Newsletter of the

WESTERN DISTRICT OF WISCONSIN BAR ASSOCIATION

Volume 21, Number 1 March 2012

Electronic Discovery: Who Pays?

Timothy D. Edwards
Axley Brynelson, LLP

Introduction

The presumption in federal court litigation is that each party should bear its own costs of production during the discovery process.[1] This presumption can lead to unfair results when discovery involves the preservation, retention and production of electronically stored information ("ESI"). This article will examine the appropriate framework for analyzing a request for cost-shifting and, to the extent possible, specifically identify how that standard has been applied in the Western District of Wisconsin. To understand how this standard has evolved, it will be necessary to identify the cost-shifting analysis that preceded the 2006 amendments to the Federal Rules of Civil Procedure and the various tests that have been adopted following the 2006 amendments.

Pre-2006 Cost-Shifting: The Zubulake Standard

Before the 2006 amendments were enacted, the United States District Court for the Southern District of New York set forth a balancing test for assessing cost-shifting requests involving ESI.[2] The Zubulake inquiry involves three sequential steps. First, the Court must determine whether the requested data is accessible or inaccessible, as gauged by the physical accessibility of the requested information (active, online data being the most accessible; erased or fragmented data being the least accessible). If the information is accessible, Zubulake calls for the production of a representative sample for the parties to conduct an assessment of the costs and benefits of full production.[3] Based on this information, the Court applies a seven-factor test to address the equities of cost-shifting, which are listed here in order of importance:

(1) The extent to which the request is specifically tailored to discover relevant information;
(2) The availability of such information from other sources;
(3) The total cost of production, compared to the amount in controversy;
(4) The total cost of production, compared to the resources available to each party;
(5) The relative ability of each party to control costs and its incentive to do so;
(6) The importance of the issues at stake in the litigation, and;
(7) The relative benefits to the parties of obtaining the information.[4]

Zubulake is widely recognized as the leading case with respect to cost-shifting involving ESI in the federal courts. The factors set forth in Zubulake have survived the 2006 amendments, sometimes in modified form, and they continue to emerge in cost-shifting disputes across the country.

Cost-Shifting: The 2006 Amendments

The 2006 amendments to the Federal Rules of Civil Procedure pertaining to electronic discovery contemplate a two-step test for assessing a cost-shifting request. First, the responding party must show that the requested information is "not reasonably accessible because of undue burden or cost."[5] After this showing is made, the requesting party must show that there is "good cause" for requiring the information to be produced.[6]

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While there is no bright line rule for assessing "good cause," the Advisory Committee provided a list of factors to consider in making this assessment:

(1) The specificity of the discovery requests;
(2) The quantity of information available from other and more easily accessed sources;
(3) The failure to produce relevant information that seems likely to have existed, but is no longer available on more easily accessed sources;
(4) The likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources;
(5) The predictions as to the importance in usefulness of the information;
(6) The importance of the issues at stake in the litigation, and;
(7) The parties' resources.[7]

Obviously, these factors closely resemble those set forth in the Zubulake decision. While the Advisory Committee's notes are not binding, they should be afforded considerable weight by the district courts. Although courts have not consistently applied either test, the factors referenced above provide critical guidance for practitioners who are trying to preserve, discover, and process electronic data.

Cost-Shifting in the Seventh Circuit

There is very little case law in the Seventh Circuit that addresses cost-shifting in connection with electronic discovery.[8] In the Western District, Magistrate Judge Stephen Crocker addressed the issue of cost-shifting in a retaliation claim brought by a former county employee, who alleged that he was terminated for complaining about allegedly improper child-support billing. In that case, plaintiff served a comprehensive request for production of documents seeking "all documents, notes, memos, e-mails, and metadata of any Lincoln County official" regarding the "reorganization or restructuring of the Lincoln County Child Support Agency."

The responsive documents included approximately four terabytes of data extracted from the computers of several Lincoln County employees and officials.[9] Following negotiations, defendant filed a motion or protective order invoking the cost-shifting provisions set forth in Zubulake and Rule 26(b)(2)(C).

The Court appears to have applied both standards and set an incremental schedule for the production of the requested electronically stored information. Noting that the "issues at stake in this lawsuit are important" and that the "potential damages are low," the Court concluded that the "cost of engaging in the ESI search plaintiff needs is disproportionate to the available recovery."[10] In this respect, the Court posed a critical question: "is it worth it to spend tens of thousands of dollars to explore ESI that might reveal a smoking gun, but is equally likely to reveal nothing much?"[11] Based on these considerations, and others, the Court concluded that ESI discovery would proceed incrementally and that the initial search would be limited to specific e-mails stored on defendant's hard drive by using the "narrowest set" of relevant search terms.[12] The Court further ordered that the parties would divide the costs of conducting the searches, and that defendant would be required to pay 100% of the cost of a privilege/relevance review.[13]

The United States District Court for the Eastern District of Wisconsin has also addressed the issue of cost-shifting in the ESI context.[14] There, plaintiff filed a motion to compel the production of a full back-up set of Gateway's e-mails and also insisted that Gateway search all of its back-up tapes for e-mails containing specific search terms.[15] In response, Gateway argued that plaintiff should share the cost of restoring the back-up tapes, given the burdensome nature of the search. Noting the presumption that "the responding party must bear the expense of complying with discovery requests," the Court referenced Rule 26(b)(2)'s proportionality test, and the Zubulake opinion, as exceptions to this general proposition.

The Court then addressed different approaches to cost-shifting, starting with Rule 26(c), which is designed to protect the parties from undue burden or expense and allows courts to condition production on payment by the requesting party.[16] Noting that the Seventh Circuit Court of Appeals has not adopted a test for cost-shifting involving electronic discovery, the Court concluded that Zubulake improved the cost-shifting analysis set forth in Rule 26(b)(2) by making the overall analysis more "dependent on the facts of the case." As a result, the Court concluded that the seven-factor Zubulake test was the most appropriate.[17] As in Haka, the Eastern District employed an incremental approach by requiring Gateway to restore a sample of back-up tapes and inviting the parties to make additional submissions regarding the cost and/or expense associated with either option.[18]

Suggestions for Practitioners.

Electronic discovery can be very expensive. For this reason, courts no longer accept the presumption requiring the responding party to pay all expenses associated with its production efforts. In every case, the parties should meet and confer up front to identify and discuss the potential sources of electronically stored information. This discussion requires transparency and a willingness to consider different options that reduce the cost of electronic discovery. In drafting discovery requests that seek electronically stored information, counsel should use specific, targeted requests that are directed towards the most likely source of relevant information. Broad, invasive, boilerplate requests will not work, and they should be avoided. Where appropriate, the parties should consider using search terms that are also targeted toward specific, relevant information from appropriate sources. In all cases, counsel should look ahead to the cost-shifting factors and carefully draft their discovery requests (and responses) with an eye toward each factor in the event of a later disagreement.

The key to making this work is cooperation between counsel. The Sedona Conference[19] and courts across the country are now insisting on cooperation between the parties, particularly in cases involving the discovery of electronically stored information. The reason is simple: it is literally impossible to conduct meaningful discovery with ESI without vital information regarding the source, accessibility, relevance, and cost of discovery ofelectronically stored information. If the parties work together and abandon the "hide the ball" philosophy of discovery that we are all familiar with, this process becomes less expensive, and more productive for both parties.

1 Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 358 (1978) ("[t]he presumption is that the responding party must bear the expense of complying with discovery requests. . .").
2 Zubulake v. UBS Warburg, LLC, 217 F.R.D. 309 (S.D.N.Y. 2003).
3 Zubulake, 217 FRD at 324.
4 Zubulake, 217 FRD at 322.
5 Fed. R. Civ. P. 26(b)(2)(B).
6 Id.
7 Id. (Advisory Committee's Notes) (2006).
8 Haka v. Lincoln County, 246 F.R.D. 577 (W.D. Wis. 2007).
9 A terabyte is 1024 gigabytes, more than a trillion bytes, equal to 500 billion typewritten pages.
10 Haka, 246 F.R.D. at 579.
11 Id.
12 Id.
13 Id.
14 Hagemeyer North America, Inc. v. Gateway Data Sciences Ct., 222 F.R.D. 594 (E.D. Wis. 2004).
15 Hagemeyer, 222 F.R.D. at 599.
16 Hagemeyer, 222 F.R.D. at 601.
17 Hagemeyer, 222 F.R.D. at 602-03.
18 Id.
19 See http://www.thesedonaconference.org/.

President's Corner

by Lynn M. Stathas

"We can speak about the institution, but ultimately the bar is the group that both is in touch with the public on the one hand and understands the judicial institution on the other." *-U. S. Supreme Court Justice Stephen Breyer*

Lawyers are in a unique position to understand how the court system works, how our clients expect it should work, and where the differences often lie. As your bar association, we appreciate the important role lawyers play in connecting the institution and the public it serves, and we are dedicated to providing information and resources to help to make that happen.

We have long been committed to facilitating the effective administration of justice, to reducing costs and delay in litigation, to educating the bar and the public about practices and procedures in our District Court, and to promoting civility among litigants, the bar and the Court. In fact, that is why we exist.

We promote these ends in a number of ways. You are likely aware of the pro bono fund we established to facilitate charitable work and access to representation. Perhaps you have participated in the continuing legal education programs we provide at little or no cost to our members, or the ECF and other training we support. Or maybe you have attended one of our Annual Meeting lunches which feature engaging keynote speakers and the opportunity for lawyers to meet with one another and the Court. (You will not want to miss our upcoming Annual Meeting featuring the Honorable Diane Wood on June 5, 2012.) We help the Court in coordinating pro bono service, and annually celebrate attorneys who provide such services. We also recognize extraordinary contributions made by attorneys with our Distinguished Service Awards.

In addition, we are busy working to implement several new and exciting initiatives. We recently launched a Mentorship Program matching new attorneys with experienced practitioners. We are updating the *Practice Expectations* to reflect changes in our Court's practices, and earlier this year we sponsored our first (and very popular) after-work social gathering providing lawyers and the Court with an opportunity to interact informally outside of Court.

In this newsletter, Peter Oppeneer, Magistrate Judge and Clerk of Court, announces the new look and features of the Court's website. Shortly, we too will be unveiling the Western District Bar Association's updated and enhanced website providing ready access to many new resources.

We hope that our efforts will help our members to more effectively practice in this District, and to serve their constituents. We welcome your feedback and suggestions, and appreciate your participation.

Court Website Takes on New Look & New Features—And Wants Your Photos!

By Peter Oppeneer,
Magistrate Judge and Clerk of Court

The public website for the Western District has been updated and given a dramatically different appearance. The format for the new website is based on a platform designed to establish a common look and feel among federal judicial websites throughout the country. Functionally, our primary objective was to make the website as useful and intuitive as possible. Among the new features:

- Expanded menus providing access to most information from the home page
- An all new electronic system for attorney admission and CM/ECF registration
- Home page links to key websites, including the WDBA and other agencies and offices that work closely with the District Court
- Changing home page photos showing the diverse beauty of the Western District
- An RSS feed for court announcements and news

We encourage you to visit the site and send us your comments by clicking on the link at the bottom of the home page. Making the site as useful as possible is an ongoing process and we appreciate your feedback. We also invite you to submit your photos from the Western District for potential use on the website and for mounting in public areas in the courthouse. So far, we have representative photos from seventeen of our forty-four counties. For a list of unrepresented counties and our format requirements, please contact Kris Jacobson at Kris.Jacobson@wiwd.uscourts.gov.

SAVE THE DATE!

The 2012 Annual Meeting of the WDBA is scheduled for Tuesday, June 5, 2012.

We are pleased to announce that the Honorable Diane P. Wood of the Seventh Circuit Court of Appeals will be our keynote speaker on the topic of *Are the Civil Procedure Rules Ready for More Change*?

The Meeting will provide:

- Opportunities to interact with fellow practitioners and members of the judiciary

- CLE programs on new developments in the Western District, practical ethics and U.S. Supreme Court decisions issued during the current term

- Our popular judges' panel

- A reception at the end of the day with food and beverages provided by the WDBA

See you there! Registration information is being prepared and will be available soon to our Western District Bar Association members.

Western District Bar Association
Post Office Box 44578
Madison, WI 53744-4578

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