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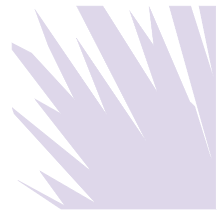

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COST SHIFTING IN ELECTRONIC DISCOVERY

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I. INTRODUCTION[1]

Although the Federal Rules of Civil Procedure nowhere explicitly speak of "cost shifting," there is no doubt that the courts may require a party propounding discovery to pay the costs that will be incurred by the responding party in providing that discovery. This is implicit in the protective order provisions of Rule 26(c), which authorizes "any order which justice requires to protect a party or person from . . . undue burden or expense . . . " *See also Advisory Committee Notes to 1970 Amendments to Rule 34*. ("The courts have ample power under Rule 26(c) to protect respondent against undue burden or expense, either by restricting discovery or requiring that the discovering party pay costs.") Cost shifting is not, however, a blanket means of "legitimizing" otherwise overbroad or unduly burdensome discovery. It is one tool available to the courts to protect a party from undue burden or expense.

While cost shifting has not historically received great judicial attention, this seems destined to change as electronic discovery becomes pervasive. As is increasingly well appreciated, the ability of modern technology to store vast amounts of records and information (a large portion of which is never reduced to a paper record, and some of which can be dauntingly expensive to recover and produce) presents increasingly critical issues for discovery. This has begun to sharpen the courts' focus on the issue of who pays for such discovery to a degree not seen in the halcyon days of purely paper discovery. These issues can arise in myriad ways, by no means all of which have yet been addressed significantly by the courts. The most common scenarios involve discovery directed to disaster recovery tapes as sources of subsequently deleted emails; *see, e.g.*, *Zubulake v. UBS-Warburg LLC*, 216 F.R.D. 280 (S.D.N.Y. 2003) (*Zubulake III*), mirror imaging hard drives for similar purposes (among others); *see, e.g.*, *Fennell v. First Steps Designs, Ltd.*, 83 F.3d 526 (1st Cir. 1996), and the need to modify software or write new software to identify and recover records or data from electronic storage. *See* 7 *Moore's Federal Practice* ¶ 37A.32[3][b][iii] (3d ed. 2003).

This topic has been the subject of considerable scholarly commentary. See, e.g., *The Sedona Principles* (Pike & Fischer 2004); Redish, *Electronic Discovery And The Litigation Matrix*, 51 Duke L. J. 561 (2001); Scheindlin & Rabkin, *Electronic Discovery In Federal Civil Litigation: Is Rule 34 Up To The Task?*, 41 B. C. L. Rev. 327 (March 2000); Artinyan, *Legal Impediments To Discovery And Destruction Of E-Mail*, 2 J. Legal Advoc. & Prac. 95 (2000); Note, *Allocating Discovery Costs In The Computer Age: Deciding Who Should Bear The Costs Of Discovery Of Electronically Stored Data*, 57 Wash. & Lee L. Rev. (Winter 2000); Note, *Electronic Media Discovery: The Economic Benefit Of Pay-Per-View*, 21 Cardozo L. Rev. 1379 (February 2000). While judicial consideration of the issues is growing rapidly, it has not, however, yet been the subject of widespread judicial analysis, and there is relatively little

1 All emphasis in quoted material is added.

guidance from the appellate level. *See, Xpedior Creditor Trust v. Credit Suisse First Boston (USA), Inc.,* 2003 WL 22283835 (S.D.N.Y., October 1, 2003); *Zubulake v. UBS-Warburg LLC ("Zubulake I")*, 217 F.R.D. 309 (S.D.N.Y. 2003); *Zubulake v. UBS-Warburg LLC ("Zubulake III")*, 216 F.R.D. 280 (S.D.N.Y. 2003); *Zubulake v. UBS-Warburg LLC ("Zubulake IV")*, 2003 WL 22410619 (S.D.N.Y. 2003); *Zubulake v. UBS-Warburg LLC* 2004 WL 1620866 (S.D.N.Y. July 20, 2004) *("Zubulake V")*; *Medtronic Sofamor Danek, Inc. v. Michelson*, 2003 U. S. Dist. LEXIS 8587 (W. D. Tenn. 2003); *McPeek v. Ashcroft*, 202 F.R.D. 31 (D.D.C. 2001); *McPeek v. Ashcroft*, 212 F.R.D. 33 (D.D.C. 2003); *Murphy Oil USA v. Fluor Daniel, Inc.*, 2002 U.S. Dist. LEXIS 3196 (E.D. La. 2002); *Rowe Entertainment, Inc. v. The William Morris Agency, Inc.*, 205 F.R.D. 521 (S.D.N.Y. 2002); *Simon Property Group L.P. v. mySimon, Inc.*, 194 F.R.D. 639 (S.D. Ind. 2000).

Because of the potential for electronic discovery to impose substantial burden and expense on the responding party, the role of Rules 26(b) and (c) merits heightened judicial attention. While the potential magnitude of electronic data demands particularized attention, an increased focus on the cost of discovery generally has been part of the mantra of the Federal Rules Advisory Committee for the last twenty years. Indeed the purpose of the 1983 amendments to Rule 26(b), which has formed the analytical basis for some of the most frequently cited cost-shifting cases involving electronic discovery, was "to encourage judges to be more aggressive in identifying and discouraging discovery overuse' and 'to enable the court to keep tighter rein on the extent of discovery.'" *Koch v. Koch Industries, Inc.*, 203 F.3d 1202, 1238(10th Cir. 2000), *quoting Advisory Committee Notes to 1983 Amendments to Rule 26(b).* That amendment, particularly subdivision (b)(2)(iii), explicitly introduced the "proportionality" test, which asks whether "the burden or expense of the proposed discovery outweighs its likely benefit."

Of course, the "computerization" of records also potentially renders discovery more effective when prudently used. Drafts of important documents such as contracts, which may include "redlining" and embedded comments, may never have been "printed out," but exist solely in electronic form. These sorts of electronic records may, for example, shed important light on the parties' intentions concerning vital contract terms or impeach one party's contention as to its intent.

But, to date no form of electronic record rivals the common e-mail as the focus of electronic discovery. To a far greater degree than was ever the case with letters or other paper documents, email has supplanted the telephone call, and even the face to face meeting, as a means of business communications. People seem prone to say things in "dashed off" emails that they would not say in other written communications. Many people seem not even to think of email as creating a lasting record. To the extent it has a historic analogue, email is most like the informal phone call or face-to-face conversation, but with at least two vital differences: First, it leaves a *record* of the *exact* words used, but divorced from the context of the "conversation." Second, email effectively becomes a "transcript" of the sort of conversations that previously existed (if at all) only in human memories of oral communications, discoverable only by deposition, with all the vagaries that entailed.

This aspect of emails, coupled with discovery of the occasional, sensationalized "smoking gun" email in a few high profile cases, understandably may pose an intuitive challenge for many jurists faced with deciding who should bear the costs of recovering emails no longer easily or inexpensively recovered because they are "deleted but are not gone." While some courts have made admirable efforts to fashion a scholarly, analytical approach to those issues, in the end they come down to subjective, human judgments that can be sensitive to the notion that the sheer magnitude of theoretically available electronic

information may mean that "there just might be gold" somewhere in it. It is this same magnitude of information, however, and the time, effort and expense often involved in providing it, that poses the prospect of imposing great burden and expense on the producing party.

II. STRUCTURE OF THE RULES

The rules of discovery recognize that "cost matters," and that not every stone must always be turned in the search for probative evidence. Thus, Rule 26(b)(1), which articulates the "Discovery Scope and Limits" under the Federal Rules, makes clear that not all discovery that meets the test of being "reasonably calculated to lead to admissible evidence" may be permitted. *See Advisory Committee Notes to 1983 Amendments, supra* ("The objective is to guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry."). Rule 26(b) does not seem to treat the limitations it imposes in subdivision (b)(2) as aberrations or "exceptions," but as intrinsic limits on the appropriate scope of discovery in the first place. Thus Rule 26(b)(1) declares that "All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii)".

In fact, the Year 2000 amendments to Rule 26(b), which specifically added the just quoted phrase, were

> added [to] call[ ] attention to the limitations of subdivision (b)(2)(i), (ii), and (iii). These limitations apply to discovery that is otherwise within the scope of subdivision (b)(1). The Committee has been told repeatedly that the courts have not implemented these limitations with the vigor that was contemplated. This otherwise redundant cross-reference has been added to emphasize the need for active judicial use of subdivision (b)(2) to control excessive discovery.

Advisory Committee Notes to 2000 Amendments to Rule 26.

Rule 26(b)(2) also directs that "[t]he frequency *or extent* of use of the discovery methods otherwise permitted under these rules . . . *shall be limited* by the court if it determines that" any of the "limitations" set out in (b)(2)(i) through (iii) are present. "[T]his sub-section was added 'to encourage judges to be more aggressive in identifying and discouraging discovery overuse' and 'to enable the court to keep tighter rein on the extent of discovery.'" *Koch Industries, supra, quoting Advisory Committee Notes to 1983 Amendments To Rule 26(b).*

Rule 26(b)(2)(iii) contains a common sense guiding principle for limiting discovery. Discovery of information that meets the "relevance" standard of Rule 26(b)(1) may nevertheless be prohibited where "the burden or expense of the proposed discovery outweighs its likely benefit . . . ." While the primary inquiry is whether the "burden or expense of the proposed discovery outweighs its likely benefit," the rule also directs that the court "tak[e] into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues." The text of the rule suggests that the additional matters the court is to "tak[e] into account" are to inform its decision as to the key proportionality inquiry, but are not independent, additional and equally weighted tests in and of themselves. The overall test imposed by the Rule 26(b)(2) factors comprises the "proportionality" test. *See, e.g.*, *Zubulake v. UBS-Warburg LLC,* 217 F.R.D. 309 (S.D.N.Y. 2003); *G-69 v. Degnan*, 139 F.R.D. 326 (D. N. J. 1990).

Rule 26 does not provide an express bridge between (a) the directive in Rule 26(b)(2) that the court "shall" limit discovery if it finds that any of the "limitations" set out in Rule 26(b)(2)(i) through (iii) are present, and (b) the protective order provisions of Rule 26(c), which require a showing of "good cause" by the moving party before protection (including cost shifting) is granted. In addition, the traditional "presumption" has been that the party responding to discovery must bear the cost of doing so. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978). In practice, the "burden" or "presumption" aspect of the cost shifting analysis has not generally appeared to be a significant factor, with the courts analyzing the situation and finding that cost shifting is or is not justified without relying heavily on the burden or presumption to be a "tie breaker." See, e.g., *See Medtronic Sofamor Danek, Inc. v. Michelson*, 2003 U. S. Dist. LEXIS 8587 (W. D. Tenn. 2003); *McPeek v. Ashcroft*, 202 F.R.D. 31 (D.D.C. 2001); *McPeek v. Ashcroft*, 212 F.R.D. 33 (D.D.C. 2003); *Murphy Oil USA v. Fluor Daniel, Inc.*, 2002 U.S. Dist. LEXIS 3196 (E.D. La. 2002); *Rowe Entertainment, Inc. v. The William Morris Agency, Inc.*, 205 F.R.D. 521 (S.D.N.Y. 2002). *Zubulake III*, however, seemed to make more of the traditional presumption in various aspects of its analysis.

The focus of the relative handful of decided cases to date dealing with cost shifting in electronic discovery has primarily been on recovering deleted email from "backup tapes." Because most businesses create such tapes only for use in the unlikely event of a catastrophic loss of their computer "system," they preserve large, temporary "snapshots" of whatever electronic records exist on the backed up server or servers at the time the snapshot is taken, and they are usable for litigation discovery only at considerable cost and effort. Emails (and other records) on such backup tapes are not "stored" with the practical expectation of having to restore or search them in the normal course of business. Indeed, the general expectation is that they will be used only under catastrophic circumstances where the cost of restoration is vastly less than the cost to the organization of losing all of it electronic records.

They are not, therefore, analogous to "closed files" or paper document repositories whose purpose is to make it possible to locate and review stored paper records with relative ease. Such paper records are generally organized and indexed to be selectively retrieved for that purpose, and they are typically accessed with some frequency in the conduct of normal business.[2]

III. RECENT JUDICIAL TREATMENT OF COST SHIFTING

Early in the evolution of the law in this area, judges and commentators confronting the often enormous costs associated with electronic discovery proposed blanket rules that placed the burden on either the producing or requesting party. The implications of such blanket rules were vividly described in the first *McPeek* decision:

> [M]aking the producing party pay for all costs of restoration as a cost of its "choice" to use computers creates a disincentive for the requesting party to demand anything less than all of the tapes. American lawyers engaged in discovery have never been accused of asking for too little. To the contrary, like the Rolling Stones, they hope that if they ask for what they want, they will get what they need. They hardly need any more encouragement to demand as much as they can from their opponent.

2 The above description of backup tapes is a generalization, similar to that used in several reported decisions. Not all organizations' backup systems work the same, however. That is, not all organizations back up the entire contents of all servers. For example, some may not back up emails at all. They may route emails to a single server containing only emails, which server is not backed up. Where emails are not backed up, the way to locate deleted emails (not otherwise discovered in hard copy form) would be to search individual hard drives, which would involve another set of burden and expense issues. Moreover, as technology advances, the degree of burden and expense in restoring and searching backup tapes is changing and will presumably continue to do so.

> The converse solution is to make the party seeking the restoration of the backup tapes pay for them, so that the requesting party literally gets what it pays for. Those who favor a "market" economic approach to the law would argue that charging the requesting party would guarantee that the requesting party would only demand what it needs. Under that rationale, shifting the cost of production solves the problem….
>
> A fairer approach borrows, by analogy, from the economic principle of "marginal utility." The more likely it is that the backup tape contains information that is relevant to a claim or defense, the fairer it is that the government agency search at its own expense. The less likely it is, the more unjust it would be to make the agency search at its own expense. The difference is "at the margin."
>
> Finally, economic considerations have to be pertinent if the court is to remain faithful to its responsibility to prevent "undue burden or expense." Fed. R. Civ. P. 26(c). If the likelihood of finding something was the only criterion, there is a risk that someone will have to spend hundreds of thousands of dollars to produce a single email. That is an awfully expensive needle to justify searching a haystack. It must be recalled that ordering the producing party to restore backup tapes upon a showing of likelihood that they will contain relevant information in every case gives the plaintiff a gigantic club with which to beat his opponent into settlement. No corporate president in her right mind would fail to settle a lawsuit for $100,000 if the restoration of backup tapes would cost $300,000. While that scenario might warm the cockles of certain lawyers' hearts, no one would accuse it of being just.[3]

McPeek also set forth another partial solution to the often enormous costs of electronic discovery by ordering a "test run" (sampling) procedure. The test run procedure was ordered by the court to garner a better understanding of the material likely to be found on contested e-mail back-up tapes and to determine if the results would be worth the expense of production. After ordering the defendant to produce back-up tapes for one computer for one targeted year, the test led the court to order production of one additional back-up tape while foreclosing discovery of the rest.

As more cases in this area are being litigated, there is an emerging trend toward a balancing test that calls upon litigators to understand the technology issues and meaningfully translate the burdens, costs, and needs involved in the arguments for and against cost shifting. Two cases (*Rowe* and *Zubulake*) represent the seminal decisions to date and are addressed in depth on the following pages.

A. The *Rowe* Factors

In January of 2002, Magistrate Judge Francis of the Southern District of New York issued a decision in *Rowe* setting forth a multi-factor approach to cost shifting. In *Rowe*, minority concert promoters claimed that the discriminatory and anti-competitive practices of booking agencies and other promoters prevented the plaintiffs from promoting certain concert events. The plaintiffs sought e-mails from defendants' back-up tapes and hard drives.

3 *McPeek,* 202 F.R.D. at 33-34.

The Magistrate Judge examined and rejected "bright line" tests employed by other courts and instead outlined the following factors in evaluating the proposed discovery:

1. *Specificity of discovery requests*. The court found that this factor favored placing the cost burden on the requesting party. The discovery requests as framed were broad, and the requesting party had the power to narrow them. "The less specific the requesting party's discovery demands, the more appropriate it is to shift the costs of production to that party."

2. *Likelihood of a successful search*. While it was likely that the broad search of e-mails would yield relevant evidence, the marginal utility of searching the e-mails was "modest at best." The requesting party had not shown that the e-mails would "be a gold mine," so this factor also weighed in favor of placing the burden on the requesting party.

3. *Availability from other sources*. The producing parties claimed that any relevant e-mails would have been printed and maintained in the proper hard copy file. However, the producing parties were unable to prove that important e-mails would have been retained (by showing, for example, a company policy requiring this) or that the information was available or accessible in a different format at a lower expense, so this factor suggested the burden should be borne by the producing parties.

4. *Purposes of retention*. "[A] party that happens to retain vestigial data for no current business purposes, but only in case of an emergency or simply because it has neglected to discard it, should not be put to the expense of producing it." Since there was no showing that the producing parties accessed their back-up tapes or the e-mails in the normal course of business, this factor tipped toward imposing costs on the requesting party.

5. *Benefit to the parties*. Because the e-mails would not be relevant to any issue on which the producing parties had the burden of proof, the producing parties would not benefit from the production of the e-mails, suggesting that the costs should be placed on the requesting party.

6. *Total costs*. Both sides agreed that substantial expense would be incurred through restoration and production of e-mails. This factor favored having the requesting party bear the costs.

7. *Ability and incentive to control costs*. Each side presented its own estimates about the costs, and the requesting party believed it would be much less expensive than the producing parties did. Further, the requesting party was in a better position to limit or control the costs by tailoring its requests.

8. *Parties' resources*. Both sides had equal abilities to bear the costs.

Based upon a review of all eight factors, the Magistrate Judge in *Rowe* found that the costs should be borne by the requesting party. The court further stated that, if the producing parties wished to conduct a pre-production privilege review (notwithstanding the

existence of a protective order stating that inadvertent production was not a waiver of privilege and that the documents were to be seen only by the attorneys), the privilege review must be conducted at the producing parties' own expense.

On appeal to the district court from the Magistrate's ruling, Judge Robert Patterson affirmed Magistrate Judge Francis' decision on each of the eight factors.[4]
Notably, Judge Patterson:

- Upheld the marginal utility analysis used to determine the likelihood of a successful search.

- Found that generalization about potential responsiveness based solely upon volume calculation is insufficient to justify burdensome discovery efforts.

- Determined the plaintiffs had never set forth a specific, concrete proposal narrowing their discovery requests, so the specificity of the requests factor properly placed the burden on the requesting parties.

- Noted that no single factor should be used as a bright-line test, instead stating that the requesting parties' argument about the total costs involved was insufficient, because of the other factors.

To date, the *Rowe* test has been applied in several reported cases.[5]

B. *Zubulake*

Most recently, in *Zubulake*, a former employee asserting gender discrimination and retaliation claims sought allegedly relevant e-mails that had been deleted and resided only on back-up disk media (disaster recovery tapes). The defendant asserted that the request was unduly burdensome as it would require expensive restoration of back-up e-mail tapes and also unnecessary as approximately 100 pages of e-mails had previously been produced.

In its May 13, 2003 decision ("*Zubulake I*"), the court initially reviewed existing law regarding discovery and declared that "[t]he Supreme Court has instructed that 'the presumption is that the responding party must bear the expense of complying with discovery requests.'" In light of this instruction, the *Zubulake* court noted that "[a]ny principled approach to electronic evidence must respect this presumption."

After dispatching defendant's relevance arguments, the court addressed the defendant's claim of undue burden, determining that "whether production of documents is unduly burdensome or expensive turns primarily on whether [documents are] kept in an accessible or inaccessible format." The court outlined five categories of data: (1) active, online data, (2) near-line data, (3) offline storage/archives, (4) back-up tapes, and (5) erased, fragmented or damaged data. "Of these, the first three categories are typically identified as accessible, and the latter two as inaccessible." Judge Scheindlin announced that "a court should consider cost-shifting only when electronic data is relatively inaccessible."

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4 *Rowe Entm't, Inc. v. William Morris Agency, Inc.*, No. 98 Civ. 8272 (RPP), 2002 WL 975713 (S.D.N.Y. May 9, 2002).

5 *See Medtronic Sofamor Danek, Inc. v. Michelson*, No. 01-2373-M1V, 2003 WL 21212601 (W.D. Tenn. May 13, 2003); *Computer Associates Intern, Inc. v. Quest Software, Inc.*, No. 02 C 4721, 2003 WL 21277129 (N.D. Ill. June 3, 2003); *In re Livent, Inc. Noteholders Sec. Litig.*, No. 98 Civ. 7161, 2003 WL 23254 at *3 (S.D.N.Y. Jan. 2, 2003); *Antioch Co. v. Scrapbook Borders, Inc.*, 210 F.R.D. 645 (D. Minn. 2002); *In re Bristol-Myers Squibb Sec. Litig.*, 205 F.R.D. 437, 443 (D.N.J. 2002); *Byers v. Illinois State Police*, No. 99C 8105, 2002 WL 1264004 (N.D. Ill. June 3, 2002); *Murphy Oil USA, Inc. v. Fluor Daniel, Inc.*, No. 99-3564, 2002 WL 246439 (E.D. La. Feb. 19, 2002).

Since the allegedly relevant e-mails resided on the defendant's inaccessible back-up tapes, Judge Scheindlin found it appropriate to consider cost shifting.

The court found that the *Rowe* test was inadequate under Rule 26(b)(2):

> In order to maintain the presumption that the responding party pays, the cost-shifting analysis must be neutral; close calls should be resolved in favor of the presumption. The *Rowe* factors, as applied, undercut that presumption for three reasons. *First,* the *Rowe* test is incomplete. *Second,* courts have given equal weight to all of the factors, when certain factors should predominate. *Third,* courts applying the *Rowe* test have not always developed a full factual record.

Judge Scheindlin proposed that some factors be added to improve the test. Specifically, she noted that Rule 26 "requires consideration of 'the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues,'" yet *Rowe* omitted these rule-based factors in its balancing test.

Judge Scheindlin also proposed that two *Rowe* factors be deleted. First, she noted that "the specificity of the discovery request" was already inherent in the second and sixth *Rowe* factors (addressing relevance and cost), and the concept could be adequately captured within one factor. Second, the court found that the fourth *Rowe* factor, "the purposes for which the responding party maintains the requested data" is unimportant because "[w]hether the data is kept for a business purpose or for disaster recovery does not affect its accessibility, which is the practical basis for calculating the cost of production."

Taking into account the proposed additions, deletions and modifications, the *Zubulake* court announced its seven factor test:

1. *The extent to which the request is specifically tailored to discover relevant information*. This is essentially a combination of the first and second factors of *Rowe*. The request must be sufficiently tailored to identify a discrete set of data or type of information sought.

2. *The availability of such information from other sources*. This is the same as the third factor of *Rowe*. Here, the requesting party already had in her possession 450 pages of e-mails that were demonstrably relevant to her request, while the producing party claimed that its production of 100 pages of e-mails was complete. Based upon these facts, the court quickly concluded that the producing party could not represent that its production was sufficient.

3. *The total cost of production, compared to the amount in controversy*. This factor modifies the sixth *Rowe* factor. Whereas *Rowe* considered the total cost of production without taking into account the amount in controversy, in *Zubulake* the court found that Rule 26 requires a broader proportionality screening that looks at the stakes involved. By way of example, the court noted that "[a] response to [a] discovery request costing $100,000 sounds (and is) costly, but in a case potentially worth millions of dollars, the cost of responding may not be unduly burdensome."

4. *The total cost of production, compared to the resources available to each party*. This modifies the eighth *Rowe* factor, which only considered the wealth of each party independent of the circumstances of production. According to the *Zubulake* court, it is more important to look at the ability to pay in relation to the total cost. "Thus, discovery that would be too expensive for one defendant to bear would be a drop in the bucket for another."

5. *The relative ability of each party to control costs and its incentive to do so*. This is the same as the seventh *Rowe* factor. Again, the requesting party has greater ability to control the costs by narrowing its requests.

6. *The importance of the issues at stake in the litigation*. This factor was added by the *Zubulake* court. The court noted that "[f]or example, if a case has the potential for broad public impact, then public policy weighs heavily in favor of permitting extensive discovery." Several examples of such cases were provided by the court, including "toxic tort class actions, environmental actions, so-called 'impact' or social reform litigation, cases involving criminal conduct, or cases implicating important legal or constitutional questions."

7. *The relative benefits to the parties of obtaining the information*. This is the same as the fifth *Rowe* factor. The *Zubulake* court maintained that discovery requests usually benefit the requesting party, but the court noted that "in the unusual case where production will also provide a tangible or strategic benefit to the responding party, that fact may weigh *against* shifting costs." (Emphasis in original).

The court noted that the seven factors should not all be given equal weight, but rather should be weighted as follows:

- In referencing *McPeek v. Ashcroft*, the court made very clear that "the first two factors —compromising the marginal utility test — are the most important." (Factors 1 and 2)

- Second in importance are the factors that address cost issues. (Factors 3, 4, and 5)

- Third in consideration is the importance of the litigation itself. (Factor 6) Though the importance of the litigation itself will rarely come into play, the court stated that factor six has the potential to override the other factors.

- Finally, the relative benefits of production receive the least weight due to the fact that discovery requests usually benefit the requesting party. (Factor 7)

Due to the fact-intensive nature of the cost shifting analysis, the court determined that it did not have sufficient information to render a decision concerning cost shifting as it related to the back-up tapes. Instead, the court ordered that a sampling procedure, much like what was done in *McPeek*, be implemented to better understand the potential relevance of data on the back-up tapes. In particular, the defendant was "ordered to produce, at its

expense, responsive e-mails from any *five* backup tapes selected *by* [plaintiff] Zubulake." The court concluded that "[o]nce the court has tangible evidence of the restoration time and cost, along with a more accurate understanding of the material on the backup tapes, the appropriate cost-shifting analysis will be conducted."

On July 24, 2003, the court issued its decision ("*Zubulake III*") (2003 WL 21714957)[6] based upon the submissions required by the June 13, 2003 Order. In that decision, the court reports that Zubulake selected the back-up tapes corresponding to a UBS employee's e-mails from May, June, July, August, and September 2001. UBS hired an outside vendor, Pinkerton Consulting & Investigations, to perform the restoration. Pinkerton restored each of the backup tapes, yielding a total of 8,344 e-mails (including duplicates).

Pinkerton then performed a search for e-mails containing (in either the e-mail's text or its header information, such as the "subject" line) the terms "Laura," "Zubulake," or "LZ." The searches yielded 1,075 unique (non-duplicate) e-mails. UBS deemed approximately 600 to be responsive to Zubulake's document request, and they were produced. (4% (25 of 625) of the responsive documents were withheld on the basis of privilege).

Pinkerton billed UBS 31.5 hours for its restoration services at an hourly rate of $245, six hours for the development, refinement and execution of a search script at $245 per hour, and 101.5 hours of "CPU Bench Utilization" time for use of Pinkerton's computer systems at a rate of $18.50 per hour. Pinkerton also included a five percent "administrative overhead fee" of $459.38. Thus, the total cost of restoration and search was $11,524.63.

In addition, UBS reported that it incurred the following costs: $4,633 in attorney time for the document review (11.3 hours at $410 per hour) and $2,845.80 in paralegal time for tasks related to document production (16.74 hours at $170 per hour). The total cost of restoration and production from the five backup tapes was $19,003.43.

UBS asked that the court order the cost of any further production — estimated to be $273,649.39, based on the cost incurred in restoring five tapes and producing responsive documents from those tapes — be shifted to Zubulake. The total figure includes $165,954.67 to restore and search the tapes and $107,694.72 in attorney and paralegal review costs.

On these facts, the court then applied the seven factor test from *Zubulake I*.

Factors One and Two

The court reiterated that these first two factors together comprise the "marginal utility test" announced in *McPeek v. Ashcroft* and are weighed the most heavily.

Zubulake presented the court with sixty-eight e-mails (of the 600 she received) that she claimed were "highly relevant to the issues in this case." 2003 WL 21714957 at *4. UBS argued that the e-mails had very little, if any, relevance to the issues in the case. The court undertook a fairly extensive review of the proffered e-mails and concluded that "a review of these e-mails reveals that they are relevant. Taken together, they tell a compelling story of the dysfunctional atmosphere surrounding UBS's U.S. Asian Equities Sales Desk (the "Desk").

6 There is another decision in the case (issued on the same day as *Zubulake I*) that addresses the plaintiff's reporting obligations but does not touch upon electronic discovery issues. That decision is known as "*Zubulake II". Zubulake v. UBS Warburg, LLC*, No. 02 Civ. 1243, 2003 WL 21087136 (S.D.N.Y. May 13, 2003).

Presumably, these sixty-eight e-mails are reasonably representative of the seventy-seven backup tapes." *Id.* at *4. However, the court added that

> [w]hile all of these e-mails are likely to have some "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence," none of them provide any direct evidence of discrimination.

Id. at *5 (citation and footnote omitted).

The court then turned to the other half of the marginal utility test — the availability of the relevant data from other sources. Neither party identified how many of the 600 e-mails produced in response to the May 13 Order had been previously produced, but the court noted that UBS previously produced only 100 pages of e-mails yet now produced 853 pages (comprising the 600 responsive e-mails) from the five selected backup tapes alone. The court concluded that "these numbers lead to the unavoidable conclusion that there are a significant number of responsive e-mails that now exist only on backup tapes." *Id.* at *5 (citation and footnote omitted).[7]

The court concluded:

> The sample restoration, which resulted in the production of relevant e-mail, has demonstrated that Zubulake's discovery request was narrowly tailored to discover relevant information. And while the subject matter of some of those e-mails was addressed in other documents, these particular e-mails are only available from the backup tapes. Thus, direct evidence of discrimination may only be available through restoration. As a result, the marginal utility of this additional discovery may be quite high.
>
> While restoration may be the only means for obtaining direct evidence of discrimination, the existence of that evidence is still speculative. The best that can be said is that Zubulake has demonstrated that the marginal utility is potentially high. All-in-all, because UBS bears the burden of proving that cost-shifting is warranted, the marginal utility test tips slightly against cost-shifting.

Id. at *6 (citation and footnote omitted).

Factors Three, Four and Five

As noted by the *Zubulake III* court, "The second group of factors addresses cost issues: 'How expensive will this production be?' and, 'Who can handle that expense?'" *Id.* at *6 (citation and footnote omitted).

The Total Cost of Production Compared to the Amount in Controversy

The total cost of restoring the remaining seventy-two tapes was extrapolated to $165,954.67 ($2,304.93 per tape). The "amount in controversy" was calculated by plaintiff as being between $15,271,361 and $19,227,361, while UBS indicated that damages could be as high as $1,265,000. *Id.* at *6 (citation and footnote omitted).

7 The court also noted that there was "some evidence that [a UBS employee] was concealing and deleting especially relevant e-mails" and that the potentially useful e-mail resided only on UBS's backup tapes. *Id.* at *5 (citation and footnote omitted).

The court noted that it could not reconcile the significant disparity, but that it was clear that the case was not a "nuisance value case, a small case or a frivolous case." *Id.* at *6 (citation and footnote omitted) ("If Zubulake prevails, her damages award undoubtedly will be higher than that of the vast majority of Title VII plaintiffs"). Thus, while "in an ordinary case, a responding party should not be required to pay for the restoration of inaccessible data if the cost of that restoration is significantly disproportionate to the value of the case," the cost of restoration in Zubulake is not "significantly disproportionate" to the projected value of the case. *Id.* at *7 (citation and footnote omitted). Accordingly, in the opinion of the court, this factor weighs against cost-shifting.

The Total Cost of Production Compared to the Resources Available to Each Party

The court found that UBS has exponentially more resources available to it than Zubulake. Yet the court noted that Zubulake is asserting a $19 million claim against UBS. So while UBS's resources clearly dwarf Zubulake's, "she may have the financial wherewithal to cover at least some of the cost of restoration." *Id.* at *7 (citation and footnote omitted). The court also noted that "it is not unheard of for plaintiff's firms to front huge expenses when multi-million dollar recoveries are in sight." *Id.* at *7 (citation and footnote omitted). The court found that "while this factor weighs against cost shifting, it does not rule it out." *Id.* at *7 (citation and footnote omitted).

The Relative Ability of Each Party to Control Costs and Its Incentive to Do So

The court found that although a less-expensive vendor could have been found, once that vendor is selected costs are not within the control of either party. Because the discovery requests were focused at this stage of the process, the court found that this factor is neutral.

Factor Six: The Importance of the Issues at Stake in the Litigation

The court referred back to *Zubulake I*, where it declared that this factor "will only rarely come into play," *id.* at *7 (citing *Zubulake I*, 2003 WL 21087884, at *11) and found that "Although this case revolves around a weighty issue — discrimination in the workplace — it is hardly unique. Claims of discrimination are common, and while discrimination is an important problem, this litigation does not present a particularly novel issue." *Id.* at *7 (citation and footnote omitted). As a result, the court found this factor to be neutral.

Factor Seven: The Relative Benefits to the Parties of Obtaining the Information

The court found that there "can be no question that Zubulake stands to gain far more than does UBS" and thereafter held that "this factor weighs in favor of cost-shifting." *Id.* at *7 (citation and footnote omitted).

The court concluded its review of the seven factor analysis as follows:

> Factors one through four tip against cost-shifting (although factor two only slightly so). Factors five and six are neutral, and factor seven favors cost-shifting. As noted in my earlier opinion in this case, however, a list of factors is not merely a matter of counting and adding; it is only a guide. Because some of the factors cut against cost shifting, but only slightly so — in particular, the possibility that the continued production will produce valuable new information — some cost-shifting is appropriate in this case, although UBS should pay the majority of the costs. There is

> plainly relevant evidence that is only available on UBS's backup tapes. At the same time, Zubulake has not been able to show that there is indispensable evidence on those backup tapes (although the fact that [a UBS employee] apparently deleted certain e-mails indicates that such evidence may exist).

Id. at *8 (citation and footnote omitted).

The court then moved to determine how much of the cost should be shifted, noting that "it is beyond cavil that the precise allocation is a matter of judgment and fairness rather than a mathematical consequence of the seven factors …." Applying this standard, the court found 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. A share that is too costly may chill the rights of litigants to pursue meritorious claims. However, because the success of this search is somewhat speculative, any cost that fairly can be assigned to Zubulake is appropriate and ensures that UBS's expenses will not be unduly burdensome. A twenty-five percent assignment to Zubulake meets these goals.

Id. at *8 (citation and footnote omitted).

Finally, the court considered the question of whether the cost shifting should apply to the entire cost of the production or only to the cost of restoring the backup tapes, the difference being $107,694.72. The court recited that "as a general rule, where cost-shifting is appropriate, only the costs of restoration and searching should be shifted" and that "the responding party should always bear the cost of reviewing and producing electronic data once it has been converted to an accessible form." *Id.* at *8 (citation and footnote omitted). The court reached this conclusion based upon the fact that the reviewing party controls the variables that underlie the cost (*e.g.*, review protocol, staffing) and that, in the court's opinion, cost-shifting is only appropriate for inaccessible — but otherwise discoverable — data. *Id.*

The court concluded:

> The costs of restoring any backup tapes are allocated between UBS and Zubulake seventy-five percent and twenty-five percent, respectively. All other costs are to be borne exclusively by UBS. Notwithstanding this ruling, UBS can potentially impose a shift of all of its costs, attorney's fees included, by making an offer to the plaintiff under Rule 68.

Id. at *9 (citation and footnote omitted).

Only a relative handful of federal courts have addressed cost shifting in the context of electronic discovery. While the *McPeek, Rowe,* and *Zubulake* decisions, for example, make admirable efforts to establish a thoughtful, coherent analytical structure and are finding a following in other courts, it is too early to predict the degree to which those decisions will ultimately influence case law or rule amendments. *See*, *Computer Assocs. Int'l, Inc. v. Quest Software, Inc.*, No. 02 C 4721, 2003 WL 21277129, at *1-2 (N.D. Ill. June 3, 2003) (reviewing eight *Rowe* factors and determining that none of the factors favored cost shifting even though defendant spent between $28,000 and $40,000 to remove privileged e-mails

from the backups and to produce a privilege log); *Murphy Oil USA, Inc. v. Fluor Daniel, Inc.,* No. 99-3564 T(1), 2002 U.S. Dist. LEXIS 3196 at *9-28 (E.D. La., Feb. 19, 2002) (largely following *Rowe* and providing two alternative protocols, letting the parties select their preferred version); *Byers v. Illinois State Police,* No. 99 C 8105, 2002 WL 1264004, at * 12 (N.D. Ill. June 3, 2002) (following *Rowe* and requiring plaintiffs to pay to license defendant's old email program if they wish to search for archived emails); *Medtronic Sofamor Danek, Inc. v. Michelson*, No. 01-2373-M1V, 2003 U.S. Dist. LEXIS 8587, at *10-31 (W.D. Tenn. May 13, 2003) (applying the *Rowe* factors and shifting some costs to party requesting restoration of backup tapes); *OpenTV v. Liberate Techs.*, 219 F.R.D. 474, 479 (N.D. Cal. 2003) (applying seven *Zubulake* factors and concluding that, "because the parties are similarly situated, they are to split equally the cost" of electronic discovery); *Xpeditor Creditor Trust v. Credit Suisse First Boston (USA), Inc.*, No. 02 Civ. 9149(SAS), 2003 WL 22283835, at *5-6 (S.D.N.Y. Oct. 2, 2003) (applying *Zubulake* factors and denying defendant's motion to require plaintiff to share in the cost of restoring computer files).

THE MULTIFACTOR ANALYSES

It may be helpful to view in one place the elements articulated in the Federal Rules, *Rowe,* and *Zubulake* in considering cost shifting (keeping in mind that the rules do not actually speak of cost shifting). Such a chart appears below.

F.R.C.P. 34(b), 26(b)(2)	***Rowe***	***Zubulake***
		Threshold inquiry: are records kept in "accessible or inaccessible format?" Information is "accessible" if "stored in a readily usable format," and it is not necessary to restore or "manipulate" it to be usable.
(1) Is the discovery sought unreasonably cumulative or duplicative, or obtainable from another less burdensome or expensive source? (26(b)(2));	(1) The specificity of the discovery requests;	(1) The extent to which the request is specifically tailored to discover relevant information [combines *Rowe* Factors 1 and 2];
(2) The request for documents "shall . . . describe . . . with reasonable particularity" what is sought. (34(b));	(2) The likelihood of discovering critical information;	(2) The availability of such information from other sources;
(3) The burden or expense of the proposed discovery outweighs its likely benefit, taking into account;	(3) The availability of such information from other sources;	(3) The total cost of production, compared to the amount in controversy;
(4) the needs of the case;	(4) The purposes for which the responding party maintains the requested data (eliminated by *Zubulake)*;	(4) The total cost of production, compared to the resources available to each party;
(5) The amount in controversy;	(5) The relative benefits to the parties of obtaining the information;	(5) The relative ability of each party to control costs and its incentive to do so;
(6) The parties' resources;	(6) The total cost associated with production;	(6) The importance of the issues at stake in the litigation;
(7) The importance of the issues at stake in the litigation;	(7) The relative ability of each party to control costs and its incentive to do so;	(7) The relative benefits to the parties of obtaining the information.
(8) The importance of the proposed discovery in resolving the issues.	(8) The resources available to each party.	

Despite substantial analytical consistency, important differences exist between the *Zubulake* and *Rowe* approaches. For example, *Zubulake* criticized *Rowe* as unduly favoring cost shifting. ("There is little doubt that the *Rowe* factors generally favored cost shifting.") *Zubulake* concluded that *Rowe*'s analysis failed to "maintain the presumption that the responding party pays" the costs of responding to discovery, and that "the cost shifting analysis must be neutral." *Zubulake* apparently believed that *Rowe* effectively "double counted" essentially the same considerations in its first and second factors (the specificity of the discovery requests and the likelihood of discovering critical information). *Zubulake* "combined" those into a single factor examining "the extent to which the request is specifically tailored to discover relevant information."

Zubulake also regarded *Rowe*'s fourth factor (the purposes for which the responding party maintains the requested data) as "typically unimportant." (*Rowe* had been more or less followed in this regard by *Murphy Oil* and *Medtronic*.) *Zubulake*, however, reasoned that why a party has kept data has nothing to do with what *Zubulake* regarded as the threshold question — accessibility. ("[I]t is important to not conflate the purpose of retention with accessibility.")

Zubulake concluded that the *Rowe*'s test was also under inclusive. Specifically, *Zubulake* reasoned that *Rowe* had failed to consider two factors that Rule 26 requires be considered. Those were (1) the amount in controversy, reasonably measured by "look[ing] beyond the (often inflated) value stated in the ad damnum clause of the complaint"; (2) the "importance of issues at stake in the litigation." While this latter factor will "only rarely come into play," when it does, it "has the potential to predominate over the others." [8]

Zubulake also made clear that the factors are not weighted equally and divided the seven factors into three categories in descending order of importance.

Finally, *Zubulake* reasoned that the cost shifting analysis should not be based on "assumptions made concerning the likelihood that relevant information will be found," but upon a "factual record." According to *Zubulake*, "such proof will rarely exist in advance of obtaining the requested discovery," so the "best solution" is to sample the information sought, without ordering all of the discovery requested, so that the marginal utility test "will not be an exercise in speculation" and the actual cost of responding can be better developed.

IV. ISSUES AND QUESTIONS

A non-exhaustive list of cost shifting issues posed by the courts' treatment of the topic in electronic discovery disputes include the following. These are general but important issues.

1. Should There Be A "Threshold" Standard (Or Presumption) As To When Cost Shifting Should Be Considered At All (Such As "Accessibility")? If So, What Should It Be?

Is there a practical need (and a sound basis) for erecting a threshold presumption of when a cost shifting analysis should even be undertaken for electronic records and data? The *Zubulake* cases could be read to require application of the proportionality test only to

8 *Zubulake* also noted that, while *Rowe* "also contemplates 'the resources available to each party'" as a factor, it was not the absolute wealth of the parties that was the relevant factor, but rather "the focus should be on the total cost of production as compared to the resources available to each party." *Zubulake* indicated that this may, however, have been "implicit in the *Rowe* test."

"inaccessible data" — essentially creating a rule that production of "accessible" data is, by definition, not "unduly burdensome or expensive." The court, for example, found that as to active email files and emails stored on optical disks "it would be wholly inappropriate *to even consider* cost shifting."

We submit this is, however, too narrow a reading of the *Zubulake* line of cases. In *Zubulake I*, Judge Scheindlin held that "cost shifting should be considered only when electronic discovery imposes 'an undue burden or expense' on the responding party. The burden or expense of discovery is, in turn, 'undue,' when it, 'outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues'." This, of course, is simply a restatement of Rule 26(b)(2).

The Court went on to say, "many courts automatically assume that an undue burden or expense may arise simply because electronic evidence is involved. This makes no sense. Electronic evidence is frequently cheaper and easier to produce than paper evidence because it can be searched automatically, key words can be run for privilege checks, and the production can be made in electronic form, obviating the need for mass photocopying. In fact, whether production of documents is unduly burdensome or expensive turns *primarily* on whether it is kept in an accessible or inaccessible format, a distinction that corresponds closely to the expense of production." (emphasis added)

The central holding in this regard is that cost shifting is a possible remedy only after undue burden is found under Rule 26(b)(2). This leaves the proportionality test in full force. Thus, a more accurate reading of the cases is that *ordinarily* in the e-discovery context, if data is accessible, there is no undue burden and, therefore, no need to reach the cost shifting question. This does not take accessible data outside the proportionality test, it simply recognizes that it is typically inappropriate, under the rules themselves, to apply the proportionality test to accessible data.

2. Is It Appropriate To Exclude Consideration Of The Cost Of Counsel's Review (For Privilege And Responsiveness) From The Consideration Of Whether Costs Should Be Shifted?

Using the example of backup tapes, much of the cost involved includes not the restoration of the tapes *per se*, but the searching of the restored information, including fees associated with counsel's review for documents identified by the search for responsiveness, privilege, or trade secret information, redactions (for privilege, to exclude portions of multi-topic emails), and so on. The costs associated with such functions are a key component of the responding party's burden and expense. These expenses can exceed the cost of restoring and searching the tapes.

Zubulake rejects these costs as a valid consideration in cost shifting, reasoning that "the responding party should always bear the cost of reviewing and producing electronic data once it has been converted into an accessible form." *Zubulake* is not alone in this view. *See, e.g., Computer Associates International, inc. v. Quest Software, Inc.*, 2003 U. S. Dist. LEXIS 9198 (N.D. Ill. 2003). But, is this conclusion unassailable? Even if it is in accord with current law, should the law or the paradigm be changed? Is this an occasion in which the potential expansion of cost by electronic discovery in and of itself merits reconsideration of how far those historic approaches can be taken?

A dollar spent on attorney review is no less a burden of discovery than a dollar spent restoring backup tapes. While it is true that the traditional "American Rule" has been that each party bears its own attorney's fees in litigation, does that beg the question in these circumstances? Such attorney review not only costs money, but it potentially affects the client's representation by diverting valuable resources away from other endeavors more valuable to the client. The former is an "expense" of discovery, and the latter is arguably a "burden" of such discovery. The rules speak of both burden and expense, presumably treating them as different things, but both of which are to be considered under Rule 26.[9] *See In re General Instrument Corp. Sec. Litig.*, 1999 WL 1072507 (N.D. Ill. Nov. 18, 1999)(non-monetary costs properly considered in assessing burden imposed by discovery.)

Moreover, there is a fuzzy line between the court's discretion to deny discovery outright due to undue burden and expense on the one hand and permitting discovery, with cost shifting, on the other. Can a court not deny discovery outright as unduly burdensome and expensive because of both the attendant attorney fees and the allocation of attorney *effort* to such tasks? And, if the court can thus deny such discovery, is it inappropriate for it to consider those same burdens and expenses as part of the cost shifting analysis and shift those costs?

3. On What Bases Should The Court Choose Between Cost Shifting And Outright Denial Of Electronic Discovery? Do Requesting Parties Get To "Buy" Discovery Whose Likely Benefit Appears To Outweigh Its Cost?

As just noted, the rules do not provide explicit guidance as to when a court should deny discovery because of undue burden or expense and when it should shift costs as a remedy for undue burden or expense. Rule 26(b)(2) seems to speak more in terms of limiting of limiting or prohibiting the discovery than in permitting it with cost shifting. (Indeed, the rules do not actually speak of cost shifting at all.) Yet, some recent decisions, such as *Zubulake* and *Rowe,* appear to proceed on the premise that as long as the requested discovery meets the liberal "discoverability" standards of Rule 26(b)(1), the requesting party is entitled to discovery and then poses the issue as one of cost shifting.

These issues present a legitimate question of how a court chooses between cost shifting and prohibiting discovery. It appears that the courts would not simply hold that a party may, via cost shifting, "buy" discovery that blatantly fails the proportionality test. But, should cost shifting really be equal in stature to, or even more favored than, simple discovery limitations or prohibitions? Doesn't the very considerations that would justify shifting costs (lack of clear likelihood of discovering information that justifies its expense) indicate that the discovery is of dubious or speculative value in the first place? Moreover, just because costs are shifted does not mean that no overall harm is done to the litigation process. Such activity involves time, both attorney and judicial, and further diversion away from the prompt and efficient resolution of the case on its merits.

4. What Is The Proper Role Of The "Resources Of The Parties" Factor In The Cost Shifting Analysis? How Far Should This Tilt The Scales?

This question – cost shifting versus discovery prohibition – is obviously related to another question: What is the proper role of the "resources" of the parties in resolving these

9 Many litigators are familiar with the tactic of seeking extensive discovery, necessitating lengthy privilege review, for the principle purpose not only of causing the opposing party expense, but to direct legal resources away from the defense or prosecution of the case and towards other matters that have little purpose other than to occupy one side with "busy work" not directly contributing to the resolution of the key issues in the case. Not all cases involve mammoth law firms with scores of associates and paralegals who can devote their time just to "privilege review" and the like. In many cases attorneys, including associates, and paralegals that would otherwise be devoting their time to the representation of the client in the central issues in the lawsuit may be diverted to discovery privilege review and the like with little benefit to their client.

issues? Clearly, Rule 26(b)(2)(iii) requires that the parties' resources be taken into account. How the courts should "take into account" the resources of the parties is a potentially critical consideration.

Zubulake and other decisions might be read to suggest that the less able the plaintiff is to bear the cost of discovery, the greater the burden that the producing party may be required to shoulder. *Zubulake* shifted 25 percent of the cost of production to the requesting party, observing, that "because the success of this search is somewhat speculative, any cost that fairly can be assigned to *Zubulake* is appropriate and ensures that UBS's expenses will not be unduly burdensome. A 25-percent assignment to *Zubulake* meets these goals." It is not clear why shifting 25 percent of the cost to the requesting party rendered the 75 percent borne by the respondent not unduly burdensome.

What precisely *Zubulake* did is not of overwhelming importance, of course, because each case will be decided as to particular percentages on its own facts. Rather, the issue is how far do the resources of the party seeking discovery take the analysis? Does the inability of a party to pay simply result in the responding party having to bear those costs, or should it result in the denial of discovery? Does requiring the requesting party to pay "what he can afford" have any true relation to the elimination of an undue burden? The intuitive answer would appear to be no.

Historically, while there has clearly been some solicitude for the financially weaker litigant in discovery matters, this consideration is not a compelling one and is not generally meant to sanction the discovery of marginal discovery whose expense outweighs its likely benefits. See 6 *Moore's Federal Practice* ¶ 26.60[5] (3d ed.); *Marker v. Union Fidelity Life Insurance Company*, 124 F.R.D. 121 (M.D.N.C. 1989). Is there any reason why electronic discovery, where the costs can be proportionally greater, should be any different?

Should therefore a party's resources matter primarily in "close calls" – when the discovery appears potentially worth undertaking, the burden on the responding party is not great, and the requesting party cannot obtain the discovery at all if he must bear the results of cost shifting? Even so, should he bear whatever he can "afford," since otherwise there is no incentive for the requesting party to be focused and restrained in seeking such discovery?

5. Should The Overall Cost Of Discovery — Including Costs of Preservation — Be A Factor In Cost Shifting?

One question not addressed by recent decisions is, to what degree, if any, the overall costs of discovery should be considered in the context of an individualized discovery issue. Nothing in the rules appears to prohibit the court from taking into account the overall burden that discovery is imposing. Such a broader consideration is arguably implicit in those aspects of Rule 26(b) that examines the other sources of discovery that have been pursued or could have been pursued. Indeed, the discovery of electronic data can easily pose the risk that a responding party could die the proverbial "death of the thousands cuts" without any one cut having been deemed to be sufficient to justify cost shifting. This may also be a relevant consideration in determining whether discovery should be taken in phases, with potentially burdensome electronic discovery reserved until a better record of the benefits of overall discovery has been obtained. (*See* discussion *infra*.)

6. Does The Rule 34(b) Option To "Produce In The Regular Course Business" Indicate That Cost Shifting Should More Readily Be Ordered?

Federal Rule 34(b) provides that "a party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request." There is a split of authority among the courts as to whether the option to produce documents as kept in the ordinary course of business is an "absolute privilege" belonging to the party producing the documents, whether it belongs to the requesting party, or whether it is one for determination by the court. *See, Renda Marine, Inc. v. United States*, 2003 U.S. Claims, LEXIS 260 (Ct. Fed. Cl. 2003), and authorities cited therein; *In Re: G-I Holdings, Inc.* 2003 US Dist. LEXIS 13901 (D.N.J. July 17, 2003)("The plain phrasing of Rule 34(b) reveals that the producing party has the option of presenting information in one of two ways."); *C & T Associates, Inc. v. Township of Abington*, 1986 US Dist. LEXIS 16490 (E.D. Penn. 1986)("Federal Rule of Civil Procedure 34(b) would appear to give the producing party the option . . . ."); *Board of Education v. Admiral Heating and Ventilating, Inc.*, 104 F.R.D. 23 (N.D. Ill. 1984)("Rule should not be interpreted as giving sole choice to the producing party.")

It appears, however, that the courts generally regard the rule as giving the producing party the option as to the form of production, subject to override if the court determines that the records have been maintained in "bad faith" or are "so disorganized that it is unreasonable" for the requesting party "to make its own review." *Renda Marine, supra, quoting Natural Resources Defense Council, Inc. v. Fox*, 1996 WL 497024, *5 n.3 (S.D.N.Y. 1996).

Since a party producing an electronic "data compilation" should have the same rights as a party producing paper documents under Rule 34(b), may a party acting under Rule 34(b) elect to "produce" (grant access to) the physical tapes or other media rather than restoring and searching them itself? If so, the party has essentially "shifted" the costs (other than privilege and trade secret review, discussed above) of restoration and search to the party seeking the discovery, consistent with a "cost shifting" principle built into Rule 34. It would seem that the information stored on the media being produced is, by definition, being produced as kept in the regular course of business and thus falls within the policy of the rule, unless the producing party has a materially superior or unique means of restoring and searching the data (which is not always the case). *See, Jicarilla Apache Nation v. United States*; 60 Fed. Cl. 413, 416 (2004) (protective order requires that responding party produce electronic documents in the format in which that party routinely uses or stores them, along with the available technical information necessary for access or use by the requesting party); *In re Honeywell Int'l Inc. Sec. Litig.*, No. M8-85, 2003 U.S. Dist. LEXIS 20602, at *4-5 (S.D.N.Y. Nov. 18, 2003) (requiring non-party to produce electronic version of audit papers even though non-party had produced the documents in paper form because the workpapers were maintained in the usual course of business in electronic, not paper form); *Zhou v. Pittsburg State Univ.*, No. 01-2493, 2003 WL 1905988, at *2 (D. Kan. Feb. 5, 2003) (finding plaintiff entitled to computerized data in addition to information already produced in hard copy form because the discovery rules require disclosure of "any back-up copies of files or archival tapes that will provide information about any 'deleted' electronic data"); *McNally Tunneling Corp. v. City of Evanston*, No. 00-C-979, 2001 WL 1568879, at *4 (N.D. Ill. Dec. 10, 2001) (concluding that there is an "apparent split of authority on whether a party is entitled to both hard-copy and electronic versions of computer files" and holding that the requesting party had failed to demonstrate that it is entitled to both); *Zakre v. Norddeutsche Landesbank*, 2004 U.S. Dist. Lexis 6026 (S.D.N.Y Apr. 6, 2004) (holding it sufficient to produce 204,000 emails in text-readable format without any further relevance

cut); *In re Lorazepan and Clorazepate Antitrust Litig.*, 300 F. Supp. 2d 43, 46 (D.D.C. 2004) (holding that no index was required where CD-ROMs were searchable); *N. Crossarm Co., Inc. v. Chem. Specialties, Inc.*, No. 03-C-415-C, 2004 U.S. Dist. LEXIS 5381, at *3-5 (W.D. Wis. Mar. 3, 2004) (denying plaintiff's motion to compel production of e-mail files in electronic format after they were already produced in hard copy form, noting that a party may produce electronic information in hard copy form absent a request for the documents in specific electronic format); *cf. Jones v. Goord*, No. 95 Civ. 8026, 2002 WL 1007614, at *10-12 (S.D.N.Y. May 16, 2002) (declining plaintiff's request for production of databases where plaintiff already had access to the information in hard copy).

Beyond this, however, does Rule 34(b) suggest anything about how the cost shifting analysis should be treated for electronic data under Rule 26? If Rule 34(b) anticipates that a responding party can effectively "shift" the cost of restoration and searching to its opponent by producing (or granting access *in situ*) the electronic storage records as they are kept in the usual course of business, but prudently does not do so because of reasonable privilege and security concerns, should at least the shifting of the cost of restoring and searching such media under Rule 26 be more favorably considered by the court? If the party could "shift" those costs without judicial approval under Rule 34(b), should the party be entitled to shift them under Rule 26?

7. Does It Matter Why The Records Are Kept In An Inaccessible (Or Expensive To Retrieve) Fashion?

Zubulake treated as irrelevant ("typically unimportant") to the cost shifting analysis the fact that the records were stored on media not expected to be used for retrieval in the normal course of business. That is, it considered the fact that they were kept solely for disaster recovery and not for retrieving them in normal operations an immaterial consideration that unduly favored cost shifting. *Zubulake* reasoned that it "conflate[d] the purpose of retention with accessibility."

This is contrary to the approach taken in *Rowe* and *Medtronic*. *Medtronic* treated this inquiry as valuable because it suggested an answer to a relevant question: "Does the reason for maintaining the backup tapes indicate that the tapes are so likely to contain relevant information that the producing party should bear the cost of their production." *Id.* at *22. *Rowe*'s discussion focused more on the fact that the organization did not keep the data on backup tapes for any business purpose and had never used the tapes:

> A party that happens to retain vestigial data for no current business purposes, but only in case of an emergency . . . should not be put to the expense of producing it. . . . There is no evidence that the defendants themselves ever search these tapes for information or even have a means for doing so.

Rowe at 432.

Considering why the records were kept in the fashion they were kept (i.e., on what storage media, such as backup tapes) seems relevant to the broad, subjective inquiry authorized by Rule 26. Indeed, the considerations listed in the rule are not meant to be exhaustive. While the reason the records were kept in a particular fashion is not an answer to whether they are accessible, does that necessarily mean the answer is unimportant? The fact that an organization does not maintain backup tapes for normal business access and use indicates that such media are not likely to be important sources of information over and

above its records that are stored for retrieval in the ordinary course of business. True, what an organization may regard as useful and what an opposing party in litigation would regard as useful are not always synonymous. However, absent evidence that the "inaccessible" storage media was deliberately chosen over a more accessible alternative *in order* to make litigation more difficult, should the rules of discovery be dramatically out of synch with normal business records keeping practices?

The rules of discovery themselves suggest otherwise. *See* Rule 34(b), which authorizes the production of documents as they are kept in the normal course of business. Is it unreasonable to treat why the organization stores the data the way it does as an indication of whether it is likely to contain material documents? A factual record (see *infra*) can be developed to indicate otherwise if that is the case, of course. The same would appear to be true, if not even more true, as to efforts to obtain data that is not even deliberately created for recovery, but created as a function of the operation of the computer system itself.

8. Should "Sampling" Be A Standard Practice?

Both *Zubulake* and *McPeek* chose to authorize sampling of backup tapes. *Zubulake* apparently saw it as necessary to create an adequate factual record on which to make an informed cost shifting decision.

But is sampling always necessary? Should it be the "norm?" Are there other reasonable "factual bases" on which to make these judgments? In a "small" case would sampling itself be an undue burden?

9. What Case Administration Procedures Might Assist In Developing Such A Record And Making The Subjective Decision On Cost Shifting?

The *Rowe* and *Zubulake* multifactor analyses are by their own description more "art" than science. The multifactor analyses represent an organized way of thinking that still comes down to subjective judgments about a number of things, including the weight to be given each factor and the likelihood of finding truly useful evidence.

Neither *Zubulake* nor *Rowe* suggests that the only way to approach cost shifting is to immediately leap into the "sampling" of inaccessible data. *Zubulake's* insistence on a "factual record" to assess the cost shifting issues does not appear intended to suggest that the only appropriate factual record is sampling. What other sorts of factual records might be considered, and how cases might be managed where inaccessible electronic discovery may pose a substantial cost issue, will vary considerably. However, some such procedures might include the following:

(1) The entire analysis will be better informed by defining and formulating the important issues in the case early and before such discovery. The potential for extensive and potentially expensive electronic discovery argues in favor of more aggressive attempts by the parties and the courts in identifying the true factual issues in the case through Rule 26 and 16 conferences and hearings before such discovery begins. Most litigators are familiar with the unfortunate circumstance of both parties engaging in broad ranging discovery without having first analyzed and identified the true factual issues in the case, as well as any areas where factual issues might be mooted by rulings of law. While early intervention is unlikely to eliminate discovery disputes, the better crystallized the issues in the case, the more informed a judgment the court can make not only as to what subject matters of discovery are appropriate, but how potentially beneficial discovery of certain types may be. Such

efforts should carry at least as much importance as the requirement that the discovery request be specifically tailored to discover relevant information. The two go hand in hand.

(2) If issues can be narrowed by judicial rulings, the courts may (and generally should) stay potentially burdensome electronic (or other) discovery pending that resolution. *See, Chudasama v. Mazda Motor Corp.*, 123 F.3rd 1353 (11th Cir. 1997) (Court has power to stay discovery where discovery may be mooted by pending, potentially dispositive motions as to issues to which discovery is directed, or entire case.) For example, in a contract dispute where large amounts of emails are sought to develop parol evidence as to a party's claimed intentions, should the court not first resolve whether parol evidence will even be admissible?

(3) Has evidence been developed in discovery that relevant emails have been destroyed? Have witnesses testified that they recall emails, the substance of which are potentially highly probative, but which do not exist in paper form in any known file and are no longer on easily accessible electronic media? Similarly, do copies of some probative emails appear in some recipients' files but not at all in the sender's, indicating that the sender deleted probative emails and that not all recipients may have them all?

(4) If backup tapes are the issue, what is the vintage of the key events and issues compared to the periods covered by available backup tapes? If the events giving rise to the lawsuit occurred five years ago and the only available backup tapes are thirty days old, that is potentially very relevant to assessing the chances of finding useful emails on those media. On the other hand, is there a specific reason to believe that the deletions of emails years old occurred only recently so that they may be captured on existing tapes?

(5) Conversely, do procedures that require a party to conduct discovery in stages in order to develop factual basis for seeking significant electronic discovery put the cart before the horse? Might not electronic discovery lessen the ultimate, overall expense to both parties? Would finding any such electronic data later necessitate a second round of depositions, for example?

10. Should The Responding Party Always Pay For The Sampling?

Zubulake ordered the responding party to bear the expense of the sampling. Should that always be the case? The amount of sampling that might be done in one case could equal or exceed the entire electronic production in a smaller case and can involve considerable potential burden and expense. By definition, the reason for sampling is often that the requesting party can demonstrate no non-speculative basis for believing the discovery will yield significant value. Is it appropriate for the party seeking discovery to bear the cost of demonstrating what existing discovery has not demonstrated (i.e., likely value from the discovery)? Even if it is appropriate for the responding party to bear some sampling costs, would it be inappropriate to require at least an equal division of the cost of sampling where the requesting party has no particular basis on which to otherwise demonstrate that the likely benefits needed to satisfy the inherent limitations imposed by Rule 26(b)(2)(iii) are present?

Moreover, how big should the sample be? How sophisticated should the design be? Should the sampling protocol be as specific as possible, rather than as broad as possible? Otherwise, is the sampling itself a fishing expedition?

11. By What Principles Should The Results Of The Sampling Be Judged? For Example, Should It Be Judged By Whether It Reveals That There Is Further "Discoverable" Evidence, By Whether It Indicates A Likelihood Of Highly Probative Evidence, Or Something Else?

How are the sampling results measured — whether they reveal that there is "discoverable" information to be found or whether there is truly probative evidence to be found? It seems appropriate to have some idea of how this assessment will be made when embarking on the sampling process. It informs how the sampling is designed. If discovery has already yielded a substantial amount of discovery of a certain type, does it then to follow that the only justification for seeking discovery of "inaccessible" material would not be to simply find more of the same? This would seem to fit the classic standard of cumulative evidence or discovery. Can and should the search be one that is narrowed using a more refined search that truly looks for probative evidence rather than searching as broadly as possible for anything broadly relating to the lawsuit?

To use an oversimplified example, if a gender discrimination case has already yielded significant documentary evidence that a particular supervisor disliked the plaintiff, but no direct evidence of gender based animosity, should the search be one that (again, oversimplified for illustrative purposes) searches for only emails involving the plaintiff's name and a specific agreed form of reference to gender?

If the sampling results only in revealing the probability that there are other "discoverable" forms of information to be found on deleted material, but the sampling fails to yield any direct evidence of substantial probative value (i.e., yields cumulative information), how is permitting discovery to continue, or to continue without total or substantial cost shifting to the claimant, different from allowing a fishing expedition?

In addition, it may be that what is sampled may be chosen or largely dictated by the requesting party and thus will presumably reflect not simply an attempt to gain a "representative" sampling, but the requesting party's judgment as to what tapes (or other things sampled) are most likely to yield "hot" documents. Whether the sampling was the result of substantial control by the requesting party therefore seems an appropriate consideration to take into account when assessing the results of that sampling.

12. Should At A Minimum Cost Sharing Be Presumed? How Does A Court Make This Allocation On A Principled Basis?

It seems likely that sampling will often yield simply inconclusive results – no "smoking gun," but a general indication that some additional discoverable, but probably not highly probative, information exists on the media not yet restored and searched. In such circumstances it may be appropriate for the court to refuse the requested discovery outright, particularly when the requesting party cannot afford to bear its cost. If a court is not inclined to do that, however, as a general presumptive matter should it be prepared to require the requesting party to bear a substantial share, if not the majority, of the costs? Is it not fair that the requesting party at least significantly "invest" in the discovery it apparently believes to be potentially valuable?

V. CONCLUSION

These are only a few of the issues that will confront jurists, advocates, clients, and rule makers in the months and years to come. As this paper is going to print, changes to The Federal Rules are under consideration to address some of the questions posed here. *See,* http://www.kenwithers.com/rulemaking/index.html. Given the constant evolution in technology and the explosive growth in the business and personal use of electronic data and communications, these issues inevitably will continue to challenge — and motivate — us all.