

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

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# 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*).<sup>1</sup>

### **Zubulake I**

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

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

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<sup>1</sup> 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.

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)<sup>2</sup> 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<sup>3</sup> and that indexes of its magnetic backup tapes revealed that responsive e-mails were contained on a total of 94 tapes.<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup>

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."<sup>7</sup> "Any principled approach to electronic evidence must respect this presumption," the district court held. *Id.*

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<sup>2</sup> 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.

<sup>3</sup> 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.

<sup>4</sup> 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.

<sup>5</sup> 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.

<sup>6</sup> 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.

<sup>7</sup> *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."

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)).<sup>8</sup>

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.<sup>9</sup>

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<sup>10</sup> 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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<sup>8</sup> 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.

<sup>9</sup> 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](http://www.thesedonaconference.org/publications.html). The Sedona Conference's final report on this subject is due to be published early in 2004.

<sup>10</sup> 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.

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,<sup>11</sup> 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 *McPeck 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

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<sup>11</sup> 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.

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 *McPeck 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."<sup>12</sup> 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.<sup>13</sup> 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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<sup>12</sup> 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.*

<sup>13</sup> 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.

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.<sup>14</sup> “Accordingly, this factor weighs 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.”<sup>15</sup> 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.<sup>16</sup> Defendant would solely bear the \$107,694.72 cost of production review.<sup>17</sup>

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<sup>14</sup> “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.

<sup>15</sup> 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.

<sup>16</sup> 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.

<sup>17</sup> 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.

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.<sup>18</sup> 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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<sup>18</sup> "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.

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

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

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

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

*Plaintiff's requests were as specific as possible--it asked only for images of the hard drives that it has a reasonable belief contained information relevant to the use of the EDBA source code. Defendants do not dispute that they had the source code in their possession, making it likely that a thorough search of the drives will lead to the discovery of some relevant information. The search will likely reveal what uses defendants made of the source code and whether they disclosed it to other parties. Defendants are clearly in the best position to control the costs and scope of the consultation and have the incentive to do so. The review is largely for defendants' protection and benefit, and shifting the costs of the consultation would remove all incentive for them to narrowly tailor the review of the drives.*

*In Byers and Rowe, courts decided to shift some costs of discovery requests when the actual physical disclosure of the information would prove very costly. Byers, 2002 WL 1264004 at \*11; Rowe, 205 F.R.D. at 431. Defendants here seek to recover the costs of their preventive measures undertaken before the actual disclosure of the information to plaintiff. These costs are analogous to the review of documents for privileged information and should not be shifted to the requesting party. See Byers, 2002 WL 1264004 at \*12.*

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

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

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

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

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 *McPeck 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*

*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.

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

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.”<sup>20</sup>

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)<sup>21</sup> 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.”<sup>22</sup>
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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<sup>20</sup> 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, 2006. 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 production – whether to ask the court to include their agreement in an order.” Rules App. C-39.

<sup>21</sup> 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.”

<sup>22</sup> “Metadata” is “embedded data in an electronic document.” 2004 U.S. Dist. LEXIS 15722 at \*4.

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.<sup>23</sup>

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 *McPeck* 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)<sup>24</sup> 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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<sup>23</sup> 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.

<sup>24</sup> 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.

*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.<sup>25</sup>

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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<sup>25</sup> 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.

*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

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.<sup>26</sup> 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 reasonable 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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<sup>26</sup> 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).

- 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.<sup>27</sup>
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,<sup>28</sup> 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.<sup>29</sup>
  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.<sup>30</sup>

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<sup>27</sup> 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.")

<sup>28</sup> 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.

<sup>29</sup> 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."

<sup>30</sup> In many cases, both sides to a controversy will be facing the same or similar e-discovery hurdles.

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.<sup>31</sup>

## 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 (2<sup>d</sup> 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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<sup>31</sup> 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.

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 privilege (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.”*

*Id.*<sup>32</sup>

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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<sup>32</sup> *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.

*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.<sup>33</sup> 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.<sup>34</sup> 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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<sup>33</sup> The other two tapes apparently related to a period before Zubulake filed her EEOC complaint and contained e-mails of Rose Tong as well.

<sup>34</sup> 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 office where 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.

