Who Pays when E-Discovery Gets Expensive?

E-discovery can be simple and inexpensive compared to paper discovery, but often it is not—especially when responsive files are contained in outdated or inaccessible media. Indeed, e-discovery costs can be a major issue in corporate defense, which is why companies raise questions about the presumption that respondents pay the costs of discovery.

"We don't want to chill litigation brought by legitimate parties, but we need some cost sharing, particularly in cases involving one party with millions of potentially relevant documents and the other party having almost no records" says Madeleine McDonough, Partner with Shook, Hardy & Bacon in Kansas City, speaking at an event the firm sponsored in November 2004 on e-discovery trends. "Some cost sharing forces requesters to ask themselves if they really need the records and helps reduce the likelihood of requesters simply using the process to gain improper leverage."

The alternative—leaving respondents holding the bill for e-discovery—leaves the door open to abuse. But litigants argue that respondents are just as likely to abuse any cost-sharing provisions by over-estimating the cost and trouble of unearthing data. For example, a respondent might exaggerate the difficulty of restoring data from an outdated legacy system.

"Legacy files need to be examined," says Peter N. Wang, Partner with Foley & Lardner. "If you can't open them, someone else will."

Thus cost sharing is likely to remain a controversial subject that the courts will handle on a case-by-case basis. Their decisions going forward are guided largely by the standard elucidated in *Zubulake v. UBS Warburg LLC* (S.D.N.Y., May 13, 2003). The court said that for data kept in an accessible format, the usual rules of discovery apply, and the respondent is presumed to bear the costs. Only when electronic data are relatively inaccessible should a court consider cost shifting.

The courts have done so in a number of cases. In a later *Zubulake* decision (July 24, 2003) the court ordered the plaintiff to share 25 percent of approximately $166,000 in costs to restore data from the defendant's 77-tape collection. And the Northern District of Illinois in August 2004 ordered the requesting party to bear 75 percent of the respondent's $249,000 in costs to restore backup tapes, search the data and transfer it to an electronic data viewer.

Courts are willing to shift costs when appropriate, but that willingness is not fundamentally changing the presumptive cost burden. "We're not going to move to a cost-sharing system," says Hon. Shira A. Scheindlin, U.S. District Judge in the Southern District of New York. "There are exceptions, but the presumption remains that costs will be borne by the producer." Given the changing landscape of e-discovery, perhaps challenges to that presumption will increase.