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EDUCATIONAL CONFERENCE**

LAW AND TECHNOLOGY: ELECTRONIC DISCOVERY

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I. The Scope of a Request for Electronic Discovery

A. Federal Rule of Civil Procedure 34. The Rule was amended in 1970 to provide the following:

- a. Scope. any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestors behalf, to inspect and copy, any designated documents (including writings, drawing, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably useable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served;

B. Types of Computerized Information

1. Electronic documents: This category includes documents intentionally created by the computer user, such as word processing documents, spreadsheets, etc.

2. Email: The use of email has profoundly increased the amount of information that may be discoverable.

3. Hidden information: Hidden information includes electronic information created or maintained on a computer, that was not intentionally created by the computer user, but was instead created or maintained by the computer.¹

C. The Accessibility of Electronic Information

1. Active, online data.
2. Near-line data.
3. Off line storage/archives.
4. Backup tapes.
5. Erased, fragmented or damaged data.²

¹ Stephen D. Williger and Robin M. Wilson, *Negotiating the Minefields of Electronic Discovery*, 10 Rich. J.L. & Tech. 52, (Spring, 2004).

² *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D. N.Y. 2003).

II. Which Party Bears the Burden of the Expense of Production

A. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 358 (1978). The traditional rule in dealing with the cost of discovery is that each side bears its own costs. Thus, the responding party typically bears the expense of complying with discovery requests.

B. *McPeck v. Ashcroft*, 202 F.R.D. 31 (D. D.C. 2001). The court utilized the economic principal of “marginal utility” in determining which party should bear the cost of electronic discovery. The *McPeck* court decided that the more likely the computerized information contained documents that were relevant to a claim or defense, the fairer it is that the producing party search at its own expense. The less likely it is, the less fair it is to charge the producing party for the search.

C. *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421 (S.D. N.Y. 2002). The court set forth an eight factor test to ascertain to what extent the costs associated with complying with that electronic discovery request should be shifted to the requesting party. The eight factors include: (1) the specificity of the request; (2) the likelihood of discovering critical information (3) the availability of the information from other sources; (4) the purpose for which the responding party maintains the data; (5) the relative benefits to the parties of obtaining the information; (6) the total cost; (7) the relative ability of each party to control costs and the incentive to do so; and (8) the resources available to each party.

D. *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D. N.Y. 2003). In *Zubulake I*, the same court that decided the *Rowe* case modified the test to combine some of the factors, and created a new seven factor test to consider when deciding whether to shift the costs of production of electronic evidence. The *Zubulake* court adopted the following seven factor test: (1) the extent to which the request is specifically tailored to discover relevant information; (2) the availability of such information from other sources; (3) the total cost of production compared to the amount in controversy; (4) the total cost of production compared to the resources available to each party; (5) the relative ability of each party to control costs and its incentive to do so; (6) the importance of the issues at stake in the litigation; and (7) the relative benefits to the parties of obtaining the information.

E. *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280 (S.D. N.Y. 2003). In *Zubulake II*, the court utilized the same seven factor cost shifting test, but determined some cost shifting was appropriate. The costs of backup tape restoration was to be allocated with 75% owed by the defendant and 25% by the plaintiff.

III. How Much Information and Access Must be Provided in Discovery

A. *In Re: Aircrash Disaster at Detroit Metropolitan Airport on August 16, 1987*, 130 F.R.D. 634 (E.D. Mich. 1989). A hard copy of the computer data was produced. Although that hard copy was found to be reasonably useable, the production of data in a form which is directly readable by the adverse party's computer may be necessary under some circumstances. If, however, the electronic production is merely cumulative of the hard copy production, the electronic production is not necessary.

B. *Armstrong v. Executive Office of the President, Office of the Administration*, 1 F. 3d 1274 (D. D.C. Cir. 1993). A computer-based document has a history, showing the creation and modification of that particular document, and such a history is not necessarily reflected in the content of the document. Thus, this creation and modification history may have some relevance to the claims or defenses of the parties, and if so, such information is discoverable.

C. *Sattar v. Motorola, Inc.*, 138 F. 3d 1164 (7th Cir. 1998). The court found that it was not an abuse of discretion to instruct the defendant to produce emails in an electronic format, which could include a combination of downloading the data from four-inch tapes to conventional computer disks or a computer hard-drive, or loaning the plaintiff a copy of the necessary software, or offering the plaintiff onsite access to the computer systems.

D. *Playboy Enterprises, Inc. v. Welles*, 60 F. Supp. 2d 1050 (S.D. Cal. 1999). In this case, the court found that emails were discoverable and responsive to the discovery requests, including deleted emails. As a result, the plaintiff was entitled to access the defendant's hard-drive, since the defendant's actions in deleting the emails made it impossible to produce the information as a document.

IV. Use of Data Sampling Protocols

A. *McPeck v. Ashcroft*, 202 F.R.D. 31 (D.D.C. 2001). The court ordered the defendant to search a small number of backup tapes to assist in ascertaining whether additional searches were necessary.

B. *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D. N.Y. 2003). The court ordered the defendant to produce, at its own expense, all responsive emails existing on five backup tapes that were selected by the plaintiff. After reviewing the sample, the judge determined in *Zubulake II* that a broader search was necessary.

V. Preservation of Data and Sanctions for the Failure to Properly Preserve

A. Dodge, Warren, and Peters Insurance Services, Inc. v. Riley, 130 Cal. Rptr. 2d 385 (Cal. Ct. App. 2003). In this case, the plaintiff claimed misappropriation of trade secrets, unfair business practices, breach of fiduciary duty and breach of contract by ex-employees. Before they were fired and before the defendants left their employment, they copied and took with them computerized data. The court affirmed the trial court's order enjoining the defendants from destroying the electronic evidence, and ordered them to allow a court appointed expert to make a preservation copy of the data, to recover lost or deleted files, and to perform automated searches of the evidence.

B. Hildreth Mfg., L.L.C. v. Semco, Inc., 785 N.E. 2d 774 (Ohio Ct. App. 2003). The court found that even though the plaintiff failed to preserve data contained on the computer hard drives at issue, there was no reasonable possibility that the hard drives contained evidence that would have been favorable to the defendant's claims. Thus, sanctions were inappropriate.

C. Metropolitan Opera Association, Inc. v. Local 100, 212 F.R.D. 178 (S.D. N.Y. 2003). The court granted sanctions, finding that the defendants were liable for the loss of data, and ordered them to pay the plaintiff's attorneys fees necessitated by the defendants' abuse of electronic discovery. The court specifically found that defense counsel never gave adequate instructions to their clients about their clients' overall discovery obligations, knew the defendants did not have document retention or filing systems, never implement a procedure for document production or retention, delegated document production to a layperson, never went back to the layperson to assure that he had performed his obligations correctly, and ridiculed the plaintiff's inquires rather than taking action to remedy the situation.

D. Zubulake v. USB Warburg, LLC, 2004 U.S. Dist. LEXIS 13574 (S.D. N.Y. July 20, 2004). The plaintiff presented evidence that the defendant's personnel had deleted relevant emails. Some of the emails were recovered from backup tapes, and thus produced to the plaintiff long after her initial document requests, and some were lost altogether. The court awarded sanctions to the plaintiff, noting that, because the defendant's conduct was willful, the lost information was presumed to be relevant. Further, the defendant and its counsel had not taken all necessary steps to guarantee that relevant data was preserved and produced.