

## Electronic Discovery and Computer Forensics Case Law

### Discoverability

□ *Wright v. AmSouth Bancorp*, 2003 WL 245588 (11<sup>th</sup> Cir. Feb. 5, 2003). In an age discrimination suit, Plaintiff sought discovery of computer disks and tapes containing “all word processing files created, modified and/or accessed” by five of the Defendant’s employees spanning a two and a half year period. The court denied the Plaintiff’s motion to compel because his request was overly broad and unduly burdensome and made no reasonable showing of relevance.

□ *Bryant v. Aventis Pharmaceuticals, Inc.*, 2002 WL 31427434 (S.D. Ind. Oct. 21, 2002). The Indiana court mentioned without further comment that emails were recovered from the Plaintiff’s computer after her termination, confirming the general discoverability of email evidence. The court considered the content of these emails in granting summary judgment in favor of the Defendant.

□ *In re CI Host, Inc.*, 92 S.W.3d 514 (Tex. 2002). Customers brought a breach of contract class action against the company hosting their web services. During discovery, the trial court ordered the Defendant to preserve and produce computer backup tapes containing potentially relevant evidence. The Defendant objected that the request was overbroad, demanded confidential information, and was in violation of the federal Electronic Communications Privacy Act. The appellate court held that in light of the Defendant’s failure to produce evidence supporting its objections as required by Texas Rule of Civil Procedure 193.4(a), the trial court did not abuse its discretion in ordering the contents of the tapes to be produced.

□ *Southern Diagnostic Assoc. v. Bencosme*, 2002 WL 31422863 (Fla. Dist. Ct. App. Oct. 30, 2002). The appellate court quashed an order against Southern Diagnostic, a non-party in an insurance suit brought by Bencosme, compelling discovery of certain contents of its computer system. The appellate court held that that trial court's order was overly broad, setting no parameters or limitations on the inspection of Southern Diagnostic's computer system and make no account that the computer system contained confidential and privileged information. The appellate court directed the trial court to craft a narrowly tailored order that accomplishes the purposes of the discovery requests and provides for confidentiality.

□ *Collette v. St. Luke’s Roosevelt Hospital*, 2002 WL 31159103 (S.D.N.Y. Sept. 26, 2002). The New York court mentioned without further comment that emails were made available during discovery, confirming the general discoverability of email evidence.

□ *MHC Investment Comp. v. Racom Corp.*, 209 F.R.D. 431 (S.D. Iowa 2002). The Iowa court mentioned without further comment that emails were made available during discovery confirming the general discoverability of email evidence.

□ *Rowe Entertainment, Inc. v. The William Morris Agency*, 2002 WL 975713 (S.D.N.Y. May 9, 2002). “Rules 26(b) and 34 for the Federal Rules of Civil Procedure instruct that computer-stored information is discoverable under the same rules that pertain to tangible, written materials.”

- *Stallings-Daniel v. Northern Trust Co.*, 2002 WL 385566 (N.D. Ill. Mar. 12, 2002). In an employment discrimination action, the Plaintiff moved for reconsideration of the Court's denial of electronic discovery of the Defendant's email system. The court, in denying the Plaintiff's motion for reconsideration, determined that the Plaintiff presented no new information that justified an intrusive electronic investigation.
- *Dikeman v. Stearns*, 560 S.E.2d 115 (Ga. Ct. App. 2002). In a suit brought by a law firm regarding its client's unpaid legal invoices, the Defendant requested, among other things, a full and complete copy of the law firm's computer hard drive that was used to generate documents pertaining to the Defendant's case. Refusing to order the discovery, the court found the Defendant's requests to be overbroad, oppressive, annoying.
- *McPeck v. Ashcroft*, 202 F.R.D. 31 (D.D.C. 2001). "... economic considerations have to be pertinent if the court is to remain faithful to its responsibility to prevent 'undue burden or expense'...If the likelihood of finding something was the only criterion, there is a risk that someone will have to spend hundreds of thousands of dollars to produce a single email. That is an awfully expensive needle to justify searching a haystack."
- *Ex Parte Wal-mart, Inc.*, 809 So.2d 818 (Ala. 2001). In a personal injury case, Plaintiff sought discovery of Wal-mart's electronic database containing customer incident reports and employee accident review forms. The appellate court held that discovery order should have been restricted to falling-merchandise incidents with geographic and temporal limits set forth by the trial court.
- *White v. White*, 781 A.2d 85 (N.J. Super. Ct. Ch. Div. 2001). In a divorce action, the husband filed a motion to suppress his email that had been stored on the hard drive of the family computer. The Court held that the wife did not unlawfully access stored electronic communications in violation of the New Jersey Wiretap Act and did not intrude on his seclusion by accessing those emails. "Having a legitimate reason for being in the files, plaintiff had a right to seize evidence she believed indicated her husband was being unfaithful...Is rummaging through files in a computer hard drive any different than rummaging through files in an unlocked file cabinet...Not really."
- *Demelash v. Ross Stores, Inc.*, 20 P.3d 447 (Wash. Ct. App. 2001). In an action for a false shoplifting arrest, the court stated, "A trial court must manage the discovery process in a fashion that promotes full disclosure of relevant information while at the same time protecting against harmful side effects. Consequently, a court may appropriately limit discovery to protect against requests that are unduly burdensome or expensive." The court limited the scope of to a computerized summary of the store's files.
- *Milwaukee Police Assoc. v. Jones*, 615 N.W.2d 190 (Wis. Ct. App. 2000). In considering the provisions of the state's open records laws, the court concluded that the City's production of an analog tape was insufficient when a digital version existed. The court stated, "A potent open records law must remain open to technological advances so that its statutory terms remain true to the law's intent."
- *Itzenon v. Hartford Life and Accident Ins. Co.*, 2000 WL 1507422 (E.D. Pa. Oct. 10, 2000). "It is difficult to believe that in the computer era" that the Defendant could not identify files and filter out information based on specific categories.

□ *In re Dow Corning Corp.*, 250 B.R. 298 (Bankr. E.D. Mich. 2000). Federal Government did not satisfy its obligation to make medical records stored in computer databases available to Debtor, where Government directed Debtor to warehouses around the world where the information was stored.

□ *Van Westrienen v. Americontinental Collection Corp.*, 189 F.R.D. 440 (D. Or. 1999). Court held that “Plaintiffs are not entitled to unbridled access [of] Defendant’s computer system. . .Plaintiffs should pursue other less burdensome alternatives, such as identifying the number of letters and their content.”

□ *Caldera, Inc. v. Microsoft Corp.*, 72 F.Supp.2d 1295 (D. Utah 1999). A federal district court found that a series of intra-company emails offered “direct evidence” that the corporation was actively trying to destroy a competitor.

□ *Playboy Enters., Inc. v. Welles*, 60 F.Supp.2d 1050 (S.D. Cal. 1999). The Court held that Defendant’s hard drive was discoverable because it was likely that relevant information was stored on it. Production of such electronic information would not be unduly burdensome upon Defendant.

□ *Linnen v. A.H. Robins Co.*, 1999 WL 462015 (Mass. Super. June 16, 1999). “A discovery request aimed at the production of records retained in some electronic form is no different in principle, from a request for documents contained in any office file cabinet.” The court continued, “To permit a corporation such as Wyeth to reap the business benefits of such [computer] technology and simultaneously use that technology as a shield in litigation would lead to incongruous and unfair results.”

□ *Symantec Corp. v. McAfee Assoc., Inc.*, 1998 WL 740807 (N.D. Cal. Aug. 14, 1998). Plaintiff sought to obtain the entire source code for all of Defendant’s products dating back to 1995, as well as copies of all hard drives which had access to the server from which the information on the was copied. The court found that production of this magnitude would be unduly burdensome to the Defendant, both in terms of volume and in terms of the proprietary nature of the information sought.

□ *Storch v. IPCO Safety Prods. Co.*, 1997 WL 401589 (E.D. Pa. July 16, 1997). “This Court finds that in this age of high-technology where much of our information is transmitted by computer and computer disks, it is not unreasonable for the defendant to produce the information on computer disk for the plaintiff.”

□ *Strasser v. Yalamanchi*, 669 So.2d 1142 (Fla. Dist. Ct. App. 1996). The court ruled that the trial court’s discovery order should be quashed because (1) unrestricted access to Defendant’s entire computer system was overly broad and would pose a threat to confidential records and (2) there was little evidence that the purged documents could be retrieved.

□ *Fennell v. First Step Designs, Ltd.*, 83 F.3d 526 (1st Cir. 1996). The court denied Plaintiff’s broad request for discovery of Defendant’s entire hard drive. The court explained that the costs, burdens, delays, and likelihood of discovering the evidence must be weighed against the importance of the requested evidence. Court held requesting party must show a “particularized likelihood of discovering appropriate material”.

□ *Anti-Monopoly, Inc. v. Hasbro, Inc.*, 1995 WL 649934 (S.D.N.Y. Nov. 3, 1995). “The law is clear that data in computerized form is discoverable even if paper ‘hard copies’ of the information have been produced. . .[T]oday it is black letter law that computerized data is discoverable if relevant.”

- *Murlas Living Trust v. Mobil Oil Corp.*, 1995 WL 124186 (N.D. Ill. Mar. 20, 1995). The court refused to require Defendant to undergo intrusive or burdensome discovery for its electronic files where the burden is not justified by the relevance of the evidence likely to be discovered.
- *Crown Life Ins. Co. v. Craig*, 995 F.2d 1376 (7th Cir. 1993). Computer data is discoverable under Federal Rule of Procedure 34.
- *Aviles v. McKenzie*, 1992 WL 715248 (N.D. Cal. Mar. 17, 1992). In an action involving claims of wrongful termination and employment discrimination, Plaintiff presented email messages that demonstrated he was fired for whistleblowing about unsafe and illegal company practices.
- *Lawyers Title Ins. Co. v. United States Fidelity & Guar. Co.*, 122 F.R.D. 567 (N.D. Cal. 1988). The court rejected, as broadly framed and intrusive, a request to inspect the responding party's entire computer system where it was a mere possibility that responding party might produce applicable documents. Court required a showing that this inspection would lead to evidence that had not already been produced.
- *Santiago v. Miles*, 121 F.R.D. 636 (W.D.N.Y. 1988). The court noted that "[a] request for raw information in computer banks is proper and the information is obtainable under the discovery rules."
- *Daewoo Elecs. Co. v. United States*, 650 F. Supp. 1003 (Ct. Int'l Trade 1986), *rev'd on other grounds* 6 F.3d 1511 (Fed. Cir. 1993). The court rejected the government's narrow discovery position, stating that disclosure orders should be construed liberally and should not be impeded by technical objections. The court further explained, "[I]t would be a dangerous development in the law if new techniques for easing the use of information become a hindrance to discovery of disclosure in litigation."
- *Bills v. Kennecott Corp.*, 108 F.R.D. 459 (C.D. Utah 1985). "[C]ertain propositions will be applicable in virtually all cases, namely, that information stored in computers should be as freely discoverable as information not stored in computers, so parties requesting discovery should not be prejudiced thereby; and the party responding is usually in the best and most economical position to call up its own computer stored data."

## Procedure

- *Zubulake v. UBS Warburg*, 2003 WL 21087884 (S.D.N.Y. May 13, 2003). In a gender discrimination suit against her former employer, the Plaintiff requested that the Defendant produce "[a]ll documents concerning any communication by or between UBS employees concerning Plaintiff." The Defendant produced 350 pages of documents, including approximately 100 pages of email. The Plaintiff knew that additional responsive email existed that the Defendant had failed to produce because she, in fact, had produced approximately 450 pages of email correspondence. She requested that the Defendants produce the email from archival media. Claiming undue burden and expense, the Defendant urged the court to shift the cost of production to the Plaintiff, citing the *Rowe* decision. Stating that a court should consider cost-shifting only when electronic data is relatively inaccessible (such as in this case), the court considered the *Rowe* 8-factor cost shifting test. The court noted that the application of the *Rowe* factors may result in disproportionate cost shifting away from large defendants, and the court modified the test to 7 factors: (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 issue at stake in the litigation and; (7) the relative benefits to the parties of obtaining the information. The court ordered the Defendant to produce, at its own expense, all responsive email existing on its optical disks, active servers, and five backup tapes as selected by the Plaintiff. The court determined that only after the contents of the backup tapes are reviewed and the Defendant's costs are quantified, the Court will conduct the appropriate cost-shifting analysis.

□ *Go2Net, Inc. v. C I Host, Inc.*, 60 P.3d 1245 (Wash. Ct. App. 2003). After discovery commenced in a suit to collect payment due under a services contract, the parties exchanged document requests. In responding to Defendant's requests, Plaintiff provided some documents, but advised that one of its servers had crashed and was in the process of being rebuilt. Plaintiff stated that it would supplement its production at a later date. A day prior to the summary judgment hearing in the case, the Plaintiff produced the additional emails from the rebuilt server. The trial court issued summary judgment in favor of the Plaintiff. On appeal, Defendant argued that the trial court abused its discretion in refusing to vacate the summary judgment order in light of "newly discovered evidence", namely the internal email messages produced just prior to the summary judgment hearing. The appellate court found that the email messages were not "newly discovered evidence" where there was nothing to suggest that the Plaintiff deliberately tried to hide these documents.

□ *Dodge, Warren, & Peters Ins. Servs. v. Riley*, 2003 WL 245586 (Cal. Ct. App. Feb 5, 2003). Prior to termination of their employment, Defendants copied and took with them volumes of computerized data maintained in Plaintiff's files and storage media. Plaintiff sued the Defendants alleging claims of misappropriation of trade secrets, unfair business practices, breach of fiduciary duty and breach of contract. The appellate court affirmed the trial court's order issuing a preliminary injunction against Defendants, requiring the preservation of electronic evidence and ordering them to allow a court appointed expert to copy the data, recover lost or deleted files, and perform automated searches of the evidence under guidelines agreed to by the parties or established by the court.

□ *United States v. Moussaoui*, 2003 WL 548699 (E.D.Va. Jan. 7, 2003). The Defendant claims that the government failed to provide him with information retrieved from various computers used by the Defendant. The court held that the government provided the Defendant with sufficient information, including: information about the authentication of the computer hard drives, confirmation that the computer evidence had not been contaminated, the timing of the forensic examinations, and the software used to restore a hard drive image. The court further stated that the Defense possessed the computer hard drives at issue and had expert resources and subpoena power to conduct any further investigation it deemed necessary.

□ *In re Livent, Inc. Noteholders Sec. Litig.*, 2003 WL 23254 (S.D.N.Y. Jan. 2, 2003). In a securities litigation, the Defendant accounting firm produced approximately 25 email pages from the files of a particular individual at issue, in addition to 14 emails from other employees. Plaintiffs suspected this is production incomplete, and moved the court for: (1) an order "directing Deloitte to make a thorough search of all its computer systems, servers and other storage devices, back-up tapes, and the individual hard drives of employees who worked on the Livent audits" and (2) an order directing the Defendant "to produce all responsive materials found with 30 days, along with a written explanation of all the steps it has taken to find responsive materials." The court denied the Plaintiffs request and directed the Defendant to produce a

written explanation of all steps taken to find responsive email. The court directed the parties to consult the *Rowe* decision and, if unable to reach resolution, to inform the court.

□ *In re Amsted Indus.*, 2002 WL 31844956 (N.D.Ill. Dec. 17, 2002). In a suit by Plaintiff employees against their employer for breach of fiduciary duty and other wrongs stemming from a hostile takeover with use of employee stock assets, the court considered Plaintiffs' various discovery motions, including a motion compelling Defendants to retrieve email and documents generated on or after January 1, 1997. In response to Plaintiffs' discovery requests, Defendants limited its investigation to word searches of its backup tapes and only produced relevant documents generated after January 1, 1999. The production did not include email. Plaintiffs argued that the Defendants' search of electronic documents was inadequate, and that Defendants should have actually searched the hard drive of each individual Defendant and each person having access to relevant information. The court ordered the Defendant to re-search their backup tapes under a broader subject matter and time period. The court also indicated they should search the in-box, saved, and sent folders of any relevant individual's email in the same manner. The court determined the additional searches were not so burdensome or expensive as to require a limiting of the requests.

□ *Gambale v. Deutsche Bank*, 2002 WL 31655326 (S.D.N.Y. Nov. 21, 2002). As a step toward resolving several discovery disputes, the Magistrate Judge ordered the Defendants to serve an affidavit explaining the steps they have taken to search their paper and electronic files for documents responsive to Plaintiff's discovery requests and outlining the feasibility and cost of retrieving such electronic documents. The Magistrate then stated that the Plaintiff must choose between two options for producing the electronic data: (1) follow the protocol set forth in *Rowe Entertainment v. William Morris Agency*, 205 F.R.D. 421 (S.D.N.Y.2002), with the slight modification set forth in *Murphy Oil USA, Inc. v. Fluor Daniel, Inc.*, 2002 WL 246439 (E.D.La. Feb. 19, 2002), or (2) confer with the Defendant and propose a joint protocol.

□ *Kormendi v. Computer Associates Int'l, Inc.*, 2002 WL 31385832 (S.D.N.Y. Oct. 21, 2002). The parties in this employment case jointly wrote the Magistrate, requesting reconsideration and clarification of a prior order. The court previously had ordered Defendant to produce all email messages mentioning the Plaintiff over a one-year time period, with the Plaintiff to pay for the cost of the search. In the letter to the Magistrate, the Defendant stated that it had already produced the emails from persons involved in the suit and had no method to locate and reconstruct emails mentioning the Plaintiff for the listed period because its document retention policy called for employees to retain emails for a period of only thirty days. The Magistrate noted that the Plaintiff should seek other means of attaining the sought after emails, such as searching the computers of other employees who might have saved the emails. Plaintiff must still bear the cost of searching for these emails.

□ *Advanced Micro Devices, Inc. v. Intel Corp.*, 292 F.3d 664 (9<sup>th</sup> Cir. 2002). In a dispute relating to the market conduct of Intel Corp, Advanced filed a complaint with the European Commission, and sought discovery according to practices and rules in the United States under federal law. Adopting a broad interpretation of the scope of discovery rights in cases involving foreign tribunals, the Court permitted domestic-style discovery under 28 U.S.C. § 1782 in an investigation conducted by the European Community Directorate.

□ *Thompson v. Thompson*, 2002 WL 1072342 (D.N.H. May 30, 2002). The copying of email messages from the hard drive of a personal computer does not constitute interception of electronic communications for the purposes of the Electronic Communications Privacy Act of 1986. The court reasoned that an

interception can only occur “during transmission” of electronic communication transfers; thus, the acquisition of stored email does not qualify as an interception under the ECPA.

□ *The Gorgen Co. v. Brecht*, 2002 WL 977467 (Minn. Ct. App. May 14, 2002). Plaintiff brought suit against former employees for misappropriation of trade secrets. Prior to serving the complaint, Plaintiff obtained a TRO, which prohibited Defendants from destroying or altering electronic documents and provided for expedited discovery of relevant electronic data. The Appellate Court found that the district court abused its discretion by issuing the TRO and by denying the Defendants’ motion to dissolve it. The Appellate Court stated, “Although the TRO seems reasonable on its face...this issue cannot be resolved at this early stage of the litigation without a showing of irreparable harm or without complying with the rules of procedure.”

□ *Tulip Computers Int’l v. Dell Computer Corp.*, 2002 WL 818061 (D.Del. Apr. 30, 2002). On Plaintiff’s motion to compel in a patent infringement case, the Court stated that “[T]he procedure that Tulip has suggested for the discovery of email documents seems fair, efficient, and reasonable.” The Court ordered the Defendant to produce the hard disks of certain company executives to the Plaintiff’s electronic discovery expert for key word searching. After the expert completes the key word search, the Plaintiff will give the Defendant a list of the emails that contain those search terms. The Defendant will then produce the emails to the Plaintiff, subject to its own review for privilege and confidentiality.

□ *Murphy Oil USA, Inc. v. Fluor Daniel, Inc.*, 2002 WL 246439 (E.D. La. Feb. 19, 2002). The Court used the eight-factor balancing test set forth in *Rowe* to determine operating protocols and the cost shifting formula. It placed the burden on the producing party to elect one of two proposed protocols.

□ *Rowe Entertainment, Inc. v. The William Morris Agency*, 205 F.R.D. 421 (S.D.N.Y. 2002). Denying Defendants’ motion for a protective order insofar as it sought to preclude the discovery of email altogether, the Court set forth an eight factor balancing test for identifying responsive emails while protecting privileged documents. *See also Rowe Entertainment, Inc. v. The William Morris Agency*, 2002 WL 975713 (S.D.N.Y. May 9, 2002). After reanalyzing and reaffirming Judge Francis’ eight factor balancing test, the Court upheld the January 15, 2002 Order that granted Defendants’ motion to shift the costs of production of their email communications to Plaintiffs.

□ *Columbia Communications v. Echostar*, 2 Fed.Appx. 360 (4th Cir. 2001). In a contract dispute, the Court held that failure of the lessor to turn over certain computer databases during discovery did not justify a judgment for the distributor or a new trial.

□ *Perez v. Volvo Car Corp.*, 247 F.3d 303 (1st Cir. 2001). In a suit under the Racketeer Influenced and Corrupt Organizations Act, internal Volvo emails, which could have made a dispositive difference on the issue of Volvo’s knowledge of the fraud involved in the suit, were not called to the District Court’s attention until after the Court had issued summary judgment. Volvo claimed these emails offered too little, too late. However, the First Circuit disagreed, “After all, Volvo did not produce the emails to the plaintiffs until January 2000 (the same month that Volvo filed its summary judgment motion)--and then only in Swedish. Given the timing, the sheer volume of documents involved in the case, and the need for translation, fundamental fairness counsels in favor of treating the emails as newly-discovered evidence within the purview of Federal Rule of Civil Procedure 59(e).”

- *Benton v. Allstate Ins. Co.*, 2001 WL 210685 (C.D. Cal. Feb. 26, 2001). The court refused to grant a continuance on Defendant's summary judgment motion where Plaintiff claimed that he had not had an adequate opportunity to conduct discovery of Defendant's computer system. The court concluded that the Plaintiff did not show that a further continuance was necessary to prevent irreparable harm or that further discovery will enable him to obtain evidence essential to his opposition to the motion.
- *America Online, Inc. v. Anonymous*, 542 S.E.2d 377 (Va. 2001). In a case of first impression, the court refused to allow a corporation to seek information from AOL without revealing its identity.
- *Superior Consultant Co. v. Bailey*, 2000 WL 1279161 (E.D. Mich. Aug. 22, 2000). Court ordered Defendant to create and produce for Plaintiff a backup file of Defendant's laptop computer, and a backup file of any personal computer hard-drive to which Defendant had access.
- *United States v. VISA*, 1999 WL 476437 (S.D.N.Y. July 7, 1999). In a suit against VISA and MasterCard, the parties agreed to narrow the scope of the archived email search, both in terms of the number of employees whose email is to be produced and the number of days per month for which email is to be produced. The court reserved decision about which party will ultimately bear the cost of producing email.
- *Concord Boat v. Brunswick Corp.*, 1996 WL 33347247 (E.D.Ark. Dec. 23, 1996). Plaintiffs contend that Defendant's search for and production of relevant information was insufficient because it failed to review all computer documents and email. Plaintiffs filed motions to compel discovery of electronic information and to prevent further destruction of documents. The Defendant asserted that the search was reasonable and submitted that the Plaintiffs' demands were overly broad and unduly burdensome. The court ordered the parties to have a meeting with counsel and computer experts for both sides, conducting a good faith discussion to see whether agreement can be reached on a procedure to further search the Defendant's email, the choice of an expert, the procedure for specifying the expert's responsibilities, and allocation of the costs. The court also ordered the Defendant to produce a detailed description of the Defendant's electronically stored information.
- *Carbon Dioxide Indus. Antitrust Litig.*, 155 F.R.D. 209 (M.D. Fla. 1993). "[D]epositions to identify how data is maintained and to determine what hardware and software is necessary to access the information are preliminary depositions necessary to proceed with merits discovery."

## Production of Data

- *Giardina v. Lockheed Martin Corp.*, 2003 WL 1338826 (E.D.La. Mar. 14, 2003). In an employment discrimination suit, Plaintiff's discovery requests sought a list of all "non-work related Internet sites" accessed with sixteen different company computers. Defendant objected to this request as overly broad and unduly burdensome as it would require creation of detailed and lengthy reports that would take many hours to compile. The magistrate judge granted Plaintiff's motion to compel and awarded attorney fees and the District Court affirmed.
- *Lakewood Eng'g v. Lasko Prod.*, 2003 WL 1220254 (N.D.Ill. Mar. 14, 2003). In a patent infringement suit, the Plaintiff produced email and other electronic documents after the close of the discovery period. The

court found that while the Plaintiff did not engage in a good faith effort to produce all requested discovery in a timely manner, the cost to the Defendant was minimal and therefore refused to issue sanctions. To the extent that it had not already done so, the Plaintiff was ordered to produce all emails generated or received by the inventor relating to the patent at issue.

□ *Zhou v. Pittsburgh State University*, 2003 WL 1905988 (D.Kan. Feb. 5, 2003). In an employment discrimination suit, Plaintiff sought to compel Defendant to produce computer generated documents (instead of typewritten documents compiled by hand already produced) reflecting the salaries of Defendant's faculty. Relying on the Advisory Committee Notes to F.R.C.P. 34, the court stated, "[T]he disclosing party must take reasonable steps to ensure that it discloses any back-up copies of files or archival tapes that will provide information about any 'deleted' electronic data." The court granted the Plaintiff's motion to compel and ordered the Defendant to disclose all data compilations, computerized data and other electronically-recorded information reflecting the salaries of Defendant's faculty. The court further ordered the parties to preserve evidence that they know, or should know, is relevant to the ongoing litigation, including preservation of all data compilations, computerized data and other electronically-recorded information.

□ *McPeck v. Ashcroft*, 2003 WL 75780 (D.D.C. Jan. 9, 2003). In its August 1, 2001 Order, the court ordered the Defendant to search certain backup tapes to assist in ascertaining whether additional searches were justified. After completing this backup tape sample, the parties could not agree whether the search results produced relevant information such that a second search was justified. The magistrate stated, "[t]he frustration of electronic discovery as it relates to backup tapes is that backup tapes collect information indiscriminately, regardless of topic. One, therefore, cannot reasonably predict that information is likely to be on a particular tape. This is unlike the more traditional type of discovery in which one can predict that certain information would be in a particular folder because the folders in a particular file drawer are arranged alphabetically by subject matter or by author." After examining the likelihood of relevant data being contained on each of the backup tapes, the magistrate ordered additional searches of selected backup tapes likely to contain relevant evidence.

□ *York v. Hartford Underwriters Ins. Co.*, 2002 WL 31465306 (N.D.Okla. Nov. 4, 2002). In a case alleging bad faith in processing an insurance claim, the Defendant opposed Plaintiff's 30(b)(6) deposition request on the subject of Defendant's use of a claims adjusting software program called "Colossus." The Court found that the Defendant failed to demonstrate that the "Colossus" program was proprietary or confidential and ordered that the Plaintiff should be given the opportunity to discover what data was inputted into "Colossus" concerning her claim. The court also ordered the Defendant to provide a Rule 30(b)(6) witness to testify to the use of the "Colossus" program. Granting part of the Defendant's motion for a protective order, the Court held that the nature and extent of the Defendant's use of "Colossus" may be confidential and entitled to protection from third parties.

□ *Eolas Technologies Inc. v. Microsoft Corp.*, 2002 WL 31375531 (N.D.Ill. Oct. 18, 2002). In a patent infringement suit against Microsoft, the parties engaged in extensive motion practice, both on dispositive summary judgment issues and on various discovery issues. With regard to one discovery motion aimed at obtaining information which the Defendant alleged was outside the scope of the issues in the case, the court restricted discovery to spreadsheet data regarding licenses, revenue and profitability of "accused server versions of Windows 2000 and Windows NT 4.0 operating system software with Internet Explorer." With regard to another discovery motion, addressing whether certain email messages in a chain of messages must be produced, the court ordered the Defendant to produce certain emails to and from one key individual so

that the court could analyze the documents *in camera* and then make a determination as to whether the Plaintiff is entitled to receive them in an unredacted form.

□ *Jones v. Goord*, 2002 WL 1007614 (S.D.N.Y. May 16, 2002). Plaintiffs, prison inmates bringing suit against the New York State Corrections Commission for prison overcrowding, requested the production of six different electronic databases maintained by the New York state prison system. The Plaintiffs claimed that the electronic information would be more valuable than the already produced hard copies because the information would be more manipulable. The court refused to compel discovery of the databases because the burden of the proposed discovery outweighed its likely benefit, particularly in light of the Plaintiffs failure to seek discovery in a timelier manner and the vast amount of material that had already been produced in hard copy. The court stated, “As electronic mechanisms for storing and retrieving data have become more common, it has increasingly behooved courts and counsel to become familiar with such methods, and to develop expertise and procedures for incorporating ‘electronic discovery’ into the familiar rituals of litigation.”

□ *Kaufman v. Kinko’s Inc.*, Civ. Action No. 18894-NC (Del. Ch. Apr. 16, 2002). The Court granted the Plaintiffs’ motion to compel the Defendants’ production of certain email messages retrievable from Defendants backup system. The Defendants’ argument that the burdens of the retrieval process outweighed any evidentiary benefit that the Plaintiffs would obtain from the documents was unpersuasive. Instead, the Court stated, “Upon installing a data storage system, it must be assumed that at some point in the future one may need to retrieve the information previously stored. That there may be deficiencies in the retrieval system...cannot be sufficient to defeat an otherwise good faith request to examine the relevant information.”

□ *United States Fidelity & Guaranty Co. v. Braspetro Oil Servs. Co.*, 2002 WL 15652 (S.D.N.Y. Jan. 7, 2002). In a discovery dispute concerning the potential waiver of privilege with respect to materials provided to Defendants’ expert witnesses, the Court ordered the Defendants to produce all materials provided to their experts – privileged or unprivileged, whether in paper or electronic form.

□ *Braxton v. Farmer’s Ins. Group*, 209 F.R.D. 651 (N.D.Ala. 2002). In a class action brought under the Fair Credit Reporting Act, the Plaintiffs sought emails from non-party individual insurance agents of the Defendant’s insurance company. The Defendant objected, claiming that enforcement of the subpoena would subject the agents to an undue burden. The court refused to require the non-party insurance agents to engage in the task of “combing through their email files and other records in search of the documents sought by the plaintiff.” The court ordered the Defendant to locate and produce relevant emails, newsletters, and other correspondence that it sent to its agents.

□ *McNally Tunneling v. City of Evanston*, 2001 WL 1568879 (N.D. Ill. Dec. 10, 2001). In a dispute between a construction contractor and the City of Evanston, the Court denied Evanston wide-scale access to both hard-copy and electronic versions of McNally’s computer files where Evanston’s need for both sets of documents was not fully briefed to the Court. However, where McNally’s hard-copy productions were incomplete, the Court ordered McNally to supplement the hard-copy versions with its computer files to ensure that it has produced all of the relevant information.

□ *Unnamed Physician v. Board of Trustees of St. Agnes Medical Center*, 113 Cal.Rptr.2d 309 (Cal. Ct. App. 2001). In a physician review hearing, the hospital was ordered to provide the physician with all existing documents related to the hospital’s computer programs, except those of a proprietary nature.

- *Hayes v. Compass Group USA, Inc.*, 202 F.R.D. 363 (D. Conn 2001). The Plaintiff in an age discrimination action requested information on similar claims filed against the Defendant. The Defendant advised the Court of the burden and expense involved with such a request given that some of the data was stored in a non-searchable computer format. The Court ordered the Defendant to manually search the unsearchable computer data and to produce all information for which it had computer search capabilities.
- *In re the Matter of the Application of Lees*, 727 N.Y.S.2d 254 (N.Y. Sup. Ct. 2001). A rape Defendant submitted an *ex parte* motion asking that the victim and a third party be ordered to turn over their computers for inspection. Defendant sought to uncover an email in which the victim falsely claimed to have been raped on a prior occasion. The application of the Defendant was granted to the extent that he could show cause to the court.
- *McPeck v. Ashcroft*, 202 F.R.D. 31 (D.D.C. 2001). In a sexual harassment action against Plaintiff's employer, Plaintiff sought to force Defendant to search its backup systems for data that was deleted by the user but was stored on backup tape. Defendant rebutted that the remote possibility of yielding relevant evidence could not justify the costs involved. Instead of ordering recovery and production of relevant documents from all of the existing backup tapes, the Magistrate ordered the Defendant to restore and produce responsive emails from one person's computer over a one year period. After this sample data was produced and accessed, the Magistrate would then determine if a broader recovery and search was warranted given the burden and expense.
- *Kleiner v. Burns*, 2000 WL 1909470 (D. Kan. Dec. 15, 2000). Court ordered Defendant Yahoo! To disclose all electronic data compilations in its possession, custody, and control that are relevant to disputed facts. Court also ordered parties to preserve evidence that they know, or should know, is relevant to the ongoing litigation, including preservation of all data compilations, computerized data and other electronically-recorded information.
- *Illinois Tool Works, Inc. v. Metro Mark Prod. Ltd.*, 43 F.Supp.2d 951 (N.D. Ill. 1999). In an unfair competition case, the court ordered the Defendant to produce for inspection its computer after Plaintiff showed that the Defendant had been less than forthcoming in producing hard copies of requested documents. The court further issued sanctions, in the form reasonable attorney's fees and costs, for the failure to comply with the discovery orders.
- *Alexander v. FBI*, 186 F.R.D. 78 (D. D.C. 1998). The court concluded that it was appropriate to order an examination of employee's computer hard drive and server to determine whether responsive documents that had not been already produced actually existed. *See also Alexander v. FBI*, 188 F.R.D. 111 (D.C. Cir. 1998). The court refused to require Defendants to completely restore all deleted files and email where Plaintiff did not propose "targeted and appropriately worded searched of backed-up and archived email and deleted hard drives for a limited number of individuals."
- *Sattar v. Motorola, Inc.*, 138 F.3d 1164 (7th Cir. 1997). Plaintiff sought hard copies of over 200,000 emails, since its system was unable to read Defendant's electronic files. The appellate court affirmed the district court's ruling that a more reasonable accommodation was (1) some combination of downloading the data from the tapes to conventional computer disks or a computer hard-drive, (2) loaning Plaintiff a copy of the necessary software, or (3) offering Plaintiff on-site access to its own system. If all of those options failed, the court ordered that the parties would each bear half the cost of the copying the 200,000 emails.

- *Smith v. Texaco, Inc.*, 951 F. Supp. 109, (E.D. Tex 1997), *rev'd on other grounds* 263 F.3d 394 (5<sup>th</sup> Cir. 2001). Modifying the original state court TRO in a race discrimination case, the court permitted the moving of certain documents in the ordinary and usual course of business and the deletion of electronic records in the ordinary and usual course of business, provided that hard copy records be made and kept.
- *Strauss v. Microsoft Corp.*, 1995 WL 326492 (S.D.N.Y. June 1, 1995). The court denied Microsoft's motion to exclude evidence of offensive emails in a hostile work environment lawsuit.
- *Easley, McCaleb & Assoc., Inc. v. Perry*, No. E-2663 (Ga. Super. Ct. July 13, 1994). Court ordered that deleted files on Defendant's computer hard drive are discoverable, and Plaintiff's expert must be allowed to retrieve all recoverable files. Court issued an order detailing the protocol for reviewing the electronic data.
- *Torrington Co., v. United States*, 786 F. Supp. 1027 (Ct. Int'l Trade 1992). Plaintiff requested access to confidential materials contained on a computer tape. Plaintiff also requested hard copies of the data. The court refused to order the Defendant to create the computer tapes from scratch where the Plaintiff had already received the documents in paper form. In reaching its decision, the court stated, "Where the burden, cost and time required to produce the tapes is virtually equal on both parties, then the burden of producing the tapes falls on the party requesting the information."
- *PHE, Inc. v. Department of Justice*, 139 F.R.D. 249 (D.D.C. 1991). Court ordered Plaintiffs to produce computerized tax records even though Plaintiffs possessed no computer program to retrieve or display the records. "Although no program may presently exist to obtain the information requested, the Court is satisfied that with little effort the plaintiffs can retrieve the necessary and appropriate information. . . It would not be unreasonable to require the plaintiffs to incur modest additional expenditures so as to provide the defendants with the discovery necessary to establish that they are not acting in bad faith and vindictively."
- *In re Air Crash Disaster at Detroit Metro*, 130 F.R.D. 634 (E.D. Mich. 1989). In litigation brought after a passenger jet crash, the court ordered the aircraft manufacturer to provide relevant flight simulation data on computer-readable nine-track magnetic tape even though the aircraft manufacturer had already provided the data in hard copy print-outs. Because material did not currently exist on magnetic tape, the requesting party (the airline) was required to pay all reasonable and necessary costs associated with manufacture of tape.
- *Timken Co. v. United States*, 659 F. Supp 239 (Ct. Int'l Trade 1987). Court ordered production of data stored on computer tape even though it had been previously produced in a paper format.
- *Williams v. Owens-Illinois, Inc.*, 665 F.2d 918 (9th Cir. 1982). In an employment discrimination suit, the court refused to order production of the electronic information on computer tape where all the data was previously produced in hard copy. Therefore, the court determined that the Appellants were not deprived of any data.
- *City of Cleveland v. Cleveland Electric Illuminating Co.*, 538 F. Supp. 1257 (N.D. Ohio 1980). In an antitrust suit brought by a city against an electric utility, the court ordered the electric utility was entitled to pretrial production by the city of computer data and calculations underlying conclusions contained in reports of certain experts the city intended to call as witnesses.

□ *National Union Elec. Corp. v. Matsushita Elec. Ind. Co.*, 494 F. Supp. 1257 (E.D. Pa. 1980).

Defendant filed a motion to compel production of a computer tape containing the information that the Plaintiff previously produced in a hard copy. The court required Plaintiff to have computer experts create a computer-readable tape containing data previously supplied to Defendant in printed form.

□ *Pearl Brewing Co. v. Joseph Schiltz Brewing Co.*, 415 F. Supp. 1122 (S.D. Tex. 1976). In an antitrust action, court allowed Defendant to inspect and copy the computer programs and systems documentation at issue and to depose the Plaintiff's computer experts as to the creation of the systems.

□ *Adams v. Dan River Mills, Inc.*, 54 F.R.D. 220 (W.D. Va. 1972). In an employment discrimination case, the court required the Defendant to provide an electronic version of the printouts already submitted to the Plaintiff. "Because of the accuracy and inexpensiveness of producing the requested documents in the case at bar, this court sees no reason why the defendant should not be required to produce the computer cards or tapes and the W-2 print-outs to the plaintiffs."

## Costs

□ *Byers v. Illinois State Police*, 2002 WL 1264004 (N.D. Ill. June 3, 2002). In an employment discrimination suit, the plaintiffs sought an order compelling the defendants to produce archived emails. The court stated, "Based on the cost of the proposed search and the plaintiffs' failure to establish that the search will likely uncover relevant information, the Court concludes that the plaintiffs are entitled to the archived emails only if they are willing to pay for part of the cost of production....Requiring the plaintiffs to pay part of the cost of producing the emails will provide them with an incentive to focus their requests." The court granted the motion to the extent that the plaintiffs bear the cost of licensing the archived email software while the defendants continue to bear the expense of review for responsive, privileged, and confidential documents.

□ *In re Bristol-Myers Squibb Securities Litigation*, 2002 WL 169201 (D.N.J. Feb. 4, 2002). The Court modified the Plaintiff's original discovery cost commitment where Defendants "dumped" an extraordinary number of paper documents resulting in a prohibitive copying charge. The Court also denied the Defendant's motion for Plaintiff's one-half cost contribution for document scanning costs, but instead required Plaintiff to pay only for the nominal cost of copying compact discs. The Court reiterated the importance of a Rule 26(f) conference to discuss electronic discovery issues, including the fair and economical allocation of costs.

□ *Rowe Entertainment, Inc. v. The William Morris Agency*, 2002 WL 63190 (S.D.N.Y. Jan. 16, 2002). Denying Defendants' motion for a protective order insofar as it sought to preclude the discovery of email altogether, the Court adopted a balancing approach, consisting of eight factors, to determine whether discovery costs should be shifted. *See also Rowe Entertainment, Inc. v. The William Morris Agency*, 2002 WL 975713 (S.D.N.Y. May 9, 2002). After reanalyzing and reaffirming Judge Francis' eight factor balancing test, the Court upheld the January 15, 2002 Order that granted Defendants motion to shift the costs of production of their email communications to Plaintiffs.

□ *GTFM, Inc., v. Wal-Mart Stores*, 2000 WL 1693615 (S.D.N.Y. Nov. 9, 2000). The court allowed Plaintiff to recover fees for the inspection of Wal-Mart's computer records and facilities by plaintiff's expert and also upheld fees and expenses caused by Wal-Mart's failure to provide accurate discovery information in response to valid discovery requests. The court found the award of expenses "reasonable in view of the prior repeated misinformation provided by Wal-Mart concerning the availability of information..."

□ *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). The court ordered Plaintiff to pay Defendant \$10,000 for Plaintiff's failing to preserve email records for five key employees. Plaintiff was allowed to do a keyword search of Defendant's database that excluded competitive information.

□ *Zonaras v. General Motors Corp.*, 1996 WL 1671236 (S.D. Ohio Oct. 17, 1996). In this case, Plaintiffs sought to compel discovery of data compiled concerning different crash test dummy tests. In response, Defendant GMC asserted that it produced data tracings and backup materials for all but eleven of these tests, and objects to production of the remaining tests "as unduly burdensome and expensive." After balancing the elements outlined in Rule 26(b)(2)(iii), the court ordered Defendant GMC to produce data tracings and backup materials of the eleven tests where the benefits of the discovery outweighed the expense of production. Because admissibility of the electronic evidence was still undecided, the court ordered the Plaintiffs to pay half the production costs.

□ *Toledo Fair Hous. Ctr. v. Nationwide Mut. Ins. Co.*, 703 N.E.2d 340 (Ohio C.P. 1996). The court ordered discovery of certain documents from Defendant's database. Judge stated that the Defendant cannot avoid discovery simply because their own record keeping scheme makes discovery burdensome. Court ordered Defendant to pay costs of the discovery.

□ *Anti-Monopoly, Inc. v. Hasbro, Inc.*, 1995 WL 649934 (S.D.N.Y. Nov. 3, 1995). The court found that the law is clear that data in computerized form is discoverable even if paper copies of the information have been produced. The producing party can be required to design a computer program to extract the data from its computerized business records. But such an order is subject to the Court's discretion as to the allocation of the costs of designing such a computer program.

□ *In re Brand Name Prescription Drugs Antitrust Litig.*, 1995 WL 360526 (N.D. Ill. June 15, 1995). Court found that expense of retrieving electronic data was mainly due to Defendant's own recordkeeping scheme. As such, Court required Defendant to produce its responsive, computer-stored email at its own expense, subject to some limitations. Court also instructed Plaintiffs to narrow the scope of their request. Parties encouraged by Court to confer regarding scope of requests for emails.

□ *Rhone-Poulenc Rorer, Inc. v. Home Indemnity Co.*, 1991 WL 111040 (E.D. Pa. June 17, 1991). An unwieldy computerized record-keeping system, which requires heavy expenditures in money and time to produce relevant records, is simply not an adequate excuse to frustrate discovery. Plaintiffs were required to pay for copies of any documents on microfilm/microfiche which Plaintiff requests, while Defendants bear the burden of searching and producing the documents.

□ *Williams v. Du Pont*, 119 F.R.D. 648 (W.D. Ky. 1987). The discovering party must bear costs of data production and reimburse responding party for a portion of its expense in assembling the database.

□ *Delozier v. First Nat'l Bank of Gatlinburg*, 109 F.R.D. 161 (E.D. Tenn. 1986). “A court will not shift the burden of discovery onto the discovering party where the costliness of the discovery procedure involved is entirely a product of the defendant's record-keeping scheme over which the plaintiff has no control.”

□ *Bills v. Kennecott Corp.*, 108 F.R.D. 459 (C.D. Utah 1985). The court denied Defendant’s motion requiring Plaintiffs to pay the cost Defendant incurred in producing a printout of computer data that Plaintiffs sought through discovery. The court based its holding on that the amount of money involved was not excessive or inordinate, that the relative expense and burden in obtaining the data would have been substantially greater for the Plaintiffs as compared with the Defendant, that the amount of money required to obtain the data as set forth by the Defendant would have been a substantial burden to the Plaintiffs, and that the Defendant was benefited to some degree by producing the data.

□ *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1982). “[W]e do not think a defendant should be penalized for not maintaining his records in the form most convenient to some potential future litigants whose identity and perceived needs could not have been anticipated.” Where the expense of creating computer programs that would locate the desired data was the same for both parties, the Court ordered that the party seeking the information must bear the cost of production.

## Spoliation

□ *Positive Software Solutions v. New Century Mortgage Cor.*, 2003 WL 21000002 (N.D.Tex. May 2, 2003). To ensure no other potentially relevant information was deleted, the Court ordered Defendants to preserve all backups and images of servers and personal computers that contain or contained files at issue. The court further ordered the Defendant to refrain from deleting any such files still resident on any servers or personal computers and to preserve all backups or images. Finding the scope substantially overbroad, the Court denied the Plaintiff’s motion to compel imaging "of all of Defendants' media potentially containing any of the software and electronic evidence relevant to the claims in this suit" and "all images of [Defendants'] computer storage facilities, drives, and servers taken to date.”

□ *Liafail, Inc. v. Learning 2000, Inc.*, 2002 WL 31954396 (D.Del. Dec. 23, 2002). Defendant alleges that upon issuing its document requests, the Plaintiff engaged in electronic data spoliation including intentionally deleting computer files and damaging hardware. The court stated that the Plaintiff’s position on the whereabouts of the requested documents indicated questionable discovery tactics. Nevertheless, because the court record was unclear as to what had been produced, and what must still be produced, the court decided not to immediately sanction the Plaintiff. Rather, the court gave the Plaintiff time to correct or clarify the record by producing the requested documents which it has claimed as available. The court stated that should the Plaintiff choose not to heed the court's order, the court would order sanctions in the form of an adverse inference jury instruction.

□ *Antioch v. Scrapbook Borders, Inc.*, 210 F.R.D. 645 (D.Minn. 2002). In a copyright infringement action, the Plaintiff moved for issuance of an order directing the Defendant to: preserve records, expedite discovery, compel discovery, and appoint a neutral computer forensics expert. Emphasizing the potential for spoliation of the computer data, the court stated “we conclude that the Defendants may have relevant

information, on their computer equipment, which is being lost through normal use of the computer, and which might be relevant to the Plaintiff's claims, or the Defendants' defenses.”

□ *Lombardo v. Broadway Stores, Inc.*, 2002 WL 86810 (Cal. Ct. App. Jan. 22, 2002). The Court upheld sanctions where the Defendant destroyed computerized payroll data that was the subject of Plaintiff's discovery request.

□ *RKI, Inc. v. Grimes*, 177 F.Supp.2d 859 (N.D. Ill. 2001). In a trade secret misappropriation action against Plaintiff's former employee, the Court found that the Defendant defragmented his home computer in an effort to prevent plaintiff from learning that he had deleted confidential information and software. The Court ordered the Defendant to pay \$100,000 in compensatory damages, \$150,000 in punitive damages, attorneys' fees, and court costs.

□ *Heveafil Sdn. Bhd. v. United States*, 2001 WL 194986 (Ct. Int'l Trade Feb 27, 2001). In an action challenging a U.S. Department of Commerce administrative review of an “antidumping order”, the court determined that the plaintiff failed to act to the best of its ability where six months after receiving notice about maintaining its source documents, it deleted relevant data from its computer system. The court found that the plaintiff “did not cooperate to the best of its ability because after receiving notice from [the Department of Commerce], it knew or should have known to maintain th[is] source document.”

□ *Trigon Ins. Co. v. United States*, 204 F.R.D. 277 (E.D.Va. 2001). Based on computer forensic expert analysis, the Court found that the Defendant willfully and intentionally destroyed documents that should have been produced during discovery. The Court issued adverse inferences and reimbursement of Plaintiff's attorneys fees as damages for the spoliation. *Trigon Ins. Co. v. United States*, 2002 WL 31864265 (E.D.Va. Dec. 17, 2002.). Despite objection by the Defendant, the Court found Plaintiff's fees and expenses (in the amount of \$179,725.70) for hiring and deposing computer forensics experts and briefing and adjudicating the issues related to the spoliation warranted and reasonable.

□ *Pennar Software Corp. v. Fortune 500 Sys. Ltd.*, 2001 WL 1319162 (N.D.Cal. Oct. 25, 2001). In a breach of contract suit, the Court imposed sanctions upon the Defendant in the form of attorney's fees for committing spoliation of evidence and prolonging the discovery process. The Court based its findings on the Defendant's failure to present a maintenance policy, log files, or backup tapes that would track the website maintenance and deletion procedures. When the evidence was produced, the Court found that the Defendant tampered with and deleted evidence in order to evade personal jurisdiction.

□ *In re Pacific Gateway Exchange, Inc.*, 2001 WL 1334747 (N.D.Cal. Oct. 17, 2001). In a securities violation case, the Court lifted the discovery stay, stating “The court finds that there is a significant risk that relevant documents, both paper and electronic, could be irretrievably lost, which could result in prejudice to plaintiffs.”

□ *Minnesota Mining & Mfg. v. Pribyl*, 259 F.3d 587 (7<sup>th</sup> Cir. 2001). Plaintiff brought suit against three former employees for misappropriation of trade secrets. The appellate court affirmed the trial court's negative inference instruction to the jury where the one Defendant committed spoliation of evidence by downloading six gigabytes of music onto his laptop, which destroyed many files sought by the Plaintiff, the night before Defendant was to turn over his computer pursuant to the discovery request. However, the fact that hard drive space was destroyed on one Defendant's computer did not relieve the Plaintiff from proving the elements of its claims.

- *Long Island Diagnostic Imaging v. Stony Brook Diagnostic Assocs.*, 286 A.D.2d 320 (N.Y. App. Div. 2001). Where the Defendants purged their computer databases against court order and produced compromised and unusable backup tapes, the court dismissed the parties' counterclaims and third party complaint as spoliation sanctions. The court stated "The striking of a party's pleading is a proper sanction for a party who spoliates evidence."
- *Danis v. USN Communications*, 2000 WL 1694325 (N.D. Ill. Oct. 23, 2000). The court found that the Defendant failed to properly preserve information on the computer database. Court allowed the trial judge to inform jury that some of the gaps in the case were caused by Defendant's failure to turn over computer tapes and documents. The court fined the CEO of Defendant company \$10,000 for failing to properly preserve such electronic information, but denied Plaintiff's motion for default judgment.
- *Mathias v. Jacobs*, 197 F.R.D. 29 (S.D.N.Y. 2000), *vacated* 2001 WL 1149017 (S.D.N.Y. Sept. 27, 2001). Court found Plaintiff had a duty to preserve information contained on a Palm Pilot. Since Plaintiff's conduct did not destroy evidence, but rather just made it more difficult to discover, the court imposed monetary sanctions as a consequence of the spoliation.
- *Illinois Tool Works, Inc. v. Metro Mark Prod., Ltd.*, 43 F.Supp.2d. 951 (N.D. Ill. 1999). The court held that sanctions, in the form of attorney's fees and additional discovery costs, against the Defendant were warranted as a remedy for spoliation.
- *Linnen v. A.H. Robins Co.*, 1999 WL 462015 (Mass. Super. June 16, 1999). Defendant Wyeth failed to preserve emails and neglected turning over database information ordered by the court. The court sanctioned Wyeth for such "inexcusable conduct" and allowed spoliation inference to be given to jury.
- *Telecom Int'l Amer., Ltd. v. AT & T Corp.*, 189 F.R.D. 76 (S.D.N.Y. 1999). "Even without a specific discovery order, a district court may impose sanctions for spoliation of evidence, exercising its inherent power to supervise the litigation before it."
- *United States v. Koch Ind.*, 197 F.R.D. 463 (N.D. Okla. 1998). Plaintiffs claimed that Defendant thwarted discovery attempts by destroying backup computer tapes and files. Court found that Defendant failed in its duty to preserve evidence that it should have known was relevant. Court allowed Plaintiffs to inform jury that computer tapes and files were destroyed but did not allow negative inference.
- *Lauren Corp. v. Century Geophysical Corp.*, 953 P.2d 200 (Colo. Ct. App. 1998). The court held, as a matter of first impression, that a trial court may impose attorney fees and costs as sanction for bad faith and willful destruction of evidence, even absent a specific discovery order.
- *In re Cheyenne Software, Inc. v. Securities Litig.*, 1997 WL 714891 (E.D.N.Y. Aug. 18, 1997). In a securities proceeding, the court imposed \$15,000 in attorney's fees and sanctions for failing to heed the court's discovery order. The court also compelled the defendant to bear the cost of downloading and printing up to 10,000 pages of additional documents responsive to appropriate keyword searches requested by the plaintiff.
- *Chidichimo v. University of Chicago Press*, 681 N.E.2d 107 (Ill. App. Ct. 1997). Some jurisdictions recognize a tort action for negligent spoliation of evidence.

- *ABC Home Health Servs. v. IBM Corp.*, 158 F.R.D. 180 (S.D. Ga. 1994). In action for breach of contract, the court sanctioned IBM for destroying computer files in anticipation of litigation.
- *First Tech. Safety Sys., Inc. v. Depinet*, 11 F.3d 641 (6th Cir. 1993). “In order to justify proceeding *ex parte*...the applicant must do more than assert that the adverse party would dispose of evidence if given notice.” Instead, the party must demonstrate that the adverse party has a “history of disposing of evidence or violating court orders...”
- *Cabinetware Inc., v. Sullivan*, 1991 WL 327959 (E.D. Cal. July 15, 1991). The court issued a default judgment as a sanction for spoliation of electronic evidence. “Destruction of evidence cannot be countenanced in a justice system whose goal is to find the truth through honest and orderly production of evidence under established discovery rules.”
- *Computer Assocs. Int’l, Inc. v. American Fundware, Inc.*, 133 F.R.D. 166 (D. Colo. 1990). Court issued a default judgment where Defendant revised portions of the source code after being served in the action, and thus put on notice that the source code was irreplaceable evidence. Revised code was a central piece of evidence to the litigation.
- *William T. Thompson Co. v. General Nutrition Corp.*, 593 F. Supp. 1443 (C.D. Cal. 1984). GNC was ordered to preserve all records that were maintained in the ordinary course of its business; despite this, company employees were instructed that these judicial orders “should not require us to change our standard document retention or destruction policies or practices.” Court ordered a default judgment and over \$450,000 in monetary sanctions, where GNC deleted electronic documents that were not otherwise available.

## Sanctions

- *Hildreth Mfg. v. Semco, Inc.*, 2003 WL 359309 (Ohio Ct. App. Feb. 20, 2003). The appellate court found no basis for Defendant’s motion for contempt for spoliation of computer evidence. The court found that even though the Plaintiff failed to preserve data contained on the computer hard drives at issue, there was not a reasonable possibility that the hard drives contained evidence that would have been favorable to the Defendant’s claims.
- *Metropolitan Opera Assoc., Inc. v. Local 100*, 2003 WL 186645 (S.D.N.Y. Jan. 28, 2003). In a labor dispute, the Defendants failed to comply with discovery rules, specifically failing to search for, preserve, or produce electronic documents. The court stated “[C]ounsel (1) never gave adequate instructions to their clients about the clients’ overall discovery obligations, what constitutes a ‘document’...; (2) knew the Union to have no document retention or filing systems and yet never implemented a systematic procedure for document production or for retention of documents, including electronic documents; (3) delegated document production to a layperson who (at least until July 2001) did not even understand himself (and was not instructed by counsel) that a document included a draft or other non-identical copy, a computer file and an e-mail; (4) never went back to the layperson designated to assure that he had ‘establish[ed] a coherent and effective system to faithfully and effectively respond to discovery requests,’...and (5) in the face of the Met’s persistent questioning and showings that the production was faulty and incomplete, ridiculed the

inquiries, failed to take any action to remedy the situation or supplement the demonstrably false responses, failed to ask important witnesses for documents until the night before their depositions and, instead, made repeated, baseless representations that all documents had been produced.” The court granted severe sanctions, finding liability on the part of the Defendants and ordering the Defendants to pay Plaintiff’s attorneys’ fees necessitated by the discovery abuse by Defendants and their counsel. The court found that lesser sanctions, such as an adverse inference or preclusion, would not be effective in this case “because it is impossible to know what the Met would have found if the Union and its counsel had complied with their discovery obligations from the commencement of the action.”

□ *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99 (2d. Cir. Sept. 26, 2002). Defendants appeal the trial court’s denial of Defendants’ motion for sanctions, specifically in the form of an adverse jury instruction, for the Plaintiff’s failure to produce email in time for trial. The Second Circuit held that where a party breaches a discovery obligation by failing to produce evidence, the trial court has broad discretion in fashioning an appropriate sanction, including the discretion to delay the start of a trial, to declare a mistrial, or to issue an adverse inference instruction. Sanctions may be imposed where a party has not only acted in bad faith or grossly negligent, but also through ordinary negligence. Vacating the trial court’s sanctions order, the Circuit Court reversed and remanded with instructions for a renewed hearing on discovery sanctions.

□ *Williams v. Saint-Gobain Corp.*, 2002 WL 1477618 (W.D.N.Y. June 28, 2002). In an employment discrimination suit, the Court refused to issue sanctions or attorney’s fees stemming from myriad discovery disputes. Despite an earlier assertion that no further responsive documents could be located, the Defendant produced emails obtained from an executive’s computer five days before trial. The Court found no evidence of any bad faith as to the withholding or destruction of the emails and issued the parties an extended time period to complete discovery. The Court ordered each party to bear its own discovery costs.

□ *DeLoach v. Philip Morris Co.*, 206 F.R.D. 568 (M.D.N.C. Apr. 3, 2002). Plaintiffs sought discovery sanctions alleging that the Defendant’s expert report relied on computerized transaction data that was deliberately withheld from Plaintiffs during discovery. The discovery request at issue sought “[a]ll summary documents (including electronic data) relating to your leaf tobacco bids, purchases, or price paid, including but not limited to the entire Tobinet database in electronic form, but excluding individual transaction documents such as purchase orders and invoices.” Plaintiffs were only provided the database data after the Defendant’s expert report was issued (in which the Defendant’s expert relied heavily on this other computerized data). The court held that the withholding of the data resulted in unfairness to the Plaintiffs and allowed the Plaintiffs to respond to the report and provided no opportunity for the Defendant to reply.

□ *Cobell v. Norton*, 206 F.R.D. 324 (D.D.C. Mar. 29, 2002). The court issued sanctions, including attorneys fees and expenses, under Rule 37 based upon Defendants’ request for a protective order clarifying that it “may produce email in response to discovery requests by producing from paper records of email messages rather than from backup tapes and may overwrite backup tapes.” The Defendants had previously been ordered to produce the email messages from the back-up tapes. The court held that the Defendants’ motion for protective order clarifying their duty to produce the email was not appropriate.

□ *Sheppard v. River Valley Fitness One*, 2001 U.S. Dist. LEXIS 15801 (D.N.H. Sept. 27, 2001).

Plaintiffs served several requests for discovery upon Defendant which defined the term “documents” broadly, encompassing both paper documents and electronic communications. However, Defendant’s attorney (Whittington) failed to turn over the requested documents in a timely fashion and some of the documents were lost or destroyed. The Court held, “Notwithstanding Whittington's habit of trying to obstruct discovery in this case, I find that in this instance Whittington's failure to produce computer records and to retain all drafts or other documents relating to the Aubin settlement reflects a lack of diligence rather than an intentional effort to abuse the discovery process. Nevertheless, Whittington's failure to fully comply with this court's March 22 order has unfairly prejudiced the plaintiffs by depriving them of the opportunity to question Aubin about the contents of the documents.” The Court ordered the Defendant’s attorney to pay \$500 to the Plaintiff.

□ *Lexis-Nexis v. Beer*, 41 F.Supp.2d 950 (D. Minn. 1999). Employer sued former employee for

misappropriation of trade secrets. Court issued monetary sanctions against former employee where former employee failed to produce a specific copy of an electronic database he made at the time of his resignation.

□ *New York State Nat'l Org. for Women v. Cuomo*, 1998 WL 395320 (S.D.N.Y. July 14, 1998). The court refused to impose sanctions on Defendants for destroying computer databases where there was no showing that the Defendants deleted computer databases or destroyed monthly summary reports in order to impede litigation and the plaintiffs failed to demonstrate that they were prejudiced by the loss of the records.

□ *In re Prudential Ins. Co. Sale Practices Litig.*, 169 F.R.D. 598 (D.N.J. 1997). Life insurer's consistent pattern of failing to prevent unauthorized document destruction in violation of a court order, in a suit alleging deceptive sales practices, warranted sanctions requiring payment of \$1 million to court and payment of some Plaintiff’s attorney fees and costs.

□ *Gates Rubber Co. v. Bando Chem. Ind.*, 167 F.R.D. 90 (D. Colo. 1996). The court awarded sanctions (ten percent of Plaintiff company’s total attorney fees and costs) where Defendant’s employees continuously destroyed (by overwriting) electronic evidence. Court criticized Defendant’s expert for not making an image copy of the drive at issue for production.

□ *Crown Life Ins. Co. v. Craig*, 995 F.2d 1376, 1382-83 (7th Cir. 1993). Affirmed trial court’s decision to sanction insurer and enter default judgment (counterclaim) against insurer when it failed to comply with discovery order requesting raw data from database. Data from a computer said to be “documents” within the meaning of FRCP 34.

□ *American Banker Ins. Co. v. Caruth*, 786 S.W.2d 427 (Tex. Ct. App. 1990). Courts can impose sanctions on parties that fail to comply with electronic discovery requests.

□ *Capellupo v. FMC Corp.*, 126 F.R.D. 545 (D. Minn. 1989). In gender-based employment discrimination action, court held that employer's knowing and intentional destruction of documents warranted an order requiring employer to reimburse employees for twice resulting expenditures.

□ *Leeson v. State Farm Mut. Ins. Co.*, 546 N.E.2d 782 (Ill. App. Ct. 1989). Appellate Court held that Defendant’s claims were justified on grounds of oppressiveness, and therefore; the trial court abused its discretion in entering default sanctions for Defendant’s failure to comply with the discovery order. Such production would have been overly burdensome where compliance would have required Defendant to

create a computer program to find the records and at least 15 minutes for an analyst to look through each of the 2,100 claims.

□ *National Assoc. of Radiation Survivors v. Turnage*, 115 F.R.D. 543 (N.D. Cal. 1987). Court imposed sanctions on party that altered and destroyed computer documents in the regular course of business. Court appointed special master to over-see the discovery process.

## Work Product Doctrine & Privilege

□ *RLS v. United Bank of Kuwait*, 2003 WL 1563330 (S.D.N.Y. Mar. 26, 2003). In a contract dispute arising from the Defendant's alleged failure to pay the Plaintiff commissions due under the terms of written consulting agreements, the court concluded that the Defendant did not meet its burden of demonstrating that two emails were subject to privilege protection under the common interest rule.

□ *Murphy Oil USA v. Fluor Daniel*, No. 2:99-cv-03564 (E.D. La. Dec. 3, 2002). This Order follows the court's decision in *Murphy Oil USA, Inc. v. Fluor Daniel, Inc.*, 2002 WL 246439 (E.D. La. Feb. 19, 2002) ordering the Defendant to produce relevant email communications archived on backup tapes. In this motion to compel before the court, the Plaintiff sought production of a particular email and argued that the Defendant waived the attorney-client privilege by voluntarily producing the contents of an email. Two copies of the email in question existed on the Defendant's backup tapes: (1) the email attached to a message from the mail system administrator stating that the attached email was not deliverable due to an error in the mail address and (2) a copy of the same email sent to the correct email address. The Defendant produced a privilege log identifying the subject email as an attorney client communication, but at the same time inadvertently produced the administrator email and attachment. The court held that this inadvertent disclosure waived the attorney-client privilege and granted the Plaintiff's motion to compel.

□ *eSpeed, Inc. v. Chicago Board of Trade*, 2002 WL 827099 (S.D.N.Y. May 1, 2002). Cantor Fitzgerald, a third party and partial owner of Plaintiff, asserted the attorney-client privilege with respect to a series of emails and attachments addressing a patent purchase negotiation. These emails and attachments were sent by an outside attorney to an employee of Cantor Fitzgerald. The court examined the emails and attachments *in camera* and ordered production finding that the messages and documents did not contain client confidences and were not privileged.

□ *Harris v. WHMC, Inc.*, 2002 WL 1821989 (Tx. Ct. App. Aug. 8, 2002). In a medical malpractice suit, the Plaintiff appealed the trial court's exclusion from evidence certain email correspondence based on privilege. The trial court ruled that the Plaintiff could use the emails at trial for impeachment purposes, but the emails themselves would not be admitted. The Appellate Court concluded that even if the trial court erred in excluding the emails, it was harmless error and did not cause an improper judgment.

□ *Hambarian v. C.I.R.*, 118 T.C. 35 (U.S. Tax Ct. June 13, 2002). For use in connection with a criminal tax proceeding, the Defendants' attorney created searchable, electronic databases containing documents turned over by the Prosecutor during discovery. The Respondent, in the civil tax proceeding at bar, sought a motion to compel discovery of these electronic document databases from the Petitioners/Defendants. The court stated that "As the Petitioner failed to make the requisite showing of how the disclosure of the

documents selected would reveal the defense attorney's mental impressions of the case, the requested documents and computerized electronic media are not protected by the work product doctrine.”

□ *City of Reno v. Reno Police Protective Assoc.*, 59 P.3d 1212 (Nev. 2002). The court overturned the Employee Relations Board’s decision that documents sent by email cannot be considered privileged. The court stated that “[C]ourts have generally looked to the content and recipients of the email to determine if the email is protected” and held that documents transmitted by email are protected by the attorney-client privilege.

□ *Koen v. Powell*, 2002 WL 31926381 (E.D. Pa. Dec. 13, 2002). In a legal malpractice suit, the court held that the attorney-client privilege and work product doctrine did not shield the Defendants from turning over emails relating to the threatened malpractice suit.

□ *Bertsch v. Duemeland*, 639 N.W.2d 455 (N.D. 2002). *Bertsch v. Duemeland*, 639 N.W.2d 455 (N.D. 2002). In an action alleging tortious interference with a business relationship, the appellate court affirmed a lower court’s denial of the Plaintiff’s motion to compel discovery of data from some of the Defendant’s computers. Specifically, the court denied the Plaintiff access to computers purchased by the Defendant after the transaction that gave rise to the litigation. The court reasoned that the resulting data could not be relevant to the case, and that granting access “would not lead to relevant information” and “could result in disclosure of privileged and confidential information.” The court had previously permitted e-discovery of the Defendant’s computer that was owned at the time of the alleged torts.

□ *United States v. Sungard Data Systems*, 173 F.Supp.2d 20 (D.D.C. 2001). In an antitrust action, the Court set forth specific confidentiality requirements, including a precise method for designating confidential electronic documents.

□ *Long v. Anderson University*, 2001 WL 1381512 (S.D.Ind. Oct. 30, 2001). The Court found that the attorney-client privilege applied to electronic mail sent from a University human resources director to the dean of students regarding a conversation with counsel and his legal advice in a Civil Rights action against the University.

□ *Wesley College v. Pitts*, 1997 WL 557554 (D. Del. Aug. 11, 1997). The court found that the Defendant waived its work-product privilege where the email was distributed to several third parties.

□ *State of Minnesota v. Phillip Morris*, 1995 WL 862582 (Minn. Ct. App. Dec. 26, 1995). Petitioners seek relief from a trial court’s discovery order claiming that the material is attorney work product. The trial court made specific findings that (a) the computerized databases include fields containing objective information, (b) release of the specified information will not reveal the impressions, opinions, or theories of counsel, and (c) respondents have met the standards for disclosure. Both the trial court and the Court of Appeals found unpersuasive the Petitioners’ argument that the mere selection of documents for inclusion in the database would reveal attorney strategies.

□ *Scovish v. Upjohn Co.*, 1995 WL 731755 (Conn. Super. Ct. Nov. 22, 1995). The Court found that database was within attorney work-product, but that Plaintiff had substantial need of the information in the database and undue hardship would result if it was not produced. The Court ordered Defendant to produce the database after removing any portions that contain subjective thoughts and opinions.

□ *Ciba-Geigy Corp. v. Sandoz, Ltd.*, 916 F. Supp. 404 (D.N.J. 1995). Defendants produced all documents from database without conducting a privilege review. The court held that privilege is waived where the disclosure is a result of “gross negligence.”

□ *United States v. Keystone Sanitation Co.*, 885 F. Supp. 672 (M.D. Pa. 1994). In complying with the court’s discovery order, Defendants inadvertently disclosed email messages that contained potentially confidential communications. This inadvertent disclosure waived any attorney-client privilege that may have protected portions of the email.

□ *IBM v. Comdisco, Inc.*, 1992 WL 52143 (Del. Super. Ct. Mar. 11, 1992). The court allowed

production of a portion of an email message claimed to be privileged because a portion of the email message was intended to be disclosed to persons outside the attorney/client privilege. Because it relayed legal advice from IBM’s counsel, the other portion of the email was found to be privileged.

□ *Burroughs v. Barr Lab., Inc.*, 143 F.R.D. 611 (E.D.N.C. 1992), *vacated in part on other grounds* 40 F.3d 1223 (Fed. Cir. 1994). The court held that the attorney work product privilege applied to printed results of computerized database searches.

□ *Indiana Coal Council v. Nat’l Trust for Historic Preservation*, 118 F.R.D. 264 (D. D.C. 1988). The court held that the work product doctrine prevented the Plaintiff from gaining access to the Defendant’s legal research resources and findings conducted through a computer assisted legal research system.

□ *Hoffman v. United Telecomms., Inc.*, 117 F.R.D. 436 (D. Kan. 1987). In an interrogatory, Plaintiff requested specific information concerning a computer file containing information regarding possible employment discrimination. The court denied requesting party’s motion to compel finding that since the data would reveal Defendant’s discovery plan, the information was protected by the work-product doctrine.

□ *Transamerican Computer Co. v. IBM*, 573 F.2d 646 (9th Cir. 1978). The court was more lenient regarding waiver of privilege where the party was required to produce larger amounts of data and where they actually performed some degree of privilege review.

## Experts

□ *Premier Homes and Land Corp. v. Cheswell, Inc.* 2002 WL 31907329 (D.Mass. Dec. 19, 2002). In a property dispute, Plaintiff used an email purportedly sent from one of Defendant’s stockholders to Plaintiff’s president to form the core of its claim that the Defendant was not complying with the terms of a lease. The Defendant filed an ex parte motion to preserve certain electronic evidence and expedite the production of electronic records. The court, stating that it was necessary to determine the origin of the disputed email, ordered Defendant’s experts to create mirror images of Plaintiff’s computer hard drives, backup tapes, and other data storage devices. Soon thereafter, the Plaintiff confessed to his attorney that he had fabricated the email by pasting most of a heading from an earlier, legitimate message and altering the subject matter line. The Defendant’s motion to dismiss was granted and the court ordered the Plaintiff to pay the Defendant’s attorney and expert fees and court costs for committing a fraud on the court.

□ *Taylor v. State*, 2002 WL 31318065 (Tex.App. Oct. 17, 2002). On appeal, the Defendant argued that the trial court's refusal to order the State to provide him with a complete copy of the hard drive in question as "material physical evidence" for inspection requires reversal. Likening the situation to a drug case in which the Defendant has the right to have the contraband reviewed by an independent expert, the appellate court stated, "mere inspection of the images ... is not the same as an inspection of the drive itself (or an exact copy thereof). It is certainly not the same as an independent forensic examination of the contents of the hard drive by an expert."

□ *In re Pharmatrak, Inc. Privacy Litigation*, 220 F.Supp.2d 4 (D. Mass. 2002). In a class action

Privacy matter, the Plaintiffs alleged that Defendants had secretly intercepted and accessed Plaintiffs' personal information and Web browsing habits through the use of "cookies" and other devices, in violation of state and federal law. The Plaintiffs raised claims under The Wiretap Act, The Stored Communications Act, and The Computer Fraud and Abuse Act. Using computer forensic tools, Plaintiffs' expert was able to analyze the Defendant's Website tracking logs and determine that the Defendant had captured and possessed detailed private information about the Plaintiffs, including their: names, addresses, telephone numbers, dates of birth, sex, insurance status, medical conditions, education levels, occupations, and email content. Finding that the Plaintiffs failed to establish necessary elements of each of the above listed statutes, the Court issued Summary Judgment in favor of the Defendant.

□ *United States v. Lloyd*, 269 F.3d 228 (3rd Cir. 2001). The Third Circuit has ruled that a man convicted of planting a computer "time bomb" that crippled operations at New Jersey-based Omega Engineering Corp. is not entitled to a new trial on the basis of a juror prejudice. The ruling reinstates the verdict in which the Defendant was convicted on one count of computer sabotage. Computer experts were essential in recovering the evidence of the "time bomb".

□ *Munshani v. Signal Lake Venture Fund II*, 2001 WL 1526954 (Mass.Super. Oct. 9, 2001). In a dispute over authentication of an email message, the Court appointed a neutral computer forensics expert. Based on the expert's analysis and report, the Court found that the Plaintiff intentionally fabricated the disputed email and then attempted to hide that fabrication. The Court dismissed the Plaintiff's suit and ordered him to pay the Defendant's expert and attorney fees.

□ *Northwest Airlines v. Local 2000*, C.A. No. 00-08DWF/AJB (D. Minn. Feb. 2, 2000) (Order on Defendants' Motion for Protective Order and Plaintiff's Motion to Compel Discovery); *Northwest Airlines v. Local 2000*, C.A. No. 00-08DWF/AJB (D. Minn. Feb. 29, 2000) (Memorandum Opinion and Order). Court ordered Plaintiff's expert to act as a neutral 3rd party expert; on behalf of the court, the expert collected and imaged the Defendants' personal hard drives and provided the parties with a complete report of all data "deemed responsive." Court issued detailed protocol for conducting the electronic discovery.

□ *Simon Property Group v. mySimon, Inc.*, 194 F.R.D. 639 (S.D. Ind. 2000). On Plaintiff's motion to compel in a trademark case, the court held that Plaintiff was entitled to attempt to recover deleted computer files from computers used by Defendant's employees. The court required that protective measures be taken, including Plaintiff's appointment of an expert who would serve as an officer of the court and turn over the recovered information to Defendant's counsel for appropriate review.

□ *Playboy Enters., Inc. v. Welles*, 60 F.Supp.2d 1050 (S.D. Cal. 1999). The court appointed a computer expert who specialized in the field of electronic discovery to create a "mirror image" of Defendant's hard

drive. Court reserved Respondent's right to object to production after data capture by expert and review of materials.

□ *National Assoc. of Radiation Survivors v. Turnage*, 115 F.R.D. 543 (N.D. Cal. 1987). Court imposed sanctions on party that altered and destroyed computer documents in the regular course of business. Court appointed special master to oversee the discovery process.

□ *United States v. IBM*, 76 F.R.D. 97 (S.D.N.Y. 1977) Where Defendant was to produce information to plaintiff pursuant to prior court orders, but production did not comport with spirit and intent of those orders and was highly technical and complex in nature, the court determined that "exceptional conditions" existed, warranting appointment of examiner. The examiner's duties included reporting to court as to information that Defendant possessed and produced and supervising discovery.

## Computer Forensic Protocols

□ *People v. Carratu*, 2003 WL 230674 (N.Y. Sup. Ct. Jan. 22, 2003). Defendant moved to suppress computer evidence seized from his home and subsequently searched by the police department's computer forensic examiners. The Defendant claimed that the search warrants and supporting affidavits limited the search to documentary evidence relating to his illegal cable box operation and thus, the forensic examiner violated the Defendant's Fourth Amendment rights upon inspection of non-textual files with folder names clearly relating to other illegal activity. Granting the suppression motion, in part, the court stated, "In view of the Fourth Amendment's 'particularity requirement,' a warrant authorizing a search of the text files of a computer for documentary evidence pertaining to a specific crime will not authorize a search of image files containing evidence of other criminal activity."

□ *United States v. Triumph Capital Group*, 211 F.R.D. 31 (D.Conn. 2002). In order to prevent spoliation of evidence in a public corporation case, the government sought and obtained a search warrant to search and seize a laptop computer at issue. The warrant did not limit the search to any particular area of the hard drive. However, it did limit the government to search for and seize only certain evidence relating specifically to the charges and to follow detailed protocols to avoid revealing any privileged information. So that the data would not be altered, the government made mirror images of the hard drive and then proceeded with the computer forensic investigation. The Defendants argued that this mirroring amounted to a search and seizure of the entire hard drive and moved to suppress all evidence from the laptop. The court determined that although the search warrant limited the scope of the information that investigators could search for, technical realities required the government to make complete mirror images of the hard drive. Furthermore, the court ruled that copying a file does not necessarily constitute seizure of that file and that examining a file more than once does not constitute multiple searches under the Fourth Amendment.

□ *United States v. Al-Marri*, 230 F.Supp.2d 535 (S.D.N.Y. 2002). In the wake of the September 11<sup>th</sup> attacks, the FBI visited the Defendant's home perusing tips of the Defendant's allegedly suspicious activity. The FBI agents obtained the Defendant's consent to search his home and, with his affirmative consent and cooperation, seized his laptop computer, disks, and CDs for further investigation. Investigation of the computer hardware revealed evidence of credit card fraud. The Defendant moved to suppress the computer evidence, arguing that even if he validly consented to a search of his home, that consent did not encompass

the contents of his computer. The Court denied the motion to suppress and ruled that the FBI's lawful search of the Defendant's home encompassed the right to search the computer as a closed container.

□ *State v. Townsend*, 57 P.3d 255 (Wash. 2002) (Bridge, J. concurring). The principal issue the court resolved was whether a police officer violated a provision in Washington's privacy act when he saved and printed email and real time client-to-client ICQ messages between Defendant and a fictitious child. The court upheld the conviction and held that the act was not violated. In a concurring opinion, one judge further addressed the unique aspects of electronically created and stored email. "Technically, email messages are permanently recorded since 'most email programs keep copies of every message a user ever wrote, every message the user ever received, and every message the user deleted.' ... Although some email services may offer the possibility of 'shredding' an email message, arguably the equivalent of actually deleting it, the email file may still be retrievable using certain software. 'A deleted file is really not a deleted file, it is merely organized differently.' "

□ *Moench v. Red River Basin Board*, 2002 WL 31109803 (Minn. Ct. App. Sept. 24, 2002). Plaintiff was forced to resign from his executive director position after being confronted with allegations that pornographic images were found on his computer. The Plaintiff's employer used a computer forensic expert to investigate the pornographic material stored in the cache file of the Plaintiff's computer. Given that the Plaintiff's employment was terminated for cause, the Commissioner of Economic Security refused to issue unemployment benefits. The appellate court reversed the denial of benefits stating that the evidence in the record did not support the finding that the Plaintiff intentionally downloaded or stored any pornographic material on his computer.

□ *Ingenix, Inc. v. Lagalante*, 2002 U.S. Dist. LEXIS 5795 (E.D. La. Mar. 28, 2002). Defendant left his employment with the Plaintiff to work for Plaintiff's competitor as a vice president of sales. The Plaintiff (Defendant's former employer) filed suit against Defendant alleging fraudulent, abusive, and knowing misappropriation of computer files and proprietary information causing damage in excess of \$5,000 in violation of the Computer Fraud and Abuse Act. While the CFAA is a criminal statute, the court affirmed the rule that a violation of the statute can provide the basis for civil liability. Plaintiff's allegations were based upon evidence that the Defendant had misused his company laptop and took steps to appropriate data relating to customers "in the sales funnel" for his new employer. A computer forensic examination of email messages sent by Defendant and the pattern of Defendant's use and downloading of files from his laptop revealed that he had, in fact, downloaded and deleted confidential and proprietary customer information for use by Plaintiff's competitor.

□ *United States v. Bach*, 310 F.3d 1063 (8th Cir. 2002). In a criminal prosecution for possession of child pornography, Yahoo! technicians retrieved, pursuant to a search warrant, all information from the Defendant's email account. The lower court ruled that the seizure of the emails by Yahoo! was unlawful because police were not present when the Defendant's email account was searched. Reversing the lower court's opinion, the appellate court held that Yahoo!'s search of the Defendant's emails without a police officer present was reasonable under the Fourth Amendment and did not violate the Defendant's privacy rights.

□ *United States v. Tucker*, 150 F.Supp.2d 1263 (D. Utah 2001). The Defendant was found guilty of knowing possession of child pornography. The conviction was largely supported by computer

forensic evidence found in the form of deleted Internet cache files that were saved to the defendant's hard drive when he viewed the various websites.

□ *State v. Guthrie*, 627 N.W.2d 401 (S.D. 2001). In a criminal prosecution for murder, a computer specialist conducted several forensic searches on a computer used by the Defendant, finding that the computer had been used to conduct numerous Internet searches on subjects related to the incidents surrounding the murder. In addition, the forensic analysis was able to reveal that a computer printed suicide note, offered to exculpate the Defendant, was created several months after the victim's death. *State v. Guthrie*, 2002 WL 31618440 (S.D. Nov. 20, 2002). Anticipating that the State would not have time to thoroughly examine the evidence against the Defendant for murdering his wife, Defense counsel failed to disclose the victim's purported computerized suicide note during the discovery period. The appellate court affirmed the trial court's finding that defense counsel acted in bad faith by holding this evidence back from discovery. The appellate court also held that the fees of the State's computer forensic expert were reasonable because the expert was highly qualified in computer forensics.

□ *Adobe Sys., Inc. v. Sun South Prod., Inc.*, 187 F.R.D. 636 (S.D. Cal. 1999). In a computer piracy suit, the Court denied Plaintiff's *ex parte* application for a temporary restraining order. The Court based its decision on the fact that it is more difficult to erase evidence that is magnetically encoded on a computer hard disk than it is to physically destroy floppy disks, compact discs, invoices, and other tangible forms of evidence. "Manual or automated deletion of that software may remove superficial indicia, such as its icons or presence in the user's application menu. However, telltale traces of a previous installation remain, such as abandoned subdirectories, libraries, information in system files, and registry keys... Even if an infringer managed to delete every file associated with Plaintiffs' software, Plaintiffs could still recover many of those files since the operating system does not actually *erase* the files, but merely marks the space consumed by the files as free for use by other files."

□ *Byrne v. Byrne*, 650 N.Y.S.2d 499 (N.Y. Sup. Ct. 1996). In a divorce proceeding, the wife sought access to her husband's computer, which husband used for both business and personal purposes even though computer was provided by husband's employer. The wife was awarded such access to search the computer for information about the couple's finances and marital assets.

## Admissibility

□ *J.P. Morgan Chase Bank v. Liberty Mutual Ins.*, 2002 WL 31867731 (S.D.N.Y. Dec. 23, 2002). In a suit against insurance companies that had guaranteed payment in the event of Enron's bankruptcy, the court weighed the admissibility of several emails. The court determined that emails authored by senior bank officials would be allowed into evidence and that a reasonable juror could find these emails probative of the Defendants' central proposition that the transactions were actually uninsurable "off-the-books" loans.

□ *Kearley v. Mississippi*, 2002 WL 31372319 (Miss. Ct. App. Oct. 22, 2002). A criminal defendant was convicted of sexual battery and appealed on several issues including proper authentication of emails which he allegedly sent to the victim. The appellate court held that the victim's testimony that she had received and printed the emails on her computer was sufficient authentication under the rules of evidence, and the court upheld the conviction.

□ *State v. Cook*, 2002 WL 31045293 (Ohio Ct. App. Sept. 13, 2002). Defendant appealed his conviction for possessing nude images of minors, claiming in part that the trial court erred in admitting materials, over the Defendant's objection, that were generated from a "mirror image" of the Defendant's hard drive. After a detailed discussion of the mirror imaging process, the authenticity of the data taken from the image, and the possibility for tampering, the appellate court found that the trial court properly admitted the evidence.

□ *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F.Supp.2d 1146 (C.D. Cal. April 22, 2002). In a copyright and trademark infringement action, the Court refused to find that all evidence printed from websites is inauthentic and inadmissible. Instead, the Court found that the printouts were properly authenticated under Fed.R.Evid. 901(a) where the plaintiff's CEO adequately established that the exhibits attached to his declaration were "true and correct copies of pages printed from the Internet that were printed by [him] or under his direction."

□ *New York v. Microsoft Corp.*, 2002 WL 649951 (D.D.C. Apr. 12, 2002). Microsoft challenged several emails appended to the written testimony of one of the Plaintiff's witnesses, claiming that the statements contained therein were inadmissible hearsay. The court excluded multiple email messages using the following reasoning: (1) they were offered for the truth of the matters they asserted, (2) had not been shown to be business records as required under Rule 803(6), and (3) contained multiple levels of hearsay for which no exception had been established.

□ *Sea-Land Service, Inc. v. Lozen Int'l*, 285 F.3d 808 (9<sup>th</sup> Cir. April 3, 2002). The Court ruled that the trial court should have admitted an internal company email, which an employee of the plaintiff had forwarded to the defendant. The defense persuasively argued on appeal that the email was not excludable hearsay because her remarks in forwarding the email manifested an adoption or belief in truth of the information contained in the original email. The Court ruled that this satisfied the requirements for an adoptive admission under Fed.R.Evid. 801(d)(2)(B).

□ *Harveston v. State*, 798 So.2d 638 (Miss. Ct. App. 2001). In a criminal burglary prosecution, the Court refused to allow in computer database print-outs under the State's business records exception to the hearsay rule. The Court held that the State failed to meet its burden because "[T]here was no evidence offered as to the means by which the information...was compiled. The only testimony came from an investigating officer who limited his testimony to the fact that law enforcement officers routinely make use of such information. [However, t]he reliability of the information in 'business records' is determined by the competence of the *compiler* of the information and not the extent of the *consumer's* reliance on information received from another source."

□ *V Cable Inc. v. Budnick*, 23 Fed.Appx. 64 (2<sup>nd</sup> Cir. 2001). In an investigation of illegal sales and distribution of cable equipment, the police seized computers believed to contain relevant evidence of the crime. After holding the computers in question, the police sent them to an independent software company for analysis. Appellant's argument implies that, once they left police custody, the computers and any records obtained there from became corrupted and, therefore, inadmissible under Rule 803(6) of the Federal Rules of Evidence. The Court found the documents to be sufficiently trustworthy to be admitted under Rule 803(6).

□ *United States v. Meienberg*, 263 F.3d 1177 (10<sup>th</sup> Cir. 2001). The government introduced print-outs of computerized records and the Defendant objected to these print-outs based on lack of authentication. The Court held that the government met its burden by presenting a witness who testified that the print-outs were

a record of all transactions. The Court held that this was in accordance with Federal Rule of Evidence 901(b)(7).

□ *Bowe v. State*, 785 So.2d 531 (Fla. Dist. Ct. App. 2001). “An email ‘statement’ sent to another is always subject to the limitations of the hearsay rule.”

□ *People v. Markowitz*, 721 N.Y.S.2d 758 (N.Y. Sup. Ct. 2001). In a larceny and possession of stolen property suit, the court admitted computer databases that indicated how much money should have been collected by the defendant toll-booth worker. The testimony of an employee of the company that prepared the databases was sufficient foundation for admission of the electronic records.

□ *Hardison v. Balboa Ins. Co.*, 4 Fed. Appx. 663 (10th Cir. 2001). To prove that an insurance company had followed notice of cancellation requirements, the court admitted computer files and print-outs regarding how the cancelled policy was processed and maintained. The court stated that computer business records are admissible under Rule 803(6) “if the offeror establishes a sufficient foundation in the record for [their] introduction.”

□ *Broderick v. State*, 35 S.W.3d 67 (Tex. App. 2000). In child sex abuse prosecution, the court affirmed the trial court’s admission of a duplicate of defendant’s hard drive, in place of the original. The court concluded that the state’s best evidence rule did not preclude admission because the computer expert testified that the copy of the hard drive exactly duplicated the contents of the hard drive.

□ *St. Clair v. Johnny’s Oyster & Shrimp*, 76 F.Supp.2d 773 (S.D. Tex. 1999). “[A]ny evidence procured off the Internet is adequate for almost nothing, even under the most liberal interpretation of the hearsay exception.”

□ *SKW Real Estate Ltd. v. Gallicchio*, 716 A.2d 903 (Conn. App. Ct. 1998). A computer-generated document is admissible in a foreclosure action, pursuant to the business records exception to the hearsay rule.

□ *Monotype Corp. v. Int’l Typeface Corp.*, 43 F.3d 443 (9th Cir. 1994). The court declined admission of a detrimental email in a license infringement action, due to the prejudicial nature of the message and fact that the email was not admissible under the business record exception.

□ *United States v. Bowers*, 920 F.2d 220 (4th Cir. 1990). Computer data consisting of IRS taxpayer data compilations is admissible as official records.

□ *United States v. Catabran*, 836 F.2d 453 (9th Cir. 1988). Computer printouts are admissible as business records under the Federal Rules of Evidence 803(6), provided that proper foundational requirements are first established.

□ *State of Wash. v. Ben-Neth*, 663 P.2d 156 (Wash. Ct. App. 1983). Computer-generated evidence is hearsay but may be admitted as a business record provided a proper foundation is laid.

□ *United States v. Vela*, 673 F.2d 86 (5th Cir. 1982). The court admitted computerized telephone bills under the Business Records exception where a telephone company employee laid the proper foundation for the

reliability of the telephone bills record-keeping process. In describing the reliability of the computer generated documents, the court stated that the computerized reports “would be even more reliable than ... average business record(s) because they are not even touched by the hand of man.”