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COST SHIFTING

In approaching cost shifting and other electronic discovery issues it is critical that lawyers educate themselves on the technology and provide meaningful factual and expert declarations to educate the court. When necessary, courts should insist that they do so. Generalities and argument are not sufficient by themselves. Generic, conclusionary or superficial expert declarations will not be persuasive. The facts, the technology, the costs of particular aspects of discovery in the context of the case at bar must be considered in evaluating all relevant factors, including those articulated in recent cases of *Rowe* and *Zubulake, infra.*, in order to properly resolve the discovery issue before the court.

Cost shifting has long been recognized as one of the tools available to courts for regulating and facilitating discovery. It has become more important in the context of electronic discovery where the cost of production of e-mail between a few key persons may run into hundreds of thousands of dollars. Like other jurisdictions, California authorizes cost shifting as one of the tools available to a trial court to regulate and facilitate the discovery process. In *San Diego Unified Port Dist. v. Douglas E. Barnhart, Inc.* (2002) 95 Cal.App.4th 1400, 1404 the California Court of Appeal confirmed the power of trial courts to reallocate or shift the costs of discovery though it rejected the allocation in that case:

"The court's quoted statement reflects a principle of fundamental fairness and equity: When a party demands discovery involving significant "special attendant" costs beyond those typically involved in responding to routine discovery, the demanding party should bear those costs. This principle is reflected in certain California discovery statutes. Section 2034, subdivision (i)(3), requires a party seeking to depose another party's retained expert to pay the expert's fee for

appearing for deposition. Under section 2025, subdivision (p), the party noticing a deposition ordinarily bears the cost of transcribing the deposition."

In addition to the statutory authorities cited in that case, protective order sections provide express authority for cost shifting:

California Code of Civil Procedure Section 2019(b):

"The court shall restrict the frequency or extent of use of these discovery methods if it determines either of the following:

- (1) The discovery sought ... is obtainable from some other source that is more convenient, less burdensome, or less expensive.
- (2) The selected method of discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, and the importance of the issues at stake in the litigation."

California Code of Civil Procedure §2031(f):

" ...The court, for good cause shown, may make any order that justice requires to protect any party or other natural person or organization from unwarranted annoyance, embarrassment, or oppression, or undue burden and expense. This protective order may include, but is not limited to,...

- (1) That all or some ... need not be produced or made available at all.
- (4) That the inspection be made only on specified terms and conditions.

...the court may order that the party to whom the demand was directed provide or permit the discovery ...on terms and conditions that are just."

California Code of Civil Procedures Section 2031(g) provides for cost shifting in the context of computer or electronic data discovery:

"If necessary, the responding party at the reasonable expense of the demanding party shall, through detection devices, translate any data compilations included in the demand into reasonably usable form."

The California Supreme Court recognized in *Pacific Tel. & Tel. Co. v. Superior Court* (1970), 2 Cal.3d 161, fn.15 a slightly different approach to reach the same result by

recognizing that the concept of discovery relevancy expands and contracts depending upon the nature of the case and the expenses of discovery:

"Commentators have suggested that in recognition of the practical operational problems involved, the "relevancy" test should perhaps expand and contract according to the size and complexity of the case. Thus in a small case dealing with facts and issues of moderate quantity, the trial court could adopt a very relaxed view of relevancy and still keep the discovery under control; in a large, complex case dealing with numerous and diverse issues, a court could adopt more restrictive standards to contain discovery within manageable limits. (See *Developments in the Law--Discovery* (1961) 74 Harv.L.Rev. 940, 1008; *The Practical Operation of Federal Discovery* (1952) 12 F.R.D. 131, 143 (remarks of Mr. Connelly).) Under such an approach, in which the size of the litigation and the amount of prior discovery constitute important factors, we would, then, substantially defer to a trial court determination that certain inquiries should be permitted."

Courts have many alternative remedies available depending on the issues and facts presented. It must be emphasized that as a practical matter the quality of the ultimate decision will depend on the quality of the advocacy: garbage in, garbage out. Some judges may be more proactive and insist on additional facts or briefing but the norm is likely to be a decision based on what is presented by counsel. If the parties simply present an "all or nothing alternative" to the court, they are likely to receive an "all or nothing" decision. If there are no declarations providing meaningful facts or expert analysis, what is left? If the alternatives consist of general rules applied by courts in the past, the court may pick from general rules which may or may not be appropriate to the case or issues before the court.

General rules include: (1) the producing party bears the expense of production based on the rationale that it chose the form and manner of storage; (2) the producing party bears the cost of review for privilege, relevancy, and response to the request by

category; (3) the requesting party bears the cost of copying, handling and review. In addition, there are general rules of discovery that allow for court discretion not the least of which is that courts are always called upon to balance the need for discovery against the burden in a cost / benefit analysis. Normally the parties and the court will not have one analysis to make on a given motion; but many, with results varying depending on the facts and analysis of each request: some granted, some denied, granted on condition, granted as modified, denied without prejudice to rephrasing with grater specificity, etc. In essence, the courts have broad discretion and they exercise it on a daily basis. It need not be an all or nothing rule as to who pays for discovery. Sometimes, considering all relevant factors it is fair for one side or the other to pay for some items or the cost may be allocated or apportioned. Sometimes, the courts may proceed more cautiously to gather evidence as to the value and cost of the discovery by employing limited discovery or sampling. See *McPeek v. Ashcroft* 202 F.R.D. 31 (D.D.C. 2001) [the more likely to yield directly relevant information the more the producer should pay; marginal value of search] See also the follow up decision in *McPeek* 2002WL 75780 where counsel reached opposite conclusion on the value of the sample but the court denied further discovery. Cf. *Zubulake III* (S.D.N.Y., 7/24/03) where, based on sampling results from 5 tapes, the court ordered production from all backup tapes but allocated restoration costs 75% producer and 25% requester with producer paying all other costs e.g. review for relevance and privilege.

The emergence of electronic discovery as a norm and the potential costs involved have added importance to court control and analysis of the discovery process including the issues regarding cost shifting. General rules work fine when there are a hundred paper documents in a file. But when there are several hundred thousand documents or millions of documents in electronic form, allocated to clusters of bits and bytes all over a hard drive, spreadsheets, meta data that may be critical or of interest, data that is constantly changing, proprietary software that is required to read the documents, privileged and non-responsive documents intermingled, etc alternative approaches may be required.

Several recent cases have gone beyond the issue of whether costs can be shifted or apportioned and have wrestled with the issues of when, based on what factors, and to what extent production costs should be shifted from the producing party to the requesting party. See *Simon Property Group v. my Simon Inc.*(S.D.Ind.2000), 194 F.R.D. 639 [party seeking discovery paid for "neutral" court expert to conduct forensic computer examination]. Most are federal district court cases and though not controlling provide ideas and guidance for trial courts confronted with similar issues. *Murphy Oil USA v. Fluor Daniel Inc.* (2/19/02, E.D. La.) 2002 WL 246439. *Playboy Enterprises v. Welles* (S.D. Cal.1999), 60 F. Supp.2d 1050 [Tr Ct established protocol: mirror image by neutral expert at requesting party's expense; producing party to print and review all documents and submit privilege log]. *Rowe Entertainment v. The William Morris Agency* (S.D.N.Y. 2002), 205 F.R.D. *Zubulake v. UBS Warburg* (S.D.N.Y. May 2003). *Rowe and Zubulake* followed by *McPeck* are the must read cases and no analysis of them is offered here.

Cost shifting is not an issue on every discovery request and the issue must be raised by the responding party by objection, by protective order or possibly by opposition to a motion to compel production. Presumably, the responding party raising the issue would have the initial burden of proof to show that cost shifting should be considered and implemented. *Zubulake* recognizes the presumption that the producer normally pays for the costs of production. *Rowe and Zubulake* attempt to articulate the factors that should be considered once the issue of cost shifting is raised. Many lawyers have reacted to *Zubulake* as if it were a rejection of *Rowe* and of cost shifting rather than a refinement. However, it is important to place *Zubulake* and the other cases in the proper prospective. What is the holding as to what specific facts? On what court is the decision binding? Assuming the case is binding or persuasive, is it possible to distinguish the facts, technology, costs, and the application of the seven factors of *Zubulake* or the eight factors of *Rowe* from the relevant factors in your case?

It is also important in considering the dictum and analysis of the *Zubulake* I and III opinions to look at the similarities with *Rowe* and other cases and the more important teachings of *Zubulake*. Counsel should not extract a sentence from the detailed opinions

in order to find a rigid principle to apply without regard to the broader principles or the specific holding of the case. *Zubulake* and *Rowe* both follow the general rule set forth in *Rowe* that is a fundamental discovery tenet common to most jurisdictions:

" 'Under [the discovery] rules, the presumption is that the responding party must bear the expense of complying with discovery requests.'

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

Nevertheless, a court may protect the responding party from "undue burden or expense" by shifting some or all of the costs of production to the requesting party. *Id.* (citing Fed.R.Civ.P. 26(c)). Here, the expense of locating and extracting responsive e-mails is substantial, even if the more modest estimates of the plaintiffs are credited. Therefore, it is appropriate to determine which, if any, of these costs, are "undue," thus justifying allocation of those expenses to the plaintiffs."

Worth noting is that the estimated costs in *Rowe* were substantially higher than those in *Zubulake* but the high cost was not the only or even a determining factor. *Cf. Medtronic Sofamor Danek, Inc. v. Michelson*, (W.D.Tenn., 5/13/03). In *Zubulake* it appeared that there was preliminary discovery and evidence presented to support the merits of the case and substantial damages, to show less than diligent search and production to date, to establish a strong likelihood that evidence would be discovered on the backup tapes and that alternatives had not been productive. A smoking gun was presented and plaintiff found more e-mails than defendant. But this is getting ahead of the decision. Based on what the parties presented to the court, discovery was ordered as to some matters where cost was not significant and the court employed a sampling approach to 5 backup tapes as a preliminary step on the costly aspects of discovery. See also the *McPeck* cases re sampling. Based on that sampling the court ordered the requesting party to pay 25% of restoration costs of the remaining backup tapes and the producing party to pay all other production costs.

What is important for counsel to note from the decisions is the need for counsel to understand and educate the court on the facts of the case and especially the technology, costs, alternatives, and all other relevant factors. Normally, this will require meaningful

declarations from experts. No rigid black letter rules will be applicable to make life easy for lawyers or judges. It should be emphasized that all factors are not equal and that this is not a mathematical exercise but a qualitative analysis. It is not critical whether a court calls the analysis a seven factor, an eight factor, or a two factor cost/benefit analysis so long as all relevant factors are considered. This issue is not a choice between bankrupting a defendant with an onerous discovery request or depriving a plaintiff of due process and discovery to present her case. It is a search for a practical solution and for justice for all parties.

Counsel should be wary of one common trap: conceding discoverability of everything and leaping to the cost shifting issue. Before litigating such issues, more attention and efforts to resolve disputes should be focused on preliminary issues such as the following:

1. Overbreadth of a request taken as a whole and the requirement that documents be requested with reasonable particularity. See *Calcor v. Superior Court*(1997), 53 Cal.App.4th 216.
2. The degrees of relevance of the request and the probability of obtaining directly relevant evidence at reasonable cost as opposed to exhaustive and expensive discovery on the hope of finding potentially relevant information.
3. The use of sampling and gradual or staggered discovery [i.e. start with the discovery most likely to yield directly relevant evidence and the lowest cost and progress to less productive and more expensive discovery with appropriate cost shifting based on prior results]
3. Exhaustion of reasonable alternatives before pursuing the most expensive discovery.
4. Meet and confer and case management efforts, at an early stage and including the input of experts, to focus and facilitate e-discovery considering all factors and suggestions from the courts in cases such as *Rowe* and *Zublake*.
5. Consider whether privilege issues be avoided or postponed by stipulations that production of documents will not be a waiver of privilege.

Counsel and the courts should view the current cases as a starting point in an analysis that requires everyone to understand the technology, the cost alternatives, the issues and the facts that apply to particular case and discovery.