- *Secure all media.* All copies should be tamper-proof and any original media collected as evidence should be write-protected or otherwise made tamper-proof. All media (copies and originals) should be labeled by time, date, and source, and stored in a secure place. Forensic analysis of the information collected should be done on a working copy created from the secure copy whenever possible.

Summary

Businesses and individuals now use computers to store and communicate information, more than 90 percent of which is never printed on paper. Neglecting discovery aimed at computers and computer-based records thus greatly increases the odds critical evidence will be overlooked. Computer discovery does not require a computer expert. Rather, what it requires is a fundamental understanding of what kinds of information exist, where this information may be stored, and how to ask the questions that will lead you to it.

II. Electronic Discovery: The Current Legal Landscape

Theodore O. Rogers, Jr.*

Introduction

Courts, litigants, and commentators have increasingly been grappling with how to apply discovery rules that were crafted in an age of paper records to massive amounts of electronic data maintained by corporations and individuals alike. Among the difficult topics raised when discovery of electronic data is at issue are the appropriate standards for retention of electronic information, the most efficient means for determining the appropriate scope of discoverable information and, of obvious importance, which party should bear the substantial costs of retention, retrieval, and review of electronic data.

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Within the last two years, a number of significant developments have occurred. In June 2005, draft revisions to the Federal Rules of Civil Procedure, designed to address various issues raised by electronically stored information, were approved by the Standing Committee on Rules of Practice and Procedures and will likely come into effect at the end of the year. In August 2004, the American Bar Association's House of Delegates approved recommendations by the ABA Section of Litigation for amendments to the ABA's Civil Discovery Standards as they relate to preservation duties and cost shifting concerning electronic discovery. Earlier in 2004, a think tank called the Sedona Conference released two versions of an authoritative paper entitled *The Sedona Principles: Best Practices, Recommendations and Principles for Addressing Electronic Document Production.*[1] Finally, a number of highly publicized rulings concerning electronic discovery were issued, including a series of discovery opinions by the Honorable Shira A. Scheindlin of the U.S. District Court for the Southern District of New York in an employment discrimination case.[2]

Background

There is no question that electronic evidence is discoverable.[3] Some courts have treated electronic evidence in the same manner as paper evidence.[4] In *Linnen*, for example, the court emphasized that an electronic discovery request is "no different, in principle, from a request for documents contained in an office file cabinet."[5] Although the *Linnen* court acknowledged that "the reality of the situation may require a different approach and more sophisticated equipment than a photocopier," it stressed that "there is nothing about the technological aspects involved which renders documents stored in an electronic media 'undiscoverable.'"[6] Regard-

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[1] Sedona Conference Working Group on Best Practices for Electronic Document Retention & Production (Pike & Fischer, a BNA Co. July 2005), available for download at www.thesedonaconference.org.

[2] *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004).

[3] *See Rowe Entm't v. William Morris Agency Inc.*, 205 F.R.D. 421, 428 (S.D.N.Y. 2002) ("Electronic documents are no less subject to disclosure than paper records.") (citing *Simon Prop. Group L.P.* v. *MySimon, Inc.*, 194 F.R.D. 639, 640 (S.D. Ind. 2000)).

[4] *See Linnen v. A.H. Robins Co.*, No. 97-2307, 1999 Mass. Super. LEXIS 240, at *16 (Mass. Super. June 16, 1999).

[5] *Id.*

[6] *Id.*

less of the manner in which the matter is stated, it is now "black letter law that computerized data is discoverable if relevant."[7]

Commentators have also uniformly embraced the notion that electronic evidence is no less discoverable than paper documents. For example, *The Sedona Principles* note that "[t]he same rules that govern paper discovery, such as Federal Rules of Civil Procedure 1, 26, and 34, govern electronic discovery."[8] This assertion finds its authority in the Advisory Committee Notes for the 1970 amendments, which "make clear that the added reference to 'data compilations' served to include all forms of electronic data."[9]

The standards concerning discovery will vary by jurisdiction. For example, in a decision by the New York Supreme Court, Nassau County (Justice Austin) declined to follow the standards articulated by Judge Scheindlin in *Zubulake* concerning which party should bear the cost of electronic discovery.[10] The court noted that "[n]either the parties nor the Court have been able to find any cases decided by New York State Courts dealing with the issue of electronic discovery."[11] The court distinguished New York State discovery standards from federal standards, holding that "cost shifting of electronic discovery is not an issue in New York since the courts have held that the party seeking discovery should incur the costs incurred in the production of discovery material."[12] The court concluded that "the analysis of whether electronic discovery should be permitted is much simpler than it is in the federal courts. The court need only determine whether the material is discoverable and whether the party seeking the discovery is willing to bear the cost of production of the electronic material."[13]

Proposed Amendments to Federal Rules of Civil Procedure

In August 2004, the Judicial Conference's Advisory Committees on Bankruptcy Rules, Civil Rules, Criminal Rules, and Evidence Rules published for public comment proposed amendments to the Federal Rules of Practice and Procedure, including several amendments to the Federal Rules of Civil Procedure concerning

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[7] *Anti-Monopoly, Inc. v. Hasbro, Inc.,* No. 94 Civ. 2120, 1995 U.S. Dist. LEXIS 16355 (S.D.N.Y. Nov. 3, 1995).

[8] The Sedona Principles, *supra* note 1, at 1 (available online at www.thesedonaconference.org).

[9] *Id.*

[10] *Lipco Electrical Corp. v. ASG Consulting Corp.*, 2004 NY Slip Op. 50967U, N.Y.L.J., Aug. 26, 2004, at 20 (Sup. Ct. Nassau County Aug. 18, 2004).

[11] 2004 NY Slip Op. 50967U at *6.

[12] *Id.* at *8.

[13] *Id.*

electronic discovery. After hearings and consideration of public comments, in June 2005 the proposed amendments were referred to the Standing Committee on Rules of Practice and Procedure. On September 20, 2005, the Judicial Conference approved the proposed amendments for submission to the Supreme Court and recommended their adoption and submission to Congress for approval. The proposed amendments, if adopted, will become effective no earlier than December 2006.[14]

The Civil Rules Advisory Committee's lengthy report recommending that the proposed amendments on electronic discovery issues be published for comment noted that during the last several years,

> . . . electronic discovery has moved from an unusual activity encountered in large cases to a frequently-seen activity, used in an increasing proportion of the litigation filed in the federal courts. . . . Electronic discovery exhibits several distinct features that may warrant treatment in the rules. Perhaps the most prominent is the exponentially greater volume that characterizes electronic data, which makes this form of discovery more burdensome, costly, and time consuming.[15]

The proposed amendments concerning electronic discovery address five areas: (1) the need for early attention to electronic discovery issues, including preservation of information, the form of production, and privilege issues; (2) discovery of electronically stored information that is not reasonably accessible; (3) the assertion of privilege after production; (4) the application of Rules 33 and 34 to electronically stored information; and (5) a limit on available sanctions under Rule 37 for the loss of electronically stored information resulting from routine operation of computer systems.

1. The Committee proposed amendments to Rule 26(f) that would require parties to discuss electronic information during the discovery planning conference, and would provide for a report on those discussions in the parties' report of the planning meeting, including a report to the court on outstanding issues and on whether the court should issue an order protecting the right to assert privilege after

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[14]The full texts of the proposed amendments and explanatory notes, as well as comments that have been submitted, are available online at www.uscourts.gov/rules. *See also* Scheindlin, *Electronic Discovery Takes Center Stage*, N.Y.L.J. (Sept. 13, 2004), at 4 (reviewing proposed amendments as they concern electronic discovery).

[15]Available online at www.uscourts.gov/rules/comment2005/CVAug04.pdf.

inadvertent production of privileged information. Rule 16 would be amended to provide that the scheduling order may include provisions concerning electronic information, and may adopt agreements for protection against waiver and privilege.

2. A proposed amendment to Rule 26(b) would provide that a party need not provide electronic information in response to a discovery request if the information is not reasonably accessible.
3. A proposed amendment to Rule 26(b) would create a procedure for a party to assert that it produced privileged information without the intent to waive the privilege. The rule would allow a party to notify the receiving party that a privilege applies to material that was inadvertently produced. After receiving such notification, the receiving party must return, sequester, or destroy the information. The producing party must then preserve the information and put it on a privilege log pending a court ruling on a motion to compel. The proposed rule does not address whether there actually has been a privilege waiver under the circumstances.
4. Proposed amendments to Rule 33 (governing interrogatories) and Rule 34 (governing production of documents and things) would address electronic information. The amendments to Rule 33 would affirm that an answer to an interrogatory involving a review of business records should involve a search of electronic information and that a party may answer any interrogatory by providing access to such information. The amendments to Rule 34 would distinguish between electronic information and "documents," and permit the requesting party to specify the form in which electronically stored information is to be produced, with the responding party having the opportunity to object to that form. In the absence of agreement on a particular form, the producing party may either produce the information in the form in which it is ordinarily maintained or in a form that is reasonably usable.
5. Rule 37 would be amended to provide a new subsection barring courts from issuing sanctions for failing to provide electronic information lost because of the routine operation of the party's computer system, absent exceptional circumstances. This proposed rule change has proven to be the most controversial.

Comments on the amendments are available online at www.uscourts.gov/rules/e-discovery.html. Microsoft Corporation submitted a detailed comment letter, which is of particular note because it provides a useful description of the technological changes that have made electronic discovery so challenging. As an example of the magnitude of the issues and the need for courts to approach them in a balanced fashion, Microsoft described that, in 2004, it received 350 million to 400 million external e-mails per month, double the amount received in 2003. As Microsoft noted, with volume of this sort, there must be ongoing corporate procedures for disposing of information.

Amendments to ABA Civil Discovery Standards

In 1999, the American Bar Association adopted Civil Discovery Standards that, among other things, include standards addressing parties' duties to preserve electronic data and standards for shifting of the costs of production of electronic discovery. In early 2004, the ABA Section of Litigation published proposed amendments to the 1999 Electronic Discovery Standards and, after a review and comment period, the proposed amendments were adopted in revised form by the ABA's House of Delegates in August 2004.[16] With respect to the duty of preservation, the Standards identify a broad universe of types of electronic data that a party may be called upon to preserve.[17] Additionally, at least one court has cited Standard 10 with approval, advising attorneys,

> When a lawyer who has been retained to handle a matter learns that litigation is probably or has been commenced, the lawyer should inform the client of its duty to preserve potentially relevant documents and of the possible consequences for failing to do so.[18]

The Standards offer a detailed analysis for determining the allocation of costs of production and the scope of production generally. When a court is faced with a motion seeking to compel or protect against production or a motion for costshifting, the Standards recommend that the following factors be considered:

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[16]A copy of the Standards is available online at www.abanet.org/litigation.

[17]ABA Electronic Discovery Standard 29(a) (including databases; networks; computer systems, including legacy systems; servers; archives; backup or disaster recovery systems; tapes, discs, drives, cartridges, and other storage media; laptops; personal computers; internet data; and personal digital assistants).

[18]*See Thompson v. United States Dep't of Housing & Urban Dev.*, 219 F.R.D. 93, 98 (D. Md. 2003) (citing, in part, Standard 10).

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 with 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 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

o) 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.[19]

Finally, the Standards encourage parties to meet and discuss the expected breadth of electronic discovery and any anticipated problems, in a pre-trial discovery conference.[20]

The Sedona Principles

In January 2004, the Sedona Conference Working Group Series published *Best Practices, Recommendations & Principles for Addressing Electronic Document Production* ("The Principles").[21] The Principles were then subjected to a nationwide peer review and a comment period, and published in annotated form in Summer 2004.[22] The Principles are organized in a fashion similar to the Disciplinary Rules. Fourteen basic principles are set forth, with extensive comments addressing each one. A copy of the 14 principles as published in January 2004 is appended to this chapter.

With respect to the obligation to preserve data, The Principles adhere to the widely held notion that litigants have an obligation to preserve electronic data "that may be relevant to pending or threatened litigation."[23] The question of when the duty to preserve attaches "remains unchanged in the world of electronic data and documents."[24] The Principles recognize, however, that "it is unreasonable to expect parties to take every conceivable step to preserve all potentially relevant data."[25] They note that a corporation, "upon recognizing the threat of litigation, [need not] preserve every shred of paper, every e-mail or electronic document, and every backup tape. . . . Such a rule would cripple large corporations who are almost always involved in litigation."[26] To avoid

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[19]ABA Electronic Discovery Standard 29(b)(iii).
[20]ABA Electronic Discover Standard 31.
[21]Available online at www.thesedonaconference.org.
[22]Available online through Pike & Fischer, at www.pf.com.
[23]Principle 5.
[24]Comment 5 a.
[25]*Id.*
[26]*Id.* (citing *Concord Boat Corp. v. Brunswick*, 1997 WL 33352759, at *4 (E.D. Ark. Aug. 29, 1997) (quotation marks omitted)).

imposing an onerous burden, The Principles identify the need to strike a balance between "(1) an organization's duty to preserve relevant data, and (2) an organization's need, in good faith, to continue operations."[27]

The Principles recommend that, to manage the costs of litigation and the potentially excessive costs of electronic discovery, organizations "institute[] defined, orderly procedures for preserving and producing potentially relevant documents and data, and establish[] processes to identify, locate, retrieve, preserve, review, and produce data that may be responsive to discovery requests or required for initial mandatory disclosures."[28] The Principles state that parties may satisfy their obligation to preserve and produce data by use of search terms and sampling and selection criteria, to identify data most likely to contain responsive information.[29]

The Principles address the issue of preservation of backup tapes and note that "[a]bsent specific circumstances, preservation obligations should not extend to disaster recovery backup tapes created in the ordinary course of business."[30] The Principles stress that "[r]esort to disaster recovery backup tapes and other sources of data and documents requires the requesting party to demonstrate need and relevance that outweigh the cost, burden, and disruption of retrieving and processing the data from such sources."[31]

The Principles also affirm that "[a]bsent a showing of special need and relevance, a responding party should not be required to preserve, review, or produce deleted, shadowed, fragmented, or residual data or documents."[32] The Principles base the exclusion of deleted data from discovery on the fact that such data are not viewable information and thus should not be considered presumptively to be a "document."[33] Deleted or erased data often remain on the hard drive and there may be circumstances in which such data can be restored; however, such data should be ruled discoverable only after proper evaluation of the need for and relevance of the data.[34] Nor should a party have an obligation to preserve or produce "metadata," unless it is material to the dispute.[35]

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[27] *Id.*
[28] Comment 5 b.
[29] Principle 11.
[30] Comment 5 h (citing *McPeek v. Ashcroft*, 202 F.R.D. 31, 33 (D.D.C. 2001)).
[31] Principle 8.
[32] Principle 9.
[33] Comment 9 a.
[34] *Id.* (noting by way of example that the Texas state court system does not require "heroic efforts").
[35] Principle 12.

Nevertheless, some courts addressing this issue have taken an expansive view of the duty of parties to produce responsive metadata. For example, in *Williams* v. *Sprint/United Management Co.*,[36] the court cited the Sedona Principles' discussion of metadata but found that production of an electronic document "in the form in which it is regularly maintained, i.e., in its native format or as an active file,... must include all metadata" subject to objection, agreement by the parties, or protective order.[37] The court held that the defendants were required to produce metadata associated with responsive Excel spreadsheets with only limited permission to redact certain confidential information.

As to counsel's responsibilities, The Principles affirm the need for counsel to advise the client to issue a litigation hold on relevant electronic data and to maintain effective communication. According to The Principles, "an effective means of retaining documents reasonably subject to the preservation obligation should be established as soon as practicable," and "[a]n appropriate notice should be effectively communicated to an appropriate list of affected persons."[38] The Principles encourage opposing counsel to confer with each other "early in discovery regarding the preservation and production of electronic data and documents" and to "seek to agree on the scope of each party's rights and responsibilities."[39] Through early discussion and cooperation, "litigants can identify and attempt to resolve disputes before they create collateral litigation."[40]

The Principles state that sanctions "should only be considered by the court if, upon a showing of a clear duty to preserve, the court finds that there was an intentional or reckless failure to preserve and produce relevant electronic data and that there is a reasonable probability that the loss of the evidence has materially prejudiced the adverse party."[41] Thus, when a party destroys electronic evidence "in good faith under a reasonable records management policy, no sanctions should attach."[42] If all three prerequisites for sanctions are met (duty to preserve, intentional or reckless failure to meet that duty, and material prejudice), then the following sanctions may be considered: (1) monetary fines,

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[36]230 F.R.D. 640 (D. Kan. 2005).
[37]*Id.* at 656.
[38]Comment 5 c.
[39]Principle 3.
[40]Comment 3 a.
[41]Principle 14.
[42]Comment 14 d.

(2) adverse inference instructions, and (3) default judgments.[43] The Principles have been cited approvingly by a number of courts ruling on electronic discovery issues.[44]

Zubulake v. UBS Warburg

Laura Zubulake, a former director and senior salesperson for UBS's Asian Equities Sales Desk, filed a complaint against UBS in 2002 alleging sex discrimination and retaliation in the U.S. District Court for the Southern District of New York. Although the judge to whom the case was assigned, The Honorable Shira A. Scheindlin, characterized the case as a "relatively routine employment discrimination dispute," discovery produced five different decisions.[45] Judge Scheindlin, who had previously written on the subject of electronic discovery,[46] described at length in her decisions in *Zubulake* what she expects of litigants and their counsel with respect to the preservation and production of electronically stored information.

Zubulake I. The first opinion addressed the plaintiff's motion for an order compelling production of archived e-mails.[47] The court ordered the defendant to (1) bear the costs of producing all accessible data and (2) restore a sample of backup tapes to determine if cost-shifting is appropriate. In the process, the court laid out its own standard for determining whether or not cost-shifting should be applied.

The court began the cost-shifting analysis by noting that "[a]ny principled approach to electronic evidence must respect" the presumption that "the responding party must bear the expense of

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[43]Comment 14 d (citing *Carlucci v. Piper Aircraft Corp.*, 102 F.R.D. 472 (S.D. Fla. 1984)) ("Having determined that Piper intentionally destroyed documents to prevent their production, the entry of a default is the appropriate sanction.").

[44]*See E*Trade Secs., LLC v. Deutsche Bank AG*, 2005 U.S. Dist. LEXIS 3021, at *25 (D. Minn. 2005) (citing The Principles in sanctioning a company that relied on backup tapes—subsequently destroyed—instead of a litigation hold to preserve evidence); *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, at n. 122 (S.D.N.Y. 2004) (referring to the Sedona Conference as providing "very useful guidance"); *In re Search of 3817 W. West End*, 321 F. Supp. 2d 953, 956 (N.D. Ill. 2004) (relying on The Principles' definition of "metadata"); *Zakre v. Norddeutsche Landesbank Girozentrale,* 2004 U.S. Dist. LEXIS 6026 (S.D.N.Y. Apr. 6, 2004) (following Principle 11 concerning format for production of electronic data); *Pueblo of Laguna v. United States,* 60 Fed. Cl. 133 (Ct. Claims Mar. 19, 2004) (citing The Principles' standards for preservation order with approval); *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003) (citing The Principles' statement that absent specific circumstances, preservation obligations should not extend to disaster recovery backup tapes).

[45]*Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, at 424 (S.D.N.Y. 2004) ("*Zubulake* V").

[46]Schiendlin & Rabkin, *Electronic Discovery in Federal Civil Litigation: Is Rule 34 Up to the Task?,* 41 B.C. L. REV. 327 (2000).

[47]*Zubulake I,* 217 F.R.D. 309 (S.D.N.Y. 2003).

complying with discovery requests."[48] Further, the court emphasized that "cost-shifting should be considered *only* when electronic discovery imposes an 'undue burden or expense' on the responding party."[49] The court held that the type of electronic data requested determined whether or not cost-shifting is appropriate.[50] The court held that it is appropriate to consider cost-shifting when inaccessible data are sought (backup tapes; erased, fragmented, or damaged data), but not when accessible data are sought (active, online data; near-line data; offline storage/archives). Once a court determines that consideration of cost-shifting is appropriate, the court described a seven-factor test for determining whether costs should shift:

1. The extent to which the request is specifically tailored to discover the 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 with 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; and
7. The relative benefits to the parties of obtaining the information.[51]

The court held that the defendant must produce (1) all accessible data at its own cost, and (2) a sample of the inaccessible data. The sample would then be used to allow the court to engage in the fact-intensive, seven-factor cost-shifting analysis.

Zubulake II. The plaintiff asked the court to permit her to disclose a deposition marked confidential. The court denied the motion.[52] This is the only *Zubulake* decision that does not address electronic document production.

Zubulake III. After the defendant produced a sample of the inaccessible data, the court held that some cost-shifting was appro-

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[48] *Zubulake I,* at 317 (quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 398 (1978)).

[49] *Id.* at 318 (quoting Fed. R. Civ. P. 26(c)) (emphasis added).

[50] *Id.* ("[W]hether production of documents is unduly burdensome or expensive turns primarily on whether it is kept in an *accessible or inaccessible* format.").

[51] *Id.* at 322.

[52] *Zubulake II,* 230 F.R.D. 290 (S.D.N.Y. 2003).

priate.[53] The plaintiff was ordered to bear 25 percent of the costs associated with restoring and searching certain backup tapes. The court did not order shifting of the costs associated with producing the restored e-mails.

In determining the proper amount to be shifted, the court emphasized that "precise allocation is a matter of judgment and fairness rather than mathematical consequence of the seven factors."[54] The court held that because "the seven factor test requires that UBS pay the lion's share, the percentage assigned to Zubulake must be less than fifty percent."[55] The court worried that too much cost-shifting would "chill the rights of litigants to pursue meritorious claims."[56] However, noting that the discovery request is "somewhat speculative," the court held that some cost-shifting is appropriate to ensure that the defendant's expenses would not be "unduly burdensome."[57] The court held that "[a] twenty-five percent assignment to Zubulake meets these goals."[58]

Although the court found cost-shifting appropriate for the restoration of the e-mails, all other costs remained the responsibility of the producing party.[59] The court noted that "the responding party should *always* bear the cost of reviewing and producing electronic data once it has been converted to an accessible form."[60] This is true because the "producing party has the exclusive ability to control the cost of reviewing the documents" and "once the data has been restored to an accessible format and responsive documents located, cost-shifting is no longer appropriate."[61]

Zubulake IV. After the defense produced the requested information, it became clear that many documents had not been preserved. Specifically, several backup tapes were missing, certain isolated e-mail messages had been deleted, and some e-mails were produced late. The plaintiff requested: (1) an order requiring the defendant to bear the costs of restoring the remainder of the backup tapes; (2) an adverse inference instruction with respect to the missing tapes; and (3) an order requiring the defendant to bear the costs of re-deposing witnesses concerning the most

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[53] *Zubulake III,* 216 F.R.D. 280 (S.D.N.Y. 2003).
[54] *Id.* at 291.
[55] *Id.* at 289.
[56] *Id.*
[57] *Id.*
[58] *Id.* at 289.
[59] *Id.* ("As a general rule, where cost-shifting is appropriate, only the costs of restoration and searching should be shifted.").
[60] *Id.* at 290 (emphasis added).
[61] *Id.* at 290–91.

recently produced e-mails. The court held that the cost-shifting order would not be reconsidered and that an adverse instruction was not warranted. The court did, however, order the defendant to pay for the new depositions of previously deposed witnesses.[62]

The court began its decision by defining "spoliation." "Spoliation" is the "destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation."[63] According to the court, the obligation to preserve 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."[64] The court elaborated on the "should have known" standard, noting that a particular witness "should have known that the evidence [was] relevant to future litigation" because he testified that the potential of litigation was "in the back of [his] head."[65] Further, the court noted that if a litigant starts labeling e-mails as "privileged" and that e-mail is widely distributed, a duty to preserve might attach.[66] After discussing the determination of when a duty to preserve attaches, the court defined the scope of evidence preservation:

> Once a party reasonably anticipates litigation, it must suspend its routine document 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 . . . [i]f 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.[67]

Whether to implement a sanction and what type of sanction is appropriate are decisions "confined to the sound discretion of the trial judge, and [are] assessed on a case-by-case basis."[68] The court weighed the two proffered sanctions (adverse inference instruc-

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[62] *Zubulake IV*, 220 F.R.D. 212 (S.D.N.Y. 2003).
[63] *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999).
[64] *Zubulake IV*, 220 F.R.D. at 216.
[65] *Id.* at 217.
[66] *Id.*
[67] *Id.* at 218 (emphasis added).
[68] *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001).

tion and bearing the costs of additional depositions) in turn. An adverse inference instruction would allow the jury to infer that any documents destroyed by the defendant may be assumed to be favorable to the plaintiff. The court emphasized that an adverse inference instruction should be used sparingly, noting that "an adverse inference instruction often ends litigation—it is too difficult a hurdle for the spoliator to overcome. . . . Accordingly, the adverse inference instruction is an extreme sanction and should not be given lightly."[69] In order for a party to receive an adverse inference instruction (or, for that matter, any other sanction for spoliation), the party must establish:

> (1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a 'culpable state of mind'; and (3) that the destroyed evidence was 'relevant' to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.[70]

To establish a "culpable state of mind," the court held that a plaintiff need only establish ordinary negligence.[71] The court held that the plaintiff had successfully established the first two elements, but failed to establish the third. The court held that there was no evidence suggesting that the missing tape contained "peculiarly unfavorable evidence."[72] As the court summarized, "although UBS had a duty to preserve all of the backup tapes at issue, and destroyed them with the requisite culpability, Zubulake cannot demonstrate that the lost evidence would have supported her claims."[73]

The court did find it appropriate to order UBS to bear the costs of additional depositions. Noting that "there is no question that e-mails that UBS should have produced to Zubulake were destroyed by UBS," the court ordered UBS to shoulder the "costs for redeposing certain witnesses for the limited purpose of inquiring into issues raised by the destruction of evidence and any newly discovered e-mails."[74]

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[69] *Zubulake IV* at 219–20.
[70] *Id.* at 220.
[71] The court cited *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 108 (2d Cir. 2002), for the proposition that a "culpable state of mind" can be satisfied by a finding of negligence. Although *Residential Funding* does support that position, there may well be room for litigants to argue in other cases that a spoliation instruction is better suited to situations more egregious than those of mere negligence, and that a "culpable state of mind" should connote more than negligent conduct.
[72] *Id.* at 221.
[73] *Id.* at 222.
[74] *Id.*

Zubulake V. During the course of the additional depositions ordered by *Zubulake IV*, Zubulake discovered that UBS had deleted more e-mails than assumed and that UBS had not produced many preserved e-mails.[75]In light of this new information, the court reconsidered sanctions. In doing so, the court addressed in detail the responsibilities of counsel during discovery. The court held that counsel had an affirmative duty to (1) institute a litigation hold; (2) communicate the preservation duties to the key players in the litigation; and (3) inform all relevant employees of their production obligations. The litigation hold should be issued at "the outset of litigation or whenever litigation is reasonably anticipated."[76] The court further suggested that the litigation hold should be "periodically re-issued so that new employees are aware of it, and so that it is fresh in the minds of all employees."[77] The court also observed that "counsel might be advised to take physical possession of backup tapes" and to "arrange for the segregation and safeguarding of any archival media."[78]

UBS's counsel had instituted a litigation hold, communicated with many of the key players, and instructed UBS to produce active computer files. Nevertheless, the court held that "counsel are not entirely blameless."[79] The court noted that "counsel failed to properly oversee UBS in a number of important ways, both in terms of its duty to locate relevant information and its duty to preserve and timely produce that information."[80] The court held that the attorneys failed adequately to communicate the litigation hold or ascertain the key players' document management routine.

The court reiterated the traditional test for an adverse inference, namely, that the plaintiff must establish: (1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a "culpable state of mind"; and (3) that the destroyed evidence was "relevant" to the plaintiff's claim. The court concluded that UBS personnel had "acted willfully in destroying potentially relevant information."[81] The court took pains to "[n]ote that I am

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[75] *Zubulake V*, 229 F.R.D. 422 (S.D.N.Y. 2004).
[76] *Zubulake V* at 433.
[77] *Id.*
[78] *Id.* at 434.
[79] *Id.* at 435.
[80] *Id.*
[81] *Id.* at 436.

not sanctioning UBS for the loss of the tapes (which was negligent), but rather for its willful deletion of e-mails."[82]

In deciding on the appropriate sanction, the court emphasized that the "major consideration in choosing an appropriate sanction . . . is to restore Zubulake to the position that she would have been in had UBS faithfully discharged its discovery obligations."[83] The court determined that the only way to restore Zubulake to such a position was to issue an adverse inference instruction. The instruction reads:

> You have heard that UBS failed to produce some of the e-mails sent or received by UBS personnel in August and September 2001. Plaintiff has argued that this evidence was in defendants' control and would have proven facts material to the matter in controversy.
>
> If you find that UBS could have produced this evidence, and that the evidence was within its control, and that the evidence would have been material in deciding facts in dispute in this case, you are permitted, but not required, to infer that the evidence would have been unfavorable to UBS.[84]

As a further sanction, the court ordered UBS to bear the costs of any deposition or repeat depositions required by the "late production" and to pay costs of the motion at issue. The *Zubulake* case was tried to a jury in Spring 2005, and an adverse inference instruction was given. The jury found for the plaintiff, awarding $9.1 million in compensatory damages and $20.2 million in punitive damages.

Other Recent Decisions

In two rulings in March 2005, a Florida state court judge issued severe sanctions in a high-profile litigation against an investment banking firm, for what the court concluded were "discovery abuses" in producing electronic data in discovery.[85] In its initial ruling, entered March 1, 2005, the court found that the investment bank and its outside counsel had not complied with a prior ruling requiring production of e-mail, and that "many of these failings were done knowingly, deliberately, and in bad faith." The court concluded that the defendant "has spoiled evidence, justifying sanctions," and ordered that the burden of proof on the issue of fraud

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[82] *Id.* at 437.
[83] *Id.*
[84] *Id.* at 439–40.
[85] *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.*, No. 502003CA005045XXOCAI (Fla. Cir. Ct. Mar. 1, 2005).

be shifted to the defendant. In a second ruling, entered March 23, 2005, the court concluded that the defendant's "discovery abuses" were incurably prejudicial to the plaintiff, and imposed the additional sanction of granting the plaintiff's motion for entry of a default judgment on the issue of fraud. The case thereafter was tried to a jury, which awarded compensatory damages of $604.3 million and punitive damages of $850 million.

On July 12, 2004, a judge of the Northern District of Texas, in *Multitechnology Servs., L.P. v. Verizon S.W.*,[86] held that both parties must split evenly the costs of producing information from the defendant's database or archives, after weighing the benefit to the plaintiff of obtaining the information and the need to provide the defendant with an incentive to manage the costs it incurs in collecting the information.[87] The court also held that the cost of production would be considered court costs, and thus recoverable by the prevailing party. The court declined to accept the plaintiff's argument that cost-shifting was appropriate under *Zubulake*, stating that "*Zubulake* is a district court opinion without binding authority."[88] The court also distinguished *Zubulake* on the facts of the case.

On August 10, 2004, Magistrate Judge Martin Ashman of the U.S. District Court for the Northern District of Illinois adopted an eight-factor test for considering cost allocation that differs somewhat from the *Zubulake* test. The court endorsed the marginal utility approach, under which courts determine that "the more likely it is that the search will discover critical information, the fairer it is to have the responding party search at its own expense."[89] Magistrate Judge Ashman stated that, although he was guided by the factors set forth in *Zubulake* as well as another recent Southern District of New York decision,[90] he believed that more emphasis needed to be given to the importance of the requested discovery in resolving the issues in the litigation.

In a decision dated August 12, 2004, a judge of the Eastern District of Wisconsin adopted the *Zubulake* seven-factor test for cost-shifting.[91] Applying the test, the court required Gateway to

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[86] 2004 WL 1553480, at *1 (N.D. Tex. July 12, 2004).
[87] *Id.* at *1–2.
[88] *Id.* at *1.
[89] *Wiginton v. CB Richard Ellis, Inc.*, 229 F.R.D. 568, 572 (N.D. Ill. Aug. 10, 2004) (citing *McPeek v. Ashcroft*, 202 F.R.D. 31, 34 (D.D.C. 2001)).
[90] *Rowe Entm't v. William Morris Agency, Inc.*, 205 F.R.D. 421 (S.D.N.Y. 2002).
[91] *Hagemeyer N. Am., Inc. v. Gateway Data Sciences Corp.*, 222 F.R.D. 594, 603 (E.D. Wis. 2004).

make additional submissions addressing whether the burden or expense of satisfying the document request is proportionate to the likely benefit.

In *Thompson* v. *United States Dep't of Housing and Urban Dev.*,[92] the court questioned the seven-factor *Zubulake* test and proposed an alternative:

> In addition to the tests fashioned by these courts, it also can be argued with some force that the Rule 26(b)(2) balancing factors are all that is needed to allow a court to reach a fair result when considering the scope of discovery of electronic records. Rule 26(b)(2) requires a court, *sua sponte*, or upon receipt of a Rule 26(c) motion, to evaluate the costs and benefits associated with a potentially burdensome discovery request. The rule identifies the following factors to be considered: whether the discovery sought is unreasonably cumulative or duplicative; whether the information sought is obtainable from some other more convenient, less burdensome or inexpensive source; whether the party seeking the information already has had adequate opportunity to obtain the information; and whether the burden or expense of the proposed discovery outweighs its likely benefit, taking into consideration the following: 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 of the discovery sought to the resolution of the issues.[93]

As noted above, in an August 26, 2004 decision, the Supreme Court, Nassau County, declined to follow Judge Scheindlin's standards concerning which party should bear the cost of electronic discovery.[94] The court noted that "[n]either the parties nor the Court have been able to find any cases decided by New York State Courts dealing with the issue of electronic discovery."[95]

On December 7, 2004, a judge of the District of New Jersey affirmed an adverse inference instruction direction and monetary sanctions imposed by a magistrate judge in a patent litigation.[96] The court concluded that the defendant never placed a "litigation hold" on e-mail, resulting in the failure to produce a single technical e-mail in a highly technical patent litigation. The court adopted the definition of "spoliation" from *Zubulake* and discussed the possible sanctions from spoliation, such as dismissal of a claim or granting judgment in favor of a prejudiced party, suppression of

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[92] 219 F.R.D. 93, 98 (D. Md. 2003).
[93] *Id.* at 98.
[94] *Lipco Electrical Corp. v. ASG Consulting Corp.*, 2004 NY Slip Op. 50967U, N.Y.L.J., Aug. 26, 2004, at 20 (Sup. Ct. Nassau County, Aug. 18, 2004).
[95] 2004 NY Slip Op. 50967U at *6.
[96] *Mosaid Techs. Inc. v. Samsung Elecs. Co.*, 348 F. Supp. 2d 332, 336 (D.N.J. 2004).

evidence, an adverse inference, instruction fines, and attorneys' fees and costs.[97] The jury instruction adopted by the court is similar to the instruction used by Judge Scheindlin:

> You have heard that defendants failed to produce virtually all technical and other e-mails in this case. Plaintiff has argued that these e-mails were in defendants' control and would have proven facts relevant to the issues in the case.
>
> If you find that defendants could have produced these e-mails, and that the evidence was within their control, and that the e-mails would have been relevant in deciding disputed facts in this case, you are permitted, but not required, to infer that the evidence would have been unfavorable to defendants.
>
> In deciding whether to draw this inference, you may consider whether these e-mails would merely have duplicated other evidence already before you. You may also consider whether you are satisfied that defendants' failure to produce this information was reasonable. Again, any inference you decide to draw should be based on all the facts and circumstances of this case.[98]

The *Mosaid* court emphasized the notion "that when a party destroys evidence that is relevant to a claim or defense in a case, the party did so out of the well-founded fear that the content would harm him."[99] However, unlike *Zubulake IV*, which noted the extreme nature of the adverse inference instruction, the court argued that a spoliation inference is a far lesser sanction than the alternatives of dismissal or suppression of evidence.[100] The court, applying a Third Circuit standard, stated that four essential factors must be proven for a spoliation inference to apply: (1) the evidence in question must be within the party's control, (2) there must be an appearance of actual suppression or withholding of evidence, (3) the destroyed or withheld evidence was relevant to the claims or defenses, and (4) it was reasonably foreseeable that the evidence would later be discoverable.[101] The court adopted a flexible approach to the issue, rejecting the defendant's argument that the "actual suppression" of data must be intentional for liability to attach.[102]

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[97] *Id.* at 2.

[98] *Mosaid Techs. Inc. v. Samsung Elecs. Co.*, 224 F.R.D. 595, 600 (D.N.J. 2004) (citing *Zubulake*, 229 F.R.D. 422, 440 (S.D.N.Y. 2004)).

[99] 348 F. Supp. 2d at 336 (citing *Brewer v. Quaker State Oil Refining Corp.*, 72 F.3d 326, 334 (3d Cir. 1995)); *Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76, 78 (3d Cir. 1994).

[100] *Id* at 338.

[101] *Id.*

[102] *Id.* at 4–5.

Conclusion

Courts are only just beginning to consider and rule on these issues, as is evidenced by Justice Austin's August 26, 2004 decision noting that neither he nor the parties had located any prior New York State court decision on electronic discovery. It is too early to tell how influential any of the above pronouncements will be to courts as they rule. Certainly the proposed amendments to the Federal Rules of Civil Procedure, if adopted, will be important nationwide, along with the Advisory Committee commentary accompanying them. The materials presented here, including in particular the ABA's Civil Discovery Standards and the Sedona Principles, counsel a commonsense approach, and recognize the danger that the burden of electronic data collection and production and related litigation will dwarf the amounts at issue in any particular litigation.

Appendix 8.II.A

THE SEDONA PRINCIPLES FOR ELECTRONIC DOCUMENT PRODUCTION (JANUARY 2004)

1. Electronic data and documents are potentially discoverable under Fed. R. Civ. P. 34 or its state law equivalents. Organizations must properly preserve electronic data and documents that can reasonably be anticipated to be relevant to litigation.
2. When balancing the cost, burden, and need for electronic data and documents, courts and parties should apply the balancing standard embodied in Fed. R. Civ. P. 26(b)(2) and its state law equivalents, which require considering the technological feasibility and realistic costs of preserving, retrieving, producing, and reviewing electronic data, as well as the nature of the litigation and the amount in controversy.
3. Parties should confer early in discovery regarding the preservation and production of electronic data and documents when these matters are at issue in the litigation, and seek to agree on the scope of each party's rights and responsibilities.
4. Discovery requests should make as clear as possible what electronic documents and data are being asked for, while responses and objections to discovery should disclose the scope and limits of what is being produced.
5. The obligation to preserve electronic data and documents requires reasonable and good faith efforts to retain information that may be relevant to pending or threatened litigation. However, it is unreasonable to expect parties to take every conceivable step to preserve all potentially relevant data.
6. Responding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronic data and documents.
7. The requesting party has the burden on a motion to compel to show that the responding party's steps to preserve and produce relevant electronic data and documents were inadequate.

8. The primary source of electronic data and documents for production should be active data and information purposely stored in a manner that anticipates future business use and permits efficient searching and retrieval. Resort to disaster recovery backup tapes and other sources of data and documents requires the requesting party to demonstrate need and relevance that outweigh the cost, burden, and disruption of retrieving and processing the data from such sources.
9. Absent a showing of special need and relevance, a responding party should not be required to preserve, review, or produce deleted, shadowed, fragmented, or residual data or documents.
10. A responding party should follow reasonable procedures to protect privileges and objections to production of electronic data and documents.
11. A responding party may satisfy its good faith obligation to preserve and produce potentially responsive electronic data and documents by using electronic tools and processes, such as data sampling, searching, or the use of selection criteria, to identify data most likely to contain responsive information.
12. Unless it is material to resolving the dispute, there is no obligation to preserve and produce metadata absent agreement of the parties or order of the court.
13. Absent a specific objection, agreement of the parties, or order of the court, the reasonable costs of retrieving and reviewing electronic information for production should be borne by the responding party, unless the information sought is not reasonably available to the responding party in the ordinary course of business. If the data or formatting of the information sought is not reasonably available to the responding party in the ordinary course of business, then, absent special circumstances, the costs of retrieving and reviewing such electronic information should be shifted to the requesting party.
14. Sanctions, including spoliation findings, should only be considered by the court if, upon a showing of a clear duty to preserve, the court finds that there was an intentional or reckless failure to preserve and produce relevant electronic data and that there is a reasonable probability that the loss of the evidence has materially prejudiced the adverse party.