

**PROPOSED ELECTRONIC DATA DISCOVERY GUIDELINES**  
**FOR THE MARYLAND BUSINESS AND TECHNOLOGY**  
**CASE MANAGEMENT PROGRAM JUDGES**

What follows are some general, suggested guidelines for addressing different areas of Electronic Data Discovery as they may arise during the course of litigation assigned to the Business and Technology Case Management Plan.

**I. Addressing Electronic Data Discovery in the scheduling phase of cases assigned to the Business and Technology Case Management Plan.**

- A)** 2-504.1(c) Order for a Scheduling Conference: attached hereto is a proposed order regarding a Scheduling Conference in which the parties are encouraged to address and, where possible, agree on issues relating to Electronic Data Discovery (“EDD”).
- i) The parties should come to the Scheduling Conference prepared to address each of the following preliminary EDD issues and be encouraged to reach agreement prior to the Conference on as many as possible.
- B)** To the extent EDD will be required by one or both of the parties, the following issues should be addressed by the parties prior to the Scheduling Conference and subsequently by the Court at the Conference in order to reach agreement wherever possible and avoid future discovery disputes over EDD:
- i) The parties should generally identify and retain discoverable electronic information (*see, e.g.,* Fed. R. Civ. Proc. 26(f)(3)).
- (1) The parties should identify electronic data repositories (*i.e.,* active servers, exchange or email servers, etc.) that may contain relevant or discoverable information prior to the Scheduling Conference.
- (2) The parties should also address the categories of potentially relevant electronic data that should be preserved for purposes of the litigation (*i.e.,* emails, database information if it is at issue in the litigation, electronic drafts of agreements and the like).
- ii) Identify what, if any, initial discovery is necessary to identify electronic data repositories (*i.e.,* interrogatories or depositions of IT personnel).

- iii) Exchange documents and discoverable information in electronic format where appropriate.
  - (1) Documents may be exchanged in electronic format (*i.e.*, tiff, jpeg or pdf images exchanged electronically or on disk)
  - (2) Similarly, electronic data may be exchanged in electronic format in the same manner
  - (3) The parties should address and agree where possible on the format for exchange:
    - (a) Exchange of documents in their “native” format (*i.e.*, Excel, Microsoft Word or WordPerfect, etc.) or conversion of the documents to read-only pdf or tiff files;
    - (b) Exchange of metadata or whether it would be removed;
    - (c) Identification by Bates numbering;
    - (d) Inclusion of viewers on all disks for ease of retrieving documents contained on the disks; and

## II. The Attorney/Client Privilege.

- A) The parties should be encouraged to address, and engage in good faith efforts to reach agreement on, the handling of inadvertent waivers of the attorney/client privilege.
- B) The parties’ agreement should address (1) notice upon discovery of an inadvertent production of privileged documents; (2) time limits within which a producing party must notify other parties after it discovers an inadvertent production of privileged materials; (3) circumstances of the return of inadvertently produced documents.
  - i) The proposed amendment to Fed. R. Civ. Proc. 16(b)(6) provides for the “adoption of the parties’ agreement for the protection against waiving privilege,” and the BRCMP Judge’s Scheduling Order could similarly provide
  - ii) Such a provision appears consistent with, and permissible under, Md. Rule 2-504(2)(A), (B) & (G) regarding permitted items contained in Scheduling Orders.
- C) In the absence of agreement among the parties, the Court may consider application of the standards contained in the proposed amendment Fed. R. Civ. Proc. 26(b)(5)(B), which provides:

*When a party produces information without intending to waive a claim of privilege it may, within a reasonable time, notify any party that received the information that it is privileged. After being notified, the party must promptly return, sequester, or destroy the privileged information and any copies. The producing party must comply with rule 26(b)(5)(A) with regard to the information and preserve it pending a ruling by the court.*

### III. Discovery Disputes.

- A) Disputes should be referred to special masters with some experience in EDD matters wherever possible in an effort to reduce the burden on the Court. To the extent the BTCMP judges consider it appropriate, the following materials could be provided to those individuals selected to serve as discovery masters to guide them in their recommendations:
- i) The decision rendered by Magistrate Judge Paul Grimm of the United States District Court for the District of Maryland, Northern Division, in *Thompson v. United States Dep't of Housing and Urban Development*, 219 F.R.D. 93 (2004), a copy of which is attached.
  - ii) The decisions rendered by the United States District Court for the Southern District of New York in the *Zubulake* Litigation: (a) *Zubulake v. UBS Warburg LLC, et al.*, 217 F.R.D. 309 (S.D.N.Y. 2003) ("Zubulake I") and *Zubulake v. UBS Warburg, et al.*, 216 F.R.D. 280, 284 (S.D.N.Y. 2003) ("Zubulake III").<sup>1</sup>
  - iii) The Sedona Principles, which can be obtained at the following website: <http://www.thesedonaconference.org>.
  - iv) Selected Maryland case law interpreting Maryland Rules 2-402 and 2-421, among other things, for the common production of documents.

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<sup>1</sup> The Southern District has issued five opinions in the *Zubulake* litigation but only the ones cited above are directly relevant to EDD issues. *Zubulake v. UBS Warburg, et al.*, 220 F.R.D. 212 (S.D.N.Y. 2003) ("Zubulake IV") and *Zubulake v. UBS Warburg, et al.*, 2004 WL 1620866 (July 20, 2004) ("Zubulake V") relate to sanctions for a failure to preserve electronic data subject to discovery, which are tangentially relevant to EDD issues.

**B) Production of accessible v. readily inaccessible electronic data.**

- i) Accessible data: Data in use by an organization or retained in active computer systems, databases or servers should be discoverable at the producing parties' cost absent other grounds.
- ii) Inaccessible Data: Information that has been deleted from active computer systems, databases or servers in the ordinary course of business, and not in anticipation of threatened or pending litigation, or that is maintained only on readily inaccessible back-up media such as disaster recovery tapes should not be discoverable at the sole cost of the producing party absent additional submissions to the Court.
  - (1) General identification of the sources of readily inaccessible electronic information nevertheless should be provided upon request by a party.
- iii) The Court should consider the following principles espoused in the proposed amendment to Fed. R. Civ. Proc. 26(b)(2) provide:

*A party need not provide discovery of electronically stored information that the party identifies as not reasonably accessible. On motion by the requesting party, the responding party must show that the information is not reasonably accessible. If that showing is made, the court may order discovery of the information for good cause and may specify terms and conditions for such discovery.*

**C) Apportionment of EDD costs.**

- i) Absent objection, court order or agreement, reasonable costs for retrieval and production of active electronic information should be borne by the producing party pursuant to Md. Rule 2-402. To the extent a producing party seeks to offset costs of production for accessible data as burdensome, it should bear the burden of establishing that fact.
  - (1) If electronic information is reasonably available to the responding party in the ordinary course of its business, then it should bear the costs of production absent special circumstances.
- ii) Apportionment of costs for production of inaccessible electronic data may be decided according to the following "cost shifting"

factors set forth in *Thompson*, 219 F.R.D. at 98 and *Zubulake III*, 216 F.R.D. at 284:<sup>2</sup>

- (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.

NOTE: As reflected in the decisions above-referenced decisions these factors are not applied in a bright-line test but to the fact and circumstances of each case.

- D) Additional options available to the Court in deciding cost shifting disputes: (1) accept evidence from the parties as to the relative costs by way of affidavit or live testimony; (2) appoint an independent expert at the expense of one or both parties to assess the matter; and/or (3) order a small or random portion of relevant material to be retrieved and produced and the costs itemized for the Court's review.

#### IV. Retention of Electronic Data

- A) The BTCMP Court may, at its discretion, address retention of electronic information prior to and after notice of pending or threatened litigation.
- i) The proposed amendment to Fed. R. Civ. Proc. 37 provides as follows:

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<sup>2</sup> It is noteworthy, however, that the cost shifting principles set forth in available federal case law principally arise from Fed. R. Civ. Proc. 26(b)(2) from which current Md. Rule 2-402(b) was derived.

*Unless a party violated an order in the action requiring it to preserve electronically stored information, a court may not impose sanctions under these rules on the party for failing to provide such information if:*

*(1) the party took reasonable steps to preserve the information after it knew or should have known the information was discoverable in the action;*

*(2) The failure resulted from loss of information because of the routine operation of the party's electronic information system.*

ii) To determine whether discoverable information was destroyed in the ordinary course of a party's business before it knew or should have known of pending or threatened litigation in which the information may be discoverable, the BTCMP Court may assess the following factors:

- (1) Existence of established retention and destruction policies;
- (2) Adherence to those policies;
- (3) Absence of notice or knowledge of a pending or potential claim involving the information to be destroyed;
- (4) The intent of the party destroying the information; and
- (5) Observance of standards spoliation doctrines.

iii) Notice of a pending or threatened action that suspends standard destruction policies.

- (1) Generally, notice of a particular threatened claim through the service of a preservation letter, actual notice from a party of a claim that will likely result in litigation, a demand letter referencing such a claim and litigation, service of a complaint, subpoena or other recognized information request requires a party to reasonably suspend the destruction of electronically stored information in the ordinary course of its operations.
- (2) Either party should be permitted to move the Court regarding suspension of such policies, particularly where suspension notices or requests are broad or onerous.
- (3) Considerations: expense of retaining back-up materials; cost-shifting and proportionality analysis of such expense; and potential for destruction of relevant sole-source data.

- (4) *Sedona Principal No. 9* suggests the following: Absent showing of special need and relevance, responding party should not be required to preserve, review or produce electronic materials deleted in the ordinary course of business.

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