

SAN FRANCISCO BAY AREA INTELLECTUAL PROPERTY
AMERICAN INN OF COURT

Neil A. Smith
President

Joshua M. Masur
Vice President

Ian N. Feinberg
Secretary

Mary A. Fuller
Treasurer

September 2006 Meeting Announcement:

***The Electronic Discovery Amendments
to the Federal Rules of Civil Procedure***

This December, absent Congressional intervention, the discovery provisions of the Federal Rules of Civil Procedure will be amended to address directly electronic discovery issues. The first half of September's program will feature a presentation highlighting the specific proposed changes in the Rules. In the second half of the program, the panelists will discuss the potential impact of the changes on interactions among attorneys, clients, and the courts.

Panelists:

John E. Breen	<i>Whitmont Legal Technologies</i>
Ron C. Finley	<i>Mount & Stoelker</i>
Mary A. Fuller	<i>Marvell Semiconductor</i>
Joshua M. Masur	<i>Mayer Brown Rowe & Maw</i>
Megan Olesek	<i>DLA Piper</i>
Marc David Peters	<i>Pooley & Oliver</i>
Eric J. Sidebotham	
Alex Sousa	

Time and Location: September 20, 2006 at 6:00pm
Fenwick & West
801 California Street (at Castro)
Mountain View
650.988.8500

Dinner to Follow at: **Ristorante Don Giovanni**
235 Castro Street (between Dana and Villa)
Mountain View
650.961.9749

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September 2006 Meeting Hypothetical:

Finco v. Intech

Intech Microdevices Inc. is a semiconductor chip maker, developing advanced integrated digital technology platforms for the computing and communications industries. Founded in 1976, Intech's products include chips, boards and other semiconductor components that are the building blocks integral to computers, servers, and networking and communications products. Intech's most commercially successful product line is the Ultima™ Family of Microprocessors, the most recent of which is the UM-8000. Used in everything from printers to supercomputers, Ultima microprocessors are industry-leading, offering both high performance and low power consumption. Intech has design centers in its corporate headquarters in Santa Clara, CA, as well as in Chandler, AZ, Tel Aviv, Israel, Bangalore, India, and Grenoble, France; all told, Intech has over 80,000 employees located in 30 countries.

In 1994, after the successful launch of the first Ultima microprocessor, the UM-1000, and after more than 20 years at Intech, principal engineer Ron Finley took a sabbatical to sail around the world. He returned to Silicon Valley a year later, but decided not to return to Intech. He also declined several other offers for employment from semiconductor chip makers, preferring to -- as he put it -- putter around in his garage, unencumbered by management.

In 1996, Finley approached patent attorney Patricia Pending to seek representation in prosecuting patents to cover his inventions. Finley had known Pending when she was outside patent prosecution counsel with a large law firm that worked for Intech. Pending had since left that firm and started a law partnership with attorney Eric Sidebotham. Pending began to file a series of applications for Finley, being careful to keep each specification pending through continuation practice, even as patents began to issue. These applications were assigned to Finco Technologies, Inc., a corporation whose sole shareholder was Finley.

In July 2006, Finley received United States patent number 7,654,321, titled "Instruction set for conversion and transfer of integer and floating point data." The '321 patent claims priority to an application Finley had filed ten years earlier, which application had already yielded several patents. The '321 patent contains more than 500 claims -- both method and apparatus, in "comprising" and "consisting essentially of" variants -- including several that appear to have been drafted specifically to cover the instruction set architecture (ISA) of each member of Intech's Ultima family, beginning with the fourth generation UM-4000. (ISA is the part of the computer architecture related to programming, including the native data types, instructions, registers, addressing modes, memory architecture, interrupt and exception handling, and external I/O.)

Finco, represented by Pending & Sidebotham LLP, filed a patent infringement suit against Intech on the day that the '321 patent issued. Intech timely answered. The initial CMC is calendared for October 2006.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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SUSAN C. BUCKLEW
CRIMINAL RULES

JERRY E. SMITH
EVIDENCE RULES

TO: Honorable David F. Levi, Chair
Standing Committee on Rules of Practice
and Procedure

FROM: Honorable Jerry E. Smith, Chair
Advisory Committee on Evidence Rules

DATE: May 15, 2006

RE: Report of the Advisory Committee on Evidence Rules

I. Introduction

The Advisory Committee on Evidence Rules met on April 24th and 25th at Fordham Law School in New York City. The Committee approved one proposed amendment to the Evidence Rules — ultimately for direct enactment by Congress — with the recommendation that the Standing Committee approve it for release for public comment. The proposal is discussed as an action item in this Report.

The Evidence Rules Committee also discussed proposals for amending the hearsay rule and its exceptions, as well as a new rule that would cover information presented in electronic form. After extensive discussion, the Committee decided not to proceed with either of these proposals at this time. But the Committee did decide to consider the possibility of proceeding with a project to restylize the Evidence Rules. The Committee's decisions in all of those respects are discussed as information items in this Report.

The draft minutes of the April meeting set forth a more detailed discussion of all the matters considered by the Committee. Those minutes are attached to this Report. Also attached is the proposed amendment recommended for release for public comment.

II. Action Item

Proposed Rule 502 on Waiver of Attorney-Client Privilege and Work Product.

The Evidence Rules Committee has found a number of problems with the current federal common law governing the waiver of attorney-client privilege and work product. One major problem is that significant amounts of time and effort are expended during litigation to preserve the privilege, even when many of the documents are of no concern to the producing party. Parties must be extremely careful, because if a privileged document is produced, there is a risk that a court will find a subject matter waiver that will apply not only to the instant case and document but to other cases and documents as well. Moreover, an enormous amount of expense is put into document production in order to protect against inadvertent disclosure of privileged information, because the producing party risks a ruling that even a mistaken disclosure can result in a subject matter waiver. The Committee has determined that the discovery process would be more efficient and less costly if documents could be produced without risking a subject matter waiver of the attorney-client privilege or work product protection.

Another concern expressed to the Committee by members of the bar involves the production of confidential or work product material by a corporation that is the subject of a government investigation. Most federal courts have held that such a disclosure constitutes a waiver of the privilege, i.e., the courts generally reject the concept that a selective waiver is enforceable. This is a problem because it can deter corporations from cooperating in the first place.

Concerns about the common law of waiver of privilege and work product have been voiced in Congress as well. The Chairman of the House Committee on the Judiciary, by letter dated January 23, 2006, requested the Judicial Conference to initiate the rulemaking process to address the litigation costs and burdens created by the current law on waiver of attorney-client privilege and work product protection. The Chairman recognized that while any rule prepared by the Advisory Committee could proceed through the rulemaking process, it would eventually have to be enacted directly by Congress, as it would be a rule affecting privileges. See 28 U.S.C. § 2074(b).

The Committee directed its Reporter and its consultant on privileges to prepare a draft rule for its consideration that would address the problems of subject matter waiver, inadvertent disclosure, enforceability of confidentiality orders, and selective waiver. This draft rule was distributed in advance of the Committee meeting to selected federal judges, state and federal regulators, members of the bar, and academics. On the first day of its April meeting, the Committee held a mini-hearing on the proposed rule 502 and Committee Note, inviting presentations from those who reviewed the rule. (A transcript of the hearing is available from John Rabiej).

Based on comments received at the hearing, the Reporter and consultant revised the draft for consideration by the Committee at its meeting. Most importantly, the draft was scaled back so that it no longer regulates state rules on waiver as applied by state courts. The Committee— together with its liaisons and several members of the Civil Rules Committee invited to attend the meeting — discussed the draft proposal in extensive detail.

The Committee unanimously agreed on the following basic principles, as embodied in the proposed Rule 502:

1. A subject matter waiver should be found only when privilege or work product has already been disclosed, and a further disclosure “ought in fairness” to be required in order to protect against a misrepresentation that might arise from the previous disclosure.
2. An inadvertent disclosure should not constitute a waiver if the holder of the privilege or work product protection took reasonable precautions to prevent disclosure and took reasonably prompt measures, once the holder knew or should have known of the disclosure, to rectify the error.
3. A provision on selective waiver should be included in any proposed rule released for public comment, but should be placed in brackets to indicate that the Committee has not yet determined whether a provision on selective waiver should be sent to Congress.
4. Parties to litigation should be able to protect against the consequences of waiver by seeking a confidentiality order from the court; and in order to give the parties reliable protection, that confidentiality order must bind non-parties in any federal or state court.
5. Parties should be able to contract around common-law waiver rules by entering into confidentiality agreements; but in the absence of a court order, these agreements cannot bind non-parties.

After substantial discussion, the Evidence Rules Committee unanimously approved the proposed Rule 502 and the accompanying Committee Note for release for public comment. The proposed Rule 502 and Committee Note are attached to this Report as Appendix A.

Recommendation: The Evidence Rules Committee recommends that the proposed Evidence Rule 502 be approved for release for public comment.

III. Information Items

A. Crawford v. Washington and the Federal Rules Hearsay Exceptions

The Committee continues to monitor case law developments after the Supreme Court’s decision in *Crawford v. Washington*. The Court in *Crawford* held that if hearsay is “testimonial,” its admission against the accused violates the right to confrontation unless the declarant is available and subject to cross-examination. The Court rejected its previous reliability-based confrontation test, at least as it applied to “testimonial” hearsay. Questions exist about 1) the scope of the term “testimonial” and 2) whether the Confrontation Clause imposes limitations on hearsay that is not “testimonial.”

Crawford raises questions about the constitutionality as-applied of some of the hearsay exceptions in the Federal Rules of Evidence. The Evidence Rules Committee has decided that because of the uncertainty created by *Crawford*, and the recency of the Supreme Court decisions in the 2005-6 term that interpret *Crawford*, it would be imprudent to propose amendments to specific hearsay exceptions that might be construed to admit testimonial hearsay. Any attempt to determine the correct scope of the term “testimonial” might be undermined by subsequent case law handed down during the time that the rule would be going through the rulemaking process.

At its April meeting the Committee considered whether to propose a generic reference to constitutional limitations on hearsay in light of *Crawford*. A general reference to the constitutional rights of an accused could be placed in the hearsay rule itself (Rule 802) as well as the hearsay exceptions (Rules 801(d), 803, 804 and 807). But the Committee resolved not to proceed with any amendment that would provide a reference to constitutional limitations in the hearsay exceptions or the hearsay rule. The Committee determined that “constitutional warning” language was not necessary because most counsel are now aware of *Crawford*; an amendment would make the already-long Rules 801, 803 and 804 even longer; and any amendment adding constitutional language would raise the anomaly that other rules, such as perhaps Rule 403 and 404, might be subject to unconstitutional application and yet would not have similar constitutional-warning language.

B. Electronic Evidence, and Possible Restylizing of the Evidence Rules

At its Fall 2005 meeting the Evidence Rules Committee tentatively approved a new Rule 107, an amendment that would make it clear that the Evidence Rules cover evidence presented in electronic form. The proposed Rule 107 would have updated the “paper-based” language in the Evidence Rules as follows:

Rule 107. Electronic Form

As used in these rules, the following terms, whether singular or plural, include information in electronic form: “book,” “certificate,” “data compilation,” “directory,” “document,” “entry,” “list,” “memorandum,” “newspaper,” “pamphlet,” “paper,” “periodical,” “printed,” “publication,” “published,” “record,” “recorded,” “recording,” “report,” “tabulation,” “writing” and “written.” Any “attestation,” “certification,” “execution” or “signature” required by these rules may be made electronically. A certificate, declaration, document, record or the like may be “filed,” “recorded,” “sealed” or “signed” electronically.

Upon reconsideration at its April 2006 meeting, the Committee determined that it would not proceed with the proposed amendment at this time. The Committee noted that courts are not having any trouble in applying the existing, paper-based Evidence Rules to all forms of electronic evidence and that any amendment may lead to the unintended consequence of a substantive change in one or more of the Evidence Rules. The Committee also determined that the Rule would not really serve a notice function, because counsel would not think to look at a freestanding Rule 107 to determine

what “writing” means in, e.g., Rule 902. It was observed that the only way to update the language of the Evidence Rules effectively would be to amend each paper-based rule directly.

The Committee’s resolution on an electronic evidence rule led to a discussion of whether the Committee might wish to propose a restylization project for the Evidence Rules. The Committee determined that such a project would be worthy of consideration, so long as it was understood that the project would not result in a major restructuring of the Rules, such as a change of rule numbers.

The Committee directed the Reporter to pick a few rules that are clearly in need of restyling, and to work with Professor Kimble to prepare a restyled version of those rules for the Committee’s consideration at the next meeting.

I wish to emphasize that in regard to any rules or other items as to which the Committee has indicated possible interest, the Committee continues to be wary of recommending changes that are not considered absolutely necessary to the proper administration of justice.

IV. Minutes of the April 2006 Meeting

The Reporter's draft of the minutes of the Evidence Rules Committee's April 2006 meeting is attached to this Report. These minutes have not yet been approved by the Evidence Rules Committee.

Attachments:

Proposed Evidence Rule 502 and Committee Note
Draft Minutes

**PROPOSED AMENDMENT TO THE
FEDERAL RULES OF EVIDENCE***

**Rule 502. Attorney-Client Privilege and Work Product;
Limitations on Waiver**

1 **(a) Scope of waiver.** — In federal proceedings, the
2 waiver by disclosure of an attorney-client privilege or work
3 product protection extends to an undisclosed communication
4 or information concerning the same subject matter only if that
5 undisclosed communication or information ought in fairness
6 to be considered with the disclosed communication or
7 information.

8 **(b) Inadvertent disclosure.** — A disclosure of a
9 communication or information covered by the attorney-client
10 privilege or work product protection does not operate as a
11 waiver in a state or federal proceeding if the disclosure is
12 inadvertent and is made in connection with federal litigation
13 or federal administrative proceedings — and if the holder of
14 the privilege or work product protection took reasonable

*New material is underlined; matter to be omitted is lined through.

2 FEDERAL RULES OF EVIDENCE

15 precautions to prevent disclosure and took reasonably prompt
16 measures, once the holder knew or should have known of the
17 disclosure, to rectify the error, including (if applicable)
18 following the procedures in Fed. R. Civ. P. 26(b)(5)(B).

19 [(c) **Selective waiver.** — In a federal or state
20 proceeding, a disclosure of a communication or information
21 covered by the attorney-client privilege or work product
22 protection — when made to a federal public office or agency
23 in the exercise of its regulatory, investigative, or enforcement
24 authority — does not operate as a waiver of the privilege or
25 protection in favor of non-governmental persons or entities.

26 The effect of disclosure to a state or local government agency,
27 with respect to non-governmental persons or entities, is
28 governed by applicable state law. Nothing in this rule limits
29 or expands the authority of a government agency to disclose
30 communications or information to other government agencies
31 or as otherwise authorized or required by law.]

32 **(d) Controlling effect of court orders.** — A federal
33 court order that the attorney-client privilege or work product
34 protection is not waived as a result of disclosure in
35 connection with the litigation pending before the court
36 governs all persons or entities in all state or federal
37 proceedings, whether or not they were parties to the matter
38 before the court, if the order incorporates the agreement of
39 the parties before the court.

40 **(e) Controlling effect of party agreements.** — An
41 agreement on the effect of disclosure of a communication or
42 information covered by the attorney-client privilege or work
43 product protection is binding on the parties to the agreement,
44 but not on other parties unless the agreement is incorporated
45 into a court order.

46 **(f) Included privilege and protection.** — As used in
47 this rule:

- 48 1) “attorney-client privilege” means the protection
49 provided for confidential attorney-client communications,
50 under applicable law; and
- 51 2) “work product protection” means the protection
52 for materials prepared in anticipation of litigation or for trial,
53 under applicable law.

Committee Note

This new rule has two major purposes:

1) It resolves some longstanding disputes in the courts about the effect of certain disclosures of material protected by the attorney-client privilege or the work product doctrine— specifically those disputes involving inadvertent disclosure and selective waiver.

2) It responds to the widespread complaint that litigation costs for review and protection of material that is privileged or work product have become prohibitive due to the concern that any disclosure of protected information in the course of discovery (however innocent or minimal) will operate as a subject matter waiver of all protected information. This concern is especially troubling in cases involving electronic discovery. *See, e.g., Rowe Entertainment, Inc. v. William Morris Agency*, 205 F.R.D. 421, 425-26 (S.D.N.Y. 2002) (finding that in a case involving the production of e-mail, the cost of pre-production review for privileged and work product material would cost one defendant \$120,000 and another

defendant \$247,000, and that such review would take months). *See also Report to the Judicial Conference Standing Committee on Rules of Practice and Procedure by the Advisory Committee on the Federal Rules of Civil Procedure*, September 2005 at 27 (“The volume of information and the forms in which it is stored make privilege determinations more difficult and privilege review correspondingly more expensive and time-consuming yet less likely to detect all privileged information.”); *Hopson v. City of Baltimore*, 232 F.R.D. 228, 244 (D.Md. 2005) (electronic discovery may encompass “millions of documents” and to insist upon “record-by-record pre-production privilege review, on pain of subject matter waiver, would impose upon parties costs of production that bear no proportionality to what is at stake in the litigation”).

The rule seeks to provide a predictable, uniform set of standards under which parties can determine the consequences of a disclosure of communications or information covered by the attorney-client privilege or work product protection. Parties to litigation need to know, for example, that if they exchange privileged information pursuant to a confidentiality order, the court’s order will be enforceable. For example, if a federal court’s confidentiality order is not enforceable in a state court then the burdensome costs of privilege review and retention are unlikely to be reduced.

The Committee is well aware that a privilege rule proposed through the rulemaking process cannot bind state courts, and indeed that a rule of privilege cannot take effect through the ordinary rulemaking process. See 28 U.S.C § 2074(b). It is therefore anticipated that Congress must enact this rule directly, through its authority under the Commerce Clause. Cf. Class Action Fairness Act of 2005, 119 Stat. 4, PL 109-2 (relying on Commerce Clause power to regulate state class actions).

The rule makes no attempt to alter federal or state law on whether a communication or information is protected as attorney-client privilege or work product as an initial matter. Moreover, while establishing some exceptions to waiver, the rule does not purport to supplant applicable waiver doctrine generally.

The rule governs only certain waivers by disclosure. Other common-law waiver doctrines may result in a finding of waiver even where there is no disclosure of privileged information or work product. *See, e.g., Nguyen v. Excel Corp.*, 197 F.3d 200 (5th Cir. 1999) (reliance on an advice of counsel defense waives the privilege with respect to attorney-client communications pertinent to that defense); *Ryers v. Burlison*, 100 F.R.D. 436 (D.D.C. 1983) (allegation of lawyer malpractice constituted a waiver of confidential communications under the circumstances). The rule is not intended to displace or modify federal common law concerning waiver of privilege or work product where no disclosure has been made.

Subdivision (a). The rule provides that a voluntary disclosure generally results in a waiver only of the communication or information disclosed; a subject matter waiver (of either privilege or work product) is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to protect against a selective and misleading presentation of evidence to the disadvantage of the adversary. *See, e.g., In re von Bulow*, 828 F.2d 94 (2d Cir. 1987) (disclosure of privileged information in a book did not result in unfairness to the adversary in a litigation, therefore a subject matter waiver was not warranted); *In re United Mine Workers of America Employee Benefit Plans Litig.*, 159 F.R.D. 307, 312 (D.D.C. 1994) (waiver of work product limited to materials actually disclosed, because the party did not deliberately disclose documents in an attempt to gain a tactical advantage). The language concerning subject matter waiver — “ought in fairness” — is taken from Rule 106, because the animating

principle is the same. A party that makes a selective, misleading presentation that is unfair to the adversary opens itself to a more complete and accurate presentation. *See, e.g., United States v. Branch*, 91 F.3d 699 (5th Cir. 1996) (under Rule 106, completing evidence was not admissible where the party's presentation, while selective, was not misleading or unfair). The rule rejects the result in *In re Sealed Case*, 877 F.2d 976 (D.C.Cir. 1989), which held that inadvertent disclosure of documents during discovery automatically constituted a subject matter waiver.

Subdivision (b). Courts are in conflict over whether an inadvertent disclosure of privileged information or work product constitutes a waiver. A few courts find that a disclosure must be intentional to be a waiver. Most courts find a waiver only if the disclosing party acted carelessly in disclosing the communication or information and failed to request its return in a timely manner. And a few courts hold that any mistaken disclosure of protected information constitutes waiver without regard to the protections taken to avoid such a disclosure. *See generally Hopson v. City of Baltimore*, 232 F.R.D. 228 (D.Md. 2005) for a discussion of this case law.

The rule opts for the middle ground: inadvertent disclosure of privileged or protected information in connection with a federal proceeding constitutes a waiver only if the party did not take reasonable precautions to prevent disclosure and did not make reasonable and prompt efforts to rectify the error. This position is in accord with the majority view on whether inadvertent disclosure is a waiver. *See, e.g., Zapata v. IBP, Inc.*, 175 F.R.D. 574, 576-77 (D. Kan. 1997) (work product); *Hydraflow, Inc. v. Enidine, Inc.*, 145 F.R.D. 626, 637 (W.D.N.Y. 1993) (attorney-client privilege); *Edwards v. Whitaker*, 868 F.Supp. 226, 229 (M.D. Tenn. 1994) (attorney-client privilege). The rule establishes a compromise between two competing premises. On the one hand, information

covered by the attorney-client privilege or work product protection should not be treated lightly. On the other hand, a rule imposing strict liability for an inadvertent disclosure threatens to impose prohibitive costs for privilege review and retention, especially in cases involving electronic discovery.

The rule refers to “inadvertent” disclosure, as opposed to using any other term, because the word “inadvertent” is widely used by courts and commentators to cover mistaken or unintentional disclosures of information covered by the attorney-client privilege or the work product protection. *See, e.g., Manual for Complex Litigation Fourth* § 11.44 (Federal Judicial Center 2004) (referring to the “consequences of inadvertent waiver”); *Alldread v. City of Grenada*, 988 F.2d 1425, 1434 (5th Cir. 1993) (“There is no consensus, however, as to the effect of inadvertent disclosure of confidential communications.”).

Subdivision (c): Courts are in conflict over whether disclosure of privileged or protected information to a government agency conducting an investigation of the client constitutes a general waiver of the information disclosed. Most courts have rejected the concept of “selective waiver,” holding that waiver of privileged or protected information to a government agency constitutes a waiver for all purposes and to all parties. *See, e.g., Westinghouse Electric Corp. v. Republic of the Philippines*, 951 F.2d 1414 (3d Cir. 1991). Other courts have held that selective waiver is enforceable if the disclosure is made subject to a confidentiality agreement with the government agency. *See, e.g., Teachers Insurance & Annuity Association of America v. Shamrock Broadcasting Co.*, 521 F. Supp. 638 (S.D.N.Y. 1981). And a few courts have held that disclosure of protected information to the government does not constitute a general waiver, so that the information remains shielded from use by other

parties. *See, e.g., Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977).

The rule rectifies this conflict by providing that disclosure of protected information to a federal government agency exercising regulatory, investigative or enforcement authority does not constitute a waiver of attorney-client privilege or work product protection as to non-governmental persons or entities, whether in federal or state court. A rule protecting selective waiver in these circumstances furthers the important policy of cooperation with government agencies, and maximizes the effectiveness and efficiency of government investigations. *See In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, 293 F.3d 289, 314 (6th Cir. 2002) (Boggs, J., dissenting) (noting that the “public interest in easing government investigations” justifies a rule that disclosure to government agencies of information covered by the attorney-client privilege or work product protection does not constitute a waiver to private parties).

The Committee considered whether the shield of selective waiver should be conditioned on obtaining a confidentiality agreement from the government agency. It rejected that condition for a number of reasons. If a confidentiality agreement were a condition to protection, disputes would be likely to arise over whether a particular agreement was sufficiently air-tight to protect against a finding of a general waiver, thus destroying the predictability that is essential to proper administration of the attorney-client privilege and work product immunity. Moreover, a government agency might need or be required to use the information for some purpose and then would find it difficult or impossible to be bound by an air-tight confidentiality agreement, however drafted. If a confidentiality agreement were nonetheless required to trigger the protection of selective waiver, the policy of furthering cooperation with and efficiency in government investigations would be undermined.

Ultimately, the obtaining of a confidentiality agreement has little to do with the underlying policy of furthering cooperation with government agencies that animates the rule.

Subdivision (d). Confidentiality orders are becoming increasingly important in limiting the costs of privilege review and retention, especially in cases involving electronic discovery. *See Manual for Complex Litigation Fourth* § 11.446 (Federal Judicial Center 2004) (noting that fear of the consequences of waiver “may add cost and delay to the discovery process for all sides” and that courts have responded by encouraging counsel “to stipulate at the outset of discovery to a ‘nonwaiver’ agreement, which they can adopt as a case-management order.”). But the utility of a confidentiality order in reducing discovery costs is substantially diminished if it provides no protection outside the particular litigation in which the order is entered. Parties are unlikely to be able to reduce the costs of pre-production review for privilege and work product if the consequence of disclosure is that the information can be used by non-parties to the litigation.

There is some dispute on whether a confidentiality order entered in one case can bind non-parties from asserting waiver by disclosure in a separate litigation. *See generally Hopson v. City of Baltimore*, 232 F.R.D. 228 (D.Md. 2005) for a discussion of this case law. The rule provides that when a confidentiality order governing the consequences of disclosure in that case is entered in a federal proceeding, according to the terms agreed to by the parties, its terms are enforceable against non-parties in any federal or state proceeding. For example, the court order may provide for return of documents without waiver irrespective of the care taken by the disclosing party; the rule contemplates enforcement of “claw-back” and “quick peek” arrangements as a way to avoid the excessive costs of pre-production review for privilege and work product. As such, the rule provides a party with a predictable protection that is necessary to allow that

party to limit the prohibitive costs of privilege and work product review and retention.

Subdivision (e). Subdivision (e) codifies the well-established proposition that parties can enter an agreement to limit the effect of waiver by disclosure between or among them. *See, e.g., Dowd v. Calabrese*, 101 F.R.D. 427, 439 (D.D.C. 1984) (no waiver where the parties stipulated in advance that certain testimony at a deposition “would not be deemed to constitute a waiver of the attorney-client or work product privileges”); *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 290 (S.D.N.Y. 2003) (noting that parties may enter into “so-called ‘claw-back’ agreements that allow the parties to forego privilege review altogether in favor of an agreement to return inadvertently produced privilege documents”). Of course such an agreement can bind only the parties to the agreement. The rule makes clear that if parties want protection from a finding of waiver by disclosure in a separate litigation, the agreement must be made part of a court order.

Subdivision (f). The rule’s coverage is limited to attorney-client privilege and work product. The limitation in coverage is consistent with the goals of the rule, which are 1) to provide a reasonable limit on the costs of privilege and work product review and retention that are incurred by parties to litigation; and 2) to encourage cooperation with government investigations and reduce the costs of those investigations. These two interests arise mainly, if not exclusively, in the context of disclosure of attorney-client privilege and work product. The operation of waiver by disclosure, as applied to other evidentiary privileges, remains a question of federal common law. Nor does the rule purport to apply to the Fifth Amendment privilege against compelled self-incrimination.

**AMENDMENTS TO THE
FEDERAL RULES OF CIVIL PROCEDURE**

**Rule 16. Pretrial Conferences; Scheduling;
Management**

* * * * *

(b) Scheduling and Planning. Except in categories of actions exempted by district court rule as inappropriate, the district judge, or a magistrate judge when authorized by district court rule, shall, after receiving the report from the parties under Rule 26(f) or after consulting with the attorneys for the parties and any unrepresented parties by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time

- (1)** to join other parties and to amend the pleadings;
- (2)** to file motions; and
- (3)** to complete discovery.

The scheduling order also may include

- (4)** modifications of the times for disclosures under Rules 26(a) and 26(e)(1) and of the extent of discovery to be permitted;
- (5)** provisions for disclosure or discovery of electronically stored information;
- (6)** any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after production;
- (7)** the date or dates for conferences before trial, a final pretrial conference, and trial; and
- (8)** any other matters appropriate in the circumstances of the case.

The order shall issue as soon as practicable but in any event within 90 days after the appearance of a defendant and within 120 days after the complaint has been served on a defendant. A schedule shall not be

modified except upon a showing of good cause and by leave of the district judge or, when authorized by local rule, by a magistrate judge.

* * * * *

Committee Note

The amendment to Rule 16(b) is designed to alert the court to the possible need to address the handling of discovery of electronically stored information early in the litigation if such discovery is expected to occur. Rule 26(f) is amended to direct the parties to discuss discovery of electronically stored information if such discovery is contemplated in the action. Form 35 is amended to call for a report to the court about the results of this discussion. In many instances, the court's involvement early in the litigation will help avoid difficulties that might otherwise arise.

Rule 16(b) is also amended to include among the topics that may be addressed in the scheduling order any agreements that the parties reach to facilitate discovery by minimizing the risk of waiver of privilege or work-product protection. Rule 26(f) is amended to add to the discovery plan the parties' proposal for the court to enter a case-management or other order adopting such an agreement. The parties may agree to various arrangements. For example, they may agree to initial provision of requested materials without waiver of privilege or protection to enable the party seeking

production to designate the materials desired or protection for actual production, with the privilege review of only those materials to follow. Alternatively, they may agree that if privileged or protected information is inadvertently produced, the producing party may by timely notice assert the privilege or protection and obtain return of the materials without waiver. Other arrangements are possible. In most circumstances, a party who receives information under such an arrangement cannot assert that production of the information waived a claim of privilege or of protection as trial-preparation material.

An order that includes the parties' agreement may be helpful in avoiding delay and excessive cost in discovery. See *Manual for Complex Litigation (4th)* § 11.446. Rule 16(b)(6) recognizes the propriety of including such agreements in the court's order. The rule does not provide the court with authority to enter such a case-management or other order without party agreement, or limit the court's authority to act on motion.

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

(a) Required Disclosures; Methods to Discover

Additional Matter.

(1) Initial Disclosures. Except in categories of proceedings specified in Rule 26(a)(1)(E), or to the

extent otherwise stipulated or directed by order, a party must, without awaiting a discovery request, provide to other parties:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment, identifying the subjects of the information;

(B) a copy of, or a description by category and location of, all documents, electronically stored information, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment;

* * * * *

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

* * * * *

(2) Limitations.

(A) By order, the court may alter the limits in these rules on the number of depositions and interrogatories or the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.

(B) A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought

must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(C) The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by

discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery 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. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Rule 26(c).

* * * * *

(5) Claims of Privilege or Protection of Trial-Preparation Materials.

(A) Information Withheld. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial-

preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(B) Information Produced. If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A

receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

* * * * *

(f) Conference of Parties; Planning for Discovery.

Except in categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(E) or when otherwise ordered, the parties must, as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), confer to consider the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of

the case, to make or arrange for the disclosures required by Rule 26(a)(1), to discuss any issues relating to preserving discoverable information, and to develop a proposed discovery plan that indicates the parties' views and proposals concerning:

- (1)** what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement as to when disclosures under Rule 26(a)(1) were made or will be made;
- (2)** the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;
- (3)** any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

(4) any issues relating to claims of privilege or of protection as trial-preparation material, including — if the parties agree on a procedure to assert such claims after production — whether to ask the court to include their agreement in an order;

(5) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(6) any other orders that should be entered by the court under Rule 26(c) or under Rule 16(b) and (c).

* * * * *

Committee Note

Subdivision (a). Rule 26(a)(1)(B) is amended to parallel Rule 34(a) by recognizing that a party must disclose electronically stored information as well as documents that it may use to support its claims or defenses. The term “electronically stored information” has the same broad meaning in Rule 26(a)(1) as in Rule 34(a). This amendment is consistent with the 1993 addition of Rule 26(a)(1)(B). The term “data

compilations” is deleted as unnecessary because it is a subset of both documents and electronically stored information.

Subdivision (b)(2). The amendment to Rule 26(b)(2) is designed to address issues raised by difficulties in locating, retrieving, and providing discovery of some electronically stored information. Electronic storage systems often make it easier to locate and retrieve information. These advantages are properly taken into account in determining the reasonable scope of discovery in a particular case. But some sources of electronically stored information can be accessed only with substantial burden and cost. In a particular case, these burdens and costs may make the information on such sources not reasonably accessible.

It is not possible to define in a rule the different types of technological features that may affect the burdens and costs of accessing electronically stored information. Information systems are designed to provide ready access to information used in regular ongoing activities. They also may be designed so as to provide ready access to information that is not regularly used. But a system may retain information on sources that are accessible only by incurring substantial burdens or costs. Subparagraph (B) is added to regulate discovery from such sources.

Under this rule, a responding party should produce electronically stored information that is relevant, not privileged, and reasonably accessible, subject to the (b)(2)(C) limitations that apply to all

discovery. The responding party must also identify, by category or type, the sources containing potentially responsive information that it is neither searching nor producing. The identification should, to the extent possible, provide enough detail to enable the requesting party to evaluate the burdens and costs of providing the discovery and the likelihood of finding responsive information on the identified sources.

A party's identification of sources of electronically stored information as not reasonably accessible does not relieve the party of its common-law or statutory duties to preserve evidence. Whether a responding party is required to preserve unsearched sources of potentially responsive information that it believes are not reasonably accessible depends on the circumstances of each case. It is often useful for the parties to discuss this issue early in discovery.

The volume of — and the ability to search — much electronically stored information means that in many cases the responding party will be able to produce information from reasonably accessible sources that will fully satisfy the parties' discovery needs. In many circumstances the requesting party should obtain and evaluate the information from such sources before insisting that the responding party search and produce information contained on sources that are not reasonably accessible. If the requesting party continues to seek discovery of information from sources identified as not reasonably accessible, the parties should discuss the burdens and costs of accessing and retrieving the information, the needs that may establish good cause for requiring all or part

of the requested discovery even if the information sought is not reasonably accessible, and conditions on obtaining and producing the information that may be appropriate.

If the parties cannot agree whether, or on what terms, sources identified as not reasonably accessible should be searched and discoverable information produced, the issue may be raised either by a motion to compel discovery or by a motion for a protective order. The parties must confer before bringing either motion. If the parties do not resolve the issue and the court must decide, the responding party must show that the identified sources of information are not reasonably accessible because of undue burden or cost. The requesting party may need discovery to test this assertion. Such discovery might take the form of requiring the responding party to conduct a sampling of information contained on the sources identified as not reasonably accessible; allowing some form of inspection of such sources; or taking depositions of witnesses knowledgeable about the responding party's information systems.

Once it is shown that a source of electronically stored information is not reasonably accessible, the requesting party may still obtain discovery by showing good cause, considering the limitations of Rule 26(b)(2)(C) that balance the costs and potential benefits of discovery. The decision whether to require a responding party to search for and produce information that is not reasonably accessible depends not only on the burdens and costs of doing so, but also on whether those burdens and

costs can be justified in the circumstances of the case. Appropriate considerations may include: (1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties' resources.

The responding party has the burden as to one aspect of the inquiry — whether the identified sources are not reasonably accessible in light of the burdens and costs required to search for, retrieve, and produce whatever responsive information may be found. The requesting party has the burden of showing that its need for the discovery outweighs the burdens and costs of locating, retrieving, and producing the information. In some cases, the court will be able to determine whether the identified sources are not reasonably accessible and whether the requesting party has shown good cause for some or all of the discovery, consistent with the limitations of Rule 26(b)(2)(C), through a single proceeding or presentation. The good-cause determination, however, may be complicated because the court and parties may know little about what information the sources identified as not reasonably accessible might contain, whether it is relevant, or how valuable it may be to the litigation. In such cases, the parties may need some

focused discovery, which may include sampling of the sources, to learn more about what burdens and costs are involved in accessing the information, what the information consists of, and how valuable it is for the litigation in light of information that can be obtained by exhausting other opportunities for discovery.

The good-cause inquiry and consideration of the Rule 26(b)(2)(C) limitations are coupled with the authority to set conditions for discovery. The conditions may take the form of limits on the amount, type, or sources of information required to be accessed and produced. The conditions may also include payment by the requesting party of part or all of the reasonable costs of obtaining information from sources that are not reasonably accessible. A requesting party's willingness to share or bear the access costs may be weighed by the court in determining whether there is good cause. But the producing party's burdens in reviewing the information for relevance and privilege may weigh against permitting the requested discovery.

The limitations of Rule 26(b)(2)(C) continue to apply to all discovery of electronically stored information, including that stored on reasonably accessible electronic sources.

Subdivision (b)(5). The Committee has repeatedly been advised that the risk of privilege waiver, and the work necessary to avoid it, add to the costs and delay of discovery. When the review is of electronically stored information, the risk of waiver, and the time and effort required to avoid it, can

increase substantially because of the volume of electronically stored information and the difficulty in ensuring that all information to be produced has in fact been reviewed. Rule 26(b)(5)(A) provides a procedure for a party that has withheld information on the basis of privilege or protection as trial-preparation material to make the claim so that the requesting party can decide whether to contest the claim and the court can resolve the dispute. Rule 26(b)(5)(B) is added to provide a procedure for a party to assert a claim of privilege or trial-preparation material protection after information is produced in discovery in the action and, if the claim is contested, permit any party that received the information to present the matter to the court for resolution.

Rule 26(b)(5)(B) does not address whether the privilege or protection that is asserted after production was waived by the production. The courts have developed principles to determine whether, and under what circumstances, waiver results from inadvertent production of privileged or protected information. Rule 26(b)(5)(B) provides a procedure for presenting and addressing these issues. Rule 26(b)(5)(B) works in tandem with Rule 26(f), which is amended to direct the parties to discuss privilege issues in preparing their discovery plan, and which, with amended Rule 16(b), allows the parties to ask the court to include in an order any agreements the parties reach regarding issues of privilege or trial-preparation material protection. Agreements reached under Rule 26(f)(4) and orders including such agreements entered under Rule 16(b)(6) may be considered when a court determines whether a waiver has occurred. Such

agreements and orders ordinarily control if they adopt procedures different from those in Rule 26(b)(5)(B).

A party asserting a claim of privilege or protection after production must give notice to the receiving party. That notice should be in writing unless the circumstances preclude it. Such circumstances could include the assertion of the claim during a deposition. The notice should be as specific as possible in identifying the information and stating the basis for the claim. Because the receiving party must decide whether to challenge the claim and may sequester the information and submit it to the court for a ruling on whether the claimed privilege or protection applies and whether it has been waived, the notice should be sufficiently detailed so as to enable the receiving party and the court to understand the basis for the claim and to determine whether waiver has occurred. Courts will continue to examine whether a claim of privilege or protection was made at a reasonable time when delay is part of the waiver determination under the governing law.

After receiving notice, each party that received the information must promptly return, sequester, or destroy the information and any copies it has. The option of sequestering or destroying the information is included in part because the receiving party may have incorporated the information in protected trial-preparation materials. No receiving party may use or disclose the information pending resolution of the privilege claim. The receiving party may present to the court the questions whether the information is privileged or protected as trial-preparation material,

and whether the privilege or protection has been waived. If it does so, it must provide the court with the grounds for the privilege or protection specified in the producing party's notice, and serve all parties. In presenting the question, the party may use the content of the information only to the extent permitted by the applicable law of privilege, protection for trial-preparation material, and professional responsibility.

If a party disclosed the information to nonparties before receiving notice of a claim of privilege or protection as trial-preparation material, it must take reasonable steps to retrieve the information and to return it, sequester it until the claim is resolved, or destroy it.

Whether the information is returned or not, the producing party must preserve the information pending the court's ruling on whether the claim of privilege or of protection is properly asserted and whether it was waived. As with claims made under Rule 26(b)(5)(A), there may be no ruling if the other parties do not contest the claim.

Subdivision (f). Rule 26(f) is amended to direct the parties to discuss discovery of electronically stored information during their discovery-planning conference. The rule focuses on "issues relating to disclosure or discovery of electronically stored information"; the discussion is not required in cases not involving electronic discovery, and the amendment imposes no additional requirements in those cases. When the parties do anticipate disclosure or discovery of electronically stored information, discussion at the

outset may avoid later difficulties or ease their resolution.

When a case involves discovery of electronically stored information, the issues to be addressed during the Rule 26(f) conference depend on the nature and extent of the contemplated discovery and of the parties' information systems. It may be important for the parties to discuss those systems, and accordingly important for counsel to become familiar with those systems before the conference. With that information, the parties can develop a discovery plan that takes into account the capabilities of their computer systems. In appropriate cases identification of, and early discovery from, individuals with special knowledge of a party's computer systems may be helpful.

The particular issues regarding electronically stored information that deserve attention during the discovery planning stage depend on the specifics of the given case. See *Manual for Complex Litigation (4th)* § 40.25(2) (listing topics for discussion in a proposed order regarding meet-and-confer sessions). For example, the parties may specify the topics for such discovery and the time period for which discovery will be sought. They may identify the various sources of such information within a party's control that should be searched for electronically stored information. They may discuss whether the information is reasonably accessible to the party that has it, including the burden or cost of retrieving and reviewing the information. See Rule 26(b)(2)(B). Rule 26(f)(3) explicitly directs the parties to discuss the form or

forms in which electronically stored information might be produced. The parties may be able to reach agreement on the forms of production, making discovery more efficient. Rule 34(b) is amended to permit a requesting party to specify the form or forms in which it wants electronically stored information produced. If the requesting party does not specify a form, Rule 34(b) directs the responding party to state the forms it intends to use in the production. Early discussion of the forms of production may facilitate the application of Rule 34(b) by allowing the parties to determine what forms of production will meet both parties' needs. Early identification of disputes over the forms of production may help avoid the expense and delay of searches or productions using inappropriate forms.

Rule 26(f) is also amended to direct the parties to discuss any issues regarding preservation of discoverable information during their conference as they develop a discovery plan. This provision applies to all sorts of discoverable information, but can be particularly important with regard to electronically stored information. The volume and dynamic nature of electronically stored information may complicate preservation obligations. The ordinary operation of computers involves both the automatic creation and the automatic deletion or overwriting of certain information. Failure to address preservation issues early in the litigation increases uncertainty and raises a risk of disputes.

The parties' discussion should pay particular attention to the balance between the competing needs

to preserve relevant evidence and to continue routine operations critical to ongoing activities. Complete or broad cessation of a party's routine computer operations could paralyze the party's activities. Cf. *Manual for Complex Litigation (4th)* § 11.422 ("A blanket preservation order may be prohibitively expensive and unduly burdensome for parties dependent on computer systems for their day-to-day operations.") The parties should take account of these considerations in their discussions, with the goal of agreeing on reasonable preservation steps.

The requirement that the parties discuss preservation does not imply that courts should routinely enter preservation orders. A preservation order entered over objections should be narrowly tailored. Ex parte preservation orders should issue only in exceptional circumstances.

Rule 26(f) is also amended to provide that the parties should discuss any issues relating to assertions of privilege or of protection as trial-preparation materials, including whether the parties can facilitate discovery by agreeing on procedures for asserting claims of privilege or protection after production and whether to ask the court to enter an order that includes any agreement the parties reach. The Committee has repeatedly been advised about the discovery difficulties that can result from efforts to guard against waiver of privilege and work-product protection. Frequently parties find it necessary to spend large amounts of time reviewing materials requested through discovery to avoid waiving privilege. These efforts are necessary because materials subject

to a claim of privilege or protection are often difficult to identify. A failure to withhold even one such item may result in an argument that there has been a waiver of privilege as to all other privileged materials on that subject matter. Efforts to avoid the risk of waiver can impose substantial costs on the party producing the material and the time required for the privilege review can substantially delay access for the party seeking discovery.

These problems often become more acute when discovery of electronically stored information is sought. The volume of such data, and the informality that attends use of e-mail and some other types of electronically stored information, may make privilege determinations more difficult, and privilege review correspondingly more expensive and time consuming. Other aspects of electronically stored information pose particular difficulties for privilege review. For example, production may be sought of information automatically included in electronic files but not apparent to the creator or to readers. Computer programs may retain draft language, editorial comments, and other deleted matter (sometimes referred to as “embedded data” or “embedded edits”) in an electronic file but not make them apparent to the reader. Information describing the history, tracking, or management of an electronic file (sometimes called “metadata”) is usually not apparent to the reader viewing a hard copy or a screen image. Whether this information should be produced may be among the topics discussed in the Rule 26(f) conference. If it is, it may need to be reviewed to ensure that no privileged

information is included, further complicating the task of privilege review.

Parties may attempt to minimize these costs and delays by agreeing to protocols that minimize the risk of waiver. They may agree that the responding party will provide certain requested materials for initial examination without waiving any privilege or protection — sometimes known as a “quick peek.” The requesting party then designates the documents it wishes to have actually produced. This designation is the Rule 34 request. The responding party then responds in the usual course, screening only those documents actually requested for formal production and asserting privilege claims as provided in Rule 26(b)(5)(A). On other occasions, parties enter agreements — sometimes called “clawback agreements”— that production without intent to waive privilege or protection should not be a waiver so long as the responding party identifies the documents mistakenly produced, and that the documents should be returned under those circumstances. Other voluntary arrangements may be appropriate depending on the circumstances of each litigation. In most circumstances, a party who receives information under such an arrangement cannot assert that production of the information waived a claim of privilege or of protection as trial-preparation material.

Although these agreements may not be appropriate for all cases, in certain cases they can facilitate prompt and economical discovery by reducing delay before the discovering party obtains access to documents, and by reducing the cost and burden of

review by the producing party. A case-management or other order including such agreements may further facilitate the discovery process. Form 35 is amended to include a report to the court about any agreement regarding protections against inadvertent forfeiture or waiver of privilege or protection that the parties have reached, and Rule 16(b) is amended to recognize that the court may include such an agreement in a case-management or other order. If the parties agree to entry of such an order, their proposal should be included in the report to the court.

Rule 26(b)(5)(B) is added to establish a parallel procedure to assert privilege or protection as trial-preparation material after production, leaving the question of waiver to later determination by the court.

Rule 33. Interrogatories to Parties

* * * * *

(d) Option to Produce Business Records. Where the answer to an interrogatory may be derived or ascertained from the business records, including electronically stored information, of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business

records, including a compilation, abstract or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts, or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

Committee Note

Rule 33(d) is amended to parallel Rule 34(a) by recognizing the importance of electronically stored information. The term “electronically stored information” has the same broad meaning in Rule

33(d) as in Rule 34(a). Much business information is stored only in electronic form; the Rule 33(d) option should be available with respect to such records as well.

Special difficulties may arise in using electronically stored information, either due to its form or because it is dependent on a particular computer system. Rule 33(d) allows a responding party to substitute access to documents or electronically stored information for an answer only if the burden of deriving the answer will be substantially the same for either party. Rule 33(d) states that a party electing to respond to an interrogatory by providing electronically stored information must ensure that the interrogating party can locate and identify it “as readily as can the party served,” and that the responding party must give the interrogating party a “reasonable opportunity to examine, audit, or inspect” the information. Depending on the circumstances, satisfying these provisions with regard to electronically stored information may require the responding party to provide some combination of technical support, information on application software, or other assistance. The key question is whether such support enables the interrogating party to derive or ascertain the answer from the electronically stored information as readily as the responding party. A party that wishes to invoke Rule 33(d) by specifying electronically stored information may be required to provide direct access to its electronic information system, but only if that is necessary to afford the requesting party an adequate opportunity to derive or ascertain the answer to the interrogatory. In that situation, the responding

party's need to protect sensitive interests of confidentiality or privacy may mean that it must derive or ascertain and provide the answer itself rather than invoke Rule 33(d).

Rule 34. Production of Documents, Electronically Stored Information, and Things and Entry Upon Land for Inspection and Other Purposes

(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 requestor's behalf, to inspect, copy, test, or sample any designated documents or electronically stored information — including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained — translated, if necessary, by the respondent into reasonably usable form, or to inspect, copy, test, or sample any designated 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; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

(b) Procedure. The request shall set forth, either by individual item or by category, the items to be inspected, and describe each with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. The request may specify the form or forms in which electronically stored information is to be produced. Without leave of court

or written stipulation, a request may not be served before the time specified in Rule 26(d).

The party upon whom the request is served shall serve a written response within 30 days after the service of the request. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties, subject to Rule 29. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, including an objection to the requested form or forms for producing electronically stored information, stating the reasons for the objection. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. If objection is made to the requested form or forms for producing

electronically stored information — or if no form was specified in the request — the responding party must state the form or forms it intends to use. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

Unless the parties otherwise agree, or the court otherwise orders:

- (i)** 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;
- (ii)** if a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained

or in a form or forms that are reasonably usable;
and

(iii) a party need not produce the same electronically stored information in more than one form.

* * * * *

Committee Note

Subdivision (a). As originally adopted, Rule 34 focused on discovery of “documents” and “things.” In 1970, Rule 34(a) was amended to include discovery of data compilations, anticipating that the use of computerized information would increase. Since then, the growth in electronically stored information and in the variety of systems for creating and storing such information has been dramatic. Lawyers and judges interpreted the term “documents” to include electronically stored information because it was obviously improper to allow a party to evade discovery obligations on the basis that the label had not kept pace with changes in information technology. But it has become increasingly difficult to say that all forms of electronically stored information, many dynamic in nature, fit within the traditional concept of a “document.” Electronically stored information may exist in dynamic databases and other forms far different from fixed expression on paper. Rule 34(a) is amended to confirm that discovery of electronically

stored information stands on equal footing with discovery of paper documents. The change clarifies that Rule 34 applies to information that is fixed in a tangible form and to information that is stored in a medium from which it can be retrieved and examined. At the same time, a Rule 34 request for production of “documents” should be understood to encompass, and the response should include, electronically stored information unless discovery in the action has clearly distinguished between electronically stored information and “documents.”

Discoverable information often exists in both paper and electronic form, and the same or similar information might exist in both. The items listed in Rule 34(a) show different ways in which information may be recorded or stored. Images, for example, might be hard-copy documents or electronically stored information. The wide variety of computer systems currently in use, and the rapidity of technological change, counsel against a limiting or precise definition of electronically stored information. Rule 34(a)(1) is expansive and includes any type of information that is stored electronically. A common example often sought in discovery is electronic communications, such as e-mail. The rule covers — either as documents or as electronically stored information — information “stored in any medium,” to encompass future developments in computer technology. Rule 34(a)(1) is intended to be broad enough to cover all current types of computer-based information, and flexible enough to encompass future changes and developments.

References elsewhere in the rules to “electronically stored information” should be understood to invoke this expansive approach. A companion change is made to Rule 33(d), making it explicit that parties choosing to respond to an interrogatory by permitting access to responsive records may do so by providing access to electronically stored information. More generally, the term used in Rule 34(a)(1) appears in a number of other amendments, such as those to Rules 26(a)(1), 26(b)(2), 26(b)(5)(B), 26(f), 34(b), 37(f), and 45. In each of these rules, electronically stored information has the same broad meaning it has under Rule 34(a)(1). References to “documents” appear in discovery rules that are not amended, including Rules 30(f), 36(a), and 37(c)(2). These references should be interpreted to include electronically stored information as circumstances warrant.

The term “electronically stored information” is broad, but whether material that falls within this term should be produced, and in what form, are separate questions that must be addressed under Rules 26(b), 26(c), and 34(b).

The Rule 34(a) requirement that, if necessary, a party producing electronically stored information translate it into reasonably usable form does not address the issue of translating from one human language to another. *See In re Puerto Rico Elect. Power Auth.*, 687 F.2d 501, 504-510 (1st Cir. 1989).

Rule 34(a)(1) is also amended to make clear that parties may request an opportunity to test or sample

materials sought under the rule in addition to inspecting and copying them. That opportunity may be important for both electronically stored information and hard-copy materials. The current rule is not clear that such testing or sampling is authorized; the amendment expressly permits it. As with any other form of discovery, issues of burden and intrusiveness raised by requests to test or sample can be addressed under Rules 26(b)(2) and 26(c). Inspection or testing of certain types of electronically stored information or of a responding party's electronic information system may raise issues of confidentiality or privacy. The addition of testing and sampling to Rule 34(a) with regard to documents and electronically stored information is not meant to create a routine right of direct access to a party's electronic information system, although such access might be justified in some circumstances. Courts should guard against undue intrusiveness resulting from inspecting or testing such systems.

Rule 34(a)(1) is further amended to make clear that tangible things must — like documents and land sought to be examined — be designated in the request.

Subdivision (b). Rule 34(b) provides that a party must produce documents as they are kept in the usual course of business or must organize and label them to correspond with the categories in the discovery request. The production of electronically stored information should be subject to comparable requirements to protect against deliberate or inadvertent production in ways that raise unnecessary obstacles for the requesting party. Rule 34(b) is

amended to ensure similar protection for electronically stored information.

The amendment to Rule 34(b) permits the requesting party to designate the form or forms in which it wants electronically stored information produced. The form of production is more important to the exchange of electronically stored information than of hard-copy materials, although a party might specify hard copy as the requested form. Specification of the desired form or forms may facilitate the orderly, efficient, and cost-effective discovery of electronically stored information. The rule recognizes that different forms of production may be appropriate for different types of electronically stored information. Using current technology, for example, a party might be called upon to produce word processing documents, e-mail messages, electronic spreadsheets, different image or sound files, and material from databases. Requiring that such diverse types of electronically stored information all be produced in the same form could prove impossible, and even if possible could increase the cost and burdens of producing and using the information. The rule therefore provides that the requesting party may ask for different forms of production for different types of electronically stored information.

The rule does not require that the requesting party choose a form or forms of production. The requesting party may not have a preference. In some cases, the requesting party may not know what form the producing party uses to maintain its electronically stored information, although Rule 26(f)(3) is amended

to call for discussion of the form of production in the parties' pre-discovery conference.

The responding party also is involved in determining the form of production. In the written response to the production request that Rule 34 requires, the responding party must state the form it intends to use for producing electronically stored information if the requesting party does not specify a form or if the responding party objects to a form that the requesting party specifies. Stating the intended form before the production occurs may permit the parties to identify and seek to resolve disputes before the expense and work of the production occurs. A party that responds to a discovery request by simply producing electronically stored information in a form of its choice, without identifying that form in advance of the production in the response required by Rule 34(b), runs a risk that the requesting party can show that the produced form is not reasonably usable and that it is entitled to production of some or all of the information in an additional form. Additional time might be required to permit a responding party to assess the appropriate form or forms of production.

If the requesting party is not satisfied with the form stated by the responding party, or if the responding party has objected to the form specified by the requesting party, the parties must meet and confer under Rule 37(a)(2)(B) in an effort to resolve the matter before the requesting party can file a motion to compel. If they cannot agree and the court resolves the dispute, the court is not limited to the forms initially chosen by the requesting party, stated by the

responding party, or specified in this rule for situations in which there is no court order or party agreement.

If the form of production is not specified by party agreement or court order, the responding party must produce electronically stored information either in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable. Rule 34(a) requires that, if necessary, a responding party “translate” information it produces into a “reasonably usable” form. Under some circumstances, the responding party may need to provide some reasonable amount of technical support, information on application software, or other reasonable assistance to enable the requesting party to use the information. The rule does not require a party to produce electronically stored information in the form in which it is ordinarily maintained, as long as it is produced in a reasonably usable form. But the option to produce in a reasonably usable form does not mean that a responding party is free to convert electronically stored information from the form in which it is ordinarily maintained to a different form that makes it more difficult or burdensome for the requesting party to use the information efficiently in the litigation. If the responding party ordinarily maintains the information it is producing in a way that makes it searchable by electronic means, the information should not be produced in a form that removes or significantly degrades this feature.

Some electronically stored information may be ordinarily maintained in a form that is not reasonably

usable by any party. One example is “legacy” data that can be used only by superseded systems. The questions whether a producing party should be required to convert such information to a more usable form, or should be required to produce it at all, should be addressed under Rule 26(b)(2)(B).

Whether or not the requesting party specified the form of production, Rule 34(b) provides that the same electronically stored information ordinarily need be produced in only one form.

Rule 37. Failure to Make Disclosures or Cooperate in Discovery; Sanctions

* * * * *

(f) Electronically Stored Information. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

* * * * *

Committee Note

Subdivision (f). Subdivision (f) is new. It focuses on a distinctive feature of computer operations, the routine alteration and deletion of information that attends ordinary use. Many steps essential to computer operation may alter or destroy information, for reasons that have nothing to do with how that information might relate to litigation. As a result, the ordinary operation of computer systems creates a risk that a party may lose potentially discoverable information without culpable conduct on its part. Under Rule 37(f), absent exceptional circumstances, sanctions cannot be imposed for loss of electronically stored information resulting from the routine, good-faith operation of an electronic information system.

Rule 37(f) applies only to information lost due to the “routine operation of an electronic information system” — the ways in which such systems are generally designed, programmed, and implemented to meet the party’s technical and business needs. The “routine operation” of computer systems includes the alteration and overwriting of information, often without the operator’s specific direction or awareness, a feature with no direct counterpart in hard-copy documents. Such features are essential to the operation of electronic information systems.

Rule 37(f) applies to information lost due to the routine operation of an information system only if the operation was in good faith. Good faith in the routine operation of an information system may involve a

party's intervention to modify or suspend certain features of that routine operation to prevent the loss of information, if that information is subject to a preservation obligation. A preservation obligation may arise from many sources, including common law, statutes, regulations, or a court order in the case. The good faith requirement of Rule 37(f) means that a party is not permitted to exploit the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve. When a party is under a duty to preserve information because of pending or reasonably anticipated litigation, intervention in the routine operation of an information system is one aspect of what is often called a "litigation hold." Among the factors that bear on a party's good faith in the routine operation of an information system are the steps the party took to comply with a court order in the case or party agreement requiring preservation of specific electronically stored information.

Whether good faith would call for steps to prevent the loss of information on sources that the party believes are not reasonably accessible under Rule 26(b)(2) depends on the circumstances of each case. One factor is whether the party reasonably believes that the information on such sources is likely to be discoverable and not available from reasonably accessible sources.

The protection provided by Rule 37(f) applies only to sanctions "under these rules." It does not

affect other sources of authority to impose sanctions or rules of professional responsibility.

This rule restricts the imposition of “sanctions.” It does not prevent a court from making the kinds of adjustments frequently used in managing discovery if a party is unable to provide relevant responsive information. For example, a court could order the responding party to produce an additional witness for deposition, respond to additional interrogatories, or make similar attempts to provide substitutes or alternatives for some or all of the lost information.

Rule 45. Subpoena

(a) Form; Issuance.

(1) Every subpoena shall

(A) state the name of the court from which it is issued; and

(B) state the title of the action, the name of the court in which it is pending, and its civil action number; and

(C) command each person to whom it is directed to attend and give testimony or to produce and permit inspection, copying, testing,

or sampling of designated books, documents, electronically stored information, or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified; and

(D) set forth the text of subdivisions (c) and (d) of this rule.

A command to produce evidence or to permit inspection, copying, testing, or sampling may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(2) A subpoena must issue as follows:

* * * * *

(C) for production, inspection, copying, testing, or sampling, if separate from a subpoena

commanding a person's attendance, from the court for the district where the production or inspection is to be made.

(3) The clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. An attorney as officer of the court may also issue and sign a subpoena on behalf of

(A) a court in which the attorney is authorized to practice; or

(B) a court for a district in which a deposition or production is compelled by the subpoena, if the deposition or production pertains to an action pending in a court in which the attorney is authorized to practice.

(b) Service.

(1) A subpoena may be served by any person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and, if the person's attendance is commanded, by tendering to that person the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the United States or an officer or agency thereof, fees and mileage need not be tendered. Prior notice of any commanded production of documents and things or inspection of premises before trial shall be served on each party in the manner prescribed by Rule 5(b).

(2) Subject to the provisions of clause (ii) of subparagraph (c)(3)(A) of this rule, a subpoena may be served at any place within the district of the

court by which it is issued, or at any place without the district that is within 100 miles of the place of the deposition, hearing, trial, production, inspection, copying, testing, or sampling specified in the subpoena or at any place within the state where a state statute or rule of court permits service of a subpoena issued by a state court of general jurisdiction sitting in the place of the deposition, hearing, trial, production, inspection, copying, testing, or sampling specified in the subpoena. When a statute of the United States provides therefor, the court upon proper application and cause shown may authorize the service of a subpoena at any other place. A subpoena directed to a witness in a foreign country who is a national or resident of the United States shall issue under

the circumstances and in the manner and be served as provided in Title 28, U.S.C. § 1783.

(3) Proof of service when necessary shall be made by filing with the clerk of the court by which the subpoena is issued a statement of the date and manner of service and of the names of the persons served, certified by the person who made the service.

(c) Protection of Persons Subject to Subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not

limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection, copying, testing, or sampling of designated electronically stored information, books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection, copying, testing, or sampling may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the

subpoena written objection to producing any or all of the designated materials or inspection of the premises — or to producing electronically stored information in the form or forms requested. If objection is made, the party serving the subpoena shall not be entitled to inspect, copy, test, or sample the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production, inspection, copying, testing, or sampling. Such an order to compel shall protect any person who is not a party or an officer of a party from significant expense resulting from the

inspection, copying, testing, or sampling commanded.

(3)(A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held;

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a

person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) Duties in Responding to Subpoena.

(1) (A) A person responding to a subpoena to produce documents 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 demand.

(B) If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena must produce the information in a form or forms in which the person ordinarily maintains it or in a form or forms that are reasonably usable.

(C) A person responding to a subpoena need not produce the same electronically stored information in more than one form.

(D) A person responding to a subpoena need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information sought is not reasonably accessible

because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) (A) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial-preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(B) If information is produced in response to a subpoena that is subject to a claim of privilege or of protection as trial-preparation material, the

person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The person who produced the information must preserve the information until the claim is resolved.

(e) Contempt. Failure of any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from

which the subpoena issued. An adequate cause for failure to obey exists when a subpoena purports to require a nonparty to attend or produce at a place not within the limits provided by clause (ii) of subparagraph (c)(3)(A).

Committee Note

Rule 45 is amended to conform the provisions for subpoenas to changes in other discovery rules, largely related to discovery of electronically stored information. Rule 34 is amended to provide in greater detail for the production of electronically stored information. Rule 45(a)(1)(C) is amended to recognize that electronically stored information, as defined in Rule 34(a), can also be sought by subpoena. Like Rule 34(b), Rule 45(a)(1) is amended to provide that the subpoena can designate a form or forms for production of electronic data. Rule 45(c)(2) is amended, like Rule 34(b), to authorize the person served with a subpoena to object to the requested form or forms. In addition, as under Rule 34(b), Rule 45(d)(1)(B) is amended to provide that if the subpoena does not specify the form or forms for electronically stored information, the person served with the subpoena must produce electronically stored information in a form or forms in which it is usually maintained or in a form or forms that are reasonably usable. Rule 45(d)(1)(C) is added to provide that the person producing electronically stored information should not have to produce the same

information in more than one form unless so ordered by the court for good cause.

As with discovery of electronically stored information from parties, complying with a subpoena for such information may impose burdens on the responding person. Rule 45(c) provides protection against undue impositions on nonparties. For example, Rule 45(c)(1) directs that a party serving a subpoena “shall take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena,” and Rule 45(c)(2)(B) permits the person served with the subpoena to object to it and directs that an order requiring compliance “shall protect a person who is neither a party nor a party’s officer from significant expense resulting from” compliance. Rule 45(d)(1)(D) is added to provide that the responding person need not provide discovery of electronically stored information from sources the party identifies as not reasonably accessible, unless the court orders such discovery for good cause, considering the limitations of Rule 26(b)(2)(C), on terms that protect a nonparty against significant expense. A parallel provision is added to Rule 26(b)(2).

Rule 45(a)(1)(B) is also amended, as is Rule 34(a), to provide that a subpoena is available to permit testing and sampling as well as inspection and copying. As in Rule 34, this change recognizes that on occasion the opportunity to perform testing or sampling may be important, both for documents and for electronically stored information. Because testing or sampling may present particular issues of burden or intrusion for the person served with the subpoena,

however, the protective provisions of Rule 45(c) should be enforced with vigilance when such demands are made. Inspection or testing of certain types of electronically stored information or of a person's electronic information system may raise issues of confidentiality or privacy. The addition of sampling and testing to Rule 45(a) with regard to documents and electronically stored information is not meant to create a routine right of direct access to a person's electronic information system, although such access might be justified in some circumstances. Courts should guard against undue intrusiveness resulting from inspecting or testing such systems.

Rule 45(d)(2) is amended, as is Rule 26(b)(5), to add a procedure for assertion of privilege or of protection as trial-preparation materials after production. The receiving party may submit the information to the court for resolution of the privilege claim, as under Rule 26(b)(5)(B).

Other minor amendments are made to conform the rule to the changes described above.

Form 35. Report of Parties' Planning Meeting

* * * * *

3. Discovery Plan. The parties jointly propose to the court the following discovery plan: [Use separate

paragraphs or subparagraphs as necessary if parties disagree.]

Discovery will be needed on the following subjects: (brief description of subjects on which discovery will be needed)

Disclosure or discovery of electronically stored information should be handled as follows: (brief description of parties' proposals)

The parties have agreed to an order regarding claims of privilege or of protection as trial-preparation material asserted after production, as follows: (brief description of provisions of proposed order).

All discovery commenced in time to be completed by _____ (date) _____. [Discovery on ____ (issue for early discovery) _____ to be completed by _____ (date) _____.]

Quick Guide to the Amended Federal Rules of Civil Procedure – Effective December 1, 2006

Overview

After at least five years of careful consideration, Amendments to the Federal Rules of Civil Procedure will become effective December 1, 2006, barring the unlikely event of congressional intervention. The catalyst for the Amendments is Electronically Stored Information (“ESI”) such as email, application files, and the like (often referred to as electronic data, EDD, edata, etc.). Historically, Courts have applied the existing Rules to ESI, resulting in varying interpretations. The Amended Rules and comments thereto will address the following:

Early Meeting of Counsel and Meeting with the Court

Rule 26(f) is amended to require that the parties discuss:

- **Litigation Hold** - Any issues relating to preserving discoverable information – 26(f)
- **Form of Production** - Issues relating to disclosure or discovery of ESI, including the form or forms in which it should be produced – 26(f)(3)
- **Clawback & Quick Peek Agreements** - Issues relating to claims of privilege or protection as trial-preparation material, including whether to include their agreement in an order – 26(f)(4)

Form 35, the report to the Court regarding the 26(f) meeting, is amended to include the topics above, and Rule 16 is amended to include discussion with the Court of these same topics, which may result in an order addressing these issues.

Interrogatories

Rule 33 is amended to allow a responding party to direct the requesting party to ESI in response to an interrogatory **IF** the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served.

- Be aware that such a response may also require the responding party to provide some combination of technical support, information on application software, or other assistance, possibly including access to their ESI network.

Requests for Production

Rule 34 allows a requesting party to specify the form or forms in which ESI is to be produced. The responding party may object to the requested form of production or if no form of production is stated, the responding party **MUST** state the form or forms it intends to use. If the request does not specify form(s) of production, the responding party must produce ESI as ordinarily maintained or in reasonably usable form(s).

- Be aware that the Amended Rule allows a party to “test or sample”, including ESI, without a showing of cause, and may also allow access to the producing party’s network.

Responding to Requests for ESI

Rule 26(b)(2) is amended to provide a Two-Tier Approach to discovery of ESI:

- **Tier 1:** Produce accessible material, subject to privilege or protection
- **Tier 2:** Identify inaccessible material, and do not produce

Under the Amended Rule, a party need not provide discovery of ESI from sources identified as not reasonably accessible because of undue burden or cost. If challenged, the Party from whom discovery is sought must show that the information is not reasonably accessible. The Court may nonetheless order discovery from such sources.

Asserting Claims of Privilege After Production

Amended Rule 26(b)(5)(b), referred to as the Clawback provision, provides a default procedure for retrieval of inadvertently produced ESI that may be privileged or otherwise protected. This is a procedural mechanism only, and does **NOT** address the substantive interpretation of law regarding evidence, privilege and waiver.

The default procedure includes: the party claiming the privilege/protection must identify the privileged/protected items, including the basis for the claim; the receiving party must return, sequester or destroy all copies and not disclose the information until the claim is resolved; the receiving party may promptly present the information to the Court for determination of the claim; and, if the receiving party previously disclosed the protected items, the receiving party must take reasonable steps to retrieve the items.

Subpoenas

Rule 45 is amended to provide to non-parties, brought into the discovery arena through subpoena, the same procedures and protections available for party discovery under Rules 26 and 34.

Protection Against Sanction for Routine Good Faith Operation of a Document Retention/Destruction Policy

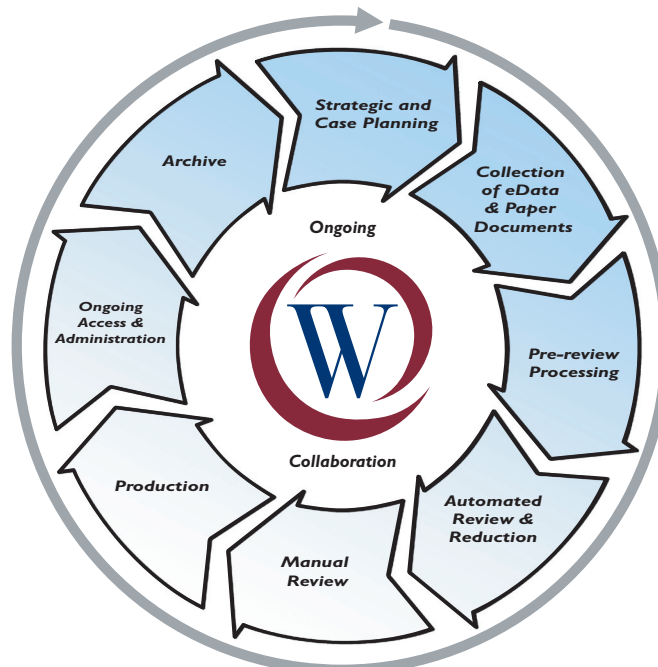
Rule 37 (f) is amended to recognize the difficulties that parties face in managing the volume of ESI in their operations, and also to recognize the need for document retention/destruction policies. The Amended Rule 37(f), referred to as the Safe Harbor provision, provides that absent exceptional circumstances, a court may not impose sanctions for failing to provide ESI lost as a result of the routine, good-faith operation of an electronic information system, which includes vendors used by the party.

Presented by the Whitmont Center for Legal Education. For additional information regarding this topic or regarding our Continuing Legal Education program, please contact: John Breen, jbreen@whitmont.com - (949) 296-1243; Art Skaran, askaran@whitmont.com - (206) 386-5820; or contact your local Whitmont office.

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The Discovery Lifecycle



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
LAURA ZUBULAKE, :
 :
 Plaintiff, : OPINION AND ORDER
 :
 -against- : 02 Civ. 1243 (SAS)
 :
 UBS WARBURG LLC, UBS WARBURG, and :
 UBS AG, :
 :
 Defendants. :
 :
-----X
SHIRA A. SCHEINDLIN, U.S.D.J.:

The world was a far different place in 1849, when Henry David Thoreau opined (in an admittedly broader context) that “[t]he process of discovery is very simple.”¹ That hopeful maxim has given way to rapid technological advances, requiring new solutions to old problems. The issue presented here is one such problem, recast in light of current technology: To what extent is inaccessible electronic data discoverable, and who should pay for its production?

I. INTRODUCTION

The Supreme Court recently reiterated that our “simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and

¹ Henry David Thoreau, A Week on the Concord and Merrimack Rivers (1849).

issues and to dispose of unmeritorious claims.”² Thus, it is now beyond dispute that “[b]road discovery is a cornerstone of the litigation process contemplated by the Federal Rules of Civil Procedure.”³ The Rules contemplate a minimal burden to bringing a claim; that claim is then fleshed out through vigorous and expansive discovery.⁴

In one context, however, the reliance on broad discovery has hit a roadblock. As individuals and corporations increasingly do business electronically⁵ -- using computers to create and store documents, make deals, and exchange e-mails -- the universe of discoverable material has expanded exponentially.⁶ The more information there is to discover, the more expensive it is to discover all the relevant information until, in the end, “discovery is not just about uncovering the

² Swierkiewicz v. Sorema, N.A., 534 U.S. 506, 512 (2002).

³ Jones v. Goord, No. 95 Civ. 8026, 2002 WL 1007614, at *1 (S.D.N.Y. May 16, 2002).

⁴ See Hickman v. Taylor, 329 U.S. 495, 500-01 (1947).

⁵ See Wendy R. Liebowitz, Digital Discovery Starts to Work, Nat’l L.J., Nov. 4, 2002, at 4 (reporting that in 1999, ninety-three percent of all information generated was in digital form).

⁶ Rowe Entm’t, Inc. v. William Morris Agency, Inc., 205 F.R.D. 421, 429 (S.D.N.Y. 2002) (explaining that electronic data is so voluminous because, unlike paper documents, “the costs of storage are virtually nil. Information is retained not because it is expected to be used, but because there is no compelling reason to discard it”), aff’d, 2002 WL 975713 (S.D.N.Y. May 9, 2002).

truth, but also about how much of the truth the parties can afford to disinter.”⁷

This case provides a textbook example of the difficulty of balancing the competing needs of broad discovery and manageable costs. Laura Zubulake is suing UBS Warburg LLC, UBS Warburg, and UBS AG (collectively, “UBS” or the “Firm”) under Federal, State and City law for gender discrimination and illegal retaliation. Zubulake’s case is certainly not frivolous⁸ and if she prevails, her damages may be substantial.⁹ She contends that key evidence is located in various e-mails exchanged among UBS employees that now exist only on backup tapes and perhaps other archived media. According to UBS, restoring those e-mails would cost approximately \$175,000.00, exclusive of attorney time in

⁷ Rowe, 205 F.R.D. at 423.

⁸ Indeed, Zubulake has already produced a sort of “smoking gun”: an e-mail suggesting that she be fired “ASAP” after her EEOC charge was filed, in part so that she would not be eligible for year-end bonuses. See 8/21/01 e-mail from Mike Davies to Rose Tong (“8/21/01 e-Mail”), Ex. G to the 3/17/03 Affirmation of James A. Batson, counsel for Zubulake (“Batson Aff.”).

⁹ At the time she was terminated, Zubulake’s annual salary was approximately \$500,000. Were she to receive full back pay and front pay, Zubulake estimates that she may be entitled to as much as \$13,000,000 in damages, not including any punitive damages or attorney’s fees. See Memorandum of Law in Support of Plaintiff’s Motion for an Order Compelling Defendants to Produce E-mails, Permitting Disclosure of Deposition Transcript and Directing Defendants to Bear Certain Expenses (“Pl. Mem.”) at 2-3.

reviewing the e-mails.¹⁰ Zubulake now moves for an order compelling UBS to produce those e-mails at its expense.¹¹

II. BACKGROUND

A. Zubulake's Lawsuit

UBS hired Zubulake on August 23, 1999, as a director and senior salesperson on its U.S. Asian Equities Sales Desk (the "Desk"), where she reported to Dominic Vail, the Desk's manager. At the time she was hired, Zubulake was told that she would be considered for Vail's position if and when it became vacant.

In December 2000, Vail indeed left his position to move to the Firm's London office. But Zubulake was not considered for his position, and the Firm instead hired Matthew Chapin as director of the Desk. Zubulake alleges that from the outset Chapin treated her differently than the other members of the Desk, all of whom were male. In particular, Chapin "undermined Ms. Zubulake's ability to perform her job by, inter alia: (a) ridiculing and belittling her in front of co-workers; (b) excluding her from work-related outings with male co-workers and clients; (c) making sexist remarks in her presence; and (d)

¹⁰ See 3/26/03 Oral Argument Transcript ("3/26/03 Tr.") at 14, 44-45.

¹¹ Zubulake also moves for an order (1) directing UBS to pay for the cost of deposing Christopher Behny, UBS's information technology expert and (2) permitting her to disclose the transcript of Behny's deposition to certain securities regulators. Those motions are denied in a separate Opinion and Order issued today.

isolating her from the other senior salespersons on the Desk by seating her apart from them.”¹² No such actions were taken against any of Zubulake’s male co-workers.

Zubulake ultimately responded by filing a Charge of (gender) Discrimination with the EEOC on August 16, 2001. On October 9, 2001, Zubulake was fired with two weeks’ notice. On February 15, 2002, Zubulake filed the instant action, suing for sex discrimination and retaliation under Title VII, the New York State Human Rights Law, and the Administrative Code of the City of New York. UBS timely answered on March 12, 2002, denying the allegations. UBS’s argument is, in essence, that Chapin’s conduct was not unlawfully discriminatory because he treated everyone equally badly. On the one hand, UBS points to evidence that Chapin’s anti-social behavior was not limited to women: a former employee made allegations of national origin discrimination against Chapin, and a number of male employees on the Desk also complained about him. On the other hand, Chapin was responsible for hiring three new females employees to the Desk.¹³

¹² Pl. Mem. at 2.

¹³ See Defendants’ Memorandum of Law in Opposition to Plaintiff’s Motion for an Order Compelling Defendants to Produce E-Mails, Permitting Disclosure of Deposition Transcript and Directing Defendants to Bear Certain Expenses (“Def. Mem.”) at 2.

B. The Discovery Dispute

Discovery in this action commenced on or about June 3, 2002, when Zubulake served UBS with her first document request. At issue here is request number twenty-eight, for "[a]ll documents concerning any communication by or between UBS employees concerning Plaintiff."¹⁴ The term document in Zubulake's request "includ[es], without limitation, electronic or computerized data compilations." On July 8, 2002, UBS responded by producing approximately 350 pages of documents, including approximately 100 pages of e-mails. UBS also objected to a substantial portion of Zubulake's requests.¹⁵

On September 12, 2002 -- after an exchange of angry letters¹⁶ and a conference before United States Magistrate Judge Gabriel W. Gorenstein -- the parties reached an agreement (the "9/12/02 Agreement"). With respect to document request twenty-eight, the parties reached the following agreement, in relevant part:

Defendants will [] ask UBS about how to retrieve e-mails that are saved in the firm's computer system and will produce responsive e-mails if retrieval is

¹⁴ Plaintiff's First Request for Production of Documents ¶ 28, Ex. E to the Declaration of Kevin B. Leblang, counsel to UBS ("Leblang Dec.").

¹⁵ See Defendants' Response to Plaintiff's First Request for Production of Documents, Ex. F to the Leblang Dec.

¹⁶ See Exs. G and H to the Leblang Dec.

possible and Plaintiff names a few individuals.¹⁷

Pursuant to the 9/12/02 Agreement, UBS agreed unconditionally to produce responsive e-mails from the accounts of five individuals named by Zubulake: Matthew Chapin, Rose Tong (a human relations representation who was assigned to handle issues concerning Zubulake), Vinay Datta (a co-worker on the Desk), Andrew Clarke (another co-worker on the Desk), and Jeremy Hardisty (Chapin's supervisor and the individual to whom Zubulake originally complained about Chapin). UBS was to produce such e-mails sent between August 1999 (when Zubulake was hired) and December 2001 (one month after her termination), to the extent possible.

UBS, however, produced no additional e-mails and insisted that its initial production (the 100 pages of e-mails) was complete. As UBS's opposition to the instant motion makes clear -- although it remains unsaid -- UBS never searched for responsive e-mails on any of its backup tapes. To the contrary, UBS informed Zubulake that the cost of producing e-mails on backup tapes would be prohibitive (estimated at the time at approximately \$300,000.00).¹⁸

Zubulake, believing that the 9/12/02 Agreement included

¹⁷ 9/18/02 Letter from James A. Batson to Kevin B. Leblang, Ex. I to the Leblang Dec. (emphasis added). See also 9/25/02 Letter from Kevin B. Leblang to James A. Batson, Ex. K to the Leblang Dec. (confirming the above as the parties' agreement).

¹⁸ See 3/26/03 Tr. at 14 (Statement of Kevin B. Leblang).

production of e-mails from backup tapes, objected to UBS's non-production. In fact, Zubulake knew that there were additional responsive e-mails that UBS had failed to produce because she herself had produced approximately 450 pages of e-mail correspondence. Clearly, numerous responsive e-mails had been created and deleted¹⁹ at UBS, and Zubulake wanted them.

On December 2, 2002, the parties again appeared before Judge Gorenstein, who ordered UBS to produce for deposition a person with knowledge of UBS's e-mail retention policies in an effort to determine whether the backup tapes contained the deleted e-mails and the burden of producing them. In response, UBS produced Christopher Behny, Manager of Global Messaging, who was deposed on January 14, 2003. Mr. Behny testified to UBS's e-mail backup protocol, and also to the cost of restoring the relevant data.

¹⁹ The term "deleted" is sticky in the context of electronic data. "'Deleting' a file does not actually erase that data from the computer's storage devices. Rather, it simply finds the data's entry in the disk directory and changes it to a 'not used' status -- thus permitting the computer to write over the 'deleted' data. Until the computer writes over the 'deleted' data, however, it may be recovered by searching the disk itself rather than the disk's directory. Accordingly, many files are recoverable long after they have been deleted -- even if neither the computer user nor the computer itself is aware of their existence. Such data is referred to as 'residual data.'" Shira A. Scheindlin & Jeffrey Rabkin, Electronic Discovery in Federal Civil Litigation: Is Rule 34 Up to the Task?, 41 B.C. L. Rev. 327, 337 (2000) (footnotes omitted). Deleted data may also exist because it was backed up before it was deleted. Thus, it may reside on backup tapes or similar media. Unless otherwise noted, I will use the term "deleted" data to mean residual data, and will refer to backed-up data as "backup tapes."

C. UBS's E-Mail Backup System

In the first instance, the parties agree that e-mail was an important means of communication at UBS during the relevant time period. Each salesperson, including the salespeople on the Desk, received approximately 200 e-mails each day.²⁰ Given this volume, and because Securities and Exchange Commission regulations require it,²¹ UBS implemented extensive e-mail backup and preservation protocols. In particular, e-mails were backed up in two distinct ways: on backup tapes and on optical disks.

1. Backup Tape Storage

UBS employees used a program called HP OpenMail, manufactured by Hewlett-Packard,²² for all work-related e-mail

²⁰ See 3/26/03 Tr. at 14 (Statement of Kevin B. Leblang).

²¹ SEC Rule 17a-4, promulgated pursuant to Section 17(a) of the Securities Exchange Act of 1934, provides in pertinent part:

Every [] broker and dealer shall preserve for a period of not less than 3 years, the first two years in an accessible place . . . [o]riginals of all communications received and copies of all communications sent by such member, broker or dealer (including inter-office memoranda and communications) relating to his business as such.

17 C.F.R. § 240.17a-4(b) and (4).

²² Hewlett-Packard has since discontinued sales of HP OpenMail, although the company still supports the product and permits existing customers to purchase new licenses. See <http://www.openmail.com/>.

communications.²³ With limited exceptions, all e-mails sent or received by any UBS employee are stored onto backup tapes. To do so, UBS employs a program called Veritas NetBackup,²⁴ which creates a "snapshot" of all e-mails that exist on a given server at the time the backup is taken. Except for scheduling the backups and physically inserting the tapes into the machines, the backup process is entirely automated.

UBS used the same backup protocol during the entire relevant time period, from 1999 through 2001. Using NetBackup, UBS backed up its e-mails at three intervals: (1) daily, at the end of each day, (2) weekly, on Friday nights, and (3) monthly, on the last business day of the month. Nightly backup tapes were kept for twenty working days, weekly tapes for one year, and monthly tapes for three years. After the relevant time period elapsed, the tapes were recycled.²⁵

²³ See 1/14/03 Deposition of Christopher Behny ("Behny Dep."), Ex. M to the Leblang Dec. Unless otherwise noted, all information about UBS's e-mail systems is culled from the Behny Dep. Because that document has been sealed, repeated pin cites are unnecessary and thus omitted.

²⁴ See generally VERITAS NetBackup Release 4.5 Technical Overview, available at <http://www.veritas.com>.

²⁵ Of course, periodic backups such as UBS's necessarily entails the loss of certain e-mails. Because backups were conducted only intermittently, some e-mails that were deleted from the server were never backed up. For example, if a user both received and deleted an e-mail on the same day, it would not reside on any backup tape. Similarly, an e-mail received and deleted within the span of one month would not exist on the monthly backup, although it might exist on a weekly or daily backup, if those tapes still exist. As explained below, if an e-

Once e-mails have been stored onto backup tapes, the restoration process is lengthy. Each backup tape routinely takes approximately five days to restore, although resort to an outside vendor would speed up the process (at greatly enhanced costs, of course). Because each tape represents a snapshot of one server's hard drive in a given month, each server/month must be restored separately onto a hard drive. Then, a program called Double Mail is used to extract a particular individual's e-mail file. That mail file is then exported into a Microsoft Outlook data file, which in turn can be opened in Microsoft Outlook, a common e-mail application. A user could then browse through the mail file and sort the mail by recipient, date or subject, or search for key words in the body of the e-mail.

Fortunately, NetBackup also created indexes of each backup tape. Thus, Behny was able to search through the tapes from the relevant time period and determine that the e-mail files responsive to Zubulake's requests are contained on a total of ninety-four backup tapes.

mail was to or from a "registered trader," however, it may have been stored on UBS's optical storage devices.

2. Optical Disk Storage

In addition to the e-mail backup tapes, UBS also stored certain e-mails on optical disks. For certain "registered traders," probably including the members of the Desk,²⁶ a copy of all e-mails sent to or received from outside sources (i.e., e-mails from a "registered trader" at UBS to someone at another entity, or vice versa) was simultaneously written onto a series of optical disks. Internal e-mails, however, were not stored on this system.

UBS has retained each optical disk used since the system was put into place in mid-1998. Moreover, the optical disks are neither erasable nor rewritable. Thus, UBS has every e-mail sent or received by registered traders (except internal e-mails) during the period of Zubulake's employment, even if the e-

²⁶ In using the phrase "registered trader," Behny referred to individuals designated to have their e-mails archived onto optical disks. Although Behny could not be certain that such a designation corresponds to Series 7 or Series 63 broker-dealers, he indicated that examples of registered traders include "equity research people, [and] equity traders type people." See Behny Dep. at 35. He admitted that members of the Desk were probably "registered" in that sense:

- Q: Do you know whether the Asian Equities Sales desk was registered to keep a secondary copy in 1999?
- A: I can't say conclusively.
- Q: Do you have an opinion?
- A: My opinion is yes.

Id. at 36. See also id. (admitting that the same was probably true in 2000 and 2001).

mail was deleted instantaneously on that trader's system.

The optical disks are easily searchable using a program called Tumbleweed.²⁷ Using Tumbleweed, a user can simply log into the system with the proper credentials and create a plain language search. Search criteria can include not just "header" information, such as the date or the name of the sender or recipient, but can also include terms within the text of the e-mail itself. For example, UBS personnel could easily run a search for e-mails containing the words "Laura" or "Zubulake" that were sent or received by Chapin, Datta, Clarke, or Hardisty.²⁸

III. LEGAL STANDARD

Federal Rules of Civil Procedure 26 through 37 govern discovery in all civil actions. As the Supreme Court long ago explained,

The pre-trial deposition-discovery mechanism established by Rules 26 to 37 is one of the most significant innovations of the Federal Rules of Civil Procedure. Under the prior federal practice, the pre-trial functions of notice-giving issue-formulation and fact-revelation were performed primarily and inadequately by the pleadings. Inquiry into the issues and the facts before trial was narrowly confined and was often cumbersome in method. The new rules, however, restrict the

²⁷ See generally <http://www.tumbleweed.com/en/products/solutions/archive.html>.

²⁸ Rose Tong, the fifth person designated by Zubulake's document request, would probably not have been a "registered trader" as she was a human resources employee.

pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role in the preparation for trial. The various instruments of discovery now serve (1) as a device, along with the pre-trial hearing under Rule 16, to narrow and clarify the basic issues between the parties, and (2) as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues. Thus civil trials in the federal courts no longer need to be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial.²⁹

Consistent with this approach, Rule 26(b)(1) specifies that,

Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii).³⁰

In turn, Rule 26(b)(2) imposes general limitations on the scope of discovery in the form of a "proportionality test":

The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

²⁹ Hickman, 329 U.S. at 500-01 (emphasis added).

³⁰ Fed. R. Civ. P. 26(b)(1) (emphasis added).

(ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery 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.³¹

Finally, "[u]nder [the discovery] rules, the presumption is that the responding party must bear the expense of complying with discovery requests, but [it] may invoke the district court's discretion under Rule 26(c) to grant orders protecting [it] from 'undue burden or expense' in doing so, including orders conditioning discovery on the requesting party's payment of the costs of discovery."³²

The application of these various discovery rules is particularly complicated where electronic data is sought because otherwise discoverable evidence is often only available from expensive-to-restore backup media. That being so, courts have devised creative solutions for balancing the broad scope of discovery prescribed in Rule 26(b)(1) with the cost-consciousness of Rule 26(b)(2). By and large, the solution has been to consider cost-shifting: forcing the requesting party, rather than the answering party, to bear the cost of discovery.

By far, the most influential response to the problem of

³¹ Fed. R. Civ. P. 26(b)(2).

³² Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 358 (1978).

cost-shifting relating to the discovery of electronic data was given by United States Magistrate Judge James C. Francis IV of this district in Rowe Entertainment. Judge Francis utilized an eight-factor test to determine whether discovery costs should be shifted. Those eight factors are:

- (1) the specificity of the discovery requests;
- (2) the likelihood of discovering critical information;
- (3) the availability of such information from other sources;
- (4) the purposes for which the responding party maintains the requested data;
- (5) the relative benefits to the parties of obtaining the information;
- (6) the total cost associated with production;
- (7) the relative ability of each party to control costs and its incentive to do so; and
- (8) the resources available to each party.³³

Both Zubulake and UBS agree that the eight-factor Rowe test should be used to determine whether cost-shifting is appropriate.³⁴

³³ 205 F.R.D. at 429.

³⁴ Zubulake mistakenly identifies the Rowe test as a "marginal utility" test. In fact, "marginal utility" -- a common term among economists, see Istvan Mészáros, Beyond Capital § 3.2 (1995) (describing the intellectual history of marginal utility) -- refers only to the second Rowe factor, the likelihood of discovering critical information. See Rowe, 205 F.R.D. at 430 (quoting McPeck v. Ashcroft, 202 F.R.D. 31, 34 (D.D.C. 2001)).

IV. DISCUSSION

A. Should Discovery of UBS's Electronic Data Be Permitted?

Under Rule 34, a party may request discovery of any document, "including writings, drawings, graphs, charts, photographs, phonorecords, and other data compilations. . . ." ³⁵ The "inclusive description" of the term document "accord[s] with changing technology." ³⁶ "It makes clear that Rule 34 applies to electronics [sic] data compilations." Thus, "[e]lectronic documents are no less subject to disclosure than paper records." ³⁷ This is true not only of electronic documents that are currently in use, but also of documents that may have been deleted and now reside only on backup disks. ³⁸

That being so, Zubulake is entitled to discovery of the requested e-mails so long as they are relevant to her claims, ³⁹ which they clearly are. As noted, e-mail constituted a substantial means of communication among UBS employees. To that

³⁵ Fed. R. Civ. P. 34(a).

³⁶ Advisory Committee Note to Fed. R. Civ. P. 34.

³⁷ Rowe, 205 F.R.D. at 428 (collecting cases).

³⁸ See Antioch Co. v. Scapbook Borders, Inc., 210 F.R.D. 645, 652 (D. Minn. 2002) ("[I]t is a well accepted proposition that deleted computer files, whether they be e-mails or otherwise, are discoverable."); Simon Property Group L.P. v. mySimon, Inc., 194 F.R.D. 639, 640 (S.D. Ind. 2000) ("First, computer records, including records that have been 'deleted,' are documents discoverable under Fed. R. Civ. P. 34.").

³⁹ See Fed. R. Civ. P. 26(b)(1).

end, UBS has already produced approximately 100 pages of e-mails, the contents of which are unquestionably relevant.⁴⁰

Nonetheless, UBS argues that Zubulake is not entitled to any further discovery because it already produced all responsive documents, to wit, the 100 pages of e-mails. This argument is unpersuasive for two reasons. First, because of the way that UBS backs up its e-mail files, it clearly could not have searched all of its e-mails without restoring the ninety-four backup tapes (which UBS admits that it has not done). UBS therefore cannot represent that it has produced all responsive e-mails. Second, Zubulake herself has produced over 450 pages of relevant e-mails, including e-mails that would have been responsive to her discovery requests but were never produced by UBS. These two facts strongly suggest that there are e-mails that Zubulake has not received that reside on UBS's backup media.⁴¹

⁴⁰ See, e.g., 8/21/01 e-Mail.

⁴¹ UBS insists that "[f]rom the time Plaintiff commenced her EEOC action in August 2001 . . . UBS collected and produced all existing responsive e-mails sent or received between 1999 and 2001 from these and other employees' computers." Def. Mem. at 6. Even if this statement is completely accurate, a simple search of employees' computer files would not have turned up e-mails deleted prior to August 2001. Such deleted documents exist only on the backup tapes and optical disks, and their absence is precisely why UBS's production is not complete.

B. Should Cost-Shifting Be Considered?

Because it apparently recognizes that Zubulake is entitled to the requested discovery, UBS expends most of its efforts urging the court to shift the cost of production to "protect [it] . . . from undue burden or expense."⁴² Faced with similar applications, courts generally engage in some sort of cost-shifting analysis, whether the refined eight-factor Rowe test or a cruder application of Rule 34's proportionality test, or something in between.⁴³

The first question, however, is whether cost-shifting must be considered in every case involving the discovery of electronic data, which -- in today's world -- includes virtually all cases. In light of the accepted principle, stated above, that electronic evidence is no less discoverable than paper evidence, the answer is, "No." The Supreme Court has instructed that "the presumption is that the responding party must bear the expense of complying with discovery requests. . . ."⁴⁴ Any principled approach to electronic evidence must respect this presumption.

Courts must remember that cost-shifting may effectively

⁴² Def. Mem. at 9 (quoting Fed. R. Civ. P. 26(c)).

⁴³ See, e.g., Byers v. Illinois State Police, No. 99 C. 8105, 2002 WL 1264004 (N.D. Ill. June 3, 2002); In re Bristol-Myers Squibb Sec. Litig., 205 F.R.D. 437, 443 (D.N.J. 2002); Rowe, 205 F.R.D. 421; McPeck, 202 F.R.D. 31.

⁴⁴ Oppenheimer Fund, 437 U.S. at 358.

end discovery, especially when private parties are engaged in litigation with large corporations. As large companies increasingly move to entirely paper-free environments, the frequent use of cost-shifting will have the effect of crippling discovery in discrimination and retaliation cases. This will both undermine the "strong public policy favor[ing] resolving disputes on their merits,"⁴⁵ and may ultimately deter the filing of potentially meritorious claims.

Thus, cost-shifting should be considered only when electronic discovery imposes an "undue burden or expense" on the responding party.⁴⁶ 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."⁴⁷

Many courts have automatically assumed that an undue burden or expense may arise simply because electronic evidence is

⁴⁵ Pecarsky v. Galaxiworld.com, Inc., 249 F.3d 167, 172 (2d Cir. 2001).

⁴⁶ Fed. R. Civ. P. 26(c).

⁴⁷ Fed. R. Civ. P. 26(b)(2)(iii). As noted, a court is also permitted to impose conditions on discovery when it might be duplicative, see Fed. R. Civ. P. 26(b)(2)(i), or when a reasonable discovery deadline has lapsed, see id. 26(b)(2)(ii). Neither of these concerns, however, is likely to arise solely because the discovery sought is of electronic data.

involved.⁴⁸ 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.⁴⁹

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). In the world of paper documents, for example, a document is accessible if it is readily available in a usable format and reasonably indexed. Examples of inaccessible paper documents could include (a) documents in storage in a difficult to reach place; (b) documents converted to microfiche and not easily readable; or (c) documents kept haphazardly, with no indexing system, in quantities that make page-by-page searches impracticable. But in the world of electronic data, thanks to search engines, any data that is

⁴⁸ See, e.g., Murphy Oil USA, Inc. v. Fluor Daniel, Inc., No. Civ.A. 99-3564, 2002 WL 246439, at *3 (E.D. La. Feb. 19, 2002) (suggesting that application of Rowe is appropriate whenever "a party, as does Flour [sic], contends that the burden or expense of the discovery outweighs the benefit of the discovery").

⁴⁹ See generally Scheindlin & Rabkin, Electronic Discovery, 41 B.C. L. Rev. at 335-341 (describing types of discoverable electronic data and their differences from paper evidence).

retained in a machine readable format is typically accessible.⁵⁰

Whether electronic data is accessible or inaccessible turns largely on the media on which it is stored. Five categories of data, listed in order from most accessible to least accessible, are described in the literature on electronic data storage:

1. Active, online data: "On-line storage is generally provided by magnetic disk. It is used in the very active stages of an electronic records [sic] life -- when it is being created or received and processed, as well as when the access frequency is high and the required speed of access is very fast, i.e., milliseconds."⁵¹ Examples of online data include hard drives.
2. Near-line data: "This typically consists of a robotic storage device (robotic library) that houses removable media, uses robotic arms to access the media, and uses multiple read/write devices to store and retrieve records. Access speeds can range from as low as milliseconds if the media is already in a read device, up to 10-30 seconds for optical disk technology, and between 20-120 seconds for sequentially searched media, such as magnetic tape."⁵² Examples include optical disks.
3. Offline storage/archives: "This is removable optical disk or magnetic tape media, which can be

⁵⁰ See Scheindlin & Rabkin, Electronic Discovery, 41 B.C. L. Rev. at 364 ("By comparison [to the time it would take to search through 100,000 pages of paper], the average office computer could search all of the documents for specific words or combination[s] of words in minute, perhaps less."); see also Public Citizen v. Carlin, 184 F.3d 900, 908-10 (D.C. Cir. 1999).

⁵¹ Cohasset Associates, Inc., White Paper: Trustworthy Storage and Management of Electronic Records: The Role of Optical Storage Technology 10 (April 2003) ("White Paper").

⁵² Id. at 11.

labeled and stored in a shelf or rack. Off-line storage of electronic records is traditionally used for making disaster copies of records and also for records considered 'archival' in that their likelihood of retrieval is minimal. Accessibility to off-line media involves manual intervention and is much slower than on-line or near-line storage. Access speed may be minutes, hours, or even days, depending on the access-effectiveness of the storage facility."⁵³ The principled difference between nearline data and offline data is that offline data lacks "the coordinated control of an intelligent disk subsystem," and is, in the lingo, JBOD ("Just a Bunch Of Disks").⁵⁴

4. Backup tapes: "A device, like a tape recorder, that reads data from and writes it onto a tape. Tape drives have data capacities of anywhere from a few hundred kilobytes to several gigabytes. Their transfer speeds also vary considerably. . . . The disadvantage of tape drives is that they are sequential-access devices, which means that to read any particular block of data, you need to read all the preceding blocks."⁵⁵ As a result, "[t]he data on a backup tape are not organized for retrieval of individual documents or files [because] . . . the organization of the data mirrors the computer's structure, not the human records management structure."⁵⁶ Backup tapes also typically employ some sort of data compression, permitting more data to be stored on each tape, but also making restoration more time-consuming and expensive, especially given the lack

⁵³ Id.

⁵⁴ CNT, The Future of Tape 2, available at <http://www.cnt.com/literature/documents/pl1556.pdf>.

⁵⁵ Webopedia, at http://inews.webopedia.com/TERM/t/tape_drive.html.

⁵⁶ Kenneth J. Withers, Computer-Based Discovery in Federal Civil Litigation (unpublished manuscript) at 15.

of uniform standard governing data compression.⁵⁷

5. Erased, fragmented or damaged data: "When a file is first created and saved, it is laid down on the [storage media] in contiguous clusters. . . . As files are erased, their clusters are made available again as free space. Eventually, some newly created files become larger than the remaining contiguous free space. These files are then broken up and randomly placed throughout the disk."⁵⁸ Such broken-up files are said to be "fragmented," and along with damaged and erased data can only be accessed after significant processing.⁵⁹

Of these, the first three categories are typically identified as accessible, and the latter two as inaccessible.⁶⁰ The difference between the two classes is easy to appreciate. Information deemed "accessible" is stored in a readily usable format.

⁵⁷ See generally SDLT, Inc., Making a Business Case for Tape, at http://quantum.treehousei.com/Surveys/publishing/survey_148/pdfs/making_a_business_case_for_tape.pdf (June 2002); Jerry Stern, The Perils of Backing Up, at http://www.grsoftware.net/backup/articles/jerry_perils.html (last visited May 5, 2003).

⁵⁸ Sunbelt Software, Inc., White Paper: Disk Defragmentation for Windows NT/2000: Hidden Gold for the Enterprise 2, at <http://www.sunbelt-software.com/evaluation/455/web/documents/idc-white-paper-english.pdf> (last visited May 5, 2003).

⁵⁹ See Executive Software, Inc., Identifying Common Reliability/Stability Problems Caused by File Fragmentation, at http://www.execsoft.com/Reliability_Stability_Whitepaper.pdf (last visited May 1, 2003) (identifying problems associated with file fragmentation, including file corruption, data loss, crashes, and hard drive failures); Stan Miastkowski, When Good Data Goes Bad, PC World, Jan. 2000, available at <http://www.pcworld.com/resource/printable/article/0,aid,13859,00.asp>.

⁶⁰ See generally White Paper 10-13.

Although the time it takes to actually access the data ranges from milliseconds to days, the data does not need to be restored or otherwise manipulated to be usable. "Inaccessible" data, on the other hand, is not readily usable. Backup tapes must be restored using a process similar to that previously described, fragmented data must be de-fragmented, and erased data must be reconstructed, all before the data is usable. That makes such data inaccessible.⁶¹

The case at bar is a perfect illustration of the range of accessibility of electronic data. As explained above, UBS maintains e-mail files in three forms: (1) active user e-mail files; (2) archived e-mails on optical disks; and (3) backup data stored on tapes. The active (HP OpenMail) data is obviously the most accessible: it is online data that resides on an active server, and can be accessed immediately. The optical disk (Tumbleweed) data is only slightly less accessible, and falls into either the second or third category. The e-mails are on optical disks that need to be located and read with the correct

⁶¹ A report prepared by the Sedona Conference recently propounded "Best Practices" for electronic discovery. See The Sedona Conference, The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production (March 2003), ("Sedona Principles"), available at http://www.thesedonaconference.org/publications_html. Although I do not endorse or indeed agree with all of the Sedona Principles, they do recognize the difference between "active data" and data stored on backup tapes or "deleted, shadowed, fragmented or residual data," see id. (Principles 8 and 9), a distinction very similar to the accessible/inaccessible test employed here.

hardware, but the system is configured to make searching the optical disks simple and automated once they are located. For these sources of e-mails -- active mail files and e-mails stored on optical disks -- it would be wholly inappropriate to even consider cost-shifting. UBS maintains the data in an accessible and usable format, and can respond to Zubulake's request cheaply and quickly. Like most typical discovery requests, therefore, the producing party should bear the cost of production.

E-mails stored on backup tapes (via NetBackup), however, are an entirely different matter. Although UBS has already identified the ninety-four potentially responsive backup tapes, those tapes are not currently accessible. In order to search the tapes for responsive e-mails, UBS would have to engage in the costly and time-consuming process detailed above. It is therefore appropriate to consider cost shifting.

C. What Is the Proper Cost-Shifting Analysis?

In the year since Rowe was decided, its eight factor test has unquestionably become the gold standard for courts resolving electronic discovery disputes.⁶² But there is little

⁶² See In re Livent, Inc. Noteholders Sec. Litig., No. 98 Civ. 7161, 2003 WL 23254, at *3 (S.D.N.Y. Jan. 2, 2003) ("the attorneys should read Magistrate Judge Francis's opinion in [Rowe]. Then Deloitte and plaintiffs should confer, in person or by telephone, and discuss the eight factors listed in that opinion."); Bristol-Myers Squibb, 205 F.R.D. at 443 ("For a more comprehensive analysis of cost allocation and cost shifting regarding production of electronic information in a different factual context, counsel are directed to the recent opinion in

doubt that the Rowe factors will generally favor cost-shifting. Indeed, of the handful of reported opinions that apply Rowe or some modification thereof, all of them have ordered the cost of discovery to be shifted to the requesting party.⁶³

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.

1. The Rowe Test Is Incomplete

a. A Modification of Rowe: Additional Factors

Certain factors specifically identified in the Rules are omitted from Rowe's eight factors. In particular, 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

[Rowe].").

⁶³ See Murphy Oil, 2002 WL 246439; Bristol-Myers Squibb, 205 F.R.D. 437; Byers, 2002 WL 1264004.

resolving the issues.”⁶⁴ Yet Rowe makes no mention of either the amount in controversy or the importance of the issues at stake in the litigation. These factors should be added. Doing so would balance the Rowe factor that typically weighs most heavily in favor of cost-shifting, “the total cost associated with production.” The cost of production is almost always an objectively large number in cases where litigating cost-shifting is worthwhile. But the cost of production when compared to “the amount in controversy” may tell a different story. 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.⁶⁵

Rowe also contemplates “the resources available to each party.” But here too -- although this consideration may be implicit in the Rowe test -- the absolute wealth of the parties is not the relevant factor. More important than comparing the relative ability of a party to pay for discovery, the focus should be on the total cost of production as compared to the resources available to each party. Thus, discovery that would be too expensive for one defendant to bear would be a drop in the

⁶⁴ Fed. R. Civ. P. 26(b)(2)(iii).

⁶⁵ A word of caution, however: in evaluating this factor courts must look beyond the (often inflated) value stated in the ad damnum clause of the complaint.

bucket for another.⁶⁶

Last, "the importance of the issues at stake in the litigation" is a critical consideration, even if it is one that will rarely be invoked. For example, if a case has the potential for broad public impact, then public policy weighs heavily in favor of permitting extensive discovery. Cases of this ilk might include 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.

b. A Modification of Rowe: Eliminating Two Factors

Two of the Rowe factors should be eliminated:

First, the Rowe test includes "the specificity of the discovery request." Specificity is surely the touchstone of any good discovery request,⁶⁷ requiring a party to frame a request broadly enough to obtain relevant evidence, yet narrowly enough to control costs. But relevance and cost are already two of the Rowe factors (the second and sixth). Because the first and

⁶⁶ UBS, for example, reported net profits after tax of 942 million Swiss Francs (approximately \$716 million) for the third quarter of 2002 alone. See 11/12/02 UBS Press Release, available at http://www.ubswarburg.com/e/port_genint/index_genint.html.

⁶⁷ See Sedona Principles (Principle 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.").

second factors are duplicative, they can be combined. Thus, the first factor should be: the extent to which the request is specifically tailored to discover relevant information.

Second, the fourth factor, "the purposes for which the responding party maintains the requested data" is typically unimportant. Whether 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.⁶⁸

⁶⁸ Indeed, although Judge Francis weighed the purpose for which data is retained, his analysis also focused on accessibility:

If a party maintains electronic data for the purpose of utilizing it in connection with current activities, it may be expected to respond to discovery requests at its own expense. . . . Conversely, however, a party that happens to retain vestigial data for no current business purpose, 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.

205 F.R.D. at 431 (emphasis added). It is certainly true that data kept solely for disaster recovery is often relatively inaccessible because it is stored on backup tapes. But it is important not to conflate the purpose of retention with accessibility. A good deal of accessible, easily produced material may be kept for no apparent business purpose. Such evidence is no less discoverable than paper documents that serve no current purpose and exist only because a party failed to discard them. See, e.g., Fidelity Nat. Title Ins. Co. of New York v. Intercounty Nat. Title Ins. Co., No. 00 C. 5658, 2002 WL 1433584, at *6 (N.D. Ill. July 2, 2002) (requiring production of documents kept for no purpose, maintained "chaotic[ally]" and "cluttered in unorganized stacks" in an off-site warehouse); Dangler v. New York City Off Track Betting Corp., No. 95 Civ. 8495, 2000 WL 1510090, at *1 (S.D.N.Y. Oct. 11, 2000) (requiring production of documents kept "disorganized" in "dozens of boxes").

Although a business purpose will often coincide with accessibility -- data that is inaccessible is unlikely to be used or needed in the ordinary course of business -- the concepts are not coterminous. In particular, a good deal of accessible data may be retained, though not in the ordinary course of business. For example, data that should rightly have been erased pursuant to a document retention/destruction policy may be inadvertently retained. If so, the fact that it should have been erased in no way shields that data from discovery. As long as the data is accessible, it must be produced.

Of course, there will be certain limited instances where the very purpose of maintaining the data will be to produce it to the opposing party. That would be the case, for example, where the SEC requested "communications sent by [a] broker or dealer (including inter-office memoranda and communications) relating to his business as such." Such communications must be maintained pursuant to SEC Rule 17a-4.⁶⁹ But in such cases, cost-shifting would not be applicable in the first place; the relevant statute or rule would dictate the extent of discovery and the associated costs.⁷⁰ Cost-shifting would also be inappropriate for another reason -- namely, that the regulation

⁶⁹ See supra, note 20.

⁷⁰ However, while Zubulake is not the stated beneficiary of SEC Rule 17a-4, see Touche Ross & Co. v. Redington, 442 U.S. 560, 569-70 (1979), to the extent that the e-mails are accessible because of it, it inures to her benefit.

itself requires that the data be kept "in an accessible place."

c. A New Seven-Factor Test

Set forth below is a new seven-factor test based on the modifications to Rowe discussed in the preceding sections.

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.

2. The Seven Factors Should Not Be Weighted Equally

Whenever a court applies a multi-factor test, there is a temptation to treat the factors as a check-list, resolving the issue in favor of whichever column has the most checks.⁷¹ But "we do not just add up the factors."⁷² When evaluating cost-shifting, the central question must be, does the request impose

⁷¹ See, e.g., Big O Tires, Inc. v. Bigfoot 4X4, Inc., 167 F. Supp. 2d 1216, 1227 (D. Colo. 2001) ("A majority of factors in the likelihood of confusion test weigh in favor of Big O. I therefore conclude that Big O has shown a likelihood of success on the merits.").

⁷² Noble v. United States, 231 F.3d 352, 359 (7th Cir. 2000).

an "undue burden or expense" on the responding party?⁷³ Put another way, "how important is the sought-after evidence in comparison to the cost of production?" The seven-factor test articulated above provide some guidance in answering this question, but the test cannot be mechanically applied at the risk of losing sight of its purpose.

Weighting the factors in descending order of importance may solve the problem and avoid a mechanistic application of the test. The first two factors -- comprising the marginal utility test -- are the most important. These factors include: (1) The extent to which the request is specifically tailored to discover relevant information and (2) the availability of such information from other sources. The substance of the marginal utility test was well described in McPeek v. Ashcroft:

The more likely it is that the backup tape contains information that is relevant to a claim or defense, the fairer it is that the [responding party] search at its own expense. The less likely it is, the more unjust it would be to make the [responding party] search at its own expense. The difference is "at the margin."⁷⁴

The second group of factors addresses cost issues: "How expensive will this production be?" and, "Who can handle that expense?" These factors include: (3) the total cost of production compared to the amount in controversy, (4) the total

⁷³ Fed. R. Civ. P. 26(b)(iii).

⁷⁴ 202 F.R.D. at 34.

cost of production compared to the resources available to each party and (5) the relative ability of each party to control costs and its incentive to do so. The third "group" -- (6) the importance of the litigation itself -- stands alone, and as noted earlier will only rarely come into play. But where it does, this factor has the potential to predominate over the others. Collectively, the first three groups correspond to the three explicit considerations of Rule 26(b)(2)(iii). Finally, the last factor -- (7) the relative benefits of production as between the requesting and producing parties -- is the least important because it is fair to presume that the response to a discovery request generally benefits the requesting party. But 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.

D. A Factual Basis Is Required to Support the Analysis

Courts applying Rowe have uniformly favored cost-shifting largely because of assumptions made concerning the likelihood that relevant information will be found. This is illustrated in Rowe itself:

Here, there is a high enough probability that a broad search of the defendants' e-mails will elicit some relevant information that the search should not be precluded altogether. However, there has certainly been no showing that the e-mails are likely to be a gold mine. No witness has testified, for example, about any e-mail communications that allegedly reflect

discriminatory or anti-competitive practices. Thus, the marginal value of searching the e-mails is modest at best, and this factor, too, militates in favor of imposing the costs of discovery on the plaintiffs.⁷⁵

But such proof will rarely exist in advance of obtaining the requested discovery. The suggestion that a plaintiff must not only demonstrate that probative evidence exists, but also prove that electronic discovery will yield a "gold mine," is contrary to the plain language of Rule 26(b)(1), which permits discovery of "any matter" that is "relevant to [a] claim or defense."

The best solution to this problem is found in McPeck:

Given the complicated questions presented [and] the clash of policies . . . I have decided to take small steps and perform, as it were, a test run. Accordingly, I will order DOJ to perform a backup restoration of the e-mails attributable to Diegelman's computer during the period of July 1, 1998 to July 1, 1999. . . . The DOJ will have to carefully document the time and money spent in doing the search. It will then have to search in the restored e-mails for any document responsive to any of the plaintiff's requests for production of documents. Upon the completion of this search, the DOJ will then file a comprehensive, sworn certification of the time and money spent and the results of the search. Once it does, I will permit the parties an opportunity to argue why the results and the expense do or do not justify any further search.⁷⁶

Requiring the responding party to restore and produce responsive

⁷⁵ 205 F.R.D. at 430. See also Murphy Oil, 2002 WL 246439, at *5 (determining that "the marginal value of searching the e-mail is modest at best" and weighs in favor of cost-shifting because "Murphy has not pointed to any evidence that shows that 'the e-mails are likely to be a gold mine'").

⁷⁶ 202 F.R.D. at 34-35.

documents from a small sample of backup tapes will inform the cost-shifting analysis laid out above. When based on an actual sample, the marginal utility test will not be an exercise in speculation -- there will be tangible evidence of what the backup tapes may have to offer. There will also be tangible evidence of the time and cost required to restore the backup tapes, which in turn will inform the second group of cost-shifting factors. Thus, by requiring a sample restoration of backup tapes, the entire cost-shifting analysis can be grounded in fact rather than guesswork.⁷⁷

IV. CONCLUSION AND ORDER

In summary, deciding disputes regarding the scope and cost of discovery of electronic data requires a three-step analysis:

First, it is necessary to thoroughly understand the responding party's computer system, both with respect to active and stored data. For data that is kept in an accessible format, the usual rules of discovery apply: the responding party should pay the costs of producing responsive data. A court should consider cost-shifting only when electronic data is relatively inaccessible, such as in backup tapes.

⁷⁷ Of course, where the cost of a sample restoration is significant compared to the value of the suit, or where the suit itself is patently frivolous, even this minor effort may be inappropriate.

Second, because the cost-shifting analysis is so fact-intensive, it is necessary to determine what data may be found on the inaccessible media. Requiring the responding party to restore and produce responsive documents from a small sample of the requested backup tapes is a sensible approach in most cases.

Third, and finally, in conducting the cost-shifting analysis, the following factors should be considered, weighted more-or-less in the following order:

1. The extent to which the request is specifically tailored to discover relevant information;
2. The availability of such information from other sources;
3. The total cost of production, compared 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.

Accordingly, UBS is ordered to produce all responsive e-mails that exist on its optical disks or on its active servers (i.e., in HP OpenMail files) at its own expense. UBS is also ordered to produce, at its expense, responsive e-mails from any five backups tapes selected by Zubulake. UBS should then prepare an affidavit detailing the results of its search, as well as the time and money spent. After reviewing the contents of the backup tapes and UBS's certification, the Court will conduct the

appropriate cost-shifting analysis.

A conference is scheduled in Courtroom 12C at 4:30 p.m.
on June 17, 2003.

SO ORDERED:

Shira A. Scheindlin
U.S.D.J.

Dated: New York, New York
May 13, 2003

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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

-----X

LAURA ZUBULAKE, : **OPINION AND ORDER**

Plaintiff, : 02 Civ. 1243 (SAS)

- against - :

UBS WARBURG LLC, UBS WARBURG, :
and UBS AG, :

Defendants.

-----X

SHIRA A. SCHEINDLIN, U.S.D.J.:

Commenting on the importance of speaking clearly and listening closely, Phillip Roth memorably quipped, “The English language is a form of communication! . . . Words aren’t only bombs and bullets — no, they’re little gifts, containing meanings!”¹ What is true in love is equally true at law: Lawyers and their clients need to communicate clearly and effectively with one another to ensure that litigation proceeds efficiently. When communication between counsel and client breaks down, conversation becomes “just crossfire,”² and there are usually casualties.

¹ PHILIP ROTH, PORTNOY’S COMPLAINT (1967).

² *Id.*

I. INTRODUCTION

This is the fifth written opinion in this case, a relatively routine employment discrimination dispute in which discovery has now lasted over two years. Laura Zubulake is once again moving to sanction UBS for its failure to produce relevant information and for its tardy production of such material. In order to decide whether sanctions are warranted, the following question must be answered: Did UBS fail to preserve and timely produce relevant information and, if so, did it act negligently, recklessly, or willfully?

This decision addresses counsel's obligation to ensure that relevant information is preserved by giving clear instructions to the client to preserve such information and, perhaps more importantly, a client's obligation to heed those instructions. Early on in this litigation, UBS's counsel — both in-house and outside — instructed UBS personnel to retain relevant electronic information. Notwithstanding these instructions, certain UBS employees deleted relevant e-mails. Other employees never produced relevant information to counsel. As a result, many discoverable e-mails were not produced to Zubulake until recently, even though they were responsive to a document request propounded on June 3,

2002.³ In addition, a number of e-mails responsive to that document request were deleted and have been lost altogether.

Counsel, in turn, failed to request retained information from one key employee and to give the litigation hold instructions to another. They also failed to adequately communicate with another employee about how she maintained her computer files. Counsel also failed to safeguard backup tapes that might have contained some of the deleted e-mails, and which would have mitigated the damage done by UBS's destruction of those e-mails.

The conduct of both counsel and client thus calls to mind the now-famous words of the prison captain in *Cool Hand Luke*: "What we've got here is a failure to communicate."⁴ Because of this failure by *both* UBS and its counsel, Zubulake has been prejudiced. As a result, sanctions are warranted.

³ See *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 312 (S.D.N.Y. 2003) ("*Zubulake I*") (quoting Zubulake's document request, which called for "[a]ll documents concerning any communications by or between UBS employees concerning Plaintiff," and defining "document" to include "without limitation, electronic or computerized data compilations.").

⁴ Captain, Road Prison 36, in *COOL HAND LUKE* (1967), found at <http://ask.yahoo.com/ask/20011026.html>.

II. FACTS

The allegations at the heart of this lawsuit and the history of the parties' discovery disputes have been well-documented in the Court's prior decisions,⁵ familiarity with which is presumed. In short, Zubulake is an equities trader specializing in Asian securities who is suing her former employer for gender discrimination, failure to promote, and retaliation under federal, state, and city law.

A. Background

Zubulake filed an initial charge of gender discrimination with the EEOC on August 16, 2001.⁶ Well before that, however — as early as April 2001 — UBS employees were on notice of Zubulake's impending court action.⁷ After

⁵ See *Zubulake I*, 217 F.R.D. 309 (addressing the legal standard for determining the cost allocation for producing e-mails contained on backup tapes); *Zubulake v. UBS Warburg LLC*, No. 02 Civ. 1243, 2003 WL 21087136 (S.D.N.Y. May 13, 2003) (“*Zubulake II*”) (addressing Zubulake's reporting obligations); *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280 (S.D.N.Y. 2003) (“*Zubulake III*”) (allocating backup tape restoration costs between Zubulake and UBS); *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003) (“*Zubulake IV*”) (ordering sanctions against UBS for violating its duty to preserve evidence).

⁶ See *Zubulake I*, 217 F.R.D. at 312.

⁷ See *Zubulake IV*, 220 F.R.D. at 217 (“Thus, the relevant people at UBS anticipated litigation in April 2001. The duty to preserve attached at the time that litigation was reasonably anticipated.”).

she received a right-to-sue letter from the EEOC, Zubulake filed this lawsuit on February 15, 2002.⁸

Fully aware of their common law duty to preserve relevant evidence, UBS's in-house attorneys gave oral instructions in August 2001 — immediately after Zubulake filed her EEOC charge — instructing employees not to destroy or delete material potentially relevant to Zubulake's claims, and in fact to segregate such material into separate files for the lawyers' eventual review.⁹ This warning pertained to both electronic and hard-copy files, but did *not* specifically pertain to so-called "backup tapes," maintained by UBS's information technology personnel.¹⁰ In particular, UBS's in-house counsel, Robert L. Salzberg, "advised relevant UBS employees to preserve and turn over to counsel all files, records or other written memoranda or documents concerning the allegations raised in the [EEOC] charge or any aspect of [Zubulake's] employment."¹¹ Subsequently — but still in August 2001 — UBS's outside counsel met with a number of the key players in the litigation and reiterated Mr. Salzberg's instructions, reminding them

⁸ See *Zubulake I*, 217 F.R.D. at 312.

⁹ See *Zubulake IV*, 220 F.R.D. at 215.

¹⁰ See *id.*

¹¹ See 10/14/03 Letter from Norman Simon, counsel to UBS, to the Court ("10/14/03 Simon Ltr.") at 1.

to preserve relevant documents, “including e-mails.”¹² Salzberg reduced these instructions to writing in e-mails dated February 22, 2002¹³ — immediately after Zubulake filed her complaint — and September 25, 2002.¹⁴ Finally, in August 2002, after Zubulake propounded a document request that specifically called for e-mails stored on backup tapes, UBS’s outside counsel instructed UBS information technology personnel to stop recycling backup tapes.¹⁵ *Every* UBS employee mentioned in this Opinion (with the exception of Mike Davies) either personally spoke to UBS’s outside counsel about the duty to preserve e-mails, or was a recipient of one of Salzberg’s e-mails.¹⁶

¹² *Id.* at 1 n.1.

¹³ *See* Ex. A to 10/14/03 Simon Ltr.

¹⁴ *See* Ex. C to 10/14/03 Simon Ltr.

¹⁵ *See Zubulake IV*, 220 F.R.D. at 215. *See also* 10/14/03 Simon Ltr. at 2 (“In late August 2002, plaintiff first requested backup e-mails from certain UBS employees. Thereafter, I advised UBS’s information technology personnel to locate and retain all existing backup tapes for employees identified by plaintiff. I re-emphasized that directive and confirmed that these tapes continued to be preserved both orally and in writing on several subsequent occasions.”).

¹⁶ Specifically, UBS’s outside counsel spoke with Matthew Chapin on August 29, 2001, with Joy Kim and Andrew Clarke on August 30, 2001, and with Jeremy Hardisty, John Holland, and Dominic Vail on August 31, 2001. *See* 10/14/03 Simon Ltr. at 1 n.1. Holland, Chapin, Hardisty, Brad Orgill, James Tregear, Rose Tong, Vail, Barbara Amone, Joshua Varsano, and Rebecca White were all direct recipients of Salzberg’s e-mails. *See* Ex. A to 10/14/03 Simon Ltr.

B. Procedural History

In *Zubulake I*, I addressed Zubulake's claim that relevant e-mails had been deleted from UBS's active servers and existed only on "inaccessible" archival media (*i.e.*, backup tapes).¹⁷ Arguing that e-mail correspondence that she needed to prove her case existed only on those backup tapes, Zubulake called for their production. UBS moved for a protective order shielding it from discovery altogether or, in the alternative, shifting the cost of backup tape restoration onto Zubulake. Because the evidentiary record was sparse, I ordered UBS to bear the costs of restoring a sample of the backup tapes.¹⁸

After the sample tapes were restored, UBS continued to press for cost shifting with respect to any further restoration of backup tapes. In *Zubulake III*, I ordered UBS to bear the lion's share of restoring certain backup tapes because Zubulake was able to demonstrate that those tapes were likely to contain relevant information.¹⁹ Specifically, Zubulake had demonstrated that UBS had failed to maintain all relevant information (principally e-mails) in its active files. After

¹⁷ See generally *Zubulake I*, 217 F.R.D. 309.

¹⁸ See *id.* at 324.

¹⁹ See *Zubulake III*, 216 F.R.D. at 289.

Zubulake III, Zubulake chose to restore sixteen backup tapes.²⁰ “In the restoration effort, the parties discovered that certain backup tapes [were] missing.”²¹ They also discovered a number of e-mails on the backup tapes that were missing from UBS’s active files, confirming Zubulake’s suspicion that relevant e-mails were being deleted or otherwise lost.²²

Zubulake III begat *Zubulake IV*, where Zubulake moved for sanctions as a result of UBS’s failure to preserve all relevant backup tapes, and UBS’s deletion of relevant e-mails. Finding fault in UBS’s document preservation strategy but lacking evidence that the lost tapes and deleted e-mails were particularly favorable to Zubulake, I ordered UBS to pay for the re-deposition of several key UBS employees — Varsano, Chapin, Hardisty, Kim, and Tong — so that Zubulake could inquire about the newly-restored e-mails.²³

C. The Instant Dispute

The essence of the current dispute is that during the re-depositions required by *Zubulake IV*, Zubulake learned about more deleted e-mails and about

²⁰ 4/22/04 Oral Argument Transcript (“Tr.”) at 29-30.

²¹ *Zubulake IV*, 220 F.R.D. at 215.

²² *See id.*; *see also Zubulake III*, 216 F.R.D. at 287.

²³ *See Zubulake IV*, 220 F.R.D. at 222 (finding that spoliation was not willful and declining to grant an adverse inference instruction).

the existence of e-mails preserved on UBS's active servers that were, to that point, never produced. In sum, Zubulake has now presented evidence that UBS personnel deleted relevant e-mails, some of which were subsequently recovered from backup tapes (or elsewhere) and thus produced to Zubulake long after her initial document requests, and some of which were lost altogether. Zubulake has also presented evidence that some UBS personnel did not produce responsive documents to counsel until recently, depriving Zubulake of the documents for almost two years.

1. Deleted E-Mails

Notwithstanding the clear and repeated warnings of counsel, Zubulake has proffered evidence that a number of key UBS employees — Orgill, Hardisty, Holland, Chapin, Varsano, and Amon — failed to retain e-mails germane to Zubulake's claims. Some of the deleted e-mails were restored from backup tapes (or other sources) and have been produced to Zubulake, others have been altogether lost, though there is strong evidence that they once existed. Although I have long been aware that certain e-mails were deleted,²⁴ the re-depositions demonstrate the scope and importance of those documents.

²⁴ See *Zubulake III*, 216 F.R.D. at 287.

a. At Least One E-Mail Has Never Been Produced

At least one e-mail has been irretrievably lost; the existence of that e-mail is known only because of oblique references to it in other correspondence. It has already been shown that Chapin — the alleged primary discriminator — deleted relevant e-mails.²⁵ In addition to those e-mails, Zubulake has evidence suggesting that Chapin deleted at least one other e-mail that has been lost *entirely*. An e-mail from Chapin sent at 10:47 AM on September 21, 2001, asks Kim to send him a “document” recounting a conversation between Zubulake and a co-worker.²⁶ Approximately 45 minutes later, Chapin sent an e-mail complaining about Zubulake to his boss and to the human resources employees handling Zubulake’s case purporting to contain a verbatim recitation of a conversation between Zubulake and her co-worker, as overheard by Kim.²⁷ This conversation allegedly took place on September 18, 2001, at 10:58 AM.²⁸ There is reason to believe that immediately after that conversation, Kim sent Chapin an e-mail that

²⁵ See *id.* (finding that Chapin “was concealing and deleting especially relevant e-mails”).

²⁶ See 9/21/01 e-mail from Chapin to Kim, UBSZ 001400.

²⁷ 7/21/01 e-mail from Chapin to Holland, Varsano and Tong, UBSZ 001399.

²⁸ See *id.*

contained the verbatim quotation that appears in Chapin's September 21 e-mail — the "document" that Chapin sought from Kim just prior to sending that e-mail — and that Chapin deleted it.²⁹ That e-mail, however, has never been recovered and is apparently lost.

Although Zubulake has only been able to present concrete evidence that this one e-mail was irretrievably lost, there may well be others. Zubulake has presented extensive proof, detailed below, that UBS personnel were deleting relevant e-mails. Many of those e-mails were recovered from backup tapes. The UBS record retention policies called for monthly backup tapes to be retained for three years.³⁰ The tapes covering the relevant time period (circa August 2001) should have been available to UBS in August 2002, when counsel instructed UBS's information technology personnel that backup tapes were also subject to

²⁹ Kim sent an e-mail at 11:19 AM on September 18, bearing the subject "2," which appears to contain a *different* verbatim quotation from Zubulake. See UBSZ 004047. The e-mail containing the quotation that Chapin used in his September 21 e-mail would have borne the subject "1" and been sent sometime between 10:58 AM and 11:19 AM. See also 2/6/04 Deposition of Matthew Chapin at 565 (Chapin testifying that he might have pasted the quotation from another document); *id.* at 587 (Chapin testifying that he wasn't sure whether the quotation was a paraphrase or pasted from another e-mail).

³⁰ See *Zubulake I*, 217 F.R.D. at 314 ("Nightly backup tapes were kept for twenty working days, weekly tapes for one year, and monthly tapes for three years. After the relevant time period elapsed, the tapes were recycled.").

the litigation hold.

Nonetheless, many backup tapes for the most relevant time periods are missing, including: Tong’s tapes for June, July, August, and September of 2001; Hardisty’s tapes for May, June, and August of 2001; Clarke and Vinay Datta’s tapes for April and September 2001; and Chapin’s tape for April 2001.³¹ Zubulake did not even learn that four of these tapes were missing until after *Zubulake IV*. Thus, it is impossible to know just how many relevant e-mails have been lost in their entirety.³²

³¹ See Current List of Missing Monthly Backup Tapes, Ex. E to 5/21/04 Reply Affirmation of James A. Batson, counsel to Zubulake (“Batson Reply Aff.”). UBS does have some weekly backup tapes for portions of these times for everyone but Tong. See *id.* n.1.

³² In *Zubulake IV*, I held that UBS’s destruction of relevant backup tapes was negligent, rather than willful, because whether the duty to preserve extended to backup tapes was “a grey area.” 220 F.R.D. at 221. I further held that “[l]itigants are now on notice, at least in this Court, that backup tapes that can be identified as storing information created by or for ‘key players’ must be preserved.” *Id.* at 221 n.47.

Because UBS lost the backup tapes mentioned in this opinion well before *Zubulake IV* was issued, it was not on notice of the precise contours of its duty to preserve backup tapes. Accordingly, I do not discuss UBS’s destruction of relevant backup tapes as proof that UBS acted willfully, but rather to show that Zubulake can no longer prove what was deleted and when, and to demonstrate that the scope of e-mails that have been irrevocably lost is broader than initially thought.

b. Many E-Mails Were Deleted and Only Later Recovered from Alternate Sources

Other e-mails were deleted in contravention of counsel’s “litigation hold” instructions, but were subsequently recovered from alternative sources — such as backup tapes — and thus produced to Zubulake, albeit almost two years after she propounded her initial document requests. For example, an e-mail from Hardisty to Holland (and on which Chapin was copied) reported that Zubulake said “that all she want[ed] is to be treated like the other ‘guys’ on the desk.”³³ That e-mail was recovered from Hardisty’s August 2001 backup tape — and thus it was on his active server as late as August 31, 2001, when the backup was generated — but was not in his active files. That e-mail therefore *must have* been deleted subsequent to counsel’s warnings.³⁴

Another e-mail, from Varsano to Hardisty dated August 31, 2001 — the very day that Hardisty met with outside counsel — forwarded an earlier message from Hardisty dated June 29, 2001, that recounted a conversation in which Hardisty “warned” Chapin about his management of Zubulake, and in

³³ 7/23/01 e-mail from Hardisty to Holland, UBSZ 002957.

³⁴ Because the e-mail was dated July 23, 2001, the same cannot be said of Chapin or Holland. Although they had a duty to preserve relevant e-mails starting in April 2001, counsel did not specifically warn them until August 2001. Chapin and Holland might have deleted the e-mail prior to counsel’s warning.

which Hardisty reminded Chapin that Zubulake could “be a good broker.”³⁵ This e-mail was absent from UBS’s initial production and had to be restored from backup; apparently neither Varsano nor Hardisty had retained it.³⁶ This deletion is especially surprising because Varsano retained the June 29, 2001 e-mail for over two months before he forwarded it to Hardisty.³⁷ Indeed, Varsano testified in his deposition that he “definitely” “saved all of the e-mails that [he] received concerning Ms. Zubulake” in 2001, that they were saved in a separate “very specific folder,” and that “all of those e-mails” were produced to counsel.³⁸

As a final example, an e-mail from Hardisty to Varsano and Orgill, dated September 1, 2001, specifically discussed Zubulake’s termination. It read: “LZ — ok once lawyers have been signed off, probably one month, but most

³⁵ 8/31/01 e-mail from Varsano to Hardisty, UBSZ 002968. Because the header information from Hardisty’s June 29, 2001 e-mail was cropped when Varsano forwarded it, it is not clear who — besides, presumably, Varsano — received that message.

³⁶ See Example of Relevant E-Mails, in Chronological Order, That Were Restored From April to October 2001 Backup Tapes, Ex. I to the 4/30/04 Affirmation of James A. Batson (“Batson Aff.”). This chart does not clearly indicate from which backup tape the e-mail was restored.

³⁷ See *id.*; see also 6/29/01 e-mail from Hardisty to Holland, Amone and Varsano, UBSZ 004097 (the underlying e-mail, also restored from a backup tape).

³⁸ 1/26/04 Deposition of Joshua Varsano (“Varsano Dep.”) at 289-90. If Varsano’s testimony is credited, then counsel somehow failed to produce those e-mails to Zubulake.

easily done in combination with the full Asiapc [downsizing] announcement. We will need to document her performance post her warning HK. Matt [Chapin] is doing that.”³⁹ Thus, Orgill and Hardisty had decided to terminate Zubulake as early as September 1, 2001. Indeed, two days later Orgill replied, “It’s a pity we can’t act on LZ earlier.”⁴⁰ Neither the authors nor any of the recipients of these e-mails retained any of them, even though these e-mails were sent within days of Hardisty’s meeting with outside counsel. They were not even preserved on backup tapes, but were only recovered because Kim happened to have retained copies.⁴¹ Rather, all three people (Hardisty, Orgill and Varsano) deleted these e-mails from their computers by the end of September 2001. Apart from their direct relevance to Zubulake’s claims, these e-mails may also serve to rebut Orgill and Hardisty’s deposition testimony. Orgill testified that he played no role in the

³⁹ 9/3/01 e-mail from Orgill to Hardisty and Varsano (replying to and attaching 9/1/01 e-mail from Hardisty to Varsano and Orgill), UBSZ 002965.

⁴⁰ *Id.*

⁴¹ These e-mails were some of the ones fortuitously recovered from Kim’s active files, as discussed below. *See* Memorandum of Law in Support of Plaintiff’s Motion for Sanctions (“Pl. Mem.”) at 6 n.18. And, indeed, Kim did not have all of the original e-mails, but retained only the last e-mail in the chain of correspondence, which had the earlier e-mails in the same chain embedded in it. It is not clear why or how she obtained this e-mail.

decision to terminate Zubulake.⁴² And Hardisty testified that he did not recall discussing Zubulake's termination with Orgill.⁴³

These are merely examples. The proof is clear: UBS personnel unquestionably deleted relevant e-mails from their computers after August 2001, even though they had received at least two directions from counsel not to. Some of those e-mails were recovered (Zubulake has pointed to at least 45),⁴⁴ but some — and no one can say how many — were not. And even those e-mails that were recovered were produced to Zubulake well after she originally asked for them.

2. Retained, But Unproduced, E-Mails

Separate and apart from the deleted material are a number of e-mails that were absent from UBS's initial production even though they were not deleted. These e-mails existed in the active, on-line files of two UBS employees — Kim and Tong — but were not produced to counsel and thus not turned over to Zubulake until she learned of their existence as a result of her counsel's questions at deposition. Indeed, these e-mails were not produced until after Zubulake had

⁴² See 3/4/03 Deposition of Brad Orgill at 43.

⁴³ See 2/26/03 Deposition of Jeremy Hardisty at 262.

⁴⁴ See The Actual Number of E-Mails not Retained by UBS Executives Post-Dating the August EEOC Filing, Ex. H to Batson Reply Aff.

conducted thirteen depositions and four re-depositions.⁴⁵

During her February 19, 2004, deposition, Kim testified that she was *never* asked to produce her files regarding Zubulake to counsel, nor did she ever actually produce them,⁴⁶ although she was asked to retain them.⁴⁷ One week after Kim's deposition, UBS produced seven new e-mails. The obvious inference to be drawn is that, subsequent to the deposition, counsel for the first time asked Kim to produce her files. Included among the new e-mails produced from Kim's computer was one (dated September 18, 2001) that recounts a conversation between Zubulake and Kim in which Zubulake complains about the way women are treated at UBS.⁴⁸ Another e-mail recovered from Kim's computer contained the correspondence, described above, in which Hardisty and Orgill discuss Zubulake's termination, and in which Orgill laments that she could not be fired sooner than she was.

On March 29, 2004, UBS produced several new e-mails, and three

⁴⁵ See Batson Reply Aff. ¶ 6.

⁴⁶ See 2/19/04 Deposition of Joy Kim at 44-45.

⁴⁷ See *id.* at 35.

⁴⁸ See UBSZ 004047.

new e-mail retention policies, from Tong's active files.⁴⁹ At her deposition two weeks earlier, Tong explained (as she had at her first deposition, a year previous) that she kept a separate "archive" file on her computer with documents pertaining to Zubulake.⁵⁰ UBS admits that until the March 2004 deposition, it misunderstood Tong's use of the word "archive" to mean backup tapes; after her March 2004 testimony, it was clear that she meant active data. Again, the inference is that UBS's counsel then, for the first time, asked her to produce her active computer files.

Among the new e-mails recovered from Tong's computer was one, dated August 21, 2001, at 11:06 AM, from Mike Davies⁵¹ to Tong that read, "received[,] thanks[,] mike,"⁵² and which was in response to an e-mail from Tong, sent eleven minutes earlier, that read, "Mike, I have just faxed over to you the 7 pages of Laura's [EEOC] charge against the bank."⁵³ While Davies' three-word e-

⁴⁹ See Ex. M to the Batson Aff.

⁵⁰ See 3/10/04 Deposition of Rose Tong at 97, 140; see also 3/4/03 Deposition of Rose Tong at 66-67.

⁵¹ Davies, Tong's supervisor, was — as far as the record before the Court shows — not specifically instructed about the litigation hold by UBS's counsel.

⁵² 8/21/01 e-mail from Davies to Tong, UBSZ 004352.

⁵³ 8/21/01 e-mail from Tong to Davies, UBSZ 004351.

mail seems insignificant in isolation, it is actually quite important.

Three hours after sending that three word response, Davies sent an e-mail to Tong with the subject line “Laura Zubulake” that reads:

I spoke to Brad [Orgill] — he’s looking to exit her asap [by the end of month], and looking for guidance from us following letter? we sent her re her performance [or does he mean PMM]

I said you were on call with US yesterday and that we need US legal advise etc, but be aware he’s looking to finalise quickly! — said if off by end August then no bonus consideration, but if still employed after aug consideration should be given?⁵⁴

Davies testified that he was unaware of Zubulake’s EEOC charge when he spoke with Orgill.⁵⁵ The timing of his e-mails, however — the newly produced e-mail that acknowledges receiving Zubulake’s EEOC charge coming three hours before the e-mail beginning “I spoke to Brad” — strongly undercuts this claim. The new e-mail, therefore, is circumstantial evidence that could support the inference that Davies knew about the EEOC charge when he spoke with Orgill, and suggests that Orgill knew about the EEOC charge when the decision was made to terminate

⁵⁴ 8/21/01 e-mail from Davies to Tong, UBSZ 004353. The text of this e-mail was part of UBS’s initial production.

⁵⁵ See 3/11/03 Deposition of Mike Davies at 21 (“The EEOC application was something new to me, so it did stand out in my mind, and I hadn’t had a conversation with anyone about it, so I hadn’t spoken to Brad about it”); see *also id.* (Davies replying “no” in response to the question “Did you ever speak to Brad about it?”).

Zubulake.⁵⁶ Its relevance to Zubulake’s retaliation claim is unquestionable, and yet it was not produced until April 20, 2004.⁵⁷

* * *

Zubulake now moves for sanctions as a result of UBS’s purported discovery failings. In particular, she asks — as she did in *Zubulake IV* — that an adverse inference instruction be given to the jury that eventually hears this case.

III. LEGAL STANDARD

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.”⁵⁸ “The determination of an appropriate sanction for spoliation, if any, is confined to the sound discretion of the trial judge,

⁵⁶ It is also plausible that Orgill and Davies spoke days earlier — before either knew about the EEOC charge — and Davies might have omitted that information from his initial e-mail to Tong. The newly discovered e-mail, however, is helpful to Zubulake in arguing her view of the evidence.

⁵⁷ Ostensible copies of these e-mails were produced on March 29, 2004 — from where is not clear — but they appear to have the incorrect time/date stamps. The copies produced on April 20, because they came directly from Tong’s computer, are more reliable.

⁵⁸ *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999).

and is assessed on a case-by-case basis.”⁵⁹ The authority to sanction litigants for spoliation arises jointly under the Federal Rules of Civil Procedure and the court’s inherent powers.⁶⁰

The spoliation of evidence germane “to proof of an issue at trial can support an inference that the evidence would have been unfavorable to the party responsible for its destruction.”⁶¹ A party seeking an adverse inference instruction (or other sanctions) based on the spoliation of evidence must establish the following three elements: (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

⁵⁹ *Fujitsu Ltd. v. Federal Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001).

⁶⁰ *See Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 72 (S.D.N.Y. 1991) (Francis, M.J.) (citing Fed. R. Civ. P. 37); *see also Shepherd v. American Broadcasting Cos.*, 62 F.3d 1469, 1474 (D.C. Cir. 1995) (“When rules alone do not provide courts with sufficient authority to protect their integrity and prevent abuses of the judicial process, the inherent power fills the gap.”); *id.* at 1475 (holding that sanctions under the court’s inherent power can “include . . . drawing adverse evidentiary inferences”).

⁶¹ *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998).

find that it would support that claim or defense.⁶²

In this circuit, a “culpable state of mind” for purposes of a spoliation inference includes ordinary negligence.⁶³ When evidence is destroyed in bad faith (*i.e.*, intentionally or willfully), that fact alone is sufficient to demonstrate relevance.⁶⁴ By contrast, when the destruction is negligent, relevance must be proven by the party seeking the sanctions.⁶⁵

In the context of a request for an adverse inference instruction, the concept of “relevance” encompasses not only the ordinary meaning of the term,⁶⁶ but also that the destroyed evidence would have been favorable to the movant.⁶⁷

⁶² *Byrnie v. Town of Cromwell*, 243 F.3d 93, 107-12 (2d Cir. 2001). An adverse inference instruction may also be warranted, in some circumstances, for the untimely production of evidence. *See Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 107 (2d Cir. 2002).

⁶³ *See Residential Funding*, 306 F.3d at 108.

⁶⁴ *See id.* at 109.

⁶⁵ *See id.*

⁶⁶ *See* Fed. R. Evid. 401; Fed. R. Civ. P. 26(b)(1).

⁶⁷ *See Residential Funding*, 306 F.3d at 108-09 (“Although we have stated that, to obtain an adverse inference instruction, a party must establish that the unavailable evidence is ‘relevant’ to its claims or defenses, our cases make clear that ‘relevant’ in this context means something more than sufficiently probative to satisfy Rule 401 of the Federal Rules of Evidence. Rather, the party seeking an adverse inference must adduce sufficient evidence from which a reasonable trier of fact could infer that the destroyed or unavailable evidence

“This corroboration requirement is even more necessary where the destruction was merely negligent, since in those cases it cannot be inferred from the conduct of the spoliator that the evidence would even have been harmful to him.”⁶⁸ This is equally true in cases of gross negligence or recklessness; only in the case of *willful* spoliation does the degree of culpability give rise to a presumption of the relevance of the documents destroyed.⁶⁹

IV. DISCUSSION

In *Zubulake IV*, I held that UBS had a duty to preserve its employees’ active files as early as April 2001, and certainly by August 2001, when Zubulake filed her EEOC charge.⁷⁰ Zubulake has thus satisfied the first element of the adverse inference test. As noted, the central question implicated by this motion is whether UBS and its counsel took all necessary steps to guarantee that relevant data was both preserved and produced. If the answer is “no,” then the next question is whether UBS acted wilfully when it deleted or failed to timely produce

would have been of the nature alleged by the party affected by its destruction.”) (quotation marks, citations, footnote, and alterations omitted).

⁶⁸ *Turner*, 142 F.R.D. at 77 (citing *Stanojev v. Ebasco Services, Inc.*, 643 F.2d 914, 924 n.7 (2d Cir. 1981)).

⁶⁹ *See Residential Funding*, 306 F.3d at 109.

⁷⁰ *See Zubulake IV*, 220 F.R.D. at 216-17.

relevant information — resulting in either a complete loss or the production of responsive information close to two years after it was initially sought. If UBS acted wilfully, this satisfies the mental culpability prong of the adverse inference test and also demonstrates that the deleted material was relevant.⁷¹ If UBS acted negligently or even recklessly, then *Zubulake* must show that the missing or late-produced information was relevant.

A. Counsel’s Duty to Monitor Compliance

In *Zubulake IV*, I summarized a litigant’s preservation obligations:

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.⁷²

⁷¹ See *Residential Funding*, 306 F.3d at 109 (“[O]nly in the case of *willful* spoliation is the spoliator’s mental culpability itself evidence of the relevance of the documents destroyed.”)

⁷² *Zubulake IV*, 220 F.R.D. at 218 (emphasis in original); *see also id.* (“[I]t does make sense to create one exception to this general rule. If a company can identify where particular employee documents are stored on backup tapes, then the tapes storing the documents of “key players” to the existing or threatened litigation should be preserved if the information contained on those tapes is not otherwise available. This exception applies to *all* backup tapes.”) (emphasis in

A party's discovery obligations do not end with the implementation of a "litigation hold" — to the contrary, that's only the beginning. Counsel must oversee compliance with the litigation hold, monitoring the party's efforts to retain and produce the relevant documents. Proper communication between a party and her lawyer will ensure (1) that all relevant information (or at least all sources of relevant information) is discovered, (2) that relevant information is retained on a continuing basis; and (3) that relevant non-privileged material is produced to the opposing party.

1. Counsel's Duty to Locate Relevant Information

Once a "litigation hold" is in place, a party and her counsel must make certain that all sources of potentially relevant information are identified and placed "on hold," to the extent required in *Zubulake IV*. To do this, counsel must become fully familiar with her client's document retention policies, as well as the client's data retention architecture.⁷³ This will invariably involve speaking with information technology personnel, who can explain system-wide backup procedures and the actual (as opposed to theoretical) implementation of the firm's

original).

⁷³ Cf. *Zubulake I*, 217 F.R.D. at 324 ("[i]t is necessary to thoroughly understand the responding party's computer system, both with respect to active and stored data").

recycling policy. It will also involve communicating with the “key players” in the litigation,⁷⁴ in order to understand how they stored information. In this case, for example, some UBS employees created separate computer files pertaining to Zubulake, while others printed out relevant e-mails and retained them in hard copy only. Unless counsel interviews each employee, it is impossible to determine whether all potential sources of information have been inspected. A brief conversation with counsel, for example, might have revealed that Tong maintained “archive” copies of e-mails concerning Zubulake, and that “archive” meant a separate on-line computer file, not a backup tape. Had that conversation taken place, Zubulake might have had relevant e-mails from that file two years ago.

To the extent that it may not be feasible for counsel to speak with every key player, given the size of a company or the scope of the lawsuit, counsel must be more creative. It may be possible to run a system-wide keyword search; counsel could then preserve a copy of each “hit.” Although this sounds burdensome, it need not be. Counsel does not have to review these documents, only see that they are retained. For example, counsel could create a broad list of search terms, run a search for a limited time frame, and then segregate responsive

⁷⁴ *Zubulake IV*, 220 F.R.D. at 218.

documents.⁷⁵ When the opposing party propounds its document requests, the parties could negotiate a list of search terms to be used in identifying responsive documents, and counsel would only be obliged to review documents that came up as “hits” on the second, more restrictive search. The initial broad cut merely guarantees that relevant documents are not lost.

In short, it is *not* sufficient to notify all employees of a litigation hold and expect that the party will then retain and produce all relevant information. Counsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched. This is not to say that counsel will necessarily succeed in locating all such sources, or that the later discovery of new sources is evidence of a lack of effort. But counsel and client must take *some reasonable steps* to see that sources of relevant information are located.

2. Counsel’s Continuing Duty to Ensure Preservation

Once a party and her counsel have identified all of the sources of potentially relevant information, they are under a duty to retain that information (as per *Zubulake IV*) and to produce information responsive to the opposing

⁷⁵ It might be advisable to solicit a list of search terms from the opposing party for this purpose, so that it could not later complain about which terms were used.

party's requests. Rule 26 creates a "duty to supplement" those responses.⁷⁶

Although the Rule 26 duty to supplement is nominally the party's, it really falls on counsel. As the Advisory Committee explains,

Although the party signs the answers, it is his lawyer who understands their significance and bears the responsibility to bring answers up to date. In a complex case all sorts of information reaches the party, who little understands its bearing on answers previously given to interrogatories. In practice, therefore, the lawyer under a continuing burden must periodically recheck all interrogatories and canvass all new information.⁷⁷

To ameliorate this burden, the Rules impose a continuing duty to supplement responses to discovery requests *only* when "a party[,] or more frequently his lawyer, obtains actual knowledge that a prior response is incorrect. This exception does not impose a duty to check the accuracy of prior responses, but it prevents knowing concealment by a party or attorney."⁷⁸

The *continuing* duty to supplement disclosures strongly suggests that parties also have a duty to make sure that discoverable information is not lost.

⁷⁶ Fed. R. Civ. P. 26(e).

⁷⁷ 1966 Advisory Committee Note to Fed. R. Civ. P. 26(e).

⁷⁸ *Id.* The Rules also create a duty to supplement in two other instances: (a) when the Court so orders, and (b) with respect to Rule 26(a) initial disclosures, "because of the obvious importance to each side of knowing all witnesses and because information about witnesses routinely comes to each lawyer's attention," *id.* See Fed. R. Civ. P. 26(e).

Indeed, the notion of a “duty to preserve” connotes an ongoing obligation.

Obviously, if information is lost or destroyed, it has not been preserved.⁷⁹

The tricky question is what that continuing duty entails. What must a lawyer do to make certain that relevant information — especially electronic information — is being retained? Is it sufficient if she periodically re-sends her initial “litigation hold” instructions? What if she communicates with the party’s information technology personnel? Must she make occasional on-site inspections?

Above all, the requirement must be reasonable. A lawyer cannot be obliged to monitor her client like a parent watching a child. At some point, the client must bear responsibility for a failure to preserve. At the same time, counsel is more conscious of the contours of the preservation obligation; a party cannot reasonably be trusted to receive the “litigation hold” instruction once and to fully comply with it without the active supervision of counsel.⁸⁰

⁷⁹ See OXFORD ENGLISH DICTIONARY (2d ed. 1989) (defining “preserve” as “[t]o keep safe from harm or injury; to keep in safety, save, take care of, guard”); *see also id.* (defining “retain” as “[t]o keep hold or possession of; to continue having or keeping, in various senses”).

⁸⁰ See *Telecom International Am. Ltd. v. AT&T Corp.*, 189 F.R.D. 76, 81 (S.D.N.Y. 1999) (“Once on notice [that evidence is relevant], the obligation to preserve evidence runs first to counsel, who then has a duty to advise and explain to the client its obligations to retain pertinent documents that may be relevant to

There are thus a number of steps that counsel should take to ensure compliance with the preservation obligation. While these precautions may not be enough (or may be too much) in some cases, they are designed to promote the continued preservation of potentially relevant information in the typical case.

First, counsel must issue a “litigation hold” at the outset of litigation or whenever litigation is reasonably anticipated.⁸¹ 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.

Second, counsel should communicate directly with the “key players” in the litigation, *i.e.*, the people identified in a party’s initial disclosure and any subsequent supplementation thereto.⁸² Because these “key players” are the “employees likely to have relevant information,”⁸³ it is particularly important that the preservation duty be communicated clearly to them. As with the litigation hold, the key players should be periodically reminded that the preservation duty is still in place.

the litigation.”) (citing *Kansas-Nebraska Natural Gas Co. v. Marathon Oil Co.*, 109 F.R.D. 12, 18 (D. Neb. 1983)).

⁸¹ See *Zubulake IV*, 220 F.R.D. at 218.

⁸² See Fed. R. Civ. P. 26(a)(1)(A).

⁸³ *Zubulake IV*, 220 F.R.D. at 218.

Finally, counsel should instruct all employees to produce electronic copies of their relevant active files. Counsel must also make sure that all backup media which the party is required to retain is identified and stored in a safe place. In cases involving a small number of relevant backup tapes, counsel might be advised to take physical possession of backup tapes. In other cases, it might make sense for relevant backup tapes to be segregated and placed in storage. Regardless of what particular arrangement counsel chooses to employ, the point is to separate relevant backup tapes from others. One of the primary reasons that electronic data is lost is ineffective communication with information technology personnel. By taking possession of, or otherwise safeguarding, all potentially relevant backup tapes, counsel eliminates the possibility that such tapes will be inadvertently recycled.

*Kier v. UnumProvident Corp.*⁸⁴ provides a disturbing example of what can happen when counsel and client do not effectively communicate. In that ERISA class action, the court entered an order on December 27, 2002, requiring UnumProvident to preserve electronic data, specifically including e-mails sent or received on six particular days. What ensued was a comedy of errors. First, before the court order was entered (but when it was subject to the common law

⁸⁴ No. 02 Civ. 8781, 2003 WL 21997747 (S.D.N.Y. Aug. 22, 2003).

duty to preserve) UnumProvident’s technical staff unilaterally decided to take a “snapshot” of its servers instead of restoring backup tapes, which would have recovered the e-mails in question. (In fact, the snapshot was useless for the purpose of preserving these e-mails because most of them had already been deleted by the time the snapshot was generated.) Once the court issued the preservation order, UnumProvident failed to take any further steps to locate the e-mails, believing that the same person who ordered the snapshot would oversee compliance with the court order. But no one told him that.

Indeed, it was not until January 13, when senior UnumProvident legal personnel inquired whether there was any way to locate the e-mails referenced in the December 27 Order, that anyone sent a copy of the Order to IBM, who provided “email, file server, and electronic data related disaster recovery services to UnumProvident.”⁸⁵ By that time, UnumProvident had written over 881 of the 1,498 tapes that contained backup data for the relevant time period. All of this led to a stern rebuke from the court.⁸⁶ Had counsel in *Kier*

⁸⁵ *Id.* at *4.

⁸⁶ *Id.* at *13 (“If UnumProvident had been as diligent as it should have been . . . many fewer [backup] tapes would have been inadvertently overwritten.”). Rather than order sanctions, the court recommended that the parties determine the feasibility of retrieving the lost data and the extent of prejudice to the plaintiffs so that an appropriate remedy could be determined.

promptly taken the precautions set out above, the e-mails would not have been lost.⁸⁷

3. What Happened at UBS After August 2001?

As more fully described above, UBS's in-house counsel issued a litigation hold in August 2001 and repeated that instruction several times from September 2001 through September 2002. Outside counsel also spoke with some (but not all) of the key players in August 2001. Nonetheless, certain employees unquestionably deleted e-mails. Although many of the deleted e-mails were recovered from backup tapes, a number of backup tapes — and the e-mails on them — are lost forever.⁸⁸ Other employees, notwithstanding counsel's request

⁸⁷ See also *Metropolitan Opera Assoc., Inc. v. Local 100, Hotel Employees & Restaurant Employees International Union*, 212 F.R.D. 178, 222 (S.D.N.Y. 2003) (ordering default judgment against defendant as a discovery sanction because “counsel (1) never gave adequate instructions to their clients about the clients’ overall discovery obligations, [including] what constitutes a ‘document’ . . . ; (2) knew the Union to have no document retention or filing systems and yet never implemented a systematic procedure for document production or for retention of documents, including electronic documents; (3) delegated document production to a layperson who . . . was not instructed by counsel[] that a document included a draft or other nonidentical copy, a computer file and an e-mail; . . . and (5) . . . failed to ask important witnesses for documents until the night before their depositions and, instead, made repeated, baseless representations that all documents had been produced.”).

⁸⁸ See *Zubulake IV*, 220 F.R.D. at 218-19 (“By its attorney’s directive in August 2002, UBS endeavored to preserve all backup tapes that existed in August 2001 (when Zubulake filed her EEOC charge) that captured data for employees

that they produce their files on Zubulake, did not do so.

a. UBS's Discovery Failings

UBS's counsel — both in-house and outside — repeatedly advised UBS of its discovery obligations. In fact, counsel came very close to taking the precautions laid out above. *First*, outside counsel issued a litigation hold in August 2001. The hold order was circulated to many of the key players in this litigation, and reiterated in e-mails in February 2002, when suit was filed, and again in September 2002. Outside counsel made clear that the hold order applied to backup tapes in August 2002, as soon as backup tapes became an issue in this case. *Second*, outside counsel communicated directly with many of the key players in August 2001 and attempted to impress upon them their preservation obligations. *Third*, and finally, counsel instructed UBS employees to produce copies of their active computer files.⁸⁹

identified by Zubulake in her document request, and all such monthly backup tapes generated thereafter. These backup tapes [all should have] existed in August 2002, because of UBS's document retention policy, which required retention for three years. In August 2001, UBS employees were instructed to maintain active electronic documents pertaining to Zubulake in separate files. Had these directives been followed, UBS would have met its preservation obligations by preserving one copy of all relevant documents that existed at, or were created after, the time when the duty to preserve attached. In fact, UBS employees did not comply with these directives.”) (footnotes omitted).

⁸⁹ Kim testified that she was not so instructed.

To be sure, counsel did not fully comply with the standards set forth above. Nonetheless, under the standards existing at the time, counsel acted reasonably to the extent that they directed UBS to implement a litigation hold. Yet notwithstanding the clear instructions of counsel, UBS personnel failed to preserve plainly relevant e-mails.

b. Counsel’s Failings

On the other hand, UBS’s counsel are not entirely blameless. “While, of course, it is true that counsel need not supervise every step of the document production process and may rely on their clients in some respects,”⁹⁰ counsel is responsible for coordinating her client’s discovery efforts. In this case, 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.

With respect to locating relevant information, counsel failed to adequately communicate with Tong about how she stored data. Although counsel determined that Tong kept her files on Zubulake in an “archive,” they apparently made no effort to learn what that meant. A few simple questions — like the ones that Zubulake’s counsel asked at Tong’s re-deposition — would have revealed that

⁹⁰ *Metropolitan Opera*, 212 F.R.D. at 222.

she kept those files in a separate *active* file on her computer.

With respect to making sure that relevant data was retained, counsel failed in a number of important respects. *First*, neither in-house nor outside counsel communicated the litigation hold instructions to Mike Davies, a senior human resources employee who was intimately involved in Zubulake's termination. *Second*, even though the litigation hold instructions were communicated to Kim, no one ever asked her to produce her files. And *third*, counsel failed to protect relevant backup tapes; had they done so, Zubulake might have been able to recover some of the e-mails that UBS employees deleted.

In addition, if Varsano's deposition testimony is to be credited, he turned over "all of the e-mails that [he] received concerning Ms. Zubulake."⁹¹ If Varsano turned over these e-mails, then counsel must have failed to produce some of them.⁹²

In sum, while UBS personnel deleted e-mails, copies of many of these e-mails were lost or belatedly produced as a result of counsel's failures.

⁹¹ Varsano Dep. at 289.

⁹² I have no reason not to credit Varsano's testimony, given that he is a human resources employee who is not implicated in the alleged discrimination against Zubulake.

c. Summary

Counsel failed to communicate the litigation hold order to all key players. They also failed to ascertain each of the key players' document management habits. By the same token, UBS employees — for unknown reasons — ignored many of the instructions that counsel gave. This case represents a failure of communication, and that failure falls on counsel and client alike.

At the end of the day, however, the duty to preserve and produce documents rests on the party. Once that duty is made clear to a party, either by court order or by instructions from counsel, that party is on notice of its obligations and acts at its own peril. Though more diligent action on the part of counsel would have mitigated some of the damage caused by UBS's deletion of e-mails, UBS deleted the e-mails in defiance of explicit instructions not to.

Because UBS personnel continued to delete relevant e-mails, Zubulake was denied access to e-mails to which she was entitled. Even those e-mails that were deleted but ultimately salvaged from other sources (*e.g.*, backup tapes or Tong and Kim's active files) were produced 22 months after they were initially requested. The effect of losing potentially relevant e-mails is obvious, but the effect of late production cannot be underestimated either. "[A]s a discovery deadline . . . draws near, discovery conduct that might have been considered

‘merely’ discourteous at an earlier point in the litigation may well breach a party’s duties to its opponent and to the court.”⁹³ Here, as UBS points out, Zubulake’s instant motion “comes more than a year after the Court’s previously imposed March 3, 2003 discovery cutoff.”⁹⁴ Although UBS attempts to portray this fact as evidence that Zubulake is being overly litigious, it is in fact a testament to the time wasted by UBS’s failure to timely produce all relevant and responsive information. With the discovery deadline long past, UBS “was under an obligation to be *as cooperative as possible*.”⁹⁵ Instead, the extent of UBS’s spoliation was uncovered by Zubulake during court-ordered re-depositions.

I therefore conclude that UBS acted wilfully in destroying potentially relevant information, which resulted either in the absence of such information or its tardy production (because duplicates were recovered from Kim or Tong’s active files, or restored from backup tapes). Because UBS’s spoliation was

⁹³ *Residential Funding*, 306 F.3d at 112.

⁹⁴ Defendants’ Memorandum of Law in Opposition to Plaintiff’s Motion for Sanctions (“Def. Mem.”) at 3.

⁹⁵ *Residential Funding*, 306 F.3d at 112 (emphasis in original); *see also id.* (suggesting that breach of that obligation might “constitute[] sanctionable misconduct in [its] own right”).

willful, the lost information is presumed to be relevant.⁹⁶

B. Remedy

Having concluded that UBS was under a duty to preserve the e-mails and that it deleted presumably relevant e-mails wilfully, I now consider the full panoply of available sanctions.⁹⁷ In doing so, I recognize that a major consideration in choosing an appropriate sanction — along with punishing UBS and deterring future misconduct — is to restore Zubulake to the position that she would have been in had UBS faithfully discharged its discovery obligations.⁹⁸

⁹⁶ See *Kronisch*, 150 F.3d at 126 (“It is a well-established and long-standing principle of law that a party’s intentional destruction of evidence relevant to proof of an issue at trial can support an inference that the evidence would have been unfavorable to the party responsible for its destruction.”) (cited in *Residential Funding*, 306 F.3d at 109); see also *Residential Funding*, 306 F.3d at 109 (“[A] showing of [wilfulness or] gross negligence in the destruction *or untimely production* of evidence will in some circumstances suffice, standing alone, to support a finding that the evidence was unfavorable to the grossly negligent party.”) (emphasis added); see also *id.* at 110 (“Just as the intentional or grossly negligent *destruction* of evidence in bad faith can support an inference that the destroyed evidence was harmful to the destroying party, so, too, can intentional or grossly negligent acts that hinder discovery support such an inference. . . .”) (emphasis in original).

⁹⁷ See *Fujitsu*, 247 F.3d at 436 (holding that the choice of sanctions for spoliation and failure to produce evidence “is confined to the sound discretion of the trial judge, and is assessed on a case-by-case basis”).

⁹⁸ See *West*, 167 F.3d at 779 (explaining that the chosen sanction should “(1) deter parties from engaging in spoliation; (2) place the risk of an erroneous judgment on the party who wrongfully created the risk; and (3) restore ‘the

That being so, I find that the following sanctions are warranted.

First, the jury empanelled to hear this case will be given an adverse inference instruction with respect to e-mails deleted after August 2001, and in particular, with respect to e-mails that were irretrievably lost when UBS's backup tapes were recycled. No one can ever know precisely what was on those tapes, but the content of e-mails recovered from other sources — along with the fact that UBS employees wilfully deleted e-mails — is sufficiently favorable to Zubulake that I am convinced that the contents of the lost tapes would have been similarly, if not more, favorable.⁹⁹

prejudiced party to the same position he would have been in absent the wrongful destruction of evidence by the opposing party.’”) (quoting *Kronisch*, 150 F.3d at 126); *see also Pastorello v. City of New York*, No. 95 Civ. 470, 2003 WL 1740606, at *8 (S.D.N.Y. Apr. 1, 2003).

⁹⁹ *Cf. Chambers v. TRM Copy Centers Corp.*, 43 F.3d 29, 37 (2d Cir. 1994) (“[e]mployers are rarely so cooperative as to include a notation in the personnel file’ that their actions are motivated by factors expressly forbidden by law. Because an employer who discriminates is unlikely to leave a ‘smoking gun’ attesting to a discriminatory intent, a victim of discrimination is seldom able to prove his claim by direct evidence, and is usually constrained to rely on circumstantial evidence.”) (quoting *Ramseur v. Chase Manhattan Bank*, 865 F.2d 460, 464 (2d Cir. 1989)) (citations omitted); *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1112 (2d Cir. 1988) (“[In] reality . . . direct evidence of discrimination is difficult to find precisely because its practitioners deliberately try to hide it. Employers of a mind to act contrary to law seldom note such a motive in their employee’s personnel dossier.”)

Note that I am *not* sanctioning UBS for the loss of the tapes (which

Second, Zubulake argues that the e-mails that *were* produced, albeit late, “are brand new and very significant to Ms. Zubulake’s retaliation claim and would have affected [her] examination of every witness . . . in this case.”¹⁰⁰ Likewise, Zubulake claims, with respect to the newly produced e-mails from Kim and Tong’s active files, that UBS’s “failure to produce these e-mails in a timely fashion precluded [her] from questioning any witness about them.”¹⁰¹ These arguments stand unrebutted and are therefore adopted in full by the Court. Accordingly, UBS is ordered to pay the costs of any depositions or re-depositions required by the late production.

Third, UBS is ordered to pay the costs of this motion.¹⁰²

Finally, I note that UBS’s belated production has resulted in a self-executing sanction. Not only was Zubulake unable to question UBS’s witnesses using the newly produced e-mails, but UBS was unable to prepare those witnesses with the aid of those e-mails. Some of UBS’s witnesses, not having seen these e-

was negligent), but rather for its *willful* deletion of e-mails. Those e-mails happen to be lost forever because the tapes that might otherwise have contained them were lost.

¹⁰⁰ Tr. at 10.

¹⁰¹ Pl. Mem. at 10.

¹⁰² Fed. R. Civ. P. 37(b)(2).

mails, have already given deposition testimony that seems to contradict the newly discovered evidence. For example, if Zubulake's version of the evidence is credited, the e-mail from Davies acknowledging receipt of Zubulake's EEOC charge at 11:06 AM on August 21, 2001, puts the lie to Davies' testimony that he had not seen the charge when he spoke to Orgill — a conversation that was reflected in an e-mail sent at 2:02 PM. Zubulake is, of course, free to use this testimony at trial.

These sanctions are designed to compensate Zubulake for the harm done to her by the loss of or extremely delayed access to potentially relevant evidence.¹⁰³ They should also stem the need for any further litigation over the backup tapes.

C. Other Alleged Discovery Abuses

In addition to the deleted (and thus never- or belatedly produced) e-mails, Zubulake complains of two other perceived discovery abuses: the destruction of a September 2001 backup tape from Tong's server, and the belated production of a UBS document retention policy.

¹⁰³ Another possible remedy would have been to order UBS to pay for the restoration of the remaining backup tapes. Zubulake, however, has conceded that further restoration is unlikely to be fruitful. *See* Tr. at 30-31.

1. Tong's September 2001 Backup Tape

Zubulake moves for sanctions because of the destruction of Tong's September 2001 backup tape. In *Zubulake III*, I ordered UBS to pay 75% of the cost of restoring certain backup tapes.¹⁰⁴ Understandably, one of the tapes that Zubulake chose to restore was Tong's tape for August 2001, the month that Zubulake filed her EEOC charge. That tape, however, had been recycled by UBS. Zubulake then chose to restore Tong's September 2001 tape, on the theory that "the majority of the e-mails on [the August 2001] tape are preserved on the September 2001 tape."¹⁰⁵ When that tape was actually restored, however, it turned out not to be the September 2001 tape at all, but rather Tong's October 2001 tape. This tape, according to UBS, was simply mislabeled.¹⁰⁶

Zubulake has already (unintentionally) restored Tong's October 2001 tape, which should contain the majority of the data on the September 2001 tape. In addition, UBS has offered to pay to restore Varsano's backup tape for August

¹⁰⁴ See *Zubulake III*, 216 F.R.D. at 291.

¹⁰⁵ *Zubulake IV*, 220 F.R.D. at 221.

¹⁰⁶ See Def. Mem. at 12 n.8; Tr. at 57 (attributing mislabeling of tape to "human error"); see also Declaration of James E. Gordon, Vice President of Pinkerton Consulting & Investigations, Inc. (detailing UBS's investigation into the missing September 2001 tape), Ex. I to the 5/14/04 Declaration of Norman C. Simon ("Simon Decl.").

2001, which it has and which has not yet been restored.¹⁰⁷ Varsano was Tong's HR counterpart in the United States, and was copied on many (but not all) of the e-mails that went to or from Tong.¹⁰⁸ These backup tapes, taken together, should recreate the lion's share of data from Tong's August 2001 tape. UBS must therefore pay for the restoration and production of relevant e-mails from Varsano's August 2001 backup tape, and pay for any re-deposition of Tong or Varsano that is necessitated by new e-mails found on that tape.

2. The July 1999 Record Management Policy

Zubulake also moves for sanctions in connection with what she refers to as "bad faith discovery tactics" on the part of UBS's counsel.¹⁰⁹ In particular, Zubulake complains of a late-produced record management policy.¹¹⁰ The existence of this policy was revealed to Zubulake at Varsano's second deposition on January 26, 2004,¹¹¹ at which time Zubulake called for its production.¹¹²

¹⁰⁷ See Tr. at 58-59.

¹⁰⁸ See *id.*

¹⁰⁹ Pl. Mem. at 8.

¹¹⁰ See June 1999 UBS Record Management Policy for the Americas Region (the "June 1999 policy"), Ex. M to the Batson Aff.

¹¹¹ See Varsano Dep. at 489-94.

¹¹² See *id.* at 494.

Zubulake twice reiterated this request in writing, in the hopes that she would have the policy in time for Hardisty's deposition on February 5, 2004. UBS did not produce the policy, however, until February 26, 2004.¹¹³

The late production of the July 1999 policy does not warrant sanctions at all. *First*, UBS's production of the policy was not late. Zubulake requested it at Varsano's deposition on January 26, 2004, and UBS produced it one month later, on February 26. The Federal Rules afford litigants thirty days to respond to document requests,¹¹⁴ and UBS produced the policy within that time. The fact that Zubulake wanted the document earlier is immaterial — if it was truly necessary to confront Hardisty with the policy, then his deposition should have been rescheduled or Zubulake should have requested relief from the Court.¹¹⁵ Not having done so, Zubulake cannot now complain that UBS improperly delayed its production of that document.

Second, even if UBS was tardy in producing the policy, Zubulake has not demonstrated that she was prejudiced. She suggests that she would have used

¹¹³ See 4/26/04 Letter from Norman Simon, counsel to UBS, to James Batson, Ex. N to the Batson Aff.

¹¹⁴ See Fed. R. Civ. P. 34(b).

¹¹⁵ See *id.* (reserving to the court the authority to lengthen or shorten the time in which a party must respond to a document request).

the policy in the depositions of Hardisty and perhaps Chapin, but does not explain how. Nor is it at all clear how Zubulake might have used the policy. With respect to e-mail, the policy states: “Email is another priority. We will have a separate policy regarding email with appropriate reference or citation in this policy and/or retention schedules.”¹¹⁶ Prior to these depositions, Zubulake had a number of UBS document retention policies that post-dated the June 1999 Policy.¹¹⁷

V. CONCLUSION

In sum, counsel has a duty to effectively communicate to her client its discovery obligations so that all relevant information is discovered, retained, and produced. In particular, once the duty to preserve attaches, counsel must identify sources of discoverable information. This will usually entail speaking directly with the key players in the litigation, as well as the client’s information technology personnel. In addition, when the duty to preserve attaches, counsel must put in place a litigation hold and make that known to all relevant employees by communicating with them directly. The litigation hold instructions must be

¹¹⁶ June 1999 Policy § 3.2.

¹¹⁷ See Retention of Back-up Tapes of Email Servers (dated June 2001), Ex. H to Simon Decl.; Retention of Back-Up Tapes of E-mail and Interchange (dated October 2001), Ex. K to Simon Decl.; *see also* Ex. M to Batson Aff. (consisting of four UBS document retention policies, including one entitled “Use of Electronic Mail, Chat and Text Messaging,” dated November 2002).

reiterated regularly and compliance must be monitored. Counsel must also call for employees to produce copies of relevant electronic evidence, and must arrange for the segregation and safeguarding of any archival media (*e.g.*, backup tapes) that the party has a duty to preserve.

Once counsel takes these steps (or once a court order is in place), a party is fully on notice of its discovery obligations. If a party acts contrary to counsel's instructions or to a court's order, it acts at its own peril.

UBS failed to preserve relevant e-mails, even after receiving adequate warnings from counsel, resulting in the production of some relevant e-mails almost two years after they were initially requested, and resulting in the complete destruction of others. For that reason, Zubulake's motion is granted and sanctions are warranted. UBS is ordered to:

1. Pay for the re-deposition of relevant UBS personnel, limited to the subject of the newly-discovered e-mails;
2. Restore and produce relevant documents from Varsano's August 2001 backup tape;
3. Pay for the re-deposition of Varsano and Tong, limited to the new material produced from Varsano's August 2001 backup tape;¹¹⁸ and

¹¹⁸ Rulings numbered (1) and (3) may both result in the re-deposition of Tong and Varsano. Obviously, each should only be re-deposed once.

4. Pay all “reasonable expenses, including attorney’s fees,”¹¹⁹ incurred by Zubulake in connection with the making of this motion.

In addition, I will give the following instruction to the jury that hears this case:

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.

In deciding whether to draw this inference, you should consider whether the evidence not produced would merely have duplicated other evidence already before you. You may also consider whether you are satisfied that UBS’s failure to produce this information was reasonable. Again, any inference you decide to draw should be based on all of the facts and circumstances in this case.¹²⁰

The Clerk is directed to close this motion [number 43 on the docket sheet]. Fact discovery shall close on October 4, 2004. A final pretrial conference is scheduled

¹¹⁹ Fed. R. Civ. P. 37(b)(2).

¹²⁰ This instruction was adapted from LEONARD B. SAND ET AL., MODERN FEDERAL JURY INSTRUCTIONS 75-7 (2004); *see also Zimmerman v. Associates First Capital Corp.*, 251 F.3d 376, 383 (2d Cir. 2001) (affirming district court’s use of a similar charge); *cf.* NEW YORK PATTERN JURY INSTRUCTIONS — CIVIL 1:77 (3d ed. 2004).

for 4:30 PM on October 13, 2004, in Courtroom 15C. If either party believes that a dispositive motion is appropriate, that date will be converted to a pre-motion conference.

VI. POSTSCRIPT

The subject of the discovery of electronically stored information is rapidly evolving. When this case began more than two years ago, there was little guidance from the judiciary, bar associations or the academy as to the governing standards. Much has changed in that time. There have been a flood of recent opinions — including a number from appellate courts — and there are now several treatises on the subject.¹²¹ In addition, professional groups such as the American Bar Association and the Sedona Conference have provided very useful guidance on thorny issues relating to the discovery of electronically stored information.¹²² Many courts have adopted, or are considering adopting, local rules addressing the

¹²¹ See MICHAEL ARKFELD, *ELECTRONIC DISCOVERY AND EVIDENCE* (2003); ADAM I. COHEN & DAVID J. LENDER, *ELECTRONIC DISCOVERY: LAW AND PRACTICE* (2004).

¹²² See Memorandum from Gregory P. Joseph & Barry F. McNeil, *Electronic Discovery Standards — Draft Amendments to ABA Civil Discovery Standards* (Nov. 17, 2003), available at <http://www.abanet.org/litigation/taskforces/electronic/document.pdf>; The Sedona Conference, *The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production* (January 2004), available at http://www.thesedonaconference.org/publications_html.

subject.¹²³ Most recently, the Standing Committee on Rules and Procedures has approved for publication and public comment a proposal for revisions to the Federal Rules of Civil Procedure designed to address many of the issues raised by the discovery of electronically stored information.¹²⁴

Now that the key issues have been addressed and national standards are developing, parties and their counsel are fully on notice of their responsibility to preserve and produce electronically stored information. The tedious and difficult fact finding encompassed in this opinion and others like it is a great burden on a court's limited resources. The time and effort spent by counsel to litigate these issues has also been time-consuming and distracting. This Court, for

¹²³ See, e.g., E.D. Ark. Local Rule 26.1; W.D. Ark. Local Rule 26.1; D. Wy. Local Rule 26.1; D.N.J. Local Rule 26.1(d); see also Memorandum from the Ninth Circuit Advisory Board, *Proposed Model Local Rule on Electronic Discovery*, available at <http://www.krollontrack.com/LawLibrary/Statutes/9thCirDraft.pdf>, D. Kan. *Electronic Discovery Guidelines*; D. Del. *Default Standards for Discovery of Electronic Document*. In addition, a number of states have adopted rules governing electronic discovery. See, e.g., Miss. R. Civ. P. 26; Tex. R. Civ. P. 193.3, 196.4. With the exception of the proposed Ninth Circuit model rule, all of these rules are collected at <http://www.kenwithers.com/rulemaking/>.

¹²⁴ The proposals forwarded from the Civil Rules Advisory Committee to the Standing Committee can be found on pages 20-70 of the memorandum available at <http://www.kenwithers.com/rulemaking/civilrules/report051704.pdf>. Those proposals were subsequently revised by the Standing Committee; the final text of the proposed rules that will be published for comment should be available some time in August 2004.

one, is optimistic that with the guidance now provided it will not be necessary to spend this amount of time again. It is hoped that counsel will heed the guidance provided by these resources and will work to ensure that preservation, production and spoliation issues are limited, if not eliminated.

SO ORDERED:

Shira A. Scheindlin
United States District Judge

Dated: New York, New York
July 20, 2004

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