

**DISCOVERY OF ELECTRONICALLY STORED INFORMATION**

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### **I. Introduction: More Information than Meets the Eye**

#### **A. Paper-based thinking in a digital world.**

1. Current discovery practices were devised for an earlier time, when documents were understood to be on paper. But as long ago as 1970, long before e-mail or the personal computer, the Federal Rules of Civil Procedure were amended to include “data compilations from which information can be obtained.”
2. So far most discovery case law is still based on ways of thinking rooted in the paper culture. Even when dealing with electronic information, courts tend to analogize to the customs of the paper culture.
  - a. For example, a Massachusetts court put it this way: “A discovery request aimed at the production of records retained in some electronic form is no different, in principle, from a request for documents contained in an office file cabinet.” *Linnen v. A.H. Robins Co.*, 1999 WL 462015, \*6 (Mass.Super.). But courts and advocates are coming to understand that this is not really true.

#### **B. Electronic information is qualitatively different from information on paper.**

1. There is vastly more material than there ever was on paper.
  - a. Documents are created electronically in orders of magnitude many times greater than was the case in the paper-based culture.
    - i. “Computerized data have become commonplace in litigation. The sheer volume of such data, when compared with conventional paper documentation, can be staggering .... One gigabyte is the equivalent of 500,000 typewritten pages. Large corporate computer networks create backup data measured in terabytes, or 1,000,000 megabytes; each

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terabyte represents the equivalent of 500 billion typewritten pages of plain text.” Manual for Complex Litigation (4th) ¶ 11.446 (2004).

- b. We now ordinarily compose and revise business documents on word processors and e-mail programs rather than on typewriters or even legal pads. As a result earlier drafts and annotations, and auxiliary working documents, tend to survive in electronic form, where in the paper-based culture they would have been discarded and destroyed.
2. Many important business records, especially statistical records, exist only in electronic format and may never be printed. Some observers estimate that 20 to 30% of electronic data never appear on paper.
    - a. Raw data used to prepare reports, and thereafter retained but not consulted, count as “documents” for discovery purposes even though never printed out. See, e.g., *Crown Life Insurance Co. v. Craig*, 995 F.2d 1376, 1382-83 (7th Cir. 1993). “A request for raw information in computer banks is proper and the information is obtainable under the discovery rules.” *Santiago v. Miles*, 121 F.R.D. 636, 640 (W.D.N.Y. 1988).
  3. Some material appears in documents of a kind which never existed before. This material is often crucial to the proof in employment cases.
    - a. “Computer files, including electronic mail messages, can be critical for meeting the plaintiff’s burden of proving discrimination, retaliation, or a hostile workplace environment. In decades past, derogatory or harassing remarks seldom extended beyond the water cooler, and proving their existence could have sunk into ‘he said, she said’ testimonial conflicts by the parties and their witnesses. Today, computer records – especially electronic mail – often provide explicit evidence of exactly who said what, when, and to whom.” Debra S. Katz and Alan R. Kabat, “Electronic Discovery in Employment Discrimination Cases,” 34 *Trial* (December 1998) 28, 30.
    - b. People creating electronic documents, especially e-mail, tend to be more informal, candid and unguarded in what they say than they would be in formal letters and reports. There is therefore a great potential for finding important relevant information existing nowhere else in the company’s records.
      - i. Even if this were not so, finders of fact (including jurors) *believe* it is so, and therefore are inclined to give extra weight to statements in e-mails.
  4. There is usually more to a document than appears on a printout.
    - a. Metadata – for example text changes, routing lists, and access records – are embedded in electronic documents and often not visible even on a screen. Some documents such as databases are unintelligible without metadata.

- i. “Certain metadata [are] critical in information management and for ensuring effective retrieval and accountability in record-keeping. Metadata can assist in proving the authenticity of the content of electronic documents, as well as establish the context of the content. Metadata can also identify and exploit the structural relationships that exist between and within electronic documents, such as versions and drafts. Metadata allows organizations to track the many layers of rights and reproduction information that exist for records and their multiple versions. Metadata may also document other legal or security requirements that have been imposed on records; for example, privacy concerns, privileged communications or work product, or proprietary interests.” *The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age* (September 2004 Public Comment Draft, Appendix D) SK071 ALI-ABA 5, 84.
  - ii. The newest version of the Sedona Guidelines (the Second Edition) can be found on the Internet at [www.thesedonaconference.org/content/miscFiles/TSC\\_PRINCP\\_2nd\\_ed\\_607.pdf](http://www.thesedonaconference.org/content/miscFiles/TSC_PRINCP_2nd_ed_607.pdf). For a case defining *metadata* and quoting the Sedona Guidelines, see *Scotts Co. LLC v. Liberty Mutual Ins. Co.*, 2007 WL 1723509, \*3 n.2 (S.D. Ohio 2007).
- b. Electronic information is sometimes dynamic, because elements it contains can automatically change when new information is added later, even to different elements of the system.
5. Copies multiply uncontrollably and sometimes untraceably.
- a. In the days of carbon paper it was relatively easy to know how many copies there were of a document, and where they were (or at least where they were supposed to have been sent). But just as the use of the copier multiplied documents and made it much harder to be sure about this, electronic information technology has made the task harder yet.
    - i. Electronic copies can be multiplied and distributed much more easily and widely than paper copies, and being so easy to store, they tend to persist where paper copies might have been discarded.
    - ii. For electronically stored information, “the costs of storage are virtually nil. Information is retained not because it is expected to be used, but because there is no compelling reason to discard it.” *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 429 (S.D.N.Y. 2002).
    - iii. Because of widespread misunderstanding about the effect of “deleting a document,” and the technical difficulty of actually ensuring that once deleted it really is irretrievably gone, documents which are intentionally discarded, and in the days of paper would have been lost forever, now remain to be discovered and hence to be searched for.

- (a) Because people often do not understand the mechanics of deletion, they think evidence is gone when really it is not. For this reason people may incorrectly deny the existence of the evidence without intending to conceal it.
    - (b) For the case that modifying electronic systems to allow for “true deletion” would radically simplify discovery, see Andrew Moerke Mason, “Throwing Out the (Electronic) Trash: True Deletion Would Soothe E-Discovery Woes,” 7 *Minnesota Journal of Law, Science & Technology* 777 (2006).
  - iv. Electronic information includes system background information not included in user-created files.
    - (a) These include computer logs and audit trails which create an electronic map of network usage, identities of network users, time and length of network access, and places a user visited on the computer system. These trails can also reveal who printed, copied, accessed or purged particular files, and the locations to which the files were downloaded.
    - (b) Special software can monitor which programs employees use, e-mail they send and receive, and Internet sites they visit.
    - (c) Access control lists governing users’ rights to view and edit information can identify individuals who had access to particular files.
- b. In the old days extra copies of documents, if not destroyed, would be stored in filing cabinets or in boxes at off-site depositories.
  - i. But electronic information is no longer confined to cabinet-like mainframe computers. It ramifies along formal and informal networks to personal computers at every work station in a company.
  - ii. It moves to laptops and the home computers of people who telecommute or may just be working at home on an individual project. Sometimes these computers are not even owned by the company.
  - iii. It survives in backup and replicant copies, including automatically created replicant copies on personal computers which survive purges of the main company server. Users may not even know that these copies exist.
  - iv. Data also survives in deliberately created archival copies created for use in case of widespread system failure.
    - (a) “It is impossible to walk ten feet into the office of a private business or government agency without seeing a network computer, which is on a server, which, in turn, is being backed up on tape (or some other media) on a daily, weekly or monthly basis. What alternative is there? Quill pens?” *McPeck v. Ashcroft*, 202 F.R.D. 31, 33 (D.D.C. 2001).

- v. Potentially discoverable electronic information survives in many places outside computers.
  - (a) It is stored on peripheral systems such as laptops, palm pilots, and cell phones.
  - (b) It lies unnoticed as residual data in the buffer memories of printers, copiers, and fax machines.
  - (c) Portable storage devices such as disks, zip-disks, flash drives, CDs, DVDs, and tapes, including dictation and phone message tapes, may contain unsuspected copies of discoverable information.
    - (1) Phone mail messages are now normally stored on computers, but even message tapes are just another format for electronic data storage.
  - (d) Companies often store large amounts of data on their websites or in commercial cyberstorage facilities.
- 6. Electronic information is often saved in unreadable or inaccessible forms.
  - a. Most networks are backed up routinely – for instance, a company may back up data fully once a week, perform spot backups throughout the week, and save the last weekly backup of every month indefinitely. But data on a backup tape or disk are organized for emergency uploading of an entire system’s records, not for finding individual documents or even documents related to particular projects or issues. They are therefore very expensive, time-consuming, and inefficient to search.
  - b. All electronic information is unintelligible without an accompanying system, and the systems for interpreting it obsolesce rapidly. A company may have information it must produce but cannot read or translate without the help of expensive consultants.
- 7. The Committee Note to the 2006 revision of Rule 34 of the Federal Rules of Civil Procedure (hereafter “Rules”) recognizes that “it has become increasingly difficult to say that all forms of electronically stored information, many dynamic in nature, fit within the traditional concept of a ‘document,’” and so the Rule was amended “to confirm that discovery of electronically stored information stands on equal footing with discovery of paper documents.”
  - a. “Courts now face the challenge of overseeing discovery at a time when potential access to electronically stored information is virtually limitless, and when the costs and burdens associated with full discovery could be more outcome-determinative, as a practical matter, than the facts and substantive law.” *Cache La Poudre Feeds, LLC v. Land O’Lakes, Inc.*, --- F.R.D. ---, 2007 WL 684001, \*5 (D.Colo.).

## II. The Duties of a Party of Whom Electronic Discovery is Demanded

### A. The standard for discoverability is a loose one.

1. It is a commonplace that material can be discovered even if not admissible at trial “if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.” Rule 26(b)(1).
  - a. Electronic material can be *more likely* than paper-based equivalents to lead to the discovery of admissible evidence, as it often comes with electronic fingerprints, trails of transmission information, and dates and times of creation, accessing and copying. In the case of e-mail it comes with earlier correspondence conveniently appended. Because a lot of records are maintained only on computers, electronic evidence can be more comprehensive than what appears on paper.
  - b. Fishing expeditions trolling for electronic information are much more onerous for the producing party than they were in the paper era, because of the huge quantities involved, sometimes incoherent storage, inaccessible media, and difficulty of isolating privileged material.

### B. The duty to be responsive.

1. The principal duty of a party of whom discovery is demanded, whether electronic or not, is to be responsive. In theory, the duties of a party subject to discovery are the same whether the information in question is electronically stored or not, although the rules cannot always be applied in exactly the same way. But the 2006 amendments to the Rules, allowing discovery to be resisted on the ground that material “not reasonably accessible because of undue burden or cost,” is changing this principle. See discussion in Part III.B below.
2. Even if the party of whom a demand is made does not have the documents in its own possession, it must still obtain them if it has the legal right to obtain them on demand. See, e.g., *In re Bankers Trust Co.*, 61 F.3d 465, 469 (6th Cir.1995); *Cache La Poudre Feeds, LLC v. Land O’Lakes, Inc.*, --- F.R.D. ---, 2007 WL 684001 (D.Colo.).
  - a. But see *Miniace v. Pacific Maritime Association*, 2006 WL 335389, \*2 (N.D.Cal. 2006) (denying a motion to compel that sought production of documents in the possession of defendant’s former directors).
3. A party “has an obligation to conduct a reasonable inquiry into the factual basis of his responses to discovery,” and based on that inquiry “is under an affirmative duty to seek that information reasonably available to it from its employees, agents, or others subject to its control.” *A. Farber and Partners, Inc. v. Garber*, 234 F.R.D. 186, 189 (C.D.Cal. 2006) (citations and quotation apparatus omitted).
  - a. It is not enough for the producing party’s lawyer just to ask people in the company for what they think might be responsive, and produce it without

verifying that their searches were sufficient. See, e.g., *Wachtel v. Health Net Inc.*, 239 F.R.D. 81 (D.N.J. 2006)

- b. “A ‘litigation hold,’ without more, will not suffice to satisfy the ‘reasonable inquiry’ requirement in Rule 26(g)(2). Counsel retains an on-going responsibility to take appropriate measures to ensure that the client has provided all available information and documents which are responsive to discovery requests.” *Cache La Poudre Feeds, LLC v. Land O’Lakes, Inc.*, --- F.R.D. ---, 2007 WL 684001, \*17 (D.Colo.).
  - c. For a dispiriting case study in uncooperative discovery and inadequate supervision by counsel, leading to unnecessarily and sanctionably deficient production of requested e-mails, see *In re Seroquel Products Liability Litigation*, 2007 WL 2412946 (M.D.Fla.).
4. Rule 34 imposes an affirmative duty to seek information reasonably available through employees, agents and others subject to the party’s control. See, e.g., *Anderson v. Cryovac, Inc.*, 862 F.2d 910, 929 (1st Cir.1988) (“once a proper discovery request has been seasonably propounded, we will not allow a party sentiently to avoid its obligations by ... failing to examine records within its control”); *In re Independent Service Organizations Antitrust Litigation*, 168 F.R.D. 651, 653 (D.Kan.1996) (party cannot meet its discovery obligations by “sticking its head in the sand and refusing to look for the answers and then saying it does not know the answers,” but must speak to employees who may have responsive information).
  5. The 2006 revisions to Rules 34 (and 45) allow the demanding party to specify the format in which it wishes production to be made (i.e., electronic vs. hard copy), and this must be honored unless there is a good reason for resisting. See, e.g., *Auto Club Family Ins. Co. v. Ahner*, 2007 WL 2480322, \*2 (E.D.La. 2007). See discussion in Part III.C below.
  6. A party which has made a disclosure or response in discovery “is under a duty to supplement or correct the disclosure or response to include information thereafter acquired” if, among other circumstances, it “learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties....” Rule 26(e).
  7. It is important that a company be quite sure about the accuracy of what it says. Ignorance (often due to counsel’s failure to consult the information technology manager) can result in unintentionally false but nevertheless sanctionable responses.
    - a. A classic example is *GTFM, Inc. v. Wal-Mart Stores Inc.*, 2000 WL 335558 (S.D.N.Y. 2000). Wal-Mart’s counsel replied to a discovery demand by saying (based on information from a company executive) that Wal-Mart did not have the capacity to produce the information requested. But a Wal-Mart information manager later testified that the company did after all have the capacity to meet the request. By that time much of the

material had been destroyed under a document retention policy, and the company was sanctioned.

8. “In the face of a denial by a party that it has possession, custody or control of documents, the [requesting] party must make an adequate showing to overcome this assertion.” *Hagemeyer North America, Inc. v. Gateway Data Sciences Corp.*, 222 F.R.D. 594, 598 (E.D.Wis. 2004).

#### C. The duty to preserve

1. “To ensure that the expansive discovery permitted by Rule 26(b)(1) does not become a futile exercise, putative litigants have a duty to preserve documents that may be relevant to pending or imminent litigation.” *Cache La Poudre Feeds, LLC v. Land O’Lakes, Inc.*, --- F.R.D. ---, 2007 WL 684001. \*6 (D.Colo.).
  - a. The court sanctioned Land O’Lakes for continuing its policy of wiping clean the hard drives of departing employees’ computers even though there was a litigation hold.
2. “[T]he 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” *Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003).
  - a. “The duty to preserve material evidence arises not only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation.” *Silvestri v. General Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001).
3. “A party’s identification of sources of electronically stored information as not reasonably accessible does not relieve the party of its common-law or statutory duties to preserve evidence. Whether a responding party is required to preserve unsearched sources of potentially responsive information that it believes are not reasonably accessible depends on the circumstances of each case. It is often useful for the parties to discuss this issue early in discovery.” Committee Note to 2006 Revision of Rule 26.
4. Metadata
  - a. The presumption is that electronic documents are to be produced with metadata included. In a thoughtful opinion, a Kansas federal court held that “when a party is ordered to produce electronic documents as they are maintained in the ordinary course of business, the producing party should produce the electronic documents with their metadata intact, unless that party timely objects to production of metadata, the parties agree that the metadata should not be produced, or the producing party requests a protective order.” *Williams v. Sprint/United Management Co.*, 230 F.R.D. 640, 652 (D.Kan. 2005).

- i. Williams had alleged age discrimination in employment, and the company had produced documents scrubbed of metadata, Excel spreadsheets with locked cells, and similarly limited material in order (it said) to protect adverse impact reports, social security numbers, and other arguably protected information.
- ii. The court continued: “The burden to object to the disclosure of metadata is appropriately placed on the party ordered to produce its electronic documents as they are ordinarily maintained because that party already has access to the metadata and is in the best position to determine whether producing it is objectionable. Placing the burden on the producing party is further supported by the fact that metadata is an inherent part of an electronic document, and its removal ordinarily requires an affirmative act by the producing party that alters the electronic document.” *Ibid.*

#### D. Information about the producing party’s data systems

1. Expect your information technology manager to be deposed and asked about your data systems, document retention policy, and whatever else the plaintiffs and their experts think might lead to discoverable material. The plaintiffs can ask for production of technical manuals and staff policies on use and preservation of the company’s electronic data.
  - a. “[D]epositions to identify how data is maintained and to determine what hardware and software is necessary to access the information are preliminary depositions necessary to proceed with merits discovery.” *In re Carbon Dioxide Industry Antitrust Litigation*, 155 F.R.D. 209, 214 (M.D. Fla. 1993).

### III. 2006 Amendments to the Federal Rules of Civil Procedure

#### A. The “E-Discovery” Amendments

1. The rules governing discovery in litigation are still catching up to the electronic revolution that has taken place in the business world. One of the most significant steps in this catch-up process took place on December 1st, 2006, when the “e-discovery” amendments to the Rules took effect. Those amendments, affecting six rules and a rule-prescribed form, are beginning to have a marked impact on civil practice in the federal courts, and in arbitrations in which the parties have agreed to follow the Federal Rules of Civil Procedure.
  - a. At this writing in Fall 2007, case law interpreting the new rules is still sparse. But there is some, and the Committee Notes give clear indications of how the law is expected to develop.
  - b. The Supreme Court’s Order giving effect to the changes says they “shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.” For an example applying the

new rules to a case filed before the change, see *W.E. Aubuchon Co. v. Benefirst, LLC*, --- F.R.D. ---, 2007 WL 1765610, \*3 (D.Mass.).

B. Protection for electronic information “not reasonably accessible”

1. Possibly the most significant change in the new amendments is that electronically stored information is presumptively not discoverable if it comes from sources that the responding party identifies as “not reasonably accessible because of undue burden or cost.”
  - a. Rule 26(b)(2)(B) now reads, in part: “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.”
  - b. This changes the basic ground rules of discovery, which previously required production of all relevant non-privileged documents. Under the new regime, electronically stored information is discoverable only if it is relevant, non-privileged *and* reasonably accessible.
  - c. According to the Committee Note to revised Rule 26, a responding party declining to produce material on this basis must identify, by category or type, any sources containing potentially responsive information that it is neither searching nor producing on the grounds that it is not reasonably accessible.
  - d. New Rule 45(d)(1)(D) has similar provisions re subpoenas.
2. The new amendment does not specify exactly what “not reasonably accessible because of undue burden or cost” means. Indeed, the Committee Note says that it “is not possible to define in a rule the different types of technological features that may affect the burdens and costs of accessing electronically stored information.”
  - a. But a party resisting production on this basis cannot just assert an undue burden – it “must make an *evidentiary showing* that the data sought is not reasonably accessible because of undue burden or cost.” *Auto Club Family Ins. Co. v. Ahner*, 2007 WL 2480322, \*3 (E.D.La.) (emphasis by the court).
  - b. “No party should object to the discovery of ESI [electronically stored information] pursuant to [Rule] 26(b)(2)(B) on the basis that it is not reasonably accessible because of undue burden or cost unless the objection has been stated with particularity, and not in conclusory or boilerplate language. ...[T]he party asserting that ESI is not reasonably accessible should be prepared to specify facts that support its contention.” *O’Bar v. Lowe’s Home Centers, Inc.*, 2007 WL 1299180, \*5 (W.D.N.C.).
  - c. If the producing party claims the protection of this new exception, the demanding party can challenge it, and the court can still order production

for “good cause.” The Committee Note to revised Rule 26 suggests these factors for deciding whether there is good cause:

- i. the specificity of the discovery request,
  - ii. the quantity of information available from other and more easily accessed sources,
  - iii. the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources,
  - iv. the likelihood of finding relevant, responsive information that cannot be obtained from other more easily accessed sources,
  - v. predictions as to the importance and usefulness of the further information,
  - vi. the importance of the issues at stake in the litigation, and
  - vii. the parties’ resources.
- d. These factors specified in the Note echo, and to a large degree adopt the analysis of, *Zubulake v. UBS Warburg*, 217 F.R.D. 309, 322 (2003). Obviously the application of these factors is case-specific and will vary according the facts. For a recent case applying the factors systematically, and ordering production of material despite finding it inaccessible, see *W.E. Aubuchon Co. v. Benefirst, LLC*, --- F.R.D. ---, 2007 WL 1765610, \*2 (D.Mass.).

C. The format in which electronically stored information must be produced.

1. Required statements and conferences

- a. The new Rule 34(b)(i) permits a requesting party to specify the form or forms in which it wants electronically stored information produced. If the requesting party does not specify a form, Rule 34(b)(ii) directs the responding party to state the forms it intends to use in the production, and to “produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable.”
  - i. Failure to comply with this requirement subjects the producing party to the risk of having to produce the material again in a different form. Cf., *Scotts Co. LLC v. Liberty Mutual Ins. Co.*, 2007 WL 1723509, \*4 (S.D. Ohio 2007) (ordering the parties to confer on this issue).
  - ii. New Rule 45(d)(1) has similar provisions for responding to subpoenas. New Rule 45(d)(1)(C) has a similar provision re subpoenas. Rule 16(b)(5) also requires pretrial discussions about electronic discovery.
- b. “Early discussion of the forms of production may facilitate the application of Rule 34(b) by allowing the parties to determine what forms of production will meet both parties’ needs. Early identification of disputes over the forms of production may help avoid the expense and delay of

searches or productions using inappropriate forms.” Committee Note to revised Rule 34.

- c. “Identifying relevant records and working out technical methods for their production is a cooperative undertaking, not part of the adversarial give and take. This is not to say that the parties cannot have reasonable disputes regarding the scope of discovery. But such disputes should not entail endless wrangling about simply identifying what records exist and determining their format.” *In re Seroquel Products Liability Litigation*, 2007 WL 2412946, \*11 (M.D.Fla.).
- d. New Rule 26(f)(3) “explicitly directs the parties to discuss the form or forms in which electronically stored information might be produced. The parties may be able to reach agreement on the forms of production, making discovery more efficient.” Committee Note to 2006 revision.
- e. Even if not required or suggested by the Rules, wise counsel will always try to work discovery issues out informally. This saves time, effort and money, helps develop a good working relationship among parties and counsel, and builds credibility with the court.
  - i. For a thorough if case-specific listing of matters that should be discussed by counsel before applying to the court for resolution, see *O’Bar v. Lowe’s Home Centers, Inc.*, 2007 WL 1299180 (W.D.N.C.).

## 2. Issues.

- a. In *CP Solutions PTE, LTD v. General Electric*, 2006 WL 1272615 (D.Conn.), allegedly as a result of a computer problem, thousands of e-mails were produced commingled, separated from their attachments, and not produced as kept in the original course of business. The court required the producing party to make a second production at its expense to get this right. A similar result, with a few more options for the producing party, was reached in *PSEG Power N.Y., Inc. v. Alberici Constructors, Inc.*, 2007 WL 2687670 (N.D.N.Y.).
- b. The 2006 Committee Note to Rule 34 states that if the responding party ordinarily maintains information “in a way that makes it searchable by electronic means, the information should not be produced in a form that removes or significantly degrades this feature.”
  - i. This suggests that producing e-mails in hard copy will no longer be proper, unless specified in advance and not objected to, since most e-mail programs have at least limited searching capabilities. As hard copies of e-mails are “reasonably usable” and are routinely produced in hard copy form, this creates a tension which has not yet been authoritatively resolved.
  - ii. For a case interpreting the former Rule 34(a) to require producing electronic documents in native format instead of TIFF files with less information, see *Hagenbuch v. 3B6 Sistemi Elettronici Industriali S.R.L.*, 2006 WL 665005 (N.D.Ill. 2006).

- c. “A party responding to a document request under Rule 34 has a choice of producing the documents ‘as they are kept in the usual course of business’ or of ‘organiz[ing] and label[ing] them to correspond with the categories in the request.’ When producing documents, the responding party cannot attempt to hide a needle in a haystack by mingling responsive documents with large numbers of nonresponsive documents. However, according to the plain language of Rule 34, a responding party has no duty to organize and label the documents if it has produced them as they are kept in the usual course of business.” *Hagemeyer North America, Inc. v. Gateway Data Sciences Corp.*, 222 F.R.D. 594, 598 (E.D.Wis. 2004) (citations omitted).
- d. Multiple productions.
  - i. Under the old Rules, the “mere fact that information which as a matter of ordinary course of one’s business is electronically stored has been produced in functional equivalent, such as through hard copy, does not in and of itself excuse a party from producing the requested information in electronic form.” *Cornell Research Found., Inc. v. Hewlett Packard Co.*, 223 F.R.D. 55, 73 (N.D.N.Y. 2003). Production in electronic form may be required to check for completeness, to search for metadata, or for other technical reasons.
  - ii. But as noted, Rule 34(b)(iii) now provides that “a party need not produce the same electronically stored information in more than one form.” Whether this will be found to conflict with the common-law rule that electronic and paper copies may both be demanded remains to be seen. Case law on the point is as yet too sparse to discern a trend.
  - iii. For a sobering case study in how difficult this issue can get, see *Williams v. Sprint/United Management Co.*, 2006 WL 3691604 (D.Kan.) (declining to order second production of e-mails in native format).

#### D. Other 2006 Rule Changes

##### 1. Rule 33(d)

- a. The phrase “including electronically stored information” has been added to Rule 33(d), allowing parties the option to produce business records electronically.
  - i. This was done in part to give explicit recognition to such procedures as direct downloading and allowing inspection on the producing party’s server. See Part IV.B.4.b below.
- b. Rule 33(d) already provided that a party responding to an interrogatory must ensure that the interrogating party can locate and identify it “as readily as can the party served.”
  - i. The Committee Note states that, depending on the circumstances, “satisfying these provisions with regard to electronically stored

information may require the responding party to provide some combination of technical support, information on application software, or other assistance. The key question is whether such support enables the interrogating party to derive or ascertain the answer from the electronically stored information as readily as the responding party.”

2. Rule 34(a) (Production of Documents) and Rule 45(a) (Subpoenas) have been amended to make specific provision for testing and sampling.
  - a. The Committee Note explains that the addition of testing and sampling to Rule 34(a) with regard to documents and electronically stored information “is not meant to create a routine right of direct access to a party’s electronic information system, although such access might be justified in some circumstances. Courts should guard against undue intrusiveness resulting from inspecting or testing such systems.”
3. New Rule 37(f) creates a “safe harbor” by providing that “[a]bsent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.”
  - a. The Committee Note states that “Among the factors that bear on a party’s good faith in the routine operation of an information system are the steps the party took to comply with a court order in the case or party agreement requiring preservation of specific electronically stored information. Whether good faith would call for steps to prevent the loss of information on sources that the party believes are not reasonably accessible under Rule 26(b)(2) depends on the circumstances of each case. One factor is whether the party reasonably believes that the information on such sources is likely to be discoverable and not available from reasonably accessible sources.”
  - b. “The good faith requirement ... means that a party is not permitted to exploit the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve. When a party is under a duty to preserve information because of pending or reasonably anticipated litigation, intervention in the routine operation of an information system is one aspect of ... a ‘litigation hold.’” *Ibid.*
  - c. “[I]t is clear that this Rule does not exempt a party who fails to stop the operation of a system that is obliterating information that may be discoverable in litigation.” *Disability Rights Council of Greater Washington v. Washington Metropolitan Transit Authority*, 242 F.R.D. 139, 146 (D.D.C. 2007) (requiring restoration of back-up tapes deleted when litigation hold was negligently not imposed). The opinion includes elements to be addressed in developing a restoration protocol.

- d. “The undisputed evidence established that Krause’s hard drives were far from being at full capacity thus making it improbable that electronic information was being overwritten or deleted by routine operation of his computers. Just as a litigant may have an obligation to suspend certain features of a ‘routine operation,’ the Court concludes that a litigant has an obligation to suspend features of a computer’s operation that are not routine if those features will result in destroying evidence. Here, that obligation required Krause to disable the running of the wiping feature of GhostSurf [an anti-virus wipe/purge program] as soon as the preservation duty attached. And it certainly obligated Krause to refrain from reinstalling GhostSurf when his computers crashed and he restored them.” *In re Krause*, 367 B.R. 740, 768 (Bkrcy.D.Kan. 2007) (denying safe harbor and imposing severe sanctions).
4. Because privilege review is often more time-consuming and costly with electronically stored information, the revised Rule 26(b)(5) creates a procedure – sometimes referred to informally as a “claw-back” provision – that allows a producing party to assert privilege and work-product claims after production.
  - a. But it would be unwise to rely on the claw-back provision as anything more than an emergency procedure after inadvertent production. Parties should still conduct careful privilege review before producing electronic materials. Because of the difficult legal judgments involved, privilege review must always be supervised, if not personally conducted, by an attorney.

#### **IV. Reducing the Burden of Electronic Discovery**

- A. The new Rules offer opportunities to reduce the burden on the producing party.
  1. Discussions among counsel
    - a. As noted, direct discussions about the practicalities of electronic discovery are now mandated for pretrial conferences by Rule 16(b)(5), for discovery-planning conferences by Rule 26(f), and elsewhere in the new rules or their accompanying commentary.
    - b. These discussions should be taken not as just another bothersome procedural requirement, but as an opportunity to streamline production, devise innovative ways to satisfy the legitimate concerns of both sides, and reduce the likelihood of expensive, time-consuming and distracting satellite disputes.
  2. The new distinctions between accessible and inaccessible media.
    - a. These are discussed at some length in Part III.B above. Wise counsel will take advantage of the newly specific protections for the producing party.
  3. Cost-shifting. This may not make production less burdensome but it can make it less expensive. See discussion in Part VI below.

- a. If cost-shifting is actually ordered, that *can* make production less burdensome, because the cost to itself may induce the demanding party to moderate its demands.

#### B. Involving experts

1. It is often wise to involve an expert consultant to work out the easiest and least disruptive ways to comply with a demand for production.
2. Using an expert can also help ensure, and demonstrate, that a reasonable good faith effort has been made to comply with the plaintiff's demands. This may be useful in avoiding sanctions if something is inadvertently missed.
3. It may be that you can afford an expert and your opponent cannot. This is an advantage of asymmetry – as discussed in Part V below, the likely asymmetry between the parties in an employment dispute has both advantages and disadvantages for the employer.
  - a. But it may be in your interest to have your expert (as well as your IT manager) work *with* the other side. The plaintiffs will be formulating their demands to some extent blindly, and they may be overbroad for that reason. If your expert and IT manager participate in negotiations and rule-mandated conferences, they may be able to help forge agreement on reasonable demands that satisfy the interests of both parties.
4. An expert can help devise technical solutions not ordinarily evident to lawyers even to IT managers.
  - a. For example, the testing and sampling now explicitly permitted by Rules 34(a) and 45(a) may allow searches to be localized and therefore abbreviated without unacceptable loss of confidentiality.
    - i. For a case ordering a test run before requiring a major restoration of backup tapes, see *McPeck v. Ashcroft*, 202 F.R.D. 31 (D.D.C. 2001).
  - b. Another useful technical device is direct downloading, which allows a transfer of files directly to the requesting party's computer without the need for copies or printouts. This is not suitable for all occasions, especially in an employment context, and privilege concerns may restrict its utility. But where it works it can be a time-saver.
    - i. A similar effort-saving method is allowing the plaintiffs or their experts to examine the documents on your client's server. Your client's IT managers will have to set technically enforceable limits. But this procedure is permitted under the rules, and allowing the other side to look for themselves may *sometimes* be a good alternative to producing unneeded copies of vastly more than they really need.
    - ii. As noted, Rule 33(d) has been amended in part to give explicit recognition to procedures of this kind.

- c. The mirror image is another useful method. If you have to keep using the database during discovery, it may be best to make a copy or mirror image for a specific date.
  - i. An independent expert, appointed as an officer of the court (and to whose selection the other party may have the right to object), can prepare a mirror image for a given date and submit it to the producing party to check for privileged or proprietary information. The redacted mirror image can then be given to the discovering party, and access to disputed portions can be negotiated or litigated in the usual way.
  - ii. This technique allows the producing party to use its systems without interference, gives the discovering party a relatively complete snapshot of the system as of a given date and relative leisure to explore it, protects against improper intrusion, and limits the scope of discovery disputes.
  - iii. For a discussion of post-amendment cases where this technique was used, see, e.g., *Calyon v. Mizuho Securities USA Inc.*, 2007 WL 1468889 (S.D.N.Y.). In *Ameriwood Industries, Inc. v. Liberman*, 2006 WL 3825291 (E.D.Mo.) and *Cenveo Corp. v. Slater*, 2007 WL 442387 (E.D.Pa.), the court balanced the privacy and confidentiality concerns of each side by allowing an independent expert to review the mirror image.
  - iv. The “few reported decisions allowing imaging of an opponent’s computer hard drive adopt an approach consistent with the policy expressed” in the 2006 amendments to Rule 26, “and do not grant a routine right of direct access to the opposing party’s computer.” *Scotts Co. LLC v. Liberty Mutual Ins. Co.*, 2007 WL 1723509, \*3 (S.D. Ohio)
- d. These are examples only and by no means a comprehensive list of technical methods that might mitigate the burdens of production.

### C. Resisting Overreaching by the Other Side

1. That demands for electronic data are inherently burdensome did not vitiate the protection of Rule 26(b)(2) even before the recent changes in the rule. Counsel should not hesitate to object to exhaustive searches for electronic data, including for example searches of hard disks for deleted material, if they do not seem justifiable or if there are less demanding or intrusive ways to get what the other side is reasonably entitled to.
  - a. In *Fennell v. First Step Designs, Ltd.*, 83 F.3d 526, 534 (1st Cir. 1996), for example, the court barred further discovery because it would entail substantial risks and costs, and “there was little particularized basis to believe that any evidence of fabrication could be discovered by Fennell’s experts.”
  - b. The court developed this point in *Lawyers Title Insurance Corp. v. U.S. Fidelity & Guaranty Co.*, 122 F.R.D. 567, 570 (N.D.Cal. 1988), saying it

was “far from clear that the court should force a party that has invested heavily in developing information management systems to share those systems with opposing counsel without some showing that the party has failed to respond in good faith and adequately to discovery probes. The mere possibility that a party might not produce all relevant, unprotected documents, is not a sufficient basis for ordering such a party to disclose its entire computerized system of information management. \* \* \* At a minimum, counsel who seek access to opponents’ information management systems should be required to show that conventional discovery methods have failed to produce the information they need to litigate their case.”

2. Remember your audience
  - a. “Businesses get into trouble when the court believes that they acted unreasonably in preserving, collecting, and/or producing discoverable electronic material. The goal, therefore, is to get to what your judge will view as a reasonable search, review, and production. The goal is not to satisfy your IT consultant or your imaging vendor, or an outside counsel for whom computer software and e-discovery is a personal hobby. Only the judge decides whether you acted reasonably. This basic truism can be overlooked with remarkable ease. Rule #1 therefore, is to gear everything – your plan for collection and review, disclosures, correspondence with opposing counsel – toward the judge’s ultimate assessment.” Val Stieglitz, “Four Practical Rules for Electronic Discovery,” 72 Defense Counsel Journal 400, 400 (2005).

## V. The Effects of Asymmetry

### A. The Problems of Asymmetry.

1. The e-discovery problems facing lawyers for large employers are complicated by asymmetry. Typically the employers are the defendants, and the plaintiffs are individuals. Even where the plaintiffs are large groups of individuals suing together as a class, most of the discovery burden will fall on the employers.
2. “Employment cases are exceptional because the burden of document production generally falls disproportionately on the employer. Stipulated protocols and ground rules will be harder to achieve in employment cases, since what goes around will not always come around, where only the employer has significantly greater document production responsibilities.” Mark D. Risk, “Electronic Discovery: Considerations for Employment Plaintiffs,” 743 PLI/Lit 139, 158 (2006).

### B. Most of the sources of relevant evidence will be under the employer’s control rather than that of the plaintiffs.

1. If, for example, the issue turns on a company employment policy, the documents material to the formation of that policy will be in company files.
2. Personnel files will be under company control.

3. The computers themselves, and the backup systems, will be under company control, as will e-mail files of both parties on the company e-mail system. This is both an advantage and a vulnerability.
  4. Documentation of practices elsewhere in the company will come from the defendant's files rather than those of the plaintiffs.
- C. Because of this asymmetry, there is little downside for the plaintiffs in making their discovery demands as broad as possible.
1. The expense of searching for responsive material, and if necessary converting it to usable form, will fall on employers rather than on plaintiffs.
  2. As individuals, the defendants do not have comparably extensive files, and there is small likelihood of finding relevant material under their control.
  3. Because of the asymmetry in size and resources, it is unusual for a court to shift any sizeable amount of the costs of production to the demanding party.
    - a. Zubulake, whose case has become a paradigm for cost-shifting in electronic discovery (see Part VI below) was an atypical employment discrimination plaintiff. She was a high-level equities trader making \$650,000 a year and had significant resources. The usual employment plaintiff will not have sufficient resources to be a candidate for cost-shifting.
    - b. It is therefore in the employers' interest to try to limit discovery *in limine* to what is reasonable under the circumstances.
    - c. The relative immunity to cost-shifting of employment plaintiffs with limited resources can be used to limit the extent of the burden placed on employers. If the court can be made to see that cost-shifting, even if impractical, would be fair, then it might require a plaintiff who cannot pay her fair share of total restoration to make do with somewhat less.
  4. On the other hand, the company will already have an information technology department, and its larger resources will often permit engaging a specialist consultant to assist with the technical aspects of the production, for example to create a mirror copy, thus avoiding (at some expense) needless disruption of operations. And its resources give it an advantage in most aspects of litigation, including the ability to litigate discovery issues.

## **VI. Cost-shifting**

- A. Costs can be substantial.
1. "As individuals and corporations increasingly do business electronically – using computers to create and store documents, make deals, and exchange e-mails – the universe of discoverable material has expanded exponentially. The more information there is to discover, the more expensive it is to discover all the relevant information until, in the end, discovery is not just about uncovering the truth, but also about how much of the truth the parties can

afford to disinter.” *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 311 (S.D.N.Y. 2003) (footnotes and quotation apparatus omitted).

2. For example, an expert may have to search the system for requested material. It may be necessary to convert material saved in superseded or compressed formats. Independent programming may sometimes be required. Examining hard drives for residual data, searching backup tapes for backup data, and restoring fragmented or partially erased data, can all be very time-consuming and expensive.

#### B. Allocation of costs

1. The traditional approach to discovery required the producing party to pay its own costs, and absent special circumstances this rule applies to electronic data retrieval as well.
  - a. “The normal and reasonable translation of electronic data into a form usable by the discovering party should be the ordinary and foreseeable burden of a respondent in the absence of a showing of extraordinary hardship.” *Daewoo Electronics Co., Ltd. v. United States*, 650 F.Supp. 1003, 1006 (C.I.T. 1986).
  - b. The new E-Discovery rules are an attempt to mitigate the difficulties caused by applying this now-too-simple rule in an increasingly complex technical environment.
2. In appropriate cases the courts can shift the cost to the discovering party, which can temper its enthusiasm for an exhaustive search. Responding parties should consider whether to apply to the court for a cost-shifting order.
3. “[I]f a party creates its own burden or expense by converting into an inaccessible format data that it should have reasonably foreseen would be discoverable material at a time when it should have anticipated litigation, then it should not be entitled to shift the costs of restoring and searching the data.” *Quinby v. WestLB AG*, --- F.R.D. ---, 2006 WL 2597900 (S.D.N.Y. 2006).
  - a. But where data has been stored inconveniently but reasonably, this may be a basis for declining to shift costs. See *Semsroth v. City of Wichita*, 239 F.R.D. 630 (D.Kan 2006) (back-up tapes, though difficult to search, were a reasonable storage method for reconstruction in case of disaster).
4. The court can encourage or even require cost-sharing as an alternative to cost-shifting. For an example, see *American International Specialty Lines Ins. Co. v. NWI-I, Inc.*, 240 F.R.D. 401 (N.D.Ill. 2007). Or the court could order that costs be shared for the independent expert-mirror copy technique described in Part IV.B.4.c above.
5. The court can strike a balance between the sides by agreeing to relatively aggressive discovery but conditioning the order on the willingness of the discovering party to assume or share costs.
6. As noted in Part V above, though, the practicality of cost-shifting is limited in the asymmetrical environment of employment litigation.

C. The *Zubulake* factors

1. The factors a court should consider in deciding whether to shift electronic discovery costs were summarized in the leading case of *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 322 (S.D.N.Y. 2003). These include:
  - a. the extent to which the request is specifically tailored to discover relevant information,
  - b. the availability of such information from other sources,
  - c. the total cost of production compared to the amount in controversy,
  - d. the total cost of production compared to the resources available to each party,
  - e. the relative ability of each party to control costs and its incentive to do so,
  - f. the importance of the issues at stake in the litigation, and
  - g. the relative benefits to the parties of obtaining the information.
  - h. These seven factors are not all given equal weight, and the method of applying them depends on the factual context of each case.
2. As of this writing in mid-September 2007 *Zubulake* has been cited 755 times, and 122 times specifically for the seven-factor test. It is clearly the gold standard for cost-shifting.
  - a. But courts have not been uniform in applying these factors, which in any event will be applied differently to every fact pattern.. *Zubulake* is not the only case to set out cost-shifting factors and paradigms. See, e.g., *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 429 (S.D.N.Y. 2002); *McPeck v. Ashcroft*, 202 F.R.D. 31, 33 (D.D.C. 2001). Courts consider the reasoning in these other cases also.
  - b. And even cases following *Zubulake* do not always follow it precisely. See, e.g., *OpenTV v. Liberate Technologies*, 219 F.R.D. 474 (N.D.Cal. 2003); *Multitechnology Services, L.P. v. Verizon Southwest*, 2004 WL 1553480 (N.D.Tex.).
  - c. The traditional presumption that the responding party pays for discovery costs can also affect the result. For example, in *Wiginton v. CB Richard Ellis, Inc.*, 229 F.R.D. 568, 577 (N.D.Ill. 2004), the *Zubulake* factors favored cost shifting, but because of the presumption the court shifted only 75% of the cost, leaving 25% with the producing party.
  - d. “Under the new pertinent rule, the producing party is relieved of producing specifically identified *inaccessible* data only upon a showing of undue burden or cost. \* \* \* The obvious negative corollary of this rule is that *accessible* data must be produced at the cost of the producing party; cost-shifting does not even become a possibility unless there is first a showing of inaccessibility. Thus, it cannot be argued that a party should ever be relieved of its obligation to produce accessible data merely

because it may take time and effort to find what is necessary.” *Peskoff v. Faber*, 240 F.R.D. 26, 31 (D.D.C. 2007) (emphasis by the court).

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