conclusion that the plaintiff failed to disclose in a timely manner the existence of the database. The appellate court also credited the district court's determination not to accept an affidavit of a vice-president of plaintiff which explained that he had copied the original application onto a backup tape. This explanation, however, was contrary to the view of the court-appointed expert and was contrary to the affiant's deposition testimony. The appellate court also accepted the district court's findings that names and customer data were deleted from the database and that this information was material because of the allegations that the hard-copy timesheets were altered or missing and did not allocate time to specific projects. The court-appointed expert had also supported this determination. The appellate court affirmed the sanctions order saying it was warranted based on the "discovery abuses and evidence tampering."
Wheelbarrow of Sins		

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Metropolitan Opera Association, Inc. v. Local 100, Hotel Employees and Restaurant Employees International Union et al (dispute over use of the Met's name to obtain benefits for Union in a dispute with a provider to the Met; defamation, violation of the Lanham Act, trade libel and others) Dismissal as a sanction for a variety of misdeeds.	212 F.R.D. 178 (S.D. N.Y. 2003)	The dismissal resulted from a number of discovery sins, including: (1) Failure to explain that documents includes electronic documents; (2) Failure look for electronic documents; (3) Mistaken belief that emails were automatically stored on the user's server; (4) Instructions that were given by a lawyer were not supported by evidence where, when and to whom the instructions were given; (5) Failure to preserve electronic documents; (6) Failure to contact ISPs to attempt to retrieve deleted emails despite representations to court they would be contacted; (7) Representation in a letter that Union had provided all responsive documents in its computers was false; (8) Emails that were produced should have been produced earlier; (9) Replacement of computers without notice after Met's counsel wanted to hire forensic experts to examine the hard drives to attempt to retrieve emails deleted.

SANCTION AVOIDANCE TIPS

These cases highlight practice pointers for lawyers as well. Among them are these:

1. For plaintiffs, sending out a document preservation letter before litigation is filed may benefit a requesting party in dealing with sloppy caretakers of electronic evidence. The duty to preserve may arise a lot earlier than litigants may realize. This duty to preserve is a trap for the unwary.
2. Lawyers must take immediate steps to advise their clients that discovery obligations include electronic documents both from a preservation and production standpoint.[50]
3. Preservation memoranda take on new meaning in the e-discovery environment. They should be thoughtful and inclusive and reach the appropriate audience. Too narrowly limiting the scope of electronic preservation directives may be perilous.

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[50] As noted earlier, n.20, the Standing Committee of on Rules of Practice and Procedure of the Judicial Conference of the United States has promulgated revisions to the Federal Rules of Civil Procedure to address electronic discovery issues. See http://www.uscourts.gov/rules/Reports/ST09-2005.pdf. The revisions should take effect on December 1, 2006 if the Supreme Court accepts the revisions and Congress allows them to take effect. One of the proposals is to change Rule 26(f) (addressing the conference of the parties before the Rule 16 scheduling conference) to provide that the parties discuss "any issues relating to preserving discoverable information." In addition, new paragraphs 26(f)(3) and (4) would require the parties to state their views on "(3) any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;" and "(4) any issues relating to claims of privilege or of protection as trial-preparation material, including – if the parties agree on a procedure to assert such claims after production – whether to ask the court to include their agreement in an order." Rules App. C-31, 39.

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4. The information technology department or similar groups play a growing role in e-discovery matters and should be involved early in preservation and production efforts.
5. In organizing the effort to respond to discovery, ensure that the universe of electronic files is considered. Learn enough about a client's electronic filing system to know where to look.
6. *Zubulake V* highlights a fundamental difference between paper and electronic document preservation and production. Electronic document retention habits are not controlled by secretaries, assistants, and filing clerks. In the paper document world, these persons are efficient and know how to follow well-defined rules that satisfy a litigant's need to meet the requirements of a litigation hold. In the electronic world, the burden of document preservation is falling on their bosses who have not heretofore had to worry about document preservation or production, have inconsistent electronic document retention habits, and operate within an undefined or ill-defined protocol for electronic document management.
7. Determine the electronic document storage habits of the key players. (*Zubulake V* contained 17 references to key "employee(s)" or "player.") These habits include archiving e-mail on the hard drives of the person's computer; checking out documents onto floppy disks, CDs, DVDs, flash drives; e-mailing documents to personal e-mail addresses; and identifying document versions residing on notebook computers, PDAs, home computers, or other storage media. Then ensure that such documents are preserved.
8. Determine the applicable recycling program timetables for corporate storage media, especially where documents associated with key players reside. Suspend corporate recycling programs or otherwise demonstrate that you have captured all potentially relevant documents in a reasonable manner.
9. Follow up with key players to verify that they are following preservation instructions.
10. Individual employee's storage/copying habits complicate the job of responding to electronic discovery. The last piece of testimony one should learn in a deposition of one's witness is about an electronic storage/copying habit of a witness that produces an electronic file location that was not theretofore inspected.
11. Slow production can be as dangerous as no production. Heed the teaching of *Residential Holdings*.
12. Don't forget voice mail. Whether it is office voice mail, or voice mail associated with cellular telephones or even home voice mail, it should be the subject of inquiry when the duty to preserve attaches, and then potentially relevant messages should be preserved.
13. Adverse inference instructions are not easy to come by as *Zubulake IV* demonstrates, but they are not extinct as *Zubulake V* and *Stevenson* show.
14. Good faith has great value in facing a sanctions claim. Being able to show the absence of prejudice is just as important.
15. As was the case with cost-shifting, an agreed upon protocol up front among counsel that takes into account the realities of each side's e-discovery burden should reduce the likelihood of a later sanctions claim.[51] But the protocol must be followed!
16. And if these tips are too many to remember, then just follow the Golden Rule. If you traded places with your opponent, would you regard your actions as digitally reasonable?[52]

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[51] Revised Rule 16 recognizes the need for early discussion of electronic discovery issues and the unique privilege-evaluation and protection problems raised by electronic discovery. New paragraphs (b)(5) and (6) would permit the Rule 16 Scheduling Order to include: "(5) provisions for disclosure or discovery of electronically stored information; (6) any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after production." Rules App. C-27.

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CONCLUSION

In the digital world, discovery is the same but different. Bytes and bits can mean a lot of bucks. Foresight, coordination, thoughtful planning, and forthrightness will save money and avoid the risk of discovery sanctions.

/jmb

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[52] Revised Rule 37 addresses a safe harbor for a party. Revised Rule 37(f) provides that, "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provided electronically stored information lost as a result of the routine, good-faith operation of an electronic information system." Rules App. C-86. What are exceptional circumstances? Does reference to "under these rules on a party" mean that this safe harbor is inapplicable to a violation of a prelitigation duty to preserve? Can loss of information after a duty to preserve arises be the "good-faith operation" of an electronic information system? Note the emphasis on "party" and "system." Are individuals who delete electronic information covered? If not, that means the safe harbor would cover company-storage systems subject to routine, good-faith operation but not individual storage habits, particularly of key players.

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ABOUT THE PRESENTER

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Mr. Barkett is a partner at the law firm of Shook, Hardy & Bacon L.L.P. in its Miami office. He is a graduate of the University of Notre Dame (B.A. Government, 1972, *summa cum laude)* and the Yale Law School (J.D. 1975) and served as a former law clerk to the Honorable David W. Dyer on the old Fifth Circuit Court of Appeals. Mr. Barkett has, over the years, been a commercial litigator (contract and corporate disputes, employment, trademark, and antitrust), environmental litigator (CERCLA, RCRA, and toxic tort), and, for the past several years, a peacemaker and problem solver, serving as an arbitrator, mediator, facilitator, or allocator in a variety of environmental or commercial contexts. He has served or is serving as a neutral in over forty matters involving in the aggregate more than $350 million. In November 2003, he was appointed by the presiding judge to serve as the Special Master to oversee the implementation and enforcement of the 1992 Consent Decree between the United States and the State of Florida relating to the restoration of the Florida Everglades. He also consults with major corporations on the evaluation of legal strategy and risk and conducts independent investigations for corporations where such services are needed.

Mr. Barkett is a former Co-Chair of the Environmental Litigation Committee of the ABA's Section of Litigation and currently is Co-Director of CLE for the Section. He is editor and one of the authors of the Section of Litigation's Monograph, *Ex Parte Contacts with Former Employees* (Environmental Litigation Committee, October 2002), and wrote *Ethical Issues in Environmental Dispute Resolution*, a chapter in the recent ABA publication entitled, *Environmental Dispute Resolution, An Anthology of Practical Experience* (July 2002). His paper, *A Baker's Dozen: Reasons Why You Should Read the 2002 Model Rules of Professional Conduct*, was presented at the Section of Litigation's 2003 Annual Conference. He also wrote, *Bytes, Bits and Bucks: Cost-Shifting and Sanctions in E-Discovery*, which was presented at the Section of Litigation's 2004 Annual Conference and also appears at 71 Def. Couns. J. 334 (2004). His paper, *Tattletales or Crime-Stoppers: Disclosure Ethics Under Model Rules 1.6 and 1.13* was presented at the 2004 ABA Annual Meeting. Among his other works are, *Help Is On the Way...Sort Of: How the Civil Rules Advisory Committee Proposes to Fill the E-Discovery Void* (which appears at 72 Def. Couns. J. 37 (2005)), a terrorism-related article on torts, entitled, *If Terror Reigns, Will Torts Follow?* 9 Widener Law Symposium 485 (2003); *A Database Analysis of the Superfund Allocation Case Law*, Shook, Hardy & Bacon L.L.P.: Miami (2003); *The CERCLA Limitations Puzzle*, 19 N.R.E. 70 (2004); and *The Courtroom of the Twenty-First Century – ADR*, CONFLICT MANAGEMENT (Summer 2002), ADR Committee, ABA Section of Litigation.

Mr. Barkett has been recently recognized in a number of lawyer-recognition publications, including Who's Who Legal 2005 (International Bar Association); Best Lawyers in America 2005-2006 (National Law Journal); Best of the Bar, (South Florida Business Journal, April 2004); Legal Elite, (Florida Trend 2004-06), and Chambers USA American's Leading Lawyers (2004-2006).

Shook Hardy & Bacon is an international law firm with offices in Miami, Tampa, San Francisco, Orange County, Houston, Orange County, Washington, D.C., London, and Geneva. It is one of the premier litigation firms in America with nearly 500 litigators who represented many of the Fortune 100 companies in complex litigation in jurisdictions throughout the United States.

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APPENDIX I

Comparison of Cost-Shifting Factors contained in *Rowe*, *Zubulake*, *Wiginton* and ABA Civil Discovery Standard 29(b)(iii)

Rowe Factors	*Zubulake Factors*	*Wiginton Factors*	*Revised Civil Discovery Standard 29(b)(iii)*
(1) the specificity of the discovery requests; (2) the likelihood of discovering critical information;	1. The extent to which the request is specifically tailored to discover relevant information.	1) the likelihood of discovering critical information	g. the breadth of the discovery request h. whether efforts have been made to confine initial production to tranches or subsets of potentially responsive data
(3) the availability of such information from other sources	2. The availability of such information from other sources	2) the availability of such information from other sources	b. the need for the discovery, including the benefit to the requesting party and the availability of the 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	7. The relative benefits to the parties of obtaining the information	8) the relative benefits to the parties of obtaining the information	i. the extent to which production would disrupt the normal operations and processing routines of the responding party m. Whether responding to the request would impose the burden or expense of acquiring or creating software to retrieve potentially responsive electronic data or otherwise require the responding party to render inaccessible electronic information accessible, where the responding party would not do so in the ordinary course of its day-to-day use of the information n. whether responding to the request would impose the burden or expense of converting electronic information into

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Rowe Factors	*Zubulake Factors*	*Wiginton Factors*	*Revised Civil Discovery Standard 29(b)(iii)*
			hard copies, or converting hard copies into electronic format
(6) the total cost associated with production;	3. The total cost of production, compared with the amount in controversy	3) the amount in controversy as compared to the total cost of production	a. the burden and expense of the discovery, considering among other factors the total cost of production compared to the amount in controversy l. the resources of each party as compared to the total cost of production
(7) the relative ability of each party to control costs and its incentive to do so	5. The relative ability of each party to control costs and its incentive to do so	5) the relative ability of each party to control costs and its incentive to do so	k. the relative ability of each party to control costs and its incentive to do so o. whether the responding party stores electronic information in a manner that is designed to make discovery impracticable or needlessly costly or burdensome in pending or future litigation, and not justified by any legitimate personal, business, or other non-litigation related reason
(8) the resources available to each party	4. The total cost of production compared to the resources available to each party	4) the parties' resources as compared to the total cost of production	j. whether the requesting party has offered to pay some or all of the discovery expenses
	6. The importance of the issues at stake in the litigation	6) the importance of the issues at stake in the litigation	c. the complexity of the case and the importance of the issues
		7) the importance of the requested discovery in resolving the issues at stake in the litigation	d. the need to protect the attorney-client privilege or attorney work product including the burden and expense of a privilege review by the producing party and the risk of inadvertent disclosure of privileged or protected information

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Rowe Factors	*Zubulake Factors*	*Wiginton Factors*	*Revised Civil Discovery Standard 29(b)(iii)*
			despite reasonable diligence on the part of the producing party
			e. the need to protect trade secrets, proprietary, or confidential information
			f. whether the information or the software needed to access it is proprietary or constitutes confidential business information
			p. whether the responding party has deleted, discarded or erased electronic information after litigation was commenced or after the responding party was aware that litigation was probable and, if so, the responding party's state of mind in doing so

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