

Annotated Case Law on Electronic Discovery

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I. Data Preservation and Spoliation

ACS Consultant Co., Inc. v. Williams, 2006 WL 897559 (E.D. Mich. Apr. 6, 2006).

In a suit against former employees for employment contract violations and theft of proprietary business information, the plaintiff sought and obtained a preliminary injunction enjoining the defendants from destroying any information of the plaintiff, including taking any action to delete data or “wipe” any computer hard drive, laptop, or Blackberry issued by the plaintiff to the former employees.

Adams v. Gateway, Inc., Case No. 2:02-CV-106 TS (D. Utah Mar. 6, 2006) (unsealed by order denying defendant’s motion to maintain seal, Mar. 22, 2006).

In a patent infringement suit in which there were allegations of spoliation of e-mail evidence, the district judge upheld the magistrate judge’s report and recommendation that the defendant be prohibited from asserting attorney–client privilege or work-product protection, that a negative inference be imposed, that a warning be issued that any further withheld or tardy disclosure may result in judgment against the defendant, and that attorneys’ fees and costs associated with the defendant’s spoliation of evidence be awarded to the plaintiff. The defendant objected that the magistrate judge’s report failed to conclude that defendant had engaged in bad-faith activity resulting in the loss of evidence and failed to take into account the defendant’s remedial actions. The district judge found that there was ample circumstantial evidence to support a finding of intentional, bad-faith destruction of e-mail messages central to the facts of the case (later produced in hard copy form), and that the defendant offered no alternative explanation for their loss. Acknowledging that the decision was a “close call,” the court chose not to impose a “terminating sanction,” as the defendant did not have prior warning of such a sanction, and that the evidential inference and award of attorneys’ fees and costs were adequate.

AdvantageCare Health Partners, LP v. Access IV, Inc., 2005 WL 1398641 (N.D. Cal. June 14, 2005).

In a trade secrets appropriation case, the defendants were found to have deleted files from their hard drives to conceal their activities shortly after entry of a temporary restraining order and were fined \$20,000 as a sanction. One of the defen-

dants moved for reconsideration on the grounds that she had not actually participated in the sanctionable activity. The court denied the motion, as the court's original order extended to all the defendants and the moving defendant presented no new material evidence that would distinguish her conduct from that of any of the other defendants.

Anderson v. Crossroads Capital Partners LLC, No. Civ. 01-2000, 2004 WL 256512 (D. Minn. Feb. 10, 2004). In a sexual harassment and whistle-blower suit, the defendant requested and obtained access to the plaintiff's personal computer. The defendant's examining expert reported that the hard drive found in the plaintiff's computer was manufactured more than two years after the alleged events and that the plaintiff had recently installed and used a file-wiping program called "CyberScrub." In response, the plaintiff claimed that she had been using the same computer throughout the litigation, despite changing the hard drive, she also disclaimed any intent to use CyberScrub to destroy potential evidence. The judge found that although the plaintiff's "exceedingly tedious and disingenuous claim of naiveté . . . defies the bounds of reason," her behavior was not egregious enough to warrant dismissal of the case. But since "[she] intentionally destroyed evidence," the court instead would give the jury an adverse inference instruction during trial.

Arista Records, Inc. v. Sakfield Holding Co. S.L., 314 F. Supp. 2d 27 (D.D.C. 2004). In a copyright infringement suit, the central question was jurisdiction. The court ordered discovery limited to the jurisdictional issues, particularly discovery of the Internet servers that would presumably contain copies of the copyrighted works, Internet transaction histories, and subscriber information. When the plaintiffs' expert examined these servers, he found that the defendants had intentionally destroyed most of the data by running a "data wiping" program fifty times from a remote location after receiving notice of copyright claims. The court admonished the defendants for arguing that "it destroyed crucial evidence to prevent further transfer of music files" because the defendants "could have disconnected its website from the Internet in any number of ways without destroying one single file." But the court declined to "impose any particular sanctions as a result of these actions but instead grant[ed] plaintiffs the right to file appropriate motions for sanctions or otherwise in the future." On the jurisdictional issue, the court accepted the plaintiffs' expert's extrapolation from the fragmentary data recovered that approximately 241 users in the District of Columbia had downloaded approximately 20,000 copyrighted musical works. The defendants' claim, that plaintiffs' evidence was inadequate, lacked merit because "[d]estruction of evidence raises the presumption that disclosure of the materials would be damaging." Therefore the court held that the plaintiff had established "continuous and systematic contacts" between the defendant and the District of Columbia.

Arthur Andersen, LLP v. United States, 544 U.S. 696 (2005). In the conclusion to the famous criminal action against the Arthur Andersen accounting firm stemming from the collapse of Enron, the Supreme Court overturned Arthur Andersen’s conviction for criminal obstruction of justice for shredding documents prior to receiving a subpoena from the SEC. The Court determined that the trial court’s instruction to the jury omitted the essential element of scienter—actual knowledge of a proceeding (in contrast to the “reasonable anticipation of litigation” standard in civil actions) and the intent to obstruct that proceeding.

Broccoli v. Echostar Communications Corp., 2005 WL 1863176 (D. Md. Aug. 4, 2005). In an employment suit involving federal claims of sexual harassment and state claims of breach of contract, the jury found for the plaintiff on the state claims but failed to find for the plaintiff on the federal claims arising from the same facts. In post-trial litigation, the judge found the jury verdict contradictory and refused to award attorneys fees to the defendant, as the lack of evidence that resulted in the jury’s verdict on the federal claims was the result of the defendant’s failure to preserve discoverable electronic evidence in discovery, a finding made by the court prior to trial. Recounting the defendant’s “extraordinary” electronic record destruction policy and the defendant’s failure to suspend that policy when the duty to preserve evidence arose, the judge granted the plaintiff attorneys fees on the state claims and the discovery sanction motion, and sustained the plaintiff’s objection to the defendant’s motion for attorneys’ fees on the federal claims.

Capricorn Power Co. v. Siemens Westinghouse Power Corp., 220 F.R.D. 429 (W.D. Pa. 2004). In a liability case stemming from the failure of electric generator equipment, both the plaintiff and the defendant filed motions for data preservation orders. The court noted that the case law on the standard for issuing such orders is “scant” and that attempts to borrow the four-part test for injunctive relief are inappropriate. The court announced a new three-part test for data preservation orders:

1. the level of concern the court has for the continuing existence and maintenance of the integrity of the evidence in question in the absence of an order directing preservation of the evidence;
2. any irreparable harm likely to result to the party seeking the preservation of evidence absent an order directing preservation; and
3. the capability of an individual, entity, or party to maintain the evidence sought to be preserved, not only as to the evidence’s original form, condition, or contents, but also as to the physical, spatial, and financial burdens created by ordering evidence preservation.

Applying this new test, the court concluded that the defendant’s motion for a data preservation order was not justified or necessary. Likewise, the court denied the plaintiff’s

counter-motion, which appeared to have been filed as a “tactical, quid pro quo response to the [d]efendant’s motion” rather than out of necessity.

Clare v. Coleman (Parent) Holdings, Inc. 2006 WL 14091347 (Fla. App. 4th Dist., May 24, 2006). Ancillary to the *Coleman (Parent) Holdings v. Morgan Stanley* orders rendered in March of 2005 involving the alleged failure of Morgan Stanley to produce relevant data from backup tapes and subsequent misrepresentation to the court, the attorney whose *pro hoc vice* license was suspended as a sanction filed a writ of certiorari requesting review. Because the trial court made no finding that the attorney was personally involved in the alleged misconduct, was given no notice of or opportunity to be heard concerning the revocation of his *pro hoc vice* status, and had suffered irreparable harm by the imposition of the sanction, the appellate court granted the writ and directed the trial court to strike the revocation order.

Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., No. CA 03-5045, 2005 WL 679071 (Fla. Cir. Ct., 15th Cir. Mar. 1, 2005), 2005 WL 674885 (Mar. 23, 2005). In a lawsuit alleging accounting fraud and misrepresentation in the sale of stock, the plaintiff filed a motion for sanctions, including an adverse inference jury instruction for the defendant’s destruction of e-mails. The defendant had a practice of overwriting e-mails after twelve months, although it was required by the SEC to retain e-mails for two years. The court had ordered the defendant to review backup tapes, conduct searches, produce e-mails and a privilege log, and certify compliance with discovery obligations. The defendant certified discovery as complete despite having failed to review more than 1,400 backup tapes. In its order dated March 1, 2005, the court granted the adverse inference instruction sanction, noting that “the conclusion is inescapable that the defendant sought to thwart discovery” and “[the defendant] gave no thought to using an outside contractor to expedite the process . . . [knowing] it lacked the technological capacity to upload and search the data . . . and would not attain that capacity for months.” In addition to the adverse inference instruction and disqualification of counsel, the court made findings that shifted the usual burden in a fraud case onto the defendant to demonstrate that it did not commit the fraud alleged. Two weeks later, it was disclosed that the defendant had not informed the plaintiff or the court of thousands of additional backup tapes that existed but had not been secured or reviewed. In its order on March 23, 2005, the court revoked the *pro hoc vice* license of the defendant’s trial lawyer and disqualified the law firm, forcing the defendant to seek substitute counsel two weeks before trial.

Communications Center, Inc. v. Hewitt, No. Civ. S-03-1968 WBS KJM (E.D. Cal. Apr. 5, 2005). In a trade secret appropriation case, the defendant was ordered to produce a mirror image of four hard drives for inspection under a protective protocol. Instead, the defendants produced a collection of compact disks on which some relevant

files had been copied. In addition, the defendant stated that he had wiped three of the four hard drives using Evidence Eliminator to remove irrelevant pornographic images and irrelevant evidence of an on-line dalliance with a woman, not his wife. The court, applying a five-factor test, concluded that the sanction of outright default judgment was not appropriate, but that the plaintiff would be allowed to present evidence of the defendant's action to the jury, and the defendant would be allowed to present his explanation. In addition, attorneys' fees for the litigation of the sanction motion would be awarded to the plaintiff.

Convolve, Inc. v. Compaq Computer Corp., 223 F.R.D. 162 (S.D.N.Y. 2004). In a patent infringement suit involving disk drive technology, the plaintiff moved for an adverse inference jury instruction, alleging spoliation of e-mail messages and laboratory test results by the defendant. In considering the circumstances surrounding the destruction of the e-mail messages, the court noted that the duty to preserve potentially discoverable e-mail had clearly arisen, since the messages were composed and sent after litigation had commenced. However, the court found that the plaintiff had failed to establish that the e-mail messages in question had been destroyed intentionally, or that the e-mail messages had any significant bearing on the facts of the case. Regarding the laboratory test results, the court found that the "results" consisted of visual observations of waves displayed on an oscilloscope as disk drives were subjected to electrical variable currents. Since these "results" were ephemeral, "the preservation of the wave form in a tangible state would have required heroic efforts far beyond those consistent with [the defendant's] regular course of business." Citing the recently published proposed amendment to Fed. R. Civ. P. 37, the court held that absent a violation of a preservation order, no sanction was warranted.

Danis v. USN Communications, 53 Fed. R. Serv. 3d (West) 828 (N.D. Ill. 2000). The plaintiffs filed a motion for sanctions against the defendants for misconduct. The court found that the plaintiffs had demonstrated inadequate document maintenance on the part of the defendants, but the plaintiffs failed to establish either that the defendants intentionally destroyed documents or that the missing documents were "critical." While insufficient to compel a default judgment, the failure to take reasonable steps to preserve data at the outset of discovery resulted in a personal fine levied against an inside director of USN.

E*Trade Securities LLC v. Deutsche Bank NG, 230 F.R.D. 582 (D. Minn. 2005). Defendants Nomura and Nomura Canada received notice from a U.S. bankruptcy court indicating that an investigation into securities trading fraud was underway, but Nomura Canada proceeded with plans to close offices and destroy employee hard drives and other data sources. Nomura itself failed to institute an adequate "litigation hold" over e-mail or backup tapes. The court sanctioned the defendants with an adverse jury instruc-

tion and imposed fines on counsel for failure to provide “substantial justification” for its discovery certifications under Fed. R. Civ. P. 26(g).

GTFM v. Wal-Mart Stores Inc., 49 Fed. R. Serv. 3d (West) 219 (S.D.N.Y. 2000). The defendant initially claimed that computer records the plaintiffs requested were not easily accessible and would place an undue burden on them. A year later the plaintiffs discovered that statement was false and that the defendant could have retrieved the desired information without difficulty, but since the elapsed time it would no longer be possible. The court ordered the defendant to pay attorneys’ fees and costs expended to litigate the sanction motion and recover the data.

Harrison v. Jones, Walker, Waechter, Poitevent, Carrere & Denegre, L.L.P., 2004 WL 2984815 (E.D. La. Dec. 9, 2004), 2005 WL 517342 (Feb. 24, 2005). In a trade secret theft/unfair trade practices case filed in state court, the plaintiff obtained an *ex parte* “Order for Expedited Discovery to Preserve Evidence” under which the plaintiff entered the defendant’s home business, accompanied by sheriffs, and imaged computer hard drives. The defendant filed this civil rights action in federal court. In December 2004, the federal court held that the civil rights claim, though yet unproven, would survive a motion to dismiss for failure to state a claim. Three months later, the federal court dismissed with prejudice the section 1983 conspiracy claim against the state court judge and the law firm, but dismissed without prejudice the civil rights claims against the remaining individuals, pending further proceedings in state court.

Hynix Semiconductor, Inc. v. Rambus, Inc., No. C-00-20905 RMW (N.D. Cal. January 4, 2006). In a patent declaratory judgment action, Hynix charged Rambus with “unclean hands,” claiming that Rambus’s records-management program, instituted immediately prior to filing patent infringement claims against companies other than Hynix, constituted unlawful destruction of evidence. The circumstances of the document destruction were the same as those chronicled in *Rambus, Inc. v. Infineon Technologies AG*, 220 F.R.D. 264 (E.D. Va. 2004). Unlike the court in Virginia, however, the court in this case found that the document destruction was not performed in anticipation of particular litigation with this particular party. Rambus therefore lacked the bad faith necessary to support Hynix’s “unclean hands” claim. In addition, Hynix failed to establish that the documents destroyed had any nexus to the facts of their case, and there was no showing of prejudice to Hynix as a result of the document destruction.

Hypro, LLC v. Reser, No. Civ. 04-4921, 2004 WL 2905321 (D. Minn. Dec. 10, 2004). In a theft of trade secrets/unfair business practices case, the plaintiff requested and obtained a temporary restraining order enjoining the defendant from engaging in a number of allegedly unfair business practices. In addition, the court granted the plaintiff’s motion to preserve “all evidence, including electronic documents and electronic

mail” during the pendency of the litigation because of the belief that the defendant had “previously attempted to destroy computer files regarding his involvement with other [d]efendants.”

Keir v. Unumprovident Corp., No. 02 Civ. 8781, 2003 WL 21997747 (S.D.N.Y. Aug. 22, 2003). In an ERISA class action suit, the parties agreed to a data preservation order after several conferences. The order was very narrowly drawn and concentrated on preserving six days of e-mail records on the defendant’s backup media and hard drives. However, the defendant’s upper management did not communicate the order to its information technology (IT) staff for nearly two weeks, and most of its data-management functions had been outsourced to IBM, which failed to implement the required preservation. Although the court found that the defendant’s failure to preserve the data was unintentional, it criticized the defendant’s poor compliance with the preservation order. The court recommended that further action be taken to determine the feasibility of retrieving the lost data to which the plaintiffs were prejudiced, in order for the court to fashion an appropriate remedy.

Krunwiede v. Brighton Assocs., LLC, 2006 WL 1308629 (N.D. Ill. May 8, 2006). In a wrongful termination lawsuit involving counterclaims of misappropriation of confidential business information, the defendant demanded return of the former employee’s laptop computer, the purchase of which the plaintiff had been reimbursed by the defendant while employed. Eventually the laptop was turned over to a neutral computer forensics examiner, who determined that the plaintiff had performed several maintenance and copying operations, including defragmentation, after receipt of a data preservation letter from the defendant and a court order requiring surrender of the laptop. While it was not conclusively established that unique, relevant files had been irrevocably destroyed, the actions of the plaintiff in conscious disregard of a court order effectively destroyed metadata in an attempt to “hide the ball” and frustrate discovery. Under these circumstances the court issued default judgment against the plaintiff, plus attorneys fees and costs.

Landmark Legal Foundation v. EPA (“Landmark II”), 272 F. Supp. 2d 70 (D.D.C. 2003) (mem.). In a civil suit stemming from a Freedom of Information Act (FOIA) request, the court issued a preliminary injunction ordering that the EPA refrain from “transporting, removing, or in any way tampering with information responsive” to the plaintiff’s FOIA request. Subsequently, the hard drives of several EPA officials were reformatted, backup tapes were erased and reused, and individual e-mails were deleted. The plaintiff filed a motion for contempt. The court held that under the strict standards of Fed. R. Civ. P. 65, the order was sufficiently specific and the data destroyed went “to the heart” of the plaintiff’s claims. The court found the EPA in contempt and ordered it to pay attorneys’ fees and costs, but the court declined to hold several individuals and

the U.S. Attorney's Office in contempt. *Cf. Landmark I*, under "III. Records Management."

Lewy v. Remington Arms Co., 836 F.2d 1104 (8th Cir. 1988). In a product liability suit alleging defective design of rifles, documents concerning past consumer complaints relevant to the suit were destroyed. The trial court issued an instruction that the jury could infer that the destroyed documents would have provided evidence against Remington "as to whether the overwriting of drafts by the expert violated any duty of preservation of obligation under Fed. R. Civ. P. 26(a)(2)(B)." Remington appealed, claiming that the document destruction was routine, pursuant to the company's three-year records retention schedule. The appeals court remanded the case to the trial court for a determination of whether a three-year records retention schedule was reasonable in relation to the importance of each document, "whether lawsuits concerning the complaint or related complaints ha[d] been filed, the frequency of such complaints, and the magnitude of the complaints," and finally whether or not the policy was instituted in bad faith.

Liggett v. Rumsfeld, 2005 WL 2099782 (E.D. Va. Aug. 29, 2005). In an employment discrimination suit, the plaintiff moved for sanctions against his former employer for failing to preserve his hard drive after termination, even though the defendant claimed that the plaintiff was terminated for viewing pornographic websites. The court held that the defendant's failure to preserve the hard drive did not, in and of itself, "suggest fraud or fabrication," as there was ample independent evidence of the plaintiff's actions and no genuine issue of fact relating the allegations of computer misuse to race or retaliation.

Linnen v. A.H. Robins Co., 1999 Mass. Super. LEXIS 240 (Mass. Super. Ct. July 15, 1999). In a wrongful death suit, the defense was initially enjoined from destroying evidence. The defendant succeeded in having the injunction vacated, but subsequently destroyed e-mails relevant to the plaintiff's case. The court could not issue monetary sanctions because the injunction had been vacated. However, the court held that a spoliation instruction to the jury was a reasonable sanction.

MasterCard International Inc. v. First National Bank of Omaha, Nos. 02 Civ. 3691, 03 Civ. 707, 2004 U.S. Dist. LEXIS 2485 (S.D.N.Y. Feb. 23, 2004). In a trademark infringement suit, the defendant moved *in limine* to exclude the testimony of the plaintiff's expert witness on the grounds that the expert destroyed e-mail correspondence with counsel and previous drafts of his report. The plaintiff, however, claimed it did not have e-mail correspondence with the expert, and the defendant did not produce evidence to the contrary. While the plaintiff's expert did overwrite prior drafts, the defendant's expert did as well. Since both parties followed the same practice, and neither

provided drafts to opposing counsel, excluding testimony was not merited. In coming to its decision the court explicitly avoided the question as to overwriting's legitimacy under Fed. R. Civ. P. 26(a)(2)(B).

MasterCard International, Inc. v. Moulton, No. 03 Civ. 3613, 2004 WL 1393992 (S.D.N.Y. June 16, 2004) (mem.). In a trademark infringement suit against a website featuring a "fairly tasteless parody" of MasterCard's "Priceless" ad campaign, the defendants failed to take any measures to preserve e-mails until five months after the suit was filed, despite knowledge of the lawsuit and a discovery request. The plaintiff moved for spoliation sanctions. The court found that the defendant did not act in bad faith in deleting the e-mails, but that such actions were "grossly negligent." As simple negligence is the threshold of culpability, sanctions were therefore appropriate. The court denied the plaintiff's request to have key issues in the case "deemed conclusively established," because plaintiff did not make a compelling case as to likely significance of the e-mails. The court concluded that the appropriate sanction was an adverse inference jury instruction.

McGuire v. Acufex Microsurgical, Inc., 175 F.R.D. 149 (D. Mass. 1997). In a sexual harassment lawsuit, the human resources director removed a paragraph of a report of an internal investigation of the sexual harassment allegations. Although normally removing a paragraph would qualify as destruction of evidence, the court held removing the paragraph was not misconduct because it was edited for accuracy. Corporations have an obligation to maintain truthful records, therefore the defendant had an obligation to remove the "false" statement, making sanctions inappropriate. The court appeared to limit its holding to the facts of the case.

***In re* Merrill Lynch & Co. Research Reports Securities Litigation, No. 02MDL 1484, 01 CV 6881, 2004 WL 305601 (S.D.N.Y. Feb. 18, 2004).** In a suit under the Private Securities Litigation Reform Act (PSLRA), the plaintiffs moved for an order lifting the PSLRA's automatic stay of discovery, claiming that discovery was necessary to preserve and restore deleted e-mails. The court held that part of the PSLRA's stay of discovery was a duty imposed on the parties to preserve all relevant evidence "as if they were the subject of a continuing request for production of documents," 15 U.S.C. § 78u-4(b)(3)(C), and therefore lifting the stay of discovery for the purpose of preserving such evidence, absent unusual circumstances, was unwarranted.

Metropolitan Opera Ass'n, Inc. v. Local 100, Hotel Employees & Restaurant Employees International Union, 212 F.R.D. 178 (S.D.N.Y. 2003). The plaintiff sued the defendant for improperly involving it in a labor dispute to which it was not a part. Contrary to counsel's representations, the defendant had failed to conduct a reasonable in-

investigation in response to discovery requests, failed to prevent the destruction of documents, failed to adequately instruct the person in charge of document collection, and shortly before a scheduled on-site inspection allowed computers subject to discovery to be replaced with new computers. The court found that the defendant's behavior was in bad faith and constituted a "combination of outrages," and ordered judgment against the defendant and payment of attorneys' fees.

Morris v. Union Pacific Railroad Co., 373 F.3d 896 (8th Cir. 2004). In a case superficially resembling *Stevenson v. Union Pacific Railroad Co.*, 354 F.3d 739 (8th Cir. 2004), decided by the same court just a few weeks earlier, the court held that Union Pacific's destruction of tape-recorded conversations between the train engineer and dispatcher at the time of an accident did not constitute spoliation, and that the plaintiff's motion for an adverse inference jury instruction should have been denied by the trial court. The appellate court distinguished the two cases, stating that in *Stevenson*, the trial court made a specific finding that Union Pacific acted with requisite intent to destroy the tape recording for the purpose of suppressing evidence, while in the *Morris* case, the trial court found that the destruction was unintentional. The appeals court went on to state that the standard announced in *Lewy v. Remington Arms*, 836 F.2d 1104 (8th Cir. 1988), that a finding of spoliation could be sustained if the accused "knew or should have known" that the destroyed evidence would be relevant to pending or anticipated litigation, was to be replaced by a new standard requiring a trial court to find "intentional destruction indicating a desire to suppress the truth" before an adverse inference jury instruction could be issued.

New York State National Organization for Women v. Cuomo, No. 93 Civ.7146, 1998 WL 395320 (S.D.N.Y. July 14, 1998), dismissed on other grounds sub nom. New York State National Organization for Women v. Pataki, 261 F.2d 156 (2d Cir. 2001). In a class action against the governor of New York and others alleging inadequate enforcement of discrimination laws, the plaintiffs sought sanctions for the defendants' failure to preserve a computer database of discrimination complaints and annual summaries of the data prepared for the governor's review. The court held that while a duty to preserve such relevant evidence arose long before an explicit document request was issued, "[d]efendants' counsel treated that obligation cavalierly. Counsel have a duty to advise their client of pending litigation and of the requirement to preserve potentially relevant evidence." However, absent any evidence of bad faith on the part of the defendants or prejudice to the plaintiffs' case, no sanction for spoliation was appropriate.

Olson v. IBM, 2006 WL 503291 (D. Minn. Mar. 1, 2006). In an employment discrimination suit, the defendant's computer forensics expert was unable to recover deleted files from the plaintiff's laptop computer, returned to the defendant several months

after the plaintiff's employment had been terminated. In an interrogatory answer, the plaintiff stated that he may have "cleaned up" information on the computer to prepare it for the next user. Eventually the expert was able to recover some deleted data, which included pornographic images. At his deposition, the plaintiff admitted to deleting information, but also stated that his son and son's friends had used the laptop. The defendant amended its answer to include an "after acquired evidence" defense, stating that if it had known that the plaintiff was using the company-issued laptop to obtain and view pornography, it would have fired the plaintiff, and adding that the plaintiff's attempts to delete the files constituted spoliation for which an adverse inference against the plaintiff would be warranted. The court determined that IBM presented sufficient evidence to support its affirmative defense at trial, and summary judgment in favor of the plaintiff was denied.

Paramount Pictures Corp. v. Davis, 2005 WL 3303861 (E.D. Pa. Dec. 2, 2005). A Hollywood studio suspected an unidentified individual was distributing a pirated copy of a new theatrical release over the Internet, established that the traffic was associated with a particular IP address, and notified the internet service provider (ISP) of its intent to seek identification of the alleged pirate. Under the Digital Millennium Copyright Act, the ISP notified the subscriber of its intent to cooperate with the investigation and gave the subscriber a period of several days to file an objection. During that time, however, the subscriber erased his computer hard drive and installed a new operating system. The court found that deliberate spoliation had occurred. However, the court declined the plaintiff's motion for an adverse inference instruction, as there would be no jury at trial and an adverse inference would be tantamount to summary judgment, and there were other outstanding material issues of fact precluding summary judgment.

Phoenix Four, Inc. v. Strategic Resources Corp., 2006 WL 1409413 (S.D.N.Y. May 23, 2006). In an investment fraud case, several months after the defendants were on notice of the lawsuit (but before suit was actually filed), defendant Strategic Resources Corporation (SRC) effectively went out of business and was evicted from its offices, leaving behind ten computer workstations that were disposed of by the landlord as abandoned property. One of the individual defendants managed to take two computer workstations and a server to a new office. After suit was filed, the individual defendants were informed by their attorneys of their obligation to gather all pertinent files. The defendants responded that they did not believe there would be any relevant electronically stored information, as SRC no longer existed and the computers had been abandoned. A few months later, during a routine repair operation at the individual defendants' offices on the eve of the discovery deadline, a computer technician found approximately 25 gigabytes of data on a dormant, partitioned sector of the server salvaged from SRC that would not have been visible to workstation users. The defendants immediately contacted their counsel and instructed the technician to back-up the data. The defendants'

counsel contacted opposing counsel, who after a month of back-and-forth negotiation about the form of production, agreed to accept the newly discovered data in hard copy form, amounting to between 200 and 300 boxes of paper documents, four times the volume of documents heretofore produced. The plaintiff filed a motion for an adverse inference sanction for the destruction and late production of the documents. The court, citing *Residential Funding v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d Cir. 2002) and *Zubulake v. UBS Warburg LLC* (“Zubulake IV”), 220 F.R.D. 212 (S.D.N.Y. 2003), restated the elements necessary to sustain an adverse inference sanction. It found that the defendants had adequate notice of impending litigation giving rise to a duty to preserve evidence before the eviction, and their abandonment of the computer workstations “constituted an act of gross negligence that is not excused by the disarray of their business affairs.” However, the circumstances of the defendants’ gross negligence did not alone support a finding that the information lost would have been relevant to the litigation and that the loss could be assumed to have harmed the plaintiff, an element necessary to support an adverse inference sanction. As to the information that the individual defendants failed to find on the server they had salvaged, the court found that the defendants’ counsel had failed to conduct an adequate investigation and had simply accepted their clients’ statements regarding electronically stored information as fact. The court, citing *Zubulake v. UBS Warburg* (“Zubulake V”), 229 F.R.D. 422 (S.D.N.Y. 2004) and proposed Fed. R. Civ. P. 26(b)(2), stated that counsel’s obligation is not only to inquire about documents that may be in the client’s possession, but to inquire about sources of information, and that a simple investigation into the provenance of the defendants’ computers would have alerted counsel to the possibility that more relevant information might be found. The court declined to impose the adverse inference instruction requested by the plaintiffs, however, as the appropriate remedy under the circumstances is full disclosure. The court also rejected the proposed sanctions of issue preclusion and admission of facts, but granted the plaintiff’s request for attorneys fees and costs.

ProPath Services, LLP v. Ameripath, Inc., Civ. A. 3:04-CV-1912-P, 2004 WL 2389214 (N.D. Tex. Oct. 21, 2004). In an unfair trade practices case, the plaintiff sought a temporary restraining order (TRO) enjoining the defendant from engaging in a number of allegedly unfair business practices. Included in the proposed TRO, however, was a clause prohibiting any act of the “[d]efendants deleting or destroying any documents or e-mails containing any ProPath related information and requiring such material to be segregated.” The court’s analysis focused exclusively on the other proposed clauses dealing with the use of trade secrets, customer lists, and other materials claimed by the plaintiff in the defendant’s course of business. An amended TRO was granted by the court containing the following clause: “Defendants shall not delete, destroy, or alter any document, e-mail or computer drive containing any ProPath or ProPath related in-

formation, but shall segregate said items into a confidential file not to be used in their business.”

***In re Prudential Insurance Co. of America*, 169 F.R.D. 598 (D.N.J. 1997).** In a class action suit alleging deceptive sales practices by insurance agents, the defendant agreed to suspend its usual records retention schedule for sales literature nationwide in response to a document preservation order. Each field office had a detailed records-management handbook, which was updated often in the usual course of business, but the order to suspend destruction of sales literature was communicated by bulk e-mail, which was routinely ignored by the field agents. This finding and the defendant’s pattern of failure to prevent unauthorized document destruction warranted a \$1 million fine, reimbursement of the plaintiff’s attorneys’ fees for the motion for sanctions, and court-ordered measures to enforce the document preservation order. Also, the court stated it would draw an inference that the destroyed documents would have aided the plaintiff.

***Pueblo of Laguna v. United States*, 60 Fed. Cl. 133 (Fed. Cl. Mar. 19, 2004).** In one of several cases against the United States for alleged mishandling of Indian land trusts, the plaintiff filed a motion for a document preservation order that would affect computer data as well as paper documents. The Court of Federal Claims, although an Article I court, held that it had the same scope of inherent powers as an Article III court to issue either a document preservation order or a preliminary injunction against the destruction of documents, if appropriate. The court also held that a document preservation order does not constitute an injunction and need not meet the strict requirements for injunctive relief. However, the court held that it should exercise its inherent powers with restraint and require that a party seeking a preservation order demonstrate that the order is necessary and not unduly burdensome. The plaintiff relied on the many acts of document destruction reported in *Cobell v. Norton*, a related pending class action involving many of the same organizations as this case, to establish the need for a protective order, which the court granted. However, the court narrowed the plaintiff’s proposed document inspection, identification, and indexing protocol and adopted instead a protocol closer to the defendant’s counterproposal.

***Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d Cir. 2002).** Remanding the trial court’s denial of a spoliation instruction, the court held the trial judge has the discretion to consider “purposeful sluggishness,” resulting in denial of access to e-mail that may include discoverable data, an equivalent to spoliation for the purposes of Fed. R. Civ. P. 37. Conduct need not be willful and need not result in the physical destruction of the evidence to be sanctionable.

Sonnino v. University of Kansas Hospital Authority, 220 F.R.D. 633 (D. Kan. 2004). In an employment discrimination suit, the court overruled the defendant hospital's objection to an interrogatory seeking information about its computer and e-mail systems. The court also ruled that the brief response proffered by the defendant in a supplemental answer was inadequate, and it gave the defendant twenty days to provide a complete and full answer.

Strasser v. Yalamanchi (“Strasser II”), 783 So. 2d 1087 (Fla. Dist. Ct. App. 2001). In a breach of contract dispute, the appellants' employee threw a computer hard drive away after lightning damaged it. The appellee was not notified that the hard drive, an important piece of evidence, had been thrown away until almost a year later. Because of the critical nature of the hard drive to the appellant's case, the appellate court held that the trial court did not err when it allowed evidence to establish negligent destruction of evidence or spoliation. *Cf. Strasser I*, under “II. Scope of Electronic Discovery.”

Thompson v. United States HUD, 219 F.R.D. 93 (D. Md. 2003) (mem.). In a suit against the Department of Housing and Urban Development, the court entered an order under Fed. R. Civ. P. 37(b)(2) precluding the United States from calling certain witnesses until it either answered certain outstanding requests for the production of e-mail or demonstrated to the court's satisfaction that responsive e-mail did not exist. Later, after the deadline set by the court and on the eve of trial, the United States produced approximately 80,000 responsive e-mails. The court acknowledged that electronic discovery is expensive and a cost-benefit analysis under Fed. R. Civ. P. 26(b)(2) is appropriate when the burdens alleged are supported by facts, but when no such facts are presented, sanctions for failure to respond to discovery requests are appropriate. In determining an appropriate sanction, the court applied a five-part test:

1. surprise to the party against whom the evidence would be entered;
2. ability of that party to cure the surprise;
3. extent of possible disruption to the trial;
4. importance of the evidence; and
5. explanation for failure to produce the evidence in discovery.

Applying these factors, the court ordered that the United States be precluded from entering any of the e-mails into evidence and that U.S. attorneys be forbidden to use any of the e-mails in preparing witnesses. The plaintiffs were allowed to use the e-mails as evidence if they so chose and were invited to move for costs and attorneys' fees necessitated by last-minute review of the e-mails for trial. In addition, if evidence from the trial regarding the nonproduction of these e-mails justified it, the plaintiffs could move for contempt of court against the United States.

Treppel v. Biovail Corp., 2006 WL 278170 (S.D.N.Y. Feb. 6, 2006). In a suit for defamation, the plaintiff moved for a preservation order and to compel production of information about the defendants' electronic records management system. The court noted that the defendants may have been "shortsighted" in rejecting a stipulated preservation order, stating that while preservation orders are not automatic, they are increasingly routine in electronic discovery cases. The court then took up the question of when preservation orders are warranted and reviewed the various standards courts have used to consider preservation orders. It rejected the notion that preservation orders must meet the test of injunctive relief, and opted instead for a balancing test taking into consideration the danger of destruction, the content of the endangered records, and the burden of preservation measures. It rejected the plaintiff's motion as premature, and in the alternative adopted a questionnaire proposed by the plaintiff to ascertain information about the defendant's electronic records management system, characterizing the questions as special or supplemental interrogatories, over the presumptive 25-interrogatory limit.

Trigon Insurance Co. v. United States, 204 F.R.D. 277 (E.D. Va. 2001). In a corporate taxpayer suit against the United States, the United States hired a litigation support firm, which in turn hired experts to act as consultants and testifying experts. The litigation support firm had a policy under which all e-mail communications with experts and draft reports were destroyed. The court held that under the facts of this case, those communications and drafts would have been discoverable, and the United States was responsible for its litigation support firm's intentional spoliation. The court found that adverse inference instructions regarding the content of the destroyed electronic documents were warranted along with paying attorneys' fees. The court noted that "the degree of culpability, and the quantum of prejudice" must be taken into account to determine the "least severe, but most effective sanction."

United States v. Boeing Co., 2005 WL 2105972 (D. Kan. Aug. 31, 2005). In a case brought against a contractor by the United States alleging false claims for payment, the court denied a motion by the United States for a data-preservation order, as the motion did not establish any specific threat of immediate destruction of data. The court noted that the parties are under a duty to preserve relevant records and are expected to meet and confer on a discovery plan under Fed. R. Civ. P. 26(f) and the District of Kansas's local electronic discovery guidelines.

United States v. Philip Morris USA Inc., 327 F. Supp. 2d 21 (D.D.C. 2004). A blanket data-preservation order was entered early in this national tobacco products litigation. The defendant, however, for at least two years continued its routine practice of deleting e-mail messages more than sixty days old. After discovering this apparent violation of the order, counsel for the defendant delayed informing the court about it for an additional four months. The United States moved for sanctions against the defendant. The

court found that eleven of the company's highest placed officers and supervisors violated not only the court order, but also the company's stated policy for electronic records retention. The court fined the defendant \$250,000 per employee, for a total of \$2,750,000, and precluded the defendant from calling any of the eleven employees as witnesses at trial.

Welch v. Wal-Mart, No. 04 C 50023, 2004 WL 1510021 (N.D. Ill. July 1, 2004). In a personal injury suit involving the collapse of a display in a Wal-Mart store, the plaintiff included separate counts for the negligent spoliation of evidence, and alternatively, for the intentional spoliation of evidence, based on Wal-Mart's destruction of surveillance videotape that the plaintiff claimed had recorded the entire incident. The court, applying Illinois law, found that the count for negligent spoliation could only survive the defendant's motion to dismiss if the plaintiff could show that Wal-Mart had a duty to preserve the videotape. The court found that Wal-Mart could not have reasonably foreseen that the videotape was material to a potential civil action. Therefore the negligent spoliation count was dismissed. However, the court held that the plaintiff's count for intentional spoliation, which did not depend on the element of a duty to preserve the evidence, could survive the motion to dismiss.

Wiginton v. Ellis ("Wiginton I"), No. 02 C 6832, 2003 WL 22439865 (N.D. Ill. Oct. 27, 2003). In a putative class action alleging sexual harassment, the plaintiff's counsel notified the defendant's counsel by letter to halt all destruction of potential paper and electronic evidence. The court held the letter did not create a duty to preserve data, but it did put the defendant on notice of the type of data that would be sought during discovery. The defendant had a duty to preserve documents that might be relevant at trial and by ignoring that duty and destroying e-mails the defendant acted in bad faith. Using backup tapes, it would be possible to determine the importance of the missing e-mails. Sanctions should be proportional to the degree of harm to the party, therefore the motion for sanctions was dismissed without prejudice. If the plaintiff's expert discovered important information on the backup tapes sanctions might be appropriate.

Wm. T. Thompson Co. v. General Nutrition Corp., 593 F. Supp. 1443 (C.D. Cal. 1984). In an antitrust lawsuit, the defendant destroyed documents that were critical to the case. The defendant, knowing a lawsuit might be pending, destroyed business records that would have been relevant to the plaintiff's case. The practice continued even after a special master twice ordered the defendant to preserve its business records. The court held a default against the defendant was appropriate because the defendant "purposefully undertook a program [that] impede[d] and obstruct[ed] the litigation process." Plaintiff was awarded \$453,312 for costs in addition to attorney's fees with interest.

Zubulake v. UBS Warburg (“Zubulake V”), No. 02 Civ. 1243, 2004 WL 1620866 (S.D.N.Y. July 20, 2004). In this opinion, the fifth published in this employment discrimination lawsuit, the court considered the plaintiff’s motion for sanctions against the defendant UBS Warburg for deleting e-mails the plaintiff claimed would support her allegations of sex discrimination. The court found that, contrary to instructions from both outside counsel and in-house lawyers, certain UBS employees deleted relevant e-mails. UBS counsel failed “both in terms of its duty to locate relevant information and in its duty to preserve and timely produce that information.” In addition, the defendant failed to preserve backup tapes on which copies of the destroyed e-mails might have been found. The court held that an adverse inference jury instruction and an award of costs were appropriate, based on the apparent willful misconduct of certain UBS employees in destroying the e-mails. In a footnote, the court stressed that the sanctions were not based on the *negligent* failure to preserve the backup tapes; the defendant was sanctioned for its employees’ *willful* destruction of e-mails.

II. Scope of Electronic Discovery

Anti-Monopoly, Inc. v. Hasbro, Inc., No. 94CIV.2120, 1995 WL 649934 (S.D.N.Y. Nov. 3, 1995). The plaintiff made a motion to compel the defendants to provide certain data-processing files. The defendants contended that they had provided duplicate information in hard copy and that the motion would force the company to create new documents. Relying on *National Union Electric Corp. v. Matsushita Electric Corp.*, 494 F. Supp. 1257 (E.D. Pa. 1980), the court rejected both of the defendants’ arguments. The court stated that the plaintiff was not precluded from asking for electronic data that it already had in hard copy or electronic documents that would have to be created. However, the reasonableness of creating new documents may depend on the plaintiff’s willingness to pay the costs to do so.

Bethea v. Comcast, 218 F.R.D. 328 (D.D.C. 2003) (mem.). In an employment discrimination suit, the defendant stated that after making a diligent search, it had no documents responsive to one of the plaintiff’s requests for production. Dissatisfied with the result, the plaintiff made a motion to allow it to inspect the defendants’ computer systems believing relevant data existed on them. The court rejected the motion because the plaintiff was relying on mere speculation and could not demonstrate the relevance of compelling discovery.

Bob Barker Co. v. Ferguson Safety Prods., Inc., 2006 WL 648674 (N.D. Cal. Mar. 9, 2006). In a Lanham Act lawsuit, the plaintiff requested that the defendant produce all “financial software databases utilized in the operation of the business.” The court observed that this request was unclear, in that a “database” is a dynamic collection of data.

While the defendant would not be required to produce the database in response to this request, it would still be required to produce any information in the database and documents generated using the database responsive to other requests.

Bullis v. Nichols, 2005 WL 1838634 (W.D. Wash. Aug. 1, 2005). In a civil rights suit, the plaintiff issued a subpoena *duces tecum* under Fed. R. Civ. P. 45, requesting that the non-party City of DuPont produce employee e-mail related to plaintiff's claims. The city objected, claiming that the request would require the production of an estimated 166,000 messages. The court denied the plaintiff's motion to compel production and instructed the plaintiff to follow established federal and local rules requiring her to meet and confer with opposing counsel.

Byers v. Illinois State Police, 53 Fed. R. Serv. 3d (West) 740 (N.D. Ill. June 3, 2002) (mem.). The plaintiffs in a sex discrimination case requested discovery of e-mail backup tapes going back eight years. The court distinguished paper discovery from electronic discovery, noting the sheer volume of electronic documents available. Given the substantial cost in retrieving electronic documents, a cost-benefit analysis was necessary. The plaintiffs failed to prove that any of the e-mails from the past eight years would support their case. The court held that if the plaintiffs wanted to retrieve the e-mails they would have to bear the costs of licensing the defendant's old e-mail program.

Commodity Futures Trading Comm. v. Equity Fin. Group LLC, 2005 WL 225789 (D.N.J. Sept. 9, 2005). In an enforcement action alleging trading fraud, the government requested production of a backup tape of data from the home office computers of one of the named defendants, created while he was employed by a non-party claimant companies for the purpose of parallel proceedings. At the time of the request, the backup tape was in the possession of the CEO of the claimant company in the Bahamas. The court ordered that the backup tape belonged to the named defendant, as it was created by him from his own computers, and that the claimant company, although a non-party to the instant action, had filed an appearance, was therefore subject to this court's jurisdiction, and must produce the backup tape.

Compuware Corp. v. Moody's Investors Services, Inc., No. Civ. 03-70247, 2004 WL 2931401 (E.D. Mich. Dec. 15, 2004). The defendant in this unfair trade practices case requested "[a]ll documents, including but not limited to internal memoranda, internal e-mails, and correspondence with [IBM] or any other entity or person, referring or relating to actual or potential effects on Compuware's business of any past, present, future, or contemplated conduct by IBM." After initially objecting that the request was overbroad, the defendant responded by producing all of the requested documents, estimated in the "tens of millions," on compact disks. Arguing that the production was overbroad, the defendant asked the judge to narrow the scope of its own request and or-

der the plaintiff to index the documents on the CDs and designate those that were relevant to the subject matter of the dispute. The court denied the request.

Cumis Insurance Co. v. Diebold, Inc., No. Civ.A.02-7346, 2004 WL 1126173 (E.D. Pa. May 20, 2004). In an insurance recovery action against an armored car operator stemming from the misappropriation of funds intended to be used to replenish the cash of the insured credit union's automated teller machines, the court ordered the defendant to produce requested computer data. The plaintiff sought additional electronic documents from the defendant. The court briefly touched on the relative burdens of the parties in discovery—the requesting party's burden of demonstrating relevance, and the responding party's burden of demonstrating why the requested discovery should not be permitted. The requesting party in this case went beyond showing relevance and countered the defendant's argument that it had already produced all relevant computer data by bringing into court relevant electronic documents and e-mails obtained from other sources that the defendant had not produced.

Electrolux Home Prods., Inc. v. Whitesell Corp., 2006 WL 355453 (S.D. Ohio Feb. 15, 2006). In a commercial dispute, the defendant issued subpoenas under Fed. R. Civ. P. 45 to non-parties for the production of electronically stored information. The magistrate judge in the case entered a "Decision and Order Enforcing Subpoenas" to compel production. The non-parties did not appeal the magistrate judge's order to the district judge assigned to the case. Instead, they moved for a stay of the order pending consideration of their application for interlocutory appeal. This motion was considered by the chief magistrate judge, who found that the questions raised by the non-parties were unlikely to be certified by the Sixth Circuit and that the non-parties did not face irreparable harm or undue burden by enforcement of the subpoenas. The chief magistrate judge noted that (1) the costs will be borne by the party issuing the subpoena, (2) all discovery will be on an "attorneys eyes only" basis to protect trade secrets, and (3) the attorneys for the non-parties will have an opportunity to review the production and assert any claims of privilege before production.

Fennell v. First Step Designs, Ltd., 83 F.3d 526 (1st Cir. 1996). In a lawsuit alleging wrongful termination, the district court denied the plaintiff's motion for further discovery under Fed. R. Civ. P. 56(f) and granted the defendant summary judgment. On appeal, the court held that the district court had not abused its discretion. The court noted there would be great costs involved if it granted the plaintiff discovery of the defendant's hard drive without any demonstrable benefit. Also, the plaintiff's motion was not sufficiently specific, giving the district court reasonable concern that further discovery would be a "fishing expedition."

Fenster Family Patent Holdings, Inc. v. Siemens Medical Solutions USA, Inc., 2005 WL 2304190 (D. Del. Sept. 20, 2005). In a patent infringement suit, the plaintiff moved for access to the defendant's Intranet site. The court denied the motion, stating that the plaintiff had failed to demonstrate that the defendant was not producing documents as requested, in either electronically searchable form or as kept in the ordinary course of business.

Fischer v. UPS, 2006 WL 1046973 (E.D. Mich. Apr. 19, 2006). In an employment termination suit, the defendant produced e-mail, missing an attachment which it claimed it could not locate. The magistrate judge ordered further discovery in the form of a telephone interview of an employee of the defendant involved in the effort to find the missing attachment. The defendant objected, stating that the missing attachment was immaterial and irrelevant, being only a draft of proposed salary decisions. Upon review of the magistrate judge's order, the district judge found that while perhaps not admissible at trial, the document being sought was within the legitimate scope of discovery, and the interview would proceed.

***In re Ford Motor Co.*, 345 F.3d 1315 (11th Cir. 2003).** In a design-defect suit against Ford, the district court granted the plaintiff's motion to compel direct access to Ford's extensive dealer and customer contact databases without a hearing and before Ford had responded to the motion. Granting a writ of mandamus to vacate the district court's discovery order, the court of appeals held that the district court had abused its discretion. No findings were made that Ford had failed to comply with previous discovery orders, and the district court did not offer an explanation for its order. Further, the district court granted access to Ford's entire database, much of which was beyond the scope of discovery.

Hagemeyer North America Inc. v. Gateway Data Sciences Corp., 222 F.R.D. 594 (E.D. Wis. 2004). In a commercial dispute between two corporations, deposition testimony of one of the defendant's "top executives" indicated that computer backup tapes might contain e-mail files and accounting records. The plaintiff moved for production of the backup tapes, which had already been made available as part of a larger production of all of the defendant's business records, and upon which the plaintiff had already performed some cursory searches, resulting in no relevant documents. The court refused to compel production of all the backup tapes without a more substantial showing of a likelihood that responsive documents would be found. Adopting the approach of *McPeck v. Ashcroft*, 202 F.R.D. 31 (D.D.C. 2001), the court ordered the defendant to restore three sample backup tapes and for the parties to make additional submissions on the benefits and burdens of the proposed discovery, based on the results. The court also announced that it would adopt the factors set out in *Zubulake v. UBS Warburg*, 217

F.R.D. 309 (S.D.N.Y. 2003), to consider whether costs for any further production should be shifted to the plaintiff.

Marcin Engineering, LLC v. Founders at Grizzly Ranch, LLC, 219 F.R.D. 516 (D. Colo. 2003). In a construction-engineering suit, the defendant's motion for an extension of time for discovery of the plaintiff expert's computer drafts and preliminary work was denied. The motion came five days before the deadline for expert disclosure and the defendants had for five months delayed reviewing paper materials originally produced to them. The court stated that delay and carelessness in requesting electronic discovery are not compatible with the showings of diligence and good cause necessary to extend discovery deadlines or delay summary judgment under Fed. R. Civ. P. 56(f). Furthermore, the defendant had been repeatedly advised by the court that its proposed discovery, "when considered in the light of the amounts claimed as damages, made no economic sense."

McPeek v. Ashcroft ("McPeek I"), 202 F.R.D. 31 (D.D.C. 2001). In a sexual harassment lawsuit, the plaintiff sought a motion to compel discovery of backup tapes that might contain deleted e-mails. The court noted electronic discovery can be prohibitively expensive if left unchecked, and only discovery that justified the cost of retrieving electronic data should be granted. To determine the costs and possible benefits of allowing discovery for backup tapes, the court granted limited discovery of a sample time period where the defendant would retrieve e-mails for one year and document the costs associated with the retrieval process. Then the court would be able to properly assess the appropriate level of discovery based on the costs and whether discoverable information was uncovered.

McPeek v. Ashcroft ("McPeek II"), 212 F.R.D. 33 (D.D.C. 2003). Following up on a previous ruling in the same case, the court held that after ordering the "sampling" of a large collection of backup tapes, the resulting data supported further discovery of only one of the tapes. The opinion includes a detailed description of the sampling methods used to reach the conclusion.

Medical Billing Consultants, Inc. v. Intelligent Medical Objects, Inc., No. 01 C 9148, 2003 WL 1809465 (N.D. Ill. Apr. 4, 2003) (mem.). In a copyright and trade secret appropriation case, the defendants moved to allow on-site inspection of the plaintiff's computers. The court held that absent any showing that the plaintiff's disclosures and responses to prior requests were inadequate or that more evidence was likely to be discovered, the request would be denied as unduly burdensome.

Miller v. IBM, 2006 WL 995160 (N.D. Cal. Apr. 14, 2006). In a contract and business fraud case, the defendant moved for sanctions against the plaintiff for failure to follow a court order requiring that e-mails and attachments be produced together and failure to provide a court-ordered affidavit explaining his failure to produce other requested electronically stored information altogether. The court repeated its earlier order, warning the plaintiff that failure to comply will result in preclusion from using any of the improperly identified e-mails or attachments, or any of the other electronic documents not already produced, in its case-in-chief or defense, and “in the imposition of other sanctions, including the potential termination of this case.”

Nicholas v. Wyndham International, Inc., 373 F.3d 537 (4th Cir. 2004). In a personal injury suit brought by the parents of a minor child alleging that an employee of the defendant resort hotel had molested the child, the defendant sought discovery of computer information from the parents’ non-party family business in another district under Fed. R. Civ. P. 45. The family business filed a motion for a protective order in its home district. After consultation with the judge presiding in the original litigation, the judge in the home district granted the protective order, finding that the requested discovery was cumulative, unduly burdensome, and harassing. The defendant appealed the district court’s order. The Fourth Circuit found that the order denying discovery, unlike an order granting discovery, was not interlocutory, but final and ripe for appeal. That finding allowed the court to decide the issue of discovery. The appellate court applied the “abuse of discretion” standard and upheld the district court’s findings and order.

Nova Measuring Instruments Ltd. v. Nanometrics, Inc., 417 F. Supp. 2d 1121 (N.D. Cal. 2006). In a patent infringement suit, the defendant failed to produce electronically stored information in native format with original metadata, contrary to an agreement between the parties. The magistrate judge noted that the defendant offered no reason why it did not follow the agreed-upon form of production, and cited *In re Verisign*, 2004 WL 2445243 (N.D. Cal. Mar. 10, 2004) and *In re Honeywell International, Ltd.*, 230 F.R.D. 293 (S.D.N.Y. 2003) as examples of courts upholding orders requiring native format production with metadata.

Procter & Gamble Co. v. Haugen, 2005 WL 2660487 (10th Cir. Oct. 19, 2005). In an unfair trade practices case with a long history and many reported decisions related to electronic discovery, the Tenth Circuit reversed the trial court’s dismissal of the plaintiff’s Lanham Act claims, based on the plaintiff’s failure to produce a database maintained by a non-party contractor. The trial court’s order compelling production failed to take into account the logistical difficulties of complying with the order, which would have involved the purchase of a mainframe computer or paying the non-party an estimated \$30 million to maintain an archived version of the database. As the violation of

the order was not willful, and the prejudice to the defendant not clearly established, the extreme sanction was not justified.

Quinby v. WestLB LG (“Quinby I”), 2005 WL 3453908 (S.D.N.Y. Dec. 15, 2005). In a sex discrimination suit, the defendant objected to the production of certain e-mail based on the cost and burden of recovering the e-mail from backup tapes. The plaintiff objected, not to the defendant’s calculation of the potential costs and burdens, but to the need for resorting to backup tapes before exhausting its search of more accessible data sources. The court found that the defendant had acted appropriately in focusing on backup tapes as the primary source for the production of the requested e-mails.

Quinby v. WestLB LG (“Quinby II”), 2006 WL 59521 (S.D.N.Y. Jan. 11, 2006). In a sex discrimination suit, the defendant subpoenaed the plaintiff’s internet service provider (ISP), seeking all non-privileged e-mails sent from or received by her personal e-mail account for a period of two years. The court held that the subpoena was overbroad and would yield vast amounts of irrelevant information. The fact that the information may be innocuous does not make it subject to discovery.

Rozell v. Ross-Holst, 2006 WL 163143 (S.D.N.Y. Jan. 30, 2006). In a lawsuit for sexual harassment, retaliatory discharge, and violation of the Electronic Communications Privacy Act, the plaintiff alleged that her former employer had intercepted approximately 400 e-mail messages from her private America Online account. The defendant employer countered that they were entitled to the e-mails, as they paid for the plaintiff’s AOL account during her employment and it was used for business purposes. In the alternative, they were entitled to the e-mails in discovery, as they were likely relevant to her claims. Over the plaintiff’s objection, the disputed e-mails were submitted to the judge for *in camera* review. Prior to submission, the plaintiff’s counsel redacted the entire contents of the e-mails, leaving only the header information. The court found that while the header information was clearly relevant in determining whether or not the e-mails had been diverted, the redacted contents, if relevant, were necessary for a determination of the defendant’s position that the e-mails were relevant to the claims of harassment or retaliation, as well as the possible damages to which the plaintiff herself may be entitled. However, the court rejected the defendant’s position that all the plaintiff’s e-mails should be produced regardless of her counsel’s relevance determination, as “counsel for the producing party is the judge of relevance in the first instance.” The court went on to say that it would not hold an *in camera* inspection of the non-intercepted e-mail to determine relevance, as *in camera* review is a rare procedure and should be reserved for genuine disputes over privilege, not relevance.

SEC v. Beacon Hill Asset Management LLC, No. 02-CIV-8855, 2004 WL 1746790 (S.D.N.Y. Aug. 3, 2004). In an enforcement action by the Securities and Exchange

Commission (SEC) against a hedge fund management company, the defendant listed a number of documents on a privilege log, which it produced to the SEC in a timely manner. Absent from the privilege log was a printout of customer contacts from the defendant's marketing management software. The printout appeared on a supplemental privilege log three weeks after the court-imposed deadline. The SEC moved to compel production of the printout, claiming that privilege was waived by the defendant's deliberate failure to list the printout on its privilege log. The defendant argued that it generated the printout only after it submitted the timely privilege log, and therefore the printout did not exist at that time. The court held that the defendant failed to list the database from which the printout was derived on its privilege log in a timely manner, and therefore the printout should be produced.

Shank v. Kitsap County, 2005 WL 2099793 (W.D. Wash. Aug. 30, 2005). In an employment suit, the plaintiff possessed several recordings of relevant conversations, the existence of which were revealed in deposition testimony and belated answers to interrogatories. The recordings were produced after discovery had closed. The plaintiff argued that the recordings were on his computer in a format he could not easily access. The court rejected the plaintiff's explanation, noting that "much of present day discovery is contained on computers," and sanctioned the plaintiff by excluding the recording from evidence.

Stallings-Daniel v. Northern Trust Co., 52 Fed. R. Serv. 3d (West) 1406 (N.D. Ill. 2002). In an employment discrimination case, the plaintiff moved to allow her to use an expert to analyze the defendant's e-mail system. The plaintiff asked the court to reconsider a prior denial of a similar motion based on the "new" information that in another case the defendant may have tampered with documents. The court denied the plaintiff's motion because it was based on speculation as to the defendant's actions in an unrelated case.

Strasser v. Yalamanchi ("Strasser I"), 669 So. 2d 1142 (Fla. Dist. Ct. App. 1996). In a lawsuit involving the dissolution of a medical partnership, the plaintiff made a motion to access the computer system of the defendant. The court overruled the trial court and denied the plaintiff access. Some of the information in the system was privileged and "once confidential information is disclosed, it cannot be 'taken back.'" If the plaintiff could establish a strong likelihood that purged information would be relevant to the case and that the suggested means was the least intrusive method, then discovery might be appropriate. *Cf. Strasser II*, under "I. Data Preservation and Spoliation."

Thompson, et al. v. Jiffy Lube International, Inc., 2006 WL 1174040 (D. Kan. May 1, 2006). In a putative class action involving nationally advertised auto maintenance and

repair services, the plaintiff requested several broad categories of electronically stored information, including all vehicle service records going back to January 1, 1997; “any and all information related to e-mail . . . including messages,” all “electronic databases that state the name, telephone number, amount charged, amount paid, and services rendered for all customers . . . at any Jiffy Lube location”; and “any and all documents, including electronic databases, regarding any customer complaints received by the defendant during the relevant time period.” The defendant had responded to these requests with blanket objections containing conclusory statements regarding cost and burden, including an unsupported assertion that producing the vehicle history reports would require creating the TIFF imagebase at a cost of \$10 million. The court determined that both the plaintiffs and defendant had failed to meet their respective burdens to make reasonably specific requests and to present reasonably specific facts to support objections. The parties were ordered to meet and confer and to provide the court with a report within three weeks.

Tilberg v. Next Management Co., 2005 WL 2759860 (S.D.N.Y. Oct. 24, 2005). In a dispute between a fashion model and her agency alleging underreporting of the model’s earnings, statements by the defendant that requested documents did not exist warranted an expansion of the scope of electronic discovery, when those statements appeared to be erroneous.

Treppel v. Biovail Corp., 2006 WL 278170 (S.D.N.Y. Feb. 6, 2006). In a suit for defamation, the defendant suggested that before producing electronic information, it enter into a stipulation defining the scope of electronic discovery by identifying sources and agreeing on a set of search terms. The plaintiff refused to enter into a stipulation, taking the position that the use of search terms has no application in standard discovery of accessible electronic records. The court disagreed, citing case law precedent and *The Sedona Principles* for the proposition that a defined search strategy, including the use of search terms, is appropriate in electronic discovery. Nevertheless, the refusal of the plaintiff to enter into a stipulation establishing a search methodology, while perhaps a “missed opportunity,” did not relieve the defendant from the duty to respond to the plaintiff’s discovery request.

Williams v. Massachusetts Mutual Life Insurance Co., 226 F.R.D. 144 (D. Mass. 2005). In an employment discrimination case, the plaintiff alleged that there was a discriminatory e-mail, but could not produce a copy of it. The defendants reported that they had no such e-mail and the plaintiff moved for appointment of a special master to conduct a forensic examination of the defendant’s computer system. The defendant objected. The court rejected the motion noting that the plaintiff’s belief of the existence of the e-mail was “at best [a] highly speculative conjecture.” Without “some reliable information that the opposing party’s representations are misleading or substantively in-

accurate,” the court was unwilling to grant the plaintiff access to the defendant’s information system.

Wright v. AmSouth Bancorporation, 320 F.3d 1198 (11th Cir. 2003). In an age discrimination lawsuit, the Eleventh Circuit held that the trial court did not abuse its discretion when it denied the plaintiff’s request for discovery of “[a] computer diskette or tape copy of all word processing files created, modified and/or accessed by, or on behalf” of five employees of the defendant over a two-and-one-half-year period. The request was not reasonably related to the plaintiff’s age discrimination claims, and the court found that the request was overly broad and unduly burdensome.

III. Records Management

Arthur Andersen, LLP v. United States, 544 U.S. 696 (2005). In the conclusion to the famous criminal action against the Arthur Andersen accounting firm stemming from the collapse of Enron, the Supreme Court overturned Arthur Andersen’s conviction for criminal obstruction of justice for shredding documents prior to receiving a subpoena from the SEC. While the holding was based on inadequate jury instructions (see “I. Data Preservation and Spoliation,” above), the Court stated in dicta, “[d]ocument retention policies, which are created in part to keep certain information from getting into the hands of others, including the Government, are common in business. [citation omitted] It is, of course, not wrongful for a manager to instruct his employees to comply with a valid document retention policy under ordinary circumstances.”

***In re* Cheyenne Software, Inc., Securities Litigation, No. CV-94-2771, 1997 WL 714891 (E.D.N.Y. Aug. 18, 1997) (mem.).** In a securities litigation lawsuit, the court held that routine recycling of computer storage media must be halted during discovery when that is the most reasonable means of preserving available data. But the court refused to give an adverse jury instruction, because the plaintiff had not proved prejudice—instead the court ordered the defendant to pay \$15,000 in fees and fines.

Heveafil Sendirian (Sdn.) Berhad (Bhd.) v. United States, Nos. 02-1085, 021086, 02-1087, 2003 WL 1466193 (Fed. Cir. Mar. 19, 2003) (order not to be cited as precedent). The Federal Circuit affirmed the judgment of the U.S. Court of International Trade in refusing to admit into evidence computerized business records that, in the trial court’s view, were “at best, an unauthenticated duplicate of a database which may have been generated in the ordinary course of business.” The Federal Circuit explained that the manufacturer “did not produce evidence explaining how the copy was made, such as an affidavit by an employee with pertinent knowledge verifying the accuracy of the da-

tabase,” and that key source documentation was not retained. The court stated, “[w]hile Commerce could have taken Heveafil’s word for the authenticity of the diskette copy . . . we cannot conclude that Commerce abused its discretion in rejecting the diskette copy when the authenticity of that purported copy was not established.”

Hynix Semiconductor, Inc. v. Rambus, Inc., No. C-00-20905 RMW (N.D. Cal. Jan. 4, 2006). In a patent declaratory judgment action, Hynix charged Rambus with “unclean hands,” claiming that Rambus’s records-management program, instituted immediately prior to filing patent infringement claims against companies other than Hynix, constituted unlawful destruction of evidence. The circumstances of the document destruction were the same as those chronicled in *Rambus, Inc. v. Infineon Technologies AG*, 220 F.R.D. 264 (E.D. Va. 2004). Unlike the court in Virginia, however, the court in this case found that the records-management program that resulted in document destruction was not performed in anticipation of particular litigation with this particular party. Rambus therefore lacked the bad faith necessary to support Hynix’s “unclean hands” claim. In addition, Hynix failed to establish that the documents destroyed had any nexus to the facts of their case, and there was no showing of prejudice to Hynix as a result of the document destruction.

Kozlowski v. Sears, Roebuck & Co., 73 F.R.D. 73 (D. Mass. 1976). Before the widespread use of computers, Sears, Roebuck recorded all customer complaints about products on index cards, which were organized by the name of the complainant and with no cross-indexing, making it almost impossible to search the vast collection for complaints about the same or similar products. When Sears was sued for selling children’s pajamas made from highly flammable fabric, it argued that discovery of all complaints about flammable pajamas would be unduly burdensome and therefore should not be allowed. The court held that Sears was under an obligation to answer the discovery request, stating that “to allow a defendant whose business generates massive records to frustrate discovery by creating an inadequate filing system, and then claiming undue burden, would defeat the purposes of the discovery rules.”

Landmark Legal Foundation v. EPA (“Landmark I”), 272 F. Supp. 2d 59 (D.D.C. 2003) (mem.). After news articles appeared nationally claiming that the Environmental Protection Agency (EPA) was trying to push through regulations before the Bush administration took office, the plaintiff filed a Freedom of Information Act (FOIA) request seeking records about the EPA’s rule-making activities in the months before January 20, 2001. Dissatisfied with the response to the FOIA request, the plaintiff filed suit. In particular, the plaintiff claimed that the EPA violated FOIA by not maintaining agency e-mail in a central file in “readily reproducible” form. The court disagreed, holding that the EPA practice of printing out e-mail and filing it in various files by subject matter was a reasonable practice and did not violate FOIA. In addition, the court

held that the EPA's search for responsive documents was reasonable and adequate, and that the plaintiff cannot require a particular search methodology in its FOIA request. Finally, the plaintiff complained that the EPA had destroyed documents subject to its FOIA request. The court held that although this was troubling, FOIA is not a records management statute, and the document destruction issue would be dealt with as a separate matter. *Cf. Landmark II*, under "Data Preservation and Spoliation" at I.

Public Citizen v. Carlin, 184 F.3d 900 (D.C. Cir. 1999). In a case disputing the validity of the records management schedule known as GRS 20, the National Archivist stated that federal agency e-mail could be migrated to archival media, and once migrated, original messages left in native format on desktop computers and network servers need not be preserved. The Archivist's migration plan preserved the content of the records and all necessary information from which the provenance of the records could be determined, although the archival media selected (in this case, paper) did not allow for easy searching and sorting. The district court held that GRS 20 violated the Records Disposal Act, 44 U.S.C. § 3303a(d) (see *Public Citizen v. Carlin*, 2 F. Supp. 2d 18 (D.D.C. 1998)). On appeal, the circuit court reversed the decision, noting that the plaintiff had confused form with substance and holding that the Archivist can reasonably "permit agencies to maintain their recordkeeping systems in the form most appropriate to the business of the agency."

Rambus, Inc. v. Infineon Technologies AG, 220 F.R.D. 264 (E.D. Va. 2004). In a complex patent infringement suit involving counterclaims of fraud, the defendant sought discovery of documents, including attorney-client communications, relating to the plaintiff's document retention program, on the theories that (1) the document retention program resulted in the intentional spoliation of relevant documents (as found by the court in a previous proceeding), and therefore the crime/fraud exception to the attorney-client privilege applied; and (2) by disclosing details of the document retention program in discovery, the plaintiff had waived any privilege. The document retention program featured a "Shred Day," on which employees of the plaintiff were rewarded with pizza and beer after destroying an estimated 2 million pages of documents. While there was no Fourth Circuit precedent for the court to rely on, the court held that "the crime/fraud exception extends to materials or communication created for planning, or in furtherance of, spoliation." The court found that the plaintiff's document retention program was developed at approximately the same time as plans to file this lawsuit. The plaintiff alleged that it instituted the program as a result of concerns over the cost of discovery. The court held that even if the plaintiff "did not institute its policy in bad faith, if it reasonably anticipated litigation when it did so, it is guilty of spoliation." The court ordered an *in camera* review of the documents on the plaintiff's privilege log to determine the extent to which both the crime/fraud exception and the subject-matter waiver applied.

Renda Marine, Inc. v. United States, 58 Fed. Cl. 57 (Fed. Cl. 2003). In a contract dispute filed by a marine dredging contractor against the U.S. Army Corps of Engineers, the plaintiff moved to compel production of backup tapes and for permission to access the contracting officer's computer hard drive. The policy of the corps was that after an e-mail was read, it was either deleted or moved to a personal folder immediately. The court found that this practice continued after the defendant had been put on notice that litigation might be pending, thereby breaching a duty to preserve documents. Thus, the court granted the plaintiff's motion to compel the defendant to produce the backup tapes at its own expense and to provide access to the contracting officer's computer hard drive.

United States v. Quattrone, No. 04-5007-cr (2d Cir. Mar. 20, 2006). In the appeal of the second trial and conviction of Frank Quattrone, investment banker with Credit Suisse First Boston ("CSFB"), the circuit court vacated the judgment and remanded the case to a different trial judge for further proceedings. The case stemmed from an SEC investigation into CSFB's practices as underwriter of several initial public offerings in 2003. The facts established that Quattrone endorsed and forwarded an e-mail to key CSFB employees reminding them of the firm's e-mail and document management policy, and urging them to "clean up those files" just a few hours after discussing the likelihood that he would be called as a witness in the SEC and grand jury investigations with a CSFB attorney. Quattrone challenged his conviction on two primary grounds: first, that the evidence was insufficient to establish violations of 18 U.S.C. §§ 1503, 1505 (obstruction of grand jury and SEC proceedings), and 1512 (witness tampering); and second, that the jury instructions on the scienter requirement under all three counts were erroneous. The appeals court, applying the standard of deference normally given to jury findings, affirmed that the evidence was sufficient for a reasonable jury to choose among conflicting accounts and explanations of the defendant's behavior and find the defendant guilty on all three counts. However, applying the stricter standard of *de novo* review normally given to challenges of jury instructions, the appeals court found that the judge failed to properly instruct the jury. The jury should have been instructed that it must find that the defendant acted with the specific intent to obstruct justice by destroying relevant records or instructing other to do so, as required by the Supreme Court's recent decision in *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005). Because the appeals court could not find—beyond a reasonable doubt—that the jury would have come to the same conclusion based on the evidence with the correct instruction, the case was remanded for a third trial.

IV. Form of Production

Ayers v. SGS Control Services, 2006 WL 618786 (S.D.N.Y. Mar. 9, 2006). In a suit for unpaid overtime wages under the Fair Labor Standards Act, plaintiff employees requested that the defendant supplement its production of payroll and timekeeping data in hard copy form with the mathematical formulae used to tabulate the results. The defendant objected to producing the formulae on work product grounds, but failed to list the formulae on any privilege log. The court rejected the defendant's work product claim. Citing Fed. R. Civ. P. 1, the court ordered production of the formulae and that the production be made in electronic format to allow the plaintiffs to adequately analyze the data.

Bergersen v. Shelter Mutual Insurance Co., 2006 WL 334675 (D. Kan. Feb. 14, 2006). In a wrongful termination lawsuit, the defendant produced 7,253 documents on three CDs in no "perceivable sequential order" and without any index. When challenged, the defendant stated that the documents had been produced as they were maintained in the ordinary course of business. The court rejected the defendant's characterization of the production as meeting the requirements of Fed. R. Civ. P. 34 and noted that the parties should have entered into an agreement regarding the form of production, including consideration of document identification and order. However, the court denied the plaintiff's motion to compel as inappropriately filed more than 30 days after the defendant's document production.

Bob Barker Co. v. Ferguson Safety Prods., Inc., 2006 WL 648674 (N.D. Cal. Mar. 9, 2006). In a Lanham Act lawsuit, the plaintiff requested direct access to the defendant's computer databases. The court declined to order such access until a showing of good cause was made and a protocol proposed to protect the defendant from undue business disruption, and to protect the defendant's privileged and proprietary information.

***In re Bristol-Myers Squibb*, 205 F.R.D. 437 (D.N.J. 2002).** Early in the litigation of a securities fraud suit the parties had agreed to paper production and a per-page price for photocopying. However, the defendant did not disclose that the documents had been scanned, were being "blown back" to paper form at a cost below that of photocopying, and were available in electronic form for considerably less money. The court held the parties to the agreement to produce paper, but at the lower cost of the "blow backs," and ordered that the electronic versions also be produced, at the nominal cost of duplicating compact disks. The court rejected the defendant's argument that the plaintiff contribute to the cost of scanning the documents, as that action was taken unilaterally by the defendant, who, for its own purposes, didn't inform the plaintiff. Finally, the court la-

mented that the parties did not take the “meet and confer” obligations of Fed. R. Civ. P. 26(f) seriously in light of electronic discovery.

CP Solutions PTE, Inc. v. General Electric Co., 2006 WL 1272615 (D. Conn. Feb. 6, 2006). In a contract case involving the procurement of electronic components, the plaintiff objected to the defendant’s production of 301,539 pages of documents in tagged image file format (TIFF), in response to its 131 requests, as being an overbroad “dump truck” production designed to hide the “needle in the haystack.” It requested the court to order the defendant to organize and identify the documents and to produce electronic personal folder files (“PST files”) in native format. Finding that the defendant’s form of production satisfied the “usual course of business” requirement of Fed. R. Civ. P. 34, the court nevertheless ordered the defendant to produce the documents in “a readable, useable format” and to provide additional data to match e-mails with attachments. The court declined to order production of PST files without a further showing of need, as production of PST files in native format would require considerable burden and expense in separating out privileged and non-responsive matter.

Floeter v. City of Orlando, 2006 WL 1000306 (M.D. Fla. Apr. 14, 2006). In an employment-related lawsuit against the City of Orlando Police Department, the plaintiff requested “entry upon land” under Fed. R. Civ. P. 34 for the purposes of inspecting computer hard drives for relevant documents, to which the defendant police department objected. In denying the plaintiff’s motion to compel, the court noted that a request under Rule 34 for documents or inspection does not extend to conducting a general search for documents, and such an on-site inspection would not be considered unless there was a showing that documents had been requested which the police department had failed to produce.

Gilliam v. Addicts Rehab. Ctr. Fund, Inc., 2006 WL 228874 (S.D.N.Y. Jan. 26, 2006). In an employment class action, the defendants identified 148 compact disks containing payroll and personnel information of 150 employees as responsive to the plaintiffs’ request for production. Citing the personal nature of much of the data, however, the defendant refused to produce the disks themselves, offering instead to produce 36,000 hard copy pages for inspection only at the defendant’s premises. The plaintiffs moved to compel production of the disks themselves. Citing Rule 1 of the Federal Rules of Civil Procedure, the non-privileged nature of the data, and the availability of a protective order, the court ordered the production of the information in computerized form.

Hagemeyer North America, Inc. v. Gateway Data Sciences Corp., 222 F.R.D. 594 (E.D. Wis. 2004). In a dispute between two corporations, the plaintiff requested that the defendant search its backup tapes and identify responsive e-mails. The defendant objected, citing undue burden, because of the significant cost involved. The court, relying

on the test in *Zubulake v. UBS Warburg*, 217 F.R.D. 309 (S.D.N.Y. 2003), ordered that information from a sample of backup tapes be taken to help determine “whether the burden or expense of satisfying the entire request is proportionate to the likely benefit.”

Hagenbuch v. 3B6 Sistemi Elettronici Industriali S.R.L., 2006 WL 665005 (N.D. Ill. Mar. 8, 2006). In a patent infringement suit, the defendant objected to the plaintiff’s initial document request on grounds of burden and overbreadth, stating that it would simply make relevant documents available for inspection and copying at its premises. The plaintiff accepted the offer, inspected the documents on site, and designated numerous paper and electronic documents for copying, including CDs and DVDs. The defendant refused to copy and produce the CDs and DVDs, stating that it would only produce hard copies at the plaintiff’s expense. The defendant later modified its objection, stating that it would produce TIFF images of the electronically stored information. The plaintiff objected, stating that production of the TIFF images would not be adequate under Fed. R. Civ. P. 34. The defendant conceded that the TIFF images were fundamentally different from the electronic files they represented and made no claim of privilege justifying the redaction of the missing information, stating only that the TIFF images were a “reasonably useable form” and that its obligations were therefore satisfied under Rule 34. The magistrate judge disagreed and ordered the defendant to produce copies of the CDs and DVDs themselves, distinguishing this situation from *In re Ford Motor Co.*, 345 F.3d 1315 (11th Cir. 2003), in which the trial court gave the responding party no opportunity to raise *bona fide* objections of privilege, relevance, and burden to production of a database.

***In re Honeywell International, Inc.*, No. M8-85 WHP, 2003 WL 22722961 (S.D.N.Y. Nov. 18, 2003).** In a putative securities class action, the plaintiffs served a subpoena on non-party PriceWaterhouseCoopers (PWC), the defendant’s auditor. PWC produced 63,500 pages of financial work papers in hard-copy form. The plaintiff moved to compel the production in electronic form, claiming that the data as produced were neither in business record order nor labeled to correspond to the categories of the request, as required by Fed. R. Civ. P. 34. PWC opposed the motion to compel because it had produced the information sought in paper form and recreating it electronically would cost \$30,000. The court acknowledged that PWC had produced paper versions but stated it was “insufficient because they were not produced as kept in the usual course of business.” The court required that PWC produce the data in electronic form and said that PWC could avoid the \$30,000 expense by also producing the proprietary software to access the data. The court noted that the plaintiffs were not competitors and a confidentiality order was already in place, so PWC’s trade-secret interests would be adequately protected.

Jackson v. City of San Antonio, 2006 WL 487862 (W.D. Tex. Jan. 31, 2006). In an employment class action, the defendant elected to answer several interrogatories seeking wage and hour information with computerized records. The plaintiffs objected to the purported Fed. R. Civ. P. 33(d) response, claiming it was a “data dump.” After the defendant supplemented its answer with more detailed explanations of the data structure, the court found that the burden of extracting the requested information was essentially the same for the plaintiffs as for the defendants, and allowed the response.

***In re Lorazepam & Clorazepate*, 300 F. Supp. 2d 43 (D.D.C. 2004).** In an antitrust lawsuit, the plaintiff sought to compel the defendant to provide a searchable index of the “mountain” of electronic documents that had been provided. The defendant had previously given the plaintiff CD-ROMs with the material, but they proved unreadable and unsearchable. The court held that the plaintiff must have a company that specializes in computer forensics determine if the CD-ROMs were salvageable.

McNally Tunneling Corp. v. City of Evanston, No. 00 C 6979, 2001 WL 1568879 (N.D. Ill. Dec. 10, 2001). In a lawsuit for breach of contract, the plaintiff made a motion to compel delivery of electronic documents, which it already had in hard copy. The court noted that case law was split on whether a party is entitled to discovery in electronic form as well as paper form, citing *Williams v. Owens-Illinois*, 665 F.2d 918 (9th Cir. 1982), which denied a request for computerized data to supplement paper production, and *Anti-Monopoly, Inc. v. Hasbro, Inc.*, No. 94CIV.2120, 1995 WL 649934 (S.D.N.Y. Nov. 3, 1995), which held that a party is entitled to both hard-copy and computerized data. Since the motion was not supported by controlling case law, however, the court denied the defendant’s motion because it “failed to demonstrate that it is entitled to both [a] hard copy and an electronic version[].”

Northern Crossarm Co. v. Chemical Specialties, Inc., No. 03-C-415-C, 2004 WL 635606 (W.D. Wis. Mar. 3, 2004). The plaintiff filed a motion to compel the production of 65,000 e-mail messages in electronic form after the defendant had produced the requested e-mails in paper form. The court held that the plaintiff was not entitled to its preferred form of production under Fed. R. Civ. P. 34. Absent a specific request for the production to be in electronic form, and absent any showing that the form chosen by the producing party constituted a “sharp tactic” or “gamesmanship,” the court refused to grant the plaintiff’s motion based only on “an unfortunate failure to communicate adequately.”

Nova Measuring Instruments, Ltd. v. Nanometrics, Inc., 2006 WL 524708 (N.D. Cal. Mar. 6, 2006). In a patent infringement suit, the plaintiff moved to compel the production of electronic records in native file format. Citing *In re Verisign*, 2004 WL

2445243 (N.D. Cal. 2004), and that the defendant offered no explanation as to why it objected to production in native file format, the judge ordered that the defendant do so, with original metadata.

Physicians Interactive v. Lathian Systems, Inc., No. CA 03-1193-A, 2003 WL 23018270 (E.D. Va. Dec. 5, 2003) (mem.). In a civil suit against alleged hackers for theft of customer lists and trade secrets, the plaintiff moved for expedited discovery to enter the sites where the defendants' computers were located and make "mirror" or bit-stream images of the hard drives. The court stated the plaintiff must meet the four-part test from *Blackwelder Furniture Co. v. Selig Manufacturing Co.*, 550 F.2d 189 (4th Cir. 1977), for a preliminary injunction which requires consideration of (1) the likelihood of irreparable harm to the plaintiff if the preliminary injunction is denied; (2) the likelihood of harm to the defendant if the requested relief is granted; (3) the likelihood that the plaintiff will succeed on the merits; and (4) the public interest, as well as the test for expedited discovery requiring "unusual circumstance . . . that would likely prejudice the party if they were required to wait the normal time." The court held that the plaintiff withstood the Blackwelder test and that "[e]lectronic evidence can easily be erased and manipulated," which met the requirement for expedited discovery. Therefore, the court granted the plaintiff's motion, with the condition that the imaging be done by a computer forensics expert and that discovery be limited to information related to the alleged attacks.

***In re* Plastics Additives, No. Civ. A. 03-2038, 2004 WL 2743591 (E.D. Pa. Nov. 29, 2004).** In a complex antitrust class action, the plaintiffs made a motion to compel the defendants to "provide data in electronic format . . . and . . . provide technical assistance to the plaintiffs in understanding [the] data." The defendant objected to being compelled to provide technical assistance because the plaintiff did not carry the same burden. Agreeing with the defendant, the court found that "[b]oth parties must provide all transactional data in electronic format," however, the defendant was not required to provide technical assistance.

Powerhouse Marks, LLC. v. Chi Hsin Inpex, Inc., 2006 WL 83477 (E.D. Mich. Jan. 12, 2006). In a trademark infringement suit, the plaintiff served interrogatories for purchase and sales information. The responding party, Wal-Mart Stores, Inc., answered by reference to 1,771 pages of computer printouts. The plaintiff filed a motion to compel, claiming that the database printouts were indecipherable. The court agreed, stating that it was unable to ascertain the information sought by the interrogatories from the raw data produced. Citing Fed. R. Civ. P. 33(d) and the 1970 Advisory Committee Notes to Rule 34, the court held that in order for the burden of deriving the information to be the same for both sides, the defendant should produce computer data in the computer-readable form available to the defendant and more useable by the plaintiff.

***In re Priceline.com, Inc. Securities Litigation*, 2005 WL 3465942 (D. Conn. Dec. 8, 2005).** In a securities class action litigation, the court set out a detailed order regarding the forms of production for a variety of electronic information sources. The court rejected “native format” as a default form of production, stating a preference for static TIFF or PDF images with Bates numbering, accompanied by a searchable database of relevant metadata, but with all relevant data preserved in native format. The court also signaled its willingness to entertain cost-shifting or cost-sharing, citing the proposed amendments to the Federal Rules of Civil Procedure.

***Static Control Components, Inc. v. Lexmark International, Inc.*, 2006 WL 897218 (E.D. Ky. Apr. 5, 2006).** In a patent infringement action, the plaintiff moved to compel production of the defendant’s “presale customer inquiry database,” consisting of approximately 60,000 records, offering to extract responsive information from the database at its own expense. The defendant argued that the motion to compel was moot, as it made the database available at its premises for inspection and copying, and plaintiff had not done so. The defendant had offered what was essentially a “quick peek” review of the database, allowing the plaintiff access to the unreviewed database to perform its own searches (without waiving privilege), print out what it considered responsive information, and leave those pages with the defendant to review for privilege before producing them. The plaintiff countered by saying that the database as offered was useless, as it only accepted inquiries based on customer name, phone number, or reference number—information that the plaintiff did not have. The court stated that it would “not permit Lexmark to hide behind its peculiar computer system as an excuse for not producing information to SCC,” and ordered that the defendant produce the database in reasonably useable form under the terms of an existing protective order.

***Super Film of America, Inc. v. UCB Films, Inc.*, 219 F.R.D. 649 (D. Kan. 2004).** In a contract dispute over the sale of \$115,000 worth of transparent film, the defendant sought discovery of e-mails, documents, databases, and spreadsheets that the plaintiff claimed were beyond its “knowledge or expertise” to retrieve and produce. The plaintiff offered to make computers available to the defendant so the defendant could retrieve the requested data. The defendant objected, and the court agreed that the offer was an unreasonable attempt to shift discovery costs to the requesting party. Noting that the plaintiff’s claim that producing the documents would create an undue burden was conclusory and unsupported, the court granted the defendant’s motion for discovery.

***In re Verisign, Inc., No. C 02-02270*, 2004 WL 2445243 (N.D. Cal. Mar. 10, 2004).** In a class action securities suit, the defendants were ordered by the magistrate judge to produce all documents in electronic form. The order further stated that “[p]roduction of TIFF version alone is not sufficient,” and that “[t]he electronic version must include metadata as well as be searchable.” The defendants objected that the order required

them to produce irrelevant material and to convert TIFF images already prepared for production into some other form. The district judge interpreted the order as essentially an order to produce in native format, but found that the order was neither “clearly erroneous [n]or contrary to law.”

Williams v. Sprint/United Management Co., 2005 WL 2401626 (D. Kan. Sept. 29, 2005). In an employment class action suit alleging age discrimination in layoffs, the defendant produced Excel spreadsheets showing reduction-in-force calculations in a static image format, which eliminated the mathematical formulae behind the spreadsheets, text that exceeded cell size, and metadata. Referring to The Sedona Principles, the judge determined that the defendant should have preserved and produced the spreadsheets “as they are kept in the ordinary course of business”—that is, in native format—or taken other measures to preserve and produce non-apparent information contained within the electronic files, as it was reasonable to assume that the calculations, text, and metadata would be relevant and material to the claims raised in the lawsuit.

Zakre v. Norddeutsche Landesbank Girozentrale, No. 03 Civ. 0257, 2004 WL 764895 (S.D.N.Y. Apr. 9, 2004). The defendant produced over 200,000 e-mail messages on two CDs in a word-searchable electronic format. The plaintiff filed a motion to compel the additional production of “a meaningful and detailed document index.” The court held that the defendant produced the e-mail messages “in as close a form as possible as they are kept in the usual course of business,” and would not be required to produce an index or be “further obligated to organize and label them to correspond with Zakre’s requests.”

V. Use of Experts

Balboa Threadwork, Inc. v. Stucky, 2006 WL 763668 (D. Kan. Mar. 24, 2006). In a Lanham Act case alleging infringement of digital embroidery designs, the plaintiff sought an order allowing it to image the defendant’s computer hard drives at the plaintiff’s expense. The defendant objected, stating that it owned several computers, some of which were used in its home-based business and some of which were not. There was, however, no agreement over which computers were more likely to contain relevant evidence. The plaintiff proffered no evidence that data had been or was about to be deleted by the defendant and submitted only a broad and general affidavit by its expert that imaging was an appropriate action. Attempts to reach agreement through the meet-and-concur process proved fruitless, and the court ordered that the imaging be done at the plaintiff’s expense, but under a protocol that would protect the defendant’s personal, privileged, and non-responsive information. The court ordered that the imaging not be

performed until the parties had agreed on an appropriate protocol to be designed and executed by the parties' experts.

Gates Rubber Co. v. Bando Chemical Industries, Ltd., 167 F.R.D. 90 (D. Colo. 1996). In a lawsuit over allegedly stolen trade secrets, one of the defendants deleted certain word processing files from his computer, claiming the files were unrelated to the litigation. The plaintiff obtained permission to utilize its own technician to recover the missing files. The technician installed a commercial data-recovery program, "Norton Unerase," on the defendant's computer, and in the process destroyed additional files estimated to be 7% to 8% of the remaining discoverable data. While acknowledging that the defendant's original intentional deletion of computer files warranted a sanction, the court noted the plaintiff's negligence in attempting to recover the files offset the potential sanction. The court stated that parties to judicial proceedings have "a duty to utilize the method which would yield the most complete and accurate results" to recover and preserve computer evidence. Despite the plaintiff's negligence, the court awarded the plaintiff 10% of the fees and costs related to bringing the sanctions motion, an unusual reprimand stemming from the unique difficulty of isolating the cost of one discovery motion among many.

Harbuck v. Teets, 2005 WL 2510229 (11th Cir. 2005). In an employment discrimination suit, the plaintiff moved to compel production of e-mails that it claimed the defendant had willfully deleted. The court ordered the defendant to submit to an inspection of its computer by the court's own IT personnel, who were able to retrieve the requested data. The court then closed discovery and rendered summary judgment for the defendant. On appeal, the Eleventh Circuit found no abuse of discretion in the use of the court's own IT personnel, nor any reasonable basis for believing the defendant was hiding information.

Northwest Airlines v. Local 2000, No. Civ. A.00-08 (D. Minn. Jan. 11, 2000), discussed in Michael J. McCarthy, *Data Raid: In Airline's Suit, PC Becomes Legal Pawn, Raising Privacy Issues*, Wall Street J., May 24, 2000, at A1. In an unreported case, an airline sued a flight attendants' union, alleging that certain union activists attempted an illegal "sick out" to coincide with the millennium holiday. The airline sought discovery of the home computers of two of the most vocal union leaders, claiming that these individuals used their personal e-mail accounts to organize the job action. The magistrate judge granted the airline's discovery request, ordering inspections of the two home computers under protocols similar to the one adopted in *Playboy Enterprises, Inc. v. Welles*. However, the representations made by the airline and its computer experts regarding the amount of time and level of intrusiveness the inspection would involve turned out to be wildly inaccurate, and the neutrality of the experts came into question, leading to accusations in the public press that the requested discovery was an

unwarranted invasion of privacy and amounted to harassment of the defendants. After more than 30 days of inspection, no significant relevant evidence was found and the case was dismissed.

Playboy Enterprises, Inc. v. Welles, 60 F. Supp. 2d 1050 (S.D. Cal. 1999). In a lawsuit for trademark infringement and dilution, the plaintiff sought discovery for the defendant's hard drive, which may have contained deleted e-mails. The defendant objected, citing concerns that some of the e-mails were privileged. To protect privilege, confidentiality, and the integrity of the evidence, the court appointed a qualified neutral expert to conduct discovery of the defendant's computer hard drive and approved a detailed protocol for the expert to follow.

Rowe Entertainment, Inc. v. William Morris Agency, Inc., 51 Fed. R. Serv. 3d (West) 1106, *aff'd*, 53 Fed. R. Serv. 3d (West) 296 (S.D.N.Y. 2002). In allowing the requesting party direct access to the respondent's computer files, the court adopted a protocol in which the requesting party's expert recovered files and the requesting party's attorney reviewed them for relevance *before* the responding party reviewed them for privilege. *See also Rowe*, under "VI. Costs and Cost Allocation."

Simon Property Group, L.P. v. mySimon Inc., 194 F.R.D. 639 (S.D. Ind. 2000). In a trademark infringement lawsuit, the plaintiff sought to compel discovery of the defendant's hard drive to access deleted documents. The court adapted a similar approach as that used in *Playboy Enterprises v. Welles*, 60 F. Supp. 2d 1050 (S.D. Cal. 1999). The plaintiff was to choose an expert to create a "mirror image" of the hard drive and the expert was to furnish it to the defendant's counsel to identify and redact any documents that were privileged. The plaintiff would then have access to all material that was not privileged.

Tempo Electric Heater Corp. v. Temperature Engineering Co., No. 02 C 3572, 2004 WL 1254134 (N.D. Ill. June 3, 2004). In a suit concerning theft of trade secrets, the defendant moved for summary judgment, stating that the plaintiff had failed to produce key evidence to support its claim. In particular, the plaintiff failed to show by direct evidence that any unauthorized files existed on the defendant's computers. The circumstantial evidence offered by the plaintiff was that the defendant did not return several "access keys" and proprietary programs at the end of the parties' working relationship. The direct evidence offered in rebuttal was that the defendant hired an independent service bureau to inspect all of its computers for remnants of the plaintiff's proprietary software, and the service bureau reported that none were found. The court held that the plaintiff ultimately has the burden of proof, and that mere circumstantial evidence and

failure to conduct its own investigation of the defendant's computers did not meet that burden.

Wild v. Alster, 377 F. Supp. 2d 186 (D.D.C. 2005). In a medical malpractice case, the jury found for the defendant doctor, and the plaintiff moved for a new trial, citing prejudice resulting from the inability to have a computer forensics expert determine the dates of various medical records. However, because of routine migration of the records from one computer to another, the dates would not likely be determined accurately through metadata, and the plaintiff had requested the expert examination discovery 18 months after discovery had closed. Therefore, the court found no abuse of discretion and denied the motion for a retrial.

YCA, LLC v. Berry, No. 03 C 3116, 2004 WL 1093385 (N.D. Ill. May 7, 2004). In a lawsuit for breach of an employee non-solicitation, non-disclosure, and non-recruitment agreement, the defendant Berry moved to strike the testimony of the plaintiff YCA's computer forensics expert on the grounds that YCA had failed to identify the expert and the nature of the evidence the expert would offer in a timely manner. The expert had recovered a "plethora" of documents apparently deleted by Berry from his company-issued computer. The court denied the motion on the grounds that Berry had deliberately misled YCA during discovery by denying that he had used his company-issued computer to further his plans to establish a competing business. YCA could not be faulted for relying on Berry's representations and making a rational cost-benefit decision to not hire an expert. YCA's analysis changed at the close of discovery when Berry admitted that his previous statements were false.

VI. Costs and Cost Allocation

In re Air Crash Disaster at Detroit Metropolitan Airport, 130 F.R.D. 634 (E.D. Mich. 1989). In a lawsuit stemming from the crash of a passenger jet, the defendant made a motion to compel the plaintiff to produce a nine-track tape with simulation runs on it. The plaintiff opposed the motion because it stated that the Federal Rules of Civil Procedure do not require it to create new documents it does not already have. Relying on *National Union Electric Corp. v. Matsushita Electric Co. Ltd.*, 494 F. Supp. 1257 (E.D. Pa. 1980), the court granted the defendant's motion. However, since the plaintiff did not already have the tapes, the court allocated the cost of generating them to the defendant.

***In re Brand Name Prescription Drugs Antitrust Litig.*, Nos. 94 C 897, MDL 997, 1995 WL 360526 (N.D. Ill. June 15, 1995) (mem.)**. In an antitrust lawsuit, the plaintiff made a motion to compel the defendant to retrieve deleted e-mails at the defendant's expense. The defendant contended the request for discovery was overly broad and the expense of retrieval, \$50,000 to \$75,000, made the request overly burdensome. The court held that the defendant must bear the cost of retrieval since the plaintiff had no control over the type of record-keeping the defendant maintained. However, the plaintiff was required to narrow the scope of discovery to limit costs and to pay \$.21 for each page of the e-mails that were to be copied.

***Computer Associates International, Inc. v. Quest Software, Inc.*, 56 Fed. R. Serv. 3d (West) 401 (N.D. Ill. 2003)**. The plaintiff in a software copyright and trade secret infringement case requested that the defendant image the computer hard drives of six key employees. After the imaging, the defendant spent between \$28,000 and \$40,000 to remove privileged e-mails from the backups and create a privilege log. The defendant then filed a motion to require the plaintiff to pay these preparation costs. The court reviewed the eight factors articulated in *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421 (S.D.N.Y. 2002), and determined that none of them favored cost shifting, analogizing these preparation costs to costs for attorney review.

***Cook v. Deloitte Touche LLP*, 2005 WL 2429422 (S.D.N.Y. Sept. 30, 2005)**. In an employment discrimination suit, the plaintiff moved for an extension of time to conduct electronic discovery prior to the court's ruling on a summary judgment motion. The court denied the extension, saying that the plaintiff had failed to show that the defendant had withheld any relevant electronic records. Although the plaintiff claimed to have copies of "smoking gun" e-mails, the court was not convinced that any further evidence would justify the cost of further discovery, "nor has he [the plaintiff] volunteered to foot the bill for doing so."

***Federal Trade Commission v. U.S. Grant Resources, LLC*, No. Civ.A.04-596, 2004 WL 1396315 (E.D. La. June 18, 2004)**. The defendant in this civil fraud action was also defending a related criminal fraud action brought by the State of Louisiana. The defendant in this case served a subpoena under Fed. R. Civ. P. 45 for hard-copy records the state seized from it in the criminal action. The state's attorney filed a motion to quash the subpoena on the basis that it was overbroad and duplicative, and that the defendant should pay the costs of copying the documents. The federal court denied the motion, stating that although the defendant already had computer files representing the alleged fraudulent transactions, it was entitled to hard copies of its own documents held by the state, and that under the three-part test established by *In re Exxon Valdez*, 142 F.R.D. 380 (D.D.C. 1992), the cost of photocopying the documents was not an undue

burden that entitled the state to reimbursement, even though it was not a party to this action.

J.C. Associates v. Fidelity & Guaranty Insurance Co., 2006 WL 1445173 (D.D.C. May 25, 2006). In a suit for denial of insurance coverage for damages caused by pesticide use, plaintiff requested documents relevant to the way defendant had interpreted the “pollution exclusion” cause of past insurance contracts. The defendant conducted an electronic search, based on file codes, of 1.4 million active and inactive claim files and identified 454 potentially responsive claim files. The next step would be to review all 454 claim files for responsiveness and privilege, a process that would likely cost far more than the \$124,000 claim at issue. To reduce costs, the magistrate judge ordered the plaintiff to supply the defendant with document conversion software that would allow the defendant to scan and convert 25 randomly selected files from the 454 and search for four key words. The resulting “hits” would then be reviewed by the defendant for responsiveness and privilege, and the defendant would produce those documents for the plaintiff and submit an affidavit detailing the time and cost of the search and review. The magistrate judge would then determine, based on the “marginal utility” concept articulated in *McPeck v. Ashcroft*, 202 F.R.D. 31 (D.D.C. 2001), whether further discovery is warranted and who should bear the costs.

Laurin v. Pokoik, No. 02 Civ. 1938, 2004 U.S. Dist. LEXIS 24010 (S.D.N.Y. Nov. 30, 2004). In a hostile work environment case, the defendant alleged that the plaintiff made a particular entry in the defendant’s computer system shortly before she was terminated. The plaintiff requested any document that would prove the date the entry was actually made. The court directed the plaintiff to file a motion to compel inspection of the defendant’s computer system if and when she was willing to retain a forensic computer expert at her own expense.

Medtronic Sofamor Danek, Inc. v. Michelson, 56 Fed. R. Serv. 3d (West) 1159 (W.D. Tenn. 2003). In an intellectual property case involving spinal fusion medical technology, the defendant sought discovery of information from 996 computer backup tapes and 300 megabytes of data on the desktop computers of the plaintiff’s employees. The plaintiff objected that the proposed discovery would be unduly costly and burdensome. The court agreed and applied the eight factors articulated in *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421 (S.D.N.Y. 2002) (see below), to determine that the defendant should shoulder most of the costs of the proposed discovery. The court then ordered a detailed protocol for the parties to follow in conducting discovery of the backup tapes and hard drives. Finally, the court granted the defendant’s request that a special master be appointed under Fed. R. Civ. P. 53, with the costs to be borne equally by the parties.

Multitechnology Services, L.P. v. Verizon Southwest, No. 4:02-CV-702-Y, 2004 WL 1553480 (N.D. Tex. July 12, 2004). In a commercial lawsuit involving allegations of unfair trade practices, the plaintiff propounded interrogatories seeking information from the defendant's customer databases. The defendant sought a protective order shifting the cost of the database searches, but the plaintiff objected, stating that cost shifting would not be appropriate under the factors announced in *Zubulake v. UBS Warburg*, 217 F.R.D. 309 (S.D.N.Y. 2003), because the requested data were "accessible." The court held that *Zubulake* was neither controlling nor exactly applicable to the situation. However, applying the *Zubulake* cost-shifting factors, the court found that an even sharing of the cost would accommodate the plaintiff's need for the information while balancing the defendant's desire to control the costs. In addition, the court classified the expenditures as "court costs," rendering them recoverable by the prevailing party.

Murphy Oil USA, Inc. v. Fluor Daniel, Inc., 52 Fed. R. Serv. 3d (West) 168 (E.D. La. 2002). In a lawsuit for breach of contract, the plaintiff made a motion to compel the defendant to reproduce e-mails from its backup tapes. Following *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421 (S.D.N.Y. 2002), the court offered the defendant two options for proceeding with discovery of e-mail from the backup tapes. Under option one, the plaintiff would pay the cost of recovering the e-mails and would assess whether any of the documents were relevant, then the defendant could review those documents to determine whether any were privileged. Under the second option, the defendant could review, at its own cost, all relevant documents recovered by the expert and produce only the non-privileged documents to the plaintiff.

OpenTV v. Liberate Technologies, 219 F.R.D. 474 (N.D. Cal. Nov. 18, 2003) (order re discovery). In an intellectual property infringement suit, the magistrate judge ruled that a portion of the costs of producing relevant computer source code should be shifted from the responding party to the requesting party. The plaintiff had requested production of some 100 additional versions of source code for software products being developed by the defendant. The defendant objected, stating that locating and duplicating the requested source code would be unduly burdensome and would yield only marginally relevant results. Instead, the defendant offered to make its complete source code database available at its facilities, along with a complete index to the database and a software engineer to provide technical assistance. The plaintiff rejected the offer, arguing that it essentially shifted production costs to the plaintiff, the requesting party. The court agreed that the offer effectively shifted costs, yet because extracting the source code would take the defendant 125 to 150 hours, the court found that the requested electronic data were inaccessible for purposes of discovery and that cost-shifting would be appropriate. Applying the *Zubulake* factors (see *Zubulake I* in this section), the court determined that the costs for extraction should be split evenly, although the cost of duplication should be borne solely by the defendant.

Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340 (1978). In a class action before the Supreme Court, the issue was whether the defendant would have to pay the cost of extracting information to certify the class. The Court held that the request fell under Fed. R. Civ. P. 23(d), governing class actions, not Fed. R. Civ. P. 26, governing general discovery, because the issue was notifying a class, and not “to define or clarify issues of the case.” Also, either party would require the services of a third-party to extract the information, negating any potential cost saving were the defendant to do it. Therefore, the court held it was inappropriate to shift the burden of costs to the defendant.

Rowe Entertainment, Inc. v. William Morris Agency, Inc., 205 F.R.D. 421 (S.D.N.Y. 2002). In an action against talent agencies alleging racial discrimination in bookings, the plaintiffs requested e-mail from the defendants’ backup media. The four defendants objected, citing the high costs estimated by electronic discovery consultants to restore the backup media to accessible form and the legal costs associated with screening the e-mails for relevance and privilege. Balancing eight factors derived from the case law, the court required the plaintiffs to pay for the recovery and production of the defendants’ extensive e-mail backups, except for the cost of screening for relevance and privilege. The eight “*Rowe* factors” are

1. the specificity of the discovery request;
2. the likelihood of discovering material data;
3. the availability of those data from other sources;
4. the purposes for which the responding party maintains those data;
5. the relative benefits to the parties of obtaining those data;
6. the total costs associated with production;
7. the relative ability and incentive for each party to control its own costs; and
8. the resources available to each party.

Toshiba America Electronic Components, Inc. v. Superior Court of Santa Clara County, 21 Cal. Rptr. 3d 532 (Cal. Ct. App. 2004). A California state court judge found that California’s Code of Civil Procedure, section 2031(g)(1), was fundamentally different from Fed. R. Civ. P. 26(b)(2), in that it clearly placed the responsibility for the reasonable expense of translation of computer data, if necessary, on the requesting party. Although this litigation was in state court, neither party actually cited the California rule, basing their arguments for and against cost shifting on federal practice. The court found these arguments by both sides misplaced, stating that the parties should have relied on California’s statute.

United States v. Amerigroup, 2005 WL 3111972 (N.D. Ill. Oct. 21, 2005). In a *qui tam* action against a government contractor, the Illinois Department of Healthcare and Family Services (HFS), not a party to the suit, was served with a subpoena *duces tecum* under Fed. R. Civ. P. 45, requesting it to search for and produce e-mails of named employees based on a list of search terms. HFS objected, submitting a detailed affidavit of the cost and burden of restoring the e-mails from backup tapes before the searches could be performed. Citing the significant factor of HFS's non-party status, and the differences between Fed. R. Civ. P. 26 and 45 relating to protecting producing parties from undue burden and cost, the court granted HFS's motion to quash the subpoena.

Wiginton v. CB Richard Ellis Inc. ("Wiginton II"), N. 02-C-6832, 2004 U.S. Dist. LEXIS 15722 (N.D. Ill. Aug. 9, 2004). In a class action lawsuit alleging sexual harassment and a hostile work environment, the plaintiffs requested a search through the defendant's e-mail backup tapes for pornographic images and sexually suggestive messages. By agreement, the plaintiffs' computer discovery expert was provided with 94 selected backup tapes and with a set of search terms to use. The expert identified between 142 and 567 arguably responsive documents at a cost of \$249,000. The plaintiffs filed a motion for costs. Considering the cost-shifting factors announced in *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421 (S.D.N.Y. 2002), and *Zubulake v. UBS Warburg*, 217 F.R.D. 309 (S.D.N.Y. 2003), the court opted to modify the *Zubulake* factors to emphasize the proportionality test of Fed. R. Civ. P. 26(b)(2)(iii). The factors the court considered were

1. the likelihood of discovering critical information;
2. the availability of such information from other sources;
3. the amount in controversy as compared to the total cost of production;
4. the parties' resources as compared to the total cost of production;
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;
7. the importance of the requested discovery in resolving the issues at stake in the litigation; and
8. the relative benefits to the parties of obtaining the information.

Finding that while most of the factors weighed in favor of cost shifting, the court stated the plaintiff had not entirely overcome the presumption that the responding party bears its own costs. Therefore the court ordered that the plaintiffs should bear 75% of the costs and the defendant only 25%.

Xpedior Creditor Trust v. Credit Suisse First Boston (USA), Inc., 58 Fed. R. Serv. 3d (West) 855 (S.D.N.Y. 2003). A corporation brought a putative class action against an investment banking house, alleging breach of contract in an initial public offering

(IPO), and sought discovery of electronic data from two decommissioned computer systems. The defendant moved for a protective order that would shift to the plaintiff the costs of restoring the computer systems to access the data. Applying the seven-part test enunciated in *Zubulake v. UBS Warburg LLC* (“*Zubulake I*”), 217 F.R.D. 309 (S.D.N.Y. 2003), the judge found that the plaintiff’s request was narrowly tailored, the information was not available from any other source, and the cost of the proposed restoration (\$400,000), while high, was not extraordinary in light of the total monetary stake. She also noted that the plaintiff was a bankrupt corporation with no assets and the defendant was an international firm with assets of over \$5 billion. The final factors—ability to minimize costs, public interest in the issues at stake, and the usefulness of the information to both parties—were neutral. Therefore, although the information requested was inaccessible without incurring costs, there was no justification to shift those costs to the requesting party.

Zenith Electronics Corp. v. WH-TV Broadcasting Corp., 2004 WL 1631676 (N.D. Ill. July 19, 2004). In a breach of contract action, the court entered judgment against the defendant in favor of two third-party defendants. The third-party defendants then filed a bill of costs for \$357,618.82, naming both Zenith and WHTV Broadcasting as jointly liable. Zenith challenged the bill of costs, which included several items related to electronic discovery. The court reviewed the items in light of 28 U.S.C. § 1920. It found that the considerable cost (\$109,627.46) of printing documents originally in electronic format, including consulting time for the conversion of documents from electronic to print formats, was incurred for the convenience of the parties and was not recoverable under the statute, nor was the cost (\$182,595.47) of hiring an independent computer consultant to review the electronic documents for privilege and relevance under a court-ordered protocol.

Zubulake v. UBS Warburg LLC (“Zubulake I”), 217 F.R.D. 309 (S.D.N.Y. 2003). In a sex discrimination suit against a financial services company, the plaintiff requested e-mail beyond the approximately 100 pages produced by the defendants. She presented substantial evidence that more responsive e-mail existed, most likely on backup tapes and optical storage media created and maintained to meet SEC records-retention requirements. The defendants objected to producing e-mail from these sources, which they estimated would cost \$175,000 exclusive of attorney review time. The judge held that the plaintiff’s request was clearly relevant to her claims, but both parties raised the question of who would pay for the discovery and urged the court to apply the *Rowe* factors. The court held that for data 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 are relatively inaccessible, such as on backup tapes. Furthermore, 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. Finally, in conducting the cost-shifting analysis, the court rejected the *Rowe* factors and substituted a seven-factor test. The “*Zubulake* factors” are, in order of importance or weight:

1. the extent to which the request is tailored to discover relevant data;
2. the availability of those data from other sources;
3. the total cost of production, relative to the amount in controversy;
4. the total cost of production, relative to the resources available to each party;
5. the relative ability and incentive for each party to control its own costs;
6. the importance of the issues at stake in the litigation; and
7. the relative benefits to the parties in obtaining those data.

Zubulake v. UBS Warburg LLC (“Zubulake III”), 216 F.R.D. 280 (S.D.N.Y. 2003).

Following the May 13, 2003, opinion and order above, the defendants restored and reviewed five backup tapes selected by the plaintiff at a cost slightly over \$19,000. Six hundred e-mail messages were deemed to be responsive to the plaintiff’s discovery request. The defendants estimated that the cost for production of the entire 77-tape collection would be \$165,954.67 for restoration and \$107,694.72 for review. Analyzing each of the seven factors announced by the court in the previous decision, the court determined that the balance tipped slightly against cost shifting, and that requiring the defendants to bear 75% of the costs would be fair. However, the court determined that none of the costs for attorney review of the data, once they had been made accessible, should be borne by the requesting party.

VII. Privacy and Privilege

Biby v. Board of Regents of University of Nebraska at Lincoln, 419 F.3d 845 (8th Cir. 2005). A public university employee has no reasonable expectation of privacy in the data on his university computer when the university’s computer use policy states that computer files may be searched in litigation.

Collaboration Properties, Inc. v. Polycom, Inc., 224 F.R.D. 473 (N.D. Cal. 2004). In a lawsuit over patent infringement, a dispute arose over privilege for 58 e-mails between non-attorneys of the defendant that were forwarded to attorneys. The plaintiff argued that the defendant should provide redacted copies of the 58 e-mails, because the defendant had not demonstrated that all portions of the 58 e-mails were privileged. The defendant complied, but, according to the plaintiff, the redactions were still overbroad. In particular, the defendant redacted information showing the author and recipient of each withheld e-mail. The court ordered the defendant’s counsel to show to the plain-

tiff's counsel nonredacted copies of the e-mails, with the defendant reserving its right to assert any applicable privilege, in order to discuss more meaningfully the scope of any privilege and correlative redactions. Over the defendant's objections, the court concluded that the limited disclosure in the context of a mandated meeting of counsel did not waive the attorney–client privilege.

Crossroads Systems (Texas), Inc. v. Dot Hill Systems Corp., Case No. A-03-CA-754-SS (W.D. Tex. May 31, 2006). In a patent infringement suit, the defendant produced an e-mail authored by its Director of Intellectual Property and sent to its outside patent counsel. The address was evident on the e-mail, and the attachments to the e-mail were marked “Confidential – Attorneys Eyes Only.” The e-mail was then used as the basis of questioning in a deposition of the defendant under Fed. R. Civ. P. 30(b)(6) at which no objection was made regarding the e-mail, and again some 18 months later at a deposition of the Director of Intellectual Property himself. At that second deposition, defendant counsel raised the claim of attorney–client privilege regarding the e-mail and its attachments and demanded return of the documents. The court, applying the Fifth Circuit's five-part balancing test, found that any claim of privilege over the produced documents had been waived. But because a motion to compel further deposition testimony of the Director of Intellectual Property regarding the subject matter of the documents was not filed until after the discovery deadline, further discovery was denied.

***In re Currency Conversion Fee*, No. MDL 1409, M 21-95, 2003 WL 22389169 (S.D.N.Y. Oct. 21, 2003).** Under the “functional equivalent” exception to the corporate attorney–client privilege, the privilege is maintained even though the communications are disclosed to a third party, if that third party is the functional equivalent of a corporate employee. The court held that the exception did not apply to otherwise privileged documents processed by an outsourced computer data-processing firm.

Curto v. Medical World Communications, Inc., 2006 WL 1318387 (E.D.N.Y. May 15, 2006). In an employment suit, the defendant hired a computer forensic consultant to restore files and e-mails that had been deleted by the plaintiff from her company-issued laptops before she returned them to her employer upon her termination. The defendant then produced them to the plaintiff. The plaintiff asserted that several of these files were protected by attorney–client privilege and work product immunity. The defendant cited its computer use policy, which it said put employees on notice that they had no privacy expectation in files created or stored on company equipment, for the proposition that no privilege attached to these documents or, in the alternative, any privilege had been waived. Applying the Second Circuit's four-part test, the magistrate judge found that the privilege had not been waived, as the plaintiff (1) took reasonable steps to protect confidentiality, (2) the documents represented a tiny percentage of the data on the computers, (3) counsel's demand for the return of the documents was

prompt, and (4) fairness demanded that the documents be protected from disclosure. The magistrate judge considered the company's computer use policy to be a "subfactor," finding that the company's history of lax or selective enforcement of the policy created a "false sense of security," particularly in the context of laptop computers issued for the purpose of employees working from home. On review, the district judge upheld the magistrate judge's findings, distinguishing the home-office computer situation from "reasonable expectation of privacy" cases involving computers in the workplace.

Fraser v. Nationwide Mutual Insurance Co., 352 F.3d 107 (3d Cir. 2003). In a wrongful discharge suit, the Third Circuit upheld the district court's ruling that an employer's search for e-mails of an employee found on the workplace computer network did not violate the Electronic Communications Privacy Act (ECPA), 18 U.S.C. §§ 2510, 2701. Title I of the ECPA prohibits "interceptions," which are universally defined as searches of messages during transmission, not searches of messages that have reached their destination and are being stored. Title II of the ECPA prohibits "seizure" of stored e-mails, but exempts actions taken by the "person or entity providing the wire or electronic communications service," in this case the employer.

Haynes v. Kline, 298 F. Supp. 2d 1154 (D. Kan. 2003). In a suit by a former employee of the Kansas State attorney general, the plaintiff moved for a preliminary injunction prohibiting the attorney general's office from further accessing his private files on his former work computer. The court granted the injunction, holding that the employee demonstrated a Fourth Amendment right in the privacy of his personal computer files. The court found that although the employer stated, as part of the employee orientation, that there was "no expectation of privacy in using this [computer] system," the orientation went on to distinguish between "public" and "private" files and to warn that access to any other employee's files without permission was forbidden. Passwords were issued to each employee to prevent unauthorized access, and prior to this litigation there had been no evidence that any other employee's personal computer files had been monitored or viewed by supervisors. The defendant offered no evidence to justify its search of the employee's personal computer files. The court held that given the totality of the circumstances, the plaintiff's expectation of privacy was both subjectively and objectively reasonable.

Henry v. IAC/Interactive Group, 2006 WL 354971 (W.D. Wash. Feb. 14, 2006). After complaining of bias at her job, defendant was placed on paid leave of absence for a year, during which time she was allowed to keep and use a defendant-issued laptop computer and access to the defendant's network, including the e-mail server. She was terminated at the end of the year but was not asked to return the laptop. After retaining counsel and filing suit, she delivered the laptop and other computers to her counsel, who disclosed to defendant that she had them and intended to search the hard drives for

privileged and relevant information. Several months later, defendant demanded return of the documents found, the laptop, and two of plaintiff's personal computers, which plaintiff's counsel turned over to a neutral computer forensics firm. Defendant then moved for a temporary restraining order and preliminary injunction disqualifying plaintiff's attorney and noticed depositions of plaintiff's attorney and any legal assistants involved in the electronic document search and review process, on the basis that plaintiff had violated her employment contract by sharing the electronic files with her attorney. Finding that the elements required to support injunctive relief had been met, the court ordered the computer forensics firm to return the laptop computer and all non-privileged electronic documents to defendant and restrained plaintiff counsel from using any of the data she had obtained.

Holland v. GMAC Mortgage Corp., No. 03-2666-CM, 2004 WL 1534179 (D. Kan. June 30, 2004). The parties in this civil suit stipulated to a broad protective order, which they offered to the court. The order provided that categories of documents, including "computer records or other confidential electronic information," be designated as "confidential," and that any confidential material to be filed with the court would be filed under seal. The court refused to endorse the order, stating that "[t]he mere fact that a document is a computer record or an electronic document does not warrant protection from disclosure," and that "the fact that the parties may agree to a protective order which provides for the filing of confidential materials under seal does not dispense with the requirement that the parties establish a harm sufficient to overcome the public's right of access to judicial records."

Hopson v. The Mayor and City Council of Baltimore, 232 F.R.D. 238 (D. Md. 2005). In a putative class action lawsuit alleging race discrimination in the Baltimore Fire Department, discovery was bogged down over a number of procedural issues, one of which was the time and cost of reviewing the defendant's voluminous document collection for privilege prior to production. Citing the proposed amendments to Fed. R. Civ. P. 26(b)(5), the magistrate judge encouraged the parties to enter into a "claw back" agreement. Recognizing that "claw back" agreements raise difficult issues of privilege waiver, the judge stated that the agreement would be framed as a court order, bolstering the argument that no waiver was taking place and offering some privilege protection against parties in parallel or future litigation. However, the court noted, such an order would not relieve the parties of the duty to perform a reasonably thorough privilege review, as time and resources allow, nor would it act as an ironclad protection against a "privilege waiver" claim being raised in another jurisdiction, particularly one that takes a strict view of waiver.

Jicarilla Apache Nation v. United States, 60 Fed. Cl. 413 (Fed. Cl. 2004). In one of the many Indian land trust fund mismanagement cases, the Court of Federal Claims found that good cause existed to issue a protective order to facilitate discovery while meeting the requirements of a number of federal confidentiality laws. However, the court excluded “attorney–client privilege, the deliberative process privilege, and the attorney work product doctrine” as applicable laws. (The complete text of the order and a list of the applicable laws are published with this decision.)

Kaufman v. SunGard Investment System, 2006 WL 1307882 (D.N.J. May 10, 2006). In a breach of contract lawsuit, assets of the plaintiff’s software development company had been purchased by the defendant, who was at the same time a senior executive of the defendant. Both before and after the sale of her company to the defendant, the plaintiff had used two laptops to communicate with her attorney regarding the sale. These laptops became assets of the defendant upon the sale of the plaintiff’s company, although she retained custody of them. When she left the defendant’s employ, she surrendered the laptops, but the defendant used a computer forensics technician to determine that several files had been copied prior to the laptops being returned by plaintiff. Defendant sought an order to show cause to establish, *inter alia*, that the copied files were not protected by attorney–client privilege. The magistrate judge determined, and the district judge affirmed, that both the letter of the acquisition agreement and the defendant’s computer use policy put the plaintiff on notice that the information on the laptops belonged to the defendant upon the transfer of assets, and that the plaintiff knowingly relinquished any claim of attorney–client privilege by surrendering the laptops when she left the company.

Navigant Consulting, Inc. v. Wilkinson, 220 F.R.D. 467 (N.D. Tex. 2004). In a suit by a corporation against a group of former employees for trade secret theft, the defendants moved to compel the production of e-mails and other documents related to the corporation’s internal investigation of the defendants and other employees. The corporation objected, claiming attorney–client privilege and work product protection. Among the documents withheld was a detailed forensic analysis of one employee’s laptop computer, including a printout of data contained therein. Applying Texas law, the court held that the attorney–client privilege applies only to communications “made for the purposes of facilitating the rendition of professional legal services” and does not apply when the attorney is “functioning in some other capacity—such as an accountant, investigator, or business advisor.” The mere fact that the corporation was contemplating litigation did not turn the attorneys’ business assistance and advice into privileged attorney–client communications.

Portis v. City of Chicago, No. 02 C 3139, 2004 WL 1535854 (N.D. Ill. July 7, 2004).

In a class action suit brought by citizens who claimed unlawful detention by city police for nonviolent ordinance violations that carry no jail time, attorneys for the plaintiff class obtained approximately 20,000 relevant arrest records from the city. They proceeded to create a computerized database from the arrest records at a cost of approximately \$90,000. The city then filed a motion to compel the plaintiffs to produce the database, stating that although the database is attorney work product, it is not “opinion” work product, and that the city has a “substantial need” for the database, which it cannot recreate itself from the available information without “undue hardship.” The court found that the database was a hybrid of “fact” and “opinion” work product, but that disclosure to the city would not reveal the plaintiffs’ legal strategy or counsels’ mental impressions. The court went on to find that the database, as distinct from the individual arrest records, was an essential piece of evidence. The crux of the lawsuit was the claim that there was a pattern of unlawful detention, and such a pattern could only be established through computer analysis using the database. The court concluded that ordering the plaintiff to share the database would advance the interests of the litigation as a whole and would not violate the attorney work product doctrine, but that the parties must split the database development costs.

Tessera, Inc. v. Micron Technologies, Inc., 2006 WL 7339848 (N.D. Cal. Mar. 22, 2006).

In a patent infringement suit involving semiconductor technology, the plaintiff sought discovery from non-party Hynix Semiconductor Industries, Inc. (“Hynix”), which had been the subject of a U.S. Department of Justice investigation into DRAM chip price fixing. In the course of the investigation, Hynix compiled an extensive electronic database of documents obtained from a number of sources under a protective order in that investigation. The court set out a procedure under which the plaintiff would have access to the database and use specific search terms to identify potentially responsive documents. While Hynix would inform the various contributors generally that the database was subject to discovery in this litigation, the plaintiff would assume the responsibility and cost of contacting each contributor to obtain permission to use responsive documents or of challenging the confidentiality designation of any document it wished to use over a contributor’s objection.

United States v. Rigas, 281 F. Supp. 2d 733 (S.D.N.Y. 2003).

In a criminal case involving executives of the Adelphia Communication Corporation, the government issued grand jury subpoenas to Adelphia, pursuant to which Adelphia created twenty-six bit-stream images of employee computer hard drives. The government accidentally provided privileged information along with the material required for discovery. Upon realizing the mistake, the government petitioned to have the file returned, but the defendants responded that the government had waived its privilege. Declining to adopt a bright line rule that inadvertently volunteering privileged material always or never con-

stituted a waiver, the court adopted a four-part test to gauge the fairness of waiving privilege. The test balances

1. the reasonableness of the precautions taken to prevent inadvertent disclosure of privileged documents;
2. the volume of the discovery versus the extent of the specific discovery at issue;
3. the length of time taken by the producing party to rectify the disclosure; and
4. the overarching issue of fairness.

Applying the test to this case, the court held that the government had taken reasonable precautions, the documents relinquished were only a small portion of the total discovery, the government promptly notified the court of the mistake, and finally the court found it would not prejudice the defendants counsel to not have the material. The court held that defendants were required to return the documents to the government.

United States v. Stewart, 287 F. Supp. 2d 461 (S.D.N.Y. 2003). A year before her indictment on charges related to securities fraud, but after the investigation had been made public, Martha Stewart prepared a detailed e-mail relating her side of the facts and sent it to her attorney. The next day she accessed the e-mail and forwarded it to her daughter, without alteration. Later, attorneys for Martha Stewart Living Omnimedia (MSLO) produced documents and computer files in response to a grand jury subpoena. Both e-mails appeared on MSLO's privilege log; however, only the e-mail to the attorney was removed from the actual production. An assistant U.S. attorney later found the copy sent to the daughter. Stewart objected to MSLO's production of the e-mail on the basis that it was privileged. The court held that the e-mail to the attorney would have been privileged as attorney-client communication, but that Stewart waived the privilege when she forwarded the e-mail to her daughter. However, the court found that the work product protections offered by Fed. R. Civ. P. 26(b)(3) and Fed. R. Crim. P. 16(b) are broader than the attorney-client communication privilege, and that sharing factual work product with a family member did not waive those protections.

United States Fidelity & Guaranty Co. v. Braspetro Oil Services Co., 53 Fed. R. Serv. 3d (West) 60 (S.D.N.Y. 2002). In a surety action, the defendants provided their testifying experts with more than 50 CD-ROM disks containing 1.1 million documents, including many attorney-client communications and work product documents. The plaintiffs claimed that by providing the experts with unfettered access to the entire litigation support database, the defendants had waived any privileges and were required to produce the database under Fed. R. Civ. P. 26(a)(2) as material "considered" by the experts. The court acknowledged that while the scope of what is "considered" by an expert is unclear in the case law, the burden is on the party resisting discovery to clearly identify for the court the material that the expert did not "consider" out of the mass pro-

vided. Finding that the defendant provided no such guidance, the court held that the entire litigation support database was discoverable, as was the index and OCR-created text files the experts used in searching the database.

***In re Universal Service Fund Billing Practices Litig.*, 232 F.R.D. 669 (D. Kan. 2005).** In complex multidistrict class action litigation, the plaintiffs moved to compel the production of e-mails that defendant (AT&T) withheld on the basis of attorney–client privilege. The withheld e-mails were characterized as “strands,” containing many messages strung together in dialogue fashion, as is common with e-mail communication. The court rejected AT&T’s position that each strand should be considered one message, analogous to the minutes of a meeting, in which any privileged element rendered the entire strand as privileged. The court required that each message within any strand be separately identified and entered into the privilege log, and that the log set out nine fields of information for each document.

***Wachtel v. Guardian Life Insurance Co.*, 2006 WL 1286189 (D.N.J. May 8, 2006).** In a nationwide insurance fraud case, the district judge found sufficient evidence from the record to support a *prima facie* showing that the defendants used their counsel to delay discovery and facilitate the destruction of e-mails subject to discovery, clearing the way for the court to conduct an *in camera* inspection of attorney–client communications under the crime-fraud exception to the privilege. Specifically, the magistrate judge found, after issuing several discovery orders regarding e-mail over a three-year discovery period, that the defendants and their counsel had not disclosed that all e-mails were migrated to backup media 90 days after creation and only four of “scores” of backup tapes were subjected to any search or preservation efforts; and that any e-mail messages deleted by employees within 30 days would be lost permanently. In a separate motion, defendants sought reconsideration of the magistrate judge’s order that it produce all responsive e-mails, stating that the magistrate judge failed to consider their arguments of undue cost and burden under Fed. R. Civ. P. 26(b). The district judge affirmed the magistrate judge’s order, acknowledging that “a significant amount of time and expense is required to comply. However, defendants’ predicament is due largely to their own repeated failures to respond in a timely manner to discovery requests and to court orders. . . . The huge costs now being complained of could have been minimized by timely compliance when the e-mails were more current.” The district judge also affirmed the magistrate judge’s grant of an adverse inference instruction regarding e-mails admittedly deleted by an executive of the defendants and an award of attorneys’ fees and costs to the plaintiff.

New York State Bar Association, Committee on Professional Ethics, Opinion 749 (December 14, 2001). Topic: Use of computer software to surreptitiously examine and trace e-mail and other electronic documents (found at <http://www.nysba.org/Content/>

NavigationMenu/Attorney_Resources/Ethics_Opinions/Committee_on_Professional_Ethics_Opinion_749.htm). The receipt by an attorney of an electronic file does not constitute permission to open and read the metadata or imbedded data that file might contain. Opening and viewing such data is presumptively unauthorized and unethical. Similarly, placing a tracer “bug” in an e-mail to track the distribution and modification of the message after it has left the attorney’s computer system is unethical. For a short analysis of this ethics opinion and useful links to background technical information, see David Hricik, *The Transmission and Receipt of Invisible Confidential Information*, E-Ethics, vol. 2, no. 3, October 2003 (found at <http://www.hricik.com/eethics/2.3.html>).

VIII. Rule 37 Sanctions

See also “I. Data Preservation and Spoliation.”

Aero Products International, Inc. v. Intex Recreation Corp., No. 02 C 2590, 2004 WL 417193 (N.D. Ill. Jan. 30, 2004). In a patent infringement suit involving the manufacture and sale of air mattresses, the defendant was found to have been routinely deleting all its e-mail every thirty days during the first year of the litigation. The court entered an order requiring the defendant to recover as much destroyed electronic data as possible and authorizing the plaintiff to petition the court for appointment of a computer forensics expert at the defendant’s expense. The defendant engaged its own expert, who submitted a report and forty-five pages of recovered data. The plaintiff stated that the production was inadequate, but never petitioned the court for appointment of an expert or filed any other motion to compel further production. Instead, the plaintiff filed a motion under Fed. R. Civ. P. 37 for sanctions amounting to a default judgment against the defendant. The court denied the sanctions as inappropriate and unwarranted, given the plaintiff’s failure to pursue the discovery opportunities offered to it.

Invision Media Communications, Inc. v. Federal Insurance Co., No. 02 Civ. 5461, 2004 WL 396037 (S.D.N.Y. Mar. 2, 2004). In an insurance suit stemming from business disruption caused by the 9/11 attacks, the plaintiff and the defendant filed cross-motions to compel discovery and for sanctions. Two of the many incidents alleged involved electronic discovery. In the first incident, the plaintiff’s general counsel testified that as the company’s offices were closed and employees laid off, she directed that hard drives of those employees’ computers be “wiped.” The defendant requested sanctions for spoliation, which were denied by the court in the absence of any showing that the wiped hard drives would have rendered relevant evidence. In the second incident, the defendant requested e-mails from a three-month period around September 2001. The plaintiff initially responded that there were no responsive e-mails, as the policy had been to delete all e-mails after two weeks. However, the e-mails were eventually found

and produced. The court found that a “reasonable inquiry by the plaintiff’s counsel prior to responding to [the defendant’s] document request . . . would have alerted counsel that the plaintiff possessed electronic mail that fell within the scope of [the defendant’s] document request.” The plaintiff was directed to pay costs and reasonable attorneys’ fees resulting from the additional discovery required.

Kucala Enterprises, Ltd. v. Auto Wax Co., 56 Fed. R. Serv. 3d (West) 487 (N.D. Ill. 2003). In a patent infringement case, the defendant repeatedly requested documents from the plaintiff, including business records and correspondence from the plaintiff’s computer system. After three motions to compel production, the defendant was allowed access to the plaintiff’s computer to conduct an inspection. The computer forensics expert conducting the inspection discovered that the plaintiff had used a commercially available disk-wiping software, “Evidence Eliminator,” to “clean” approximately 3,000 files three days before the inspection, and another 12,000 on the night before the inspection between the hours of midnight and 4:00 a.m. The magistrate judge found that, based on the totality of the circumstances, the spoliation was intentional and recommended to the trial judge that the plaintiff’s case be dismissed with prejudice, and that the plaintiff pay the defendant’s attorneys’ fees and costs from the time the Evidence Eliminator was first used. On *de novo* review, the district court judge rejected the recommendation to dismiss the plaintiff’s case with prejudice, favoring adjudication of the claims and counterclaims, but upheld the recommendation that the plaintiff bear attorneys’ fees and costs. *Kucala Enterprises, Ltd. v. Auto Wax Co.*, No. 02 C 1403, 2003 WL 22433095 (N.D. Ill. Oct. 27, 2003) (rulings on objections dated October 27, 2003).

Martin v. Northwestern Mutual Life Ins. Co., 2006 WL 148991 (M.D. Fla. Jan. 19, 2006). In a lawsuit for disability benefits, the defendant subpoenaed the plaintiff lawyer’s bookkeeper and fiancé for computerized records showing the plaintiff’s income and expenses from his law practice. After relevant records were produced pursuant to the subpoenas, the plaintiff conceded that he should have produced these records in response to prior document requests, but claimed “computer illiteracy” rendered him incapable of fully responding. The defendant moved for dismissal of the suit. The court found the plaintiff’s excuse for non-production “frankly ludicrous” but declined to impose the ultimate sanction, instead ordering the plaintiff to pay expenses and attorneys’ fees.

McDowell v. District of Columbia, 2006 WL 302643 (D.D.C. Feb. 9, 2006). In a suit against the District of Columbia police department alleging unlawful strip searches, the plaintiff sought computerized arrest records that would establish patterns of police conduct. After repeated failures over several months to produce complete information from the defendant’s criminal justice information system resulting in eleven motions to compel, the judge ordered the defendant to set a date certain for compliance or face an ad-

verse inference jury instruction. The court explained that any consideration of a “litigation-ending” sanction must consider three factors – prejudice to the moving party, prejudice to the judicial system, and the need to deter such behavior in the future — and the defendant’s conduct to date, “while exasperating” and prejudicial to the plaintiff, had not yet resulted in significant prejudice to the judicial system. Finding that the defendant’s failure to produce the requested information was the result of shortages of funding and staffing rather than willfulness or gross negligence, an extreme sanction at this point would also serve no deterrence objective.

Procter & Gamble Co. v. Haugen, 2003 WL 22080734 (D. Utah Aug. 19, 2003) (order). Procter & Gamble (P&G) sued several independent distributors of rival Amway products, claiming unfair trade practices for allegedly distributing e-mail associating P&G with Satanism. P&G immediately informed the defendants of their duty to preserve computer evidence crucial to the case, but neglected to impose a similar duty upon itself, resulting in the destruction of e-mail records of five key P&G employees. Without citing Fed. R. Civ. P. 37, the court granted the defendant’s motion to dismiss the case on three grounds, each of which the court stated were sufficient alone to grant dismissal. The three grounds were (1) the plaintiff failed to preserve evidence it knew was “critical” to the case, (2) the plaintiff’s actions rendered an effective defense “basically impossible,” and (3) the plaintiff destroyed the very evidence it would need to support its proposed expert testimony on damages, rendering the testimony inadmissible on *Daubert* grounds. In a previous decision, the trial court sanctioned the plaintiff \$10,000–\$20,000 for each of the five key employees whose files had been destroyed. *Procter & Gamble Co. v. Haugen*, 179 F.R.D. 622 (D. Utah 1998), *rev’d on other grounds*, 222 F.3d 1262 (10th Cir. 2000).

Serra Chevrolet, Inc. v. General Motors Corp., CV-01-VEH-2682-S (N.D. Ala. May 20, 2005). In a disparate treatment lawsuit brought by an automobile dealer, General Motors (GM) was ordered to produce records relating to satellite dealerships and allocations within 14 days or face \$50,000 per day in penalties. GM conducted the search of its files initially by computer, but toward the end of that process discovered that it was not adequate. Two months after the deadline and immediately prior to a hearing on the sanctions, GM hired 14 paralegals to conduct an exhaustive manual search, which resulted in additional records being produced. Based on the court’s original order, the sanction would come close to \$5 million. The court reduced the amount to \$700,000, but also struck three of GM’s affirmative defenses.

Sheppard v. River Valley Fitness One, L.P., 203 F.R.D. 56 (D.N.H. 2001). The plaintiff made a motion for sanctions against the defendants’ counsel for abuses of discovery. Numerous times the plaintiff requested electronic documents, but was only given information from floppy discs in the defendants’ counsel’s office. The court at-

tributed the defendant attorney's failure to produce requested computer records to lack of diligence as opposed to intentional obstruction of discovery, hence he was fined \$500 and Aubin, a third party, was precluded from testifying at trial.

Stevenson v. Union Pacific Railroad Co., 354 F.3d 739 (8th Cir. 2004). In a negligence action arising out of a railroad crossing collision, the trial court granted the plaintiff partial summary judgment and imposed an adverse inference instruction on the defendant as a sanction for the destruction of recorded voice communications between the train crew and dispatchers and destruction of track maintenance records both before and after commencement of litigation. On appeal, the circuit court looked at the circumstances of each allegation of spoliation and applied the test of *Lewy v. Remington Arms*, 836 F.2d 1104 (8th Cir. 1988), to determine the extent of the duty of preservation. It held that the trial court did not abuse its discretion in imposing the adverse inference instruction sanction for destruction of the tape recordings, as the tape recordings were clearly relevant to reasonably anticipated litigation, there were no alternative records, and there was evidence that such recordings had been preserved in other litigation. Likewise, the destruction of track maintenance records after litigation commenced warranted the sanction. However, the routine destruction of track maintenance records pursuant to a records management policy prior to litigation did not give rise to a presumption of bad faith to justify the adverse inference instruction. And on remand, the trial court was instructed to allow the defendant to present evidence challenging the rebuttable presumption that an adverse inference instruction creates.

Theofel v. Farey-Jones, 341 F.3d 978 (9th Cir. 2003). In a commercial lawsuit, the defendant issued a subpoena to the plaintiff's Internet service provider (ISP) requesting "all copies of e-mail sent or received by anyone" employed by the plaintiff, with no limitations of time or scope. The ISP, which was not represented by counsel, complied, producing many privileged and irrelevant messages. The plaintiff moved to have the subpoena quashed and for sanctions for discovery abuse, which the magistrate judge granted. Individual employees of the plaintiff also filed civil suits against the defendant under the Stored Communications Act, Wiretap Act, and Computer Fraud and Abuse Act, which the district court dismissed. The appellate court reversed the dismissal of the claims under the Stored Communications Act and Computer Fraud and Abuse Act, stating that although the subpoena was purported to be a valid request under Fed. R. Civ. P. 45, it "transparently and egregiously" violated the standards of Rule 45 and the "defendants acted in bad faith and with gross negligence in drafting and deploying it." In so ruling, the appellate court negated any argument that the ISP knowingly consented to the request. By remanding the statutory claims to the district court, the appellate court left open the possibility of civil penalties against the defendant.

Tracy v. Financial Insurance Management Corp., 2005 WL 2100261 (Aug. 22, 2005). In an employment suit, the defendant produced requested e-mails late in discovery, after depositions had begun, citing difficulties stemming from two upgrades of its computer system. The court held that the defendant had not breached any duty of preservation and had been complete in its production, but was tardy, and could be presumed to be aware of its own computer system's configuration and history. The court allowed re-deposition of key witnesses and shifted some costs of that discovery to the defendant.

Tulip Computers International B.V. v. Dell Computer Corp., 52 Fed. R. Serv. 3d (West) 1420 (D. Del. 2002). In a patent infringement case, the defendant Dell failed several times to answer discovery requests, provide any reasonable explanations for its failures, or provide any witnesses who could answer questions about its records management systems, paper or computerized. The parties resolved the dispute regarding paper documents themselves, agreeing on Tulip's request for access to a document warehouse. For the computer records, the court ordered that Tulip could search a hard drive with e-mails from Dell executives, other than Michael Dell, using agreed upon search terms. Then Dell would be permitted to look through the e-mails derived from the queries to filter the privileged documents.

Zubulake v. UBS Warburg LLC (“Zubulake IV”), 220 F.R.D. 212 (S.D.N.Y. 2003) (opinion and order dated Oct. 22, 2003). (For factual background, see *Zubulake I* and *Zubulake III* under “VI. Costs and Cost Allocation” above.) After restoring backup tapes to locate missing e-mails, the defendant found that certain relevant tapes were missing. The plaintiff moved for sanctions, including a spoliation-inference instruction. The court found that (1) a duty to preserve the missing tapes existed; (2) the defendant was negligent and possibly reckless in failing to preserve the tapes; but (3) the plaintiff failed to demonstrate a reasonable likelihood that the missing tapes contained evidence that would have been relevant to the lawsuit. Had the plaintiff shown either that the defendant had acted with malicious intent or that the missing tapes actually held evidence that would have been damaging, a spoliation-inference instruction would have been appropriate. In the absence of either of those elements, the appropriate sanction was limited to awarding the costs of additional depositions taken pursuant to the discovery. *Cf. Zubulake V*, under “I. Data Preservation and Spoliation,” in which the adverse inference jury instruction was granted after further discovery revealed intentional deletion of e-mail.