

FACTS FOR CONFERENCE OF THE PARTIES

ASSIGNMENT: You will represent a client in a “meet and confer” conference for a case that is pending in the United States District Court for the District of Maryland. Please discuss this with the other team and decide who will represent the plaintiff and who will represent the defendant.

The conference will last for 45 minutes. At the end, you will have five minutes to orally provide a report to the court through one or more spokespersons. You should state areas of agreement, areas of disagreement, and areas where court resolution is requested.

You will not be graded on your knowledge (or lack of knowledge) of computer science. You are negotiating as attorneys and will be graded on your legal knowledge, skill, and tactics. You may communicate with your opponents before the conference.

DATE DUE: The conferences will be conducted on the dates discussed in class. Please provide the names of the students in each group. We will set the times for each presentation. Given the time commitment involved, absent good cause, your grade may be reduced if you are late to the conference. Each group should bring two typed sheets with the students’ names and i.d. numbers to the conference.

HYPOTHETICAL PRICES FOR FORENSIC SERVICES:

Please assume that all experts and attorneys live in Baltimore and that there is no charge for commuting to any site located in the Baltimore metropolitan area. Please assume that the qualifications of all experts are identical and adequate.

1. The cost to make a mirror image of one hard drive is \$1,000. If more than 35 drives are imaged, the cost drops to \$750 each. If travel to more than one location is involved, travel time is \$150 per hour, plus mileage and expenses. The expert

- prefers lobster for lunch, crab cakes for dinner, and fine hotels, with in-room movies.
2. The cost to actively copy ESI on a server is \$75 per GB. This will not capture deleted or fragmented data. The cost to capture that data is \$8,000 to \$10,000 depending on the size of the server, and the server must be “taken down” for a number of hours. And with older servers, there is always the danger that the server will not come back up after it has been downed. If travel to more than one location is involved, travel time is \$150 per hour, plus mileage and expenses. The expert prefers lobster for lunch, crab cakes for dinner, and fine hotels, with in-room movies.
 3. The cost of preserving data on a cell phone or PDA is \$500 per unit, without travel time.
 4. Computer forensic consulting services are at \$350 per hour. If travel is involved, travel time is \$150 per hour, plus mileage and expenses. The expert prefers lobster for lunch, crab cakes for dinner, and fine hotels, with in-room movies.
 5. A blank backup tape costs \$90.
 6. Plaintiff’s attorney charges \$400 per hour. Defense counsel charges \$300 per hour.
 7. Once ESI is preserved, the computer forensics expert charges \$325 per GB to search the preserved data by keyword searches. The resulting extracted data is then charged at \$325 per GB to be reconstructed in MSG or EML format. This includes removal of all non-responsive files such as system files and program files, as well as de-duplication. It then must be processed for use in a review tool

- at a cost of \$800 per GB for native file extraction, metadata extraction and full-text extraction. If you wish to have tiff or pdf conversion as well, the cost increases to \$1,500 per GB. These costs do not include the costs of voice mail or specialized services, as set out below.
8. The cost to preserve voice mail .wav files is \$100 per GB. The cost of processing those files is to be determined.
 9. In-house information technology personnel for both the plaintiff and the defendant bill at \$75 per hour.
 10. The cost for media to copy the preserved information to, i.e., external hard drives or tapes, is \$10 per GB. The cost for storage of that information is \$5 per GB per year.
 11. The cost of specialized services is \$400 per hour. This includes anything that is out of the ordinary, such as preservation of vehicle data recorders, unique databases where the data cannot be separated from the application software, legacy systems, and analysis of unidentified backup tapes, floppy disks, and CD's.

NETWORK DIAGRAM:

The following is a network diagram of plaintiff's system:

Plaintiff's counsel may, but is not required to, prepare a diagram.

The following is a network diagram of defendant's system:

Defense counsel may, but is not required to, prepare a diagram.

ORGANIZATION OF I.T. DEPARTMENTS

Neither party has a written organizational chart; however, either may prepare one.

FACTS:

Procedural posture of the litigation:

ABC Corp., and XYZ, Inc., are engaged in a commercial dispute. Suit has been filed in the Northern Division of the United States District Court for the District of Maryland. Plaintiff (ABC) has sued for \$600,000; however, plaintiff also asserts a claim for punitive damages in the amount of \$1 million. Defendant (XYZ) has answered, denying the claims, and has also counterclaimed for \$400,000. The case presents solely commercial issues; there are no significant issues of public policy presented.

Plaintiff's counsel called defense counsel and suggested a "meet and confer" at plaintiff's counsel's offices, in Baltimore. You are meeting at that location. Coffee has been served.

Previously, each party sent an appropriate preservation letter to the other. Each party issued a proper litigation hold letter. Each party wrote back to the other, suggesting that the opponent's preservation letter was overly broad, unduly burdensome, incomprehensible, etc. You may refer to the preservation or hold letters prepared by your side, if you provide them to your opponent well before the graded exercise. Each party has a written document management plan and backup tape recycling policy.

The parties had extensive settlement discussions, without reaching an agreement. During the settlement negotiations, each party disclosed certain documents and ESI to the other.

General description of the litigants:

Plaintiff is a fairly large, fairly sophisticated entity with gross sales of approximately \$1.2 million per year and a net worth of \$5 million. It is a closely held corporation,

owned by Mr. Husband and Ms. Wife. It is generally solvent, but has experienced some cash flow problems due to this transaction, and due to a general downturn in the market.

Defendant is a publicly-held corporation. Its gross sales are \$18 million per year. Its net worth is \$75 million. It has, however, been involved in a lot of litigation. Currently, there are 6 lawsuits pending against it. The other plaintiffs are seeking a total of \$100 million. It has 6 litigation holds in place, plus the one in this case. Last year, it spent \$1 million on forensic computer services. The cost of such services is a substantial drain on the bottom line.

Description of the dispute:

XYZ is a manufacturer. ABC purchases goods from XYZ and resells them. The items are “high ticket,” costing approximately \$95,000 each. They are medical devices that are used in delicate surgeries.

Generally, the devices are manufactured to order, on very short notice. A surgeon planning an operation orders one of the devices in a size and shape that is designed to the specific patients’ measurements. Time is of the essence and, absent timely delivery, surgery cannot be performed and a patient may die. XYZ operates “24/7” and its customers are located on every continent. XYZ is not the only manufacturer of the devices; however, there are very few manufacturers and the device is critical.

ABC purchases the devices at wholesale and sells them at retail to hospitals and surgeons. ABC has a vast client base in the medical community. Due to the nature of the business, orders generally come in by voice mail, followed by an email. A purchase order may be sent, but, if so, it often comes in after the sale is made.

On June 1, XXX0, ABC received a voice mail from a surgeon requesting a 20” x15” device. ABC, acting through Mr. A, immediately placed an email order with XYZ, requesting that the item be drop shipped by overnight delivery to the Venice Beach Hospital. ABC, acting through Ms. B, placed the order via voice mail on XYZ’s voice mail system. There is no question but that the message was placed on the correct voice mail system. The surgeon then sent an email to Mr. C, of ABC, asking for a 20 x 15 device, and requesting drop shipment to VBH. Surgery was set for the following day and the patient’s condition was critical. ABC forwarded the email to XYZ. ABC’s salesman, Mr. Jones, sent an email to his counterpart at XYZ, Ms. Smith, stating that the device was urgently needed for life-saving surgery the following day.

XYZ followed its usual procedures. Mr. X forwarded the messages to its manufacturing and shipping divisions. The device was promptly and timely manufactured; however, during the process, XYZ contends that, because the voice mail message was garbled, Mr. Y sent an email to ABC requesting clarification. Receiving no response, XYZ manufactured a device that was 20 cm. x 15 cm., instead of 20” x 15”. XYZ drop shipped the item to the law firm formerly known as Venable Baetjer and Howard, instead of Venice Beach Hospital. The patient died as the direct and proximate result.

While XYZ followed its usual procedures, it deviated from the 10-year course of conduct that it had established with ABC. In the past, Mr. Z had always sent a confirming email to the surgeon, with a copy to ABC. XYZ failed to send a confirming email.

The patient's estate and family filed wrongful death and survivor actions against ABC. ABC filed a third-party complaint for indemnity against XYZ. XYZ, not having been paid by ABC, filed a counterclaim for breach of contract.

Description of the information technology of the parties:

Plaintiff, ABC, is a small-time operation. Husband and Wife opened the doors in 1945, when Husband returned from WWII. The books and records were always kept on paper. Gladys has been the bookkeeper since 1950. Her daughter, Jane, was hired as a secretary, but Jane went to a Microsoft certification school that was advertised on a match book cover and, with that and some on-the-job training, Jane became the company chief information officer, or CIO, and the network administrator.

Against Gladys' wishes, Jane has been slowly converting the company record-keeping to computer. She uses commercial, off-the-shelf applications, like QuickBooks and Peachtree. Records for the past two years are stored on the company's active network. They include the accounting register that shows cash flow, receivables, and, payables. The company payroll and bank accounts are maintained with similar software. Gladys, distrustful of computers, keeps a duplicate set of books on paper.

Various company personnel use email, at home, at the office, and on PDAs. Many employees utilize cell phones. Complex transactions are analyzed using spreadsheets or slide rules, and correspondence is drafted on word processing. The company has a calendaring program and employees are encouraged to use it. All employees are directed to save their documents on the network. Not all comply, because many distrust Jane's abilities.

Before it purchased word processing software, the company used typewriters with ribbons and IBM selectric memory typewriters. The ribbons, with impressions of letters, and the memory typewriters are in the basement, along with a few old PC's and one antiquated email server that crashed a few months ago.

The company document management policy calls for deletion of email after 45 days. Invoices, purchase orders, bills, correspondence, accounting documents, etc., are to be maintained for two years. After one year, they are converted from native format to .pdf.

The company has 50 workstations and notebook computers. It has a file server, an email server, a print server, and a database server. QuickBooks and Peachtree data are on the database server. Each server is backed up daily. Backup tapes are kept for 90 days and then recycled. There is a collection of old backup tapes, floppy disks and CD's, none of which are marked with identification. There are 35 tapes, 100 disks, and 75 CD's.

The servers are limping along on bubble game and duct tape. They need to be replaced immediately. Jane has ordered and received new servers and is ready to migrate to the new system. She told Husband and Wife that the current system can crash at any time.

Jane estimates that approximately 75 GB of data resides on each server. Setting aside applications, there is likely about 3 GB of data on many of the workstations. All of the data is located in the company's Baltimore building, except that Jane takes a quarterly backup tape to an off-site facility at North Beach in Miami each quarter, for security purposes.

Defendant, XYZ, is a far-flung company. Its I.T. system is its life-blood. It cannot be shut down for any reason, and operates “24/7.”

John, the CIO, has multiple degrees from universities in information systems management. He is assisted by a network administrator and three technicians. He has been with XYZ for 10 years.

XYZ uses a sophisticated electronic record-keeping system that was designed specially for XYZ’s industry. It is called “SuperMax.” SuperMax stores all of its data on the SuperMax server. A license for SuperMax costs \$100,000. When SuperMax data is separated from SuperMax, it becomes gibberish. Because of the value of this data, XYZ has three RAID servers that do nothing but store, maintain, and backup SuperMax data. One is in Baltimore, one is in Los Angeles, and the other is, coincidentally, at the same storage facility in North Beach, Miami.

XYZ uses email extensively. It has over 200 work stations, plus uncounted PDAs. There are five email servers, at various locations around the country. Employees work long hours and are encouraged to “telecommute,” using their home computers for business purposes. XYZ provides licenses for word processing and spreadsheet programs that employees may install on their home computers, for business purposes.

Word processing is important, but XYZ considers that a local and decentralized function. Each of its six field offices, plus the headquarters, has its own server for word processing.

Systems are backed up daily. Tapes are recycled every 30 days, with quarterly tapes being kept for two quarters. Annual tapes are made every December 31, and kept for two years. XYZ generates approximately 200 backup tapes per month.

XYZ's computer usage policy forbids the storage of corporate data on workstations, except for laptops when an employee is traveling. XYZ has purchased copies of Evidence Eliminator and Office Depot "data deletion suite." Employees who save data on a laptop are directed to transfer it to the network at the earliest possible opportunity and to "wipe" the laptop for security purposes.

XYZ has been unable to estimate the volume of data stored on its systems. It believes that it approaches 1 terabyte.

XYZ has large volumes of privileged information. Most of it is of little value. XYZ has no tactical concern about sharing it with ABC, but XYZ cannot waive either the patient's confidentiality privilege or the attorney-client privilege. XYZ is particularly concerned about a possible federal criminal investigation.

Allegations of dishonesty:

During the transaction, XYZ claims that it sent an email to Husband, with a "cc" to Wife, explicitly describing the key facts. Husband and Wife deny receiving the email. Jane cannot find it on ABC's active system.

In earlier settlement discussions, each party exchanged certain information. ABC asked XYZ for copies of certain drafts and email. XYZ claims that it did not have the ESI that ABC asked for. (Please ignore any issue as to whether statements in settlement discussions are admissible. For our purposes, they are fully admissible.)

The need for third-party discovery via subpoena: ASP's, former employees, board members, and outsourced vendors:

As noted, both parties store data in the North Beach, FL, facility.

As noted, XYZ considers word processing to be a local function. About two years ago, however, it experimented with an "application service provider," or ASP. The ASP

provided word processing services over the internet. Employees accessed the word processing server and their documents were saved on the ASP's servers, much like a law student would access Lexis or Westlaw.

XYZ has great faith in John; however, it also contracts with an outside vendor, "Computer Fixers," to provide services when John is in North Beach, and because John cannot be everywhere at every time. Computer Fixers has the passwords and access codes to all of XYZ's systems. On rare occasions, it goes "over the line" to copy XYZ data to its own network, where it can check for corrupted or damaged files.

Husband and Wife have one son and one daughter. The children were on the Board of Directors; however, both preferred to perform their functions from the comfort of their well-furnished offices in San Francisco, where they were employed full-time by Prestige Law Firm (PLF) and Prestige Accounting Firm (PLA). The children received company email messages on PLF and PLA computers, where they were stored and backed up like all other ESI of PLF and PLA.

Bill was employed by ABC for 1 ½ years. Things did not go well for Bill at ABC. He was fired. Contending that he was fired for age discrimination, one weekend he broke into the locked I.T. room and stole a lot of ESI. ABC has demanded that Bill preserve the ESI and, in fact, return it. Bill has said, "pound sand, I can do whatever I want with it. I may sell it or destroy it." ABC does not know what information Bill has. Bill worked on this transaction.

OTHER DIRECTIONS:

This is intended as a learning experience. Please focus on the facts. While there is no imposed time limit for preparation, it is suggested that you spend no more than six

hours on this project. The hypothetical is complex. You will not get every issue. You will not have time to discuss every issue. You will be graded on your general approach. I have tried to give you an abundance of material, with no expectation that you will address everything. If you try to do everything, you will not be prepared for the “meet and confer” conference until 2013.

You are free to do any legal research that you desire. You are not required to do any legal research and you may, but need not, cite to any legal authorities. Remember that this is a meeting between counsel. It is unlikely that you will persuade your opponent that justice and right are on your side. Please be practical. Explain why your approach is in your opponent’s interest. You don’t have to “sell” a good idea.

You should be prepared to make a presentation to the court at the end of the conference. As mentioned in class, feel free to use the discussion group feature of TWEN to raise issues. That way the response will go to all students. You may discuss this problem with any member of the group at any time. If plaintiffs are having a discussion with defendants, both plaintiff counsel and both defense counsel should participate. Please do not discuss this with any other group. Because the exercise will take place at different times, please do not disclose any information to groups participating at a later time or date.