TRIAL LAWYERS SECTION OF THE FLORIDA BAR

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E-Discovery Update 2003

by Michelle C.S. Lange, Esq. And Christopher Wall, Esq.[1]

From the investigation and pre-discovery stages of a lawsuit through trial and beyond, zealous advocacy requires a solid understanding of many issues both legal and practical. Most attorneys today are finding that a basic understanding of technology (and in some cases thorough computer proficiency) is also essential to effectively litigate a matter. The e-information explosion requires litigators to develop plans for requesting, producing, and managing electronic documents to protect their own client's interests and to gain a strategic advantage over their opponents. This article summarizes some of the past year's electronic discovery developments specifically relating to cost allocation, sampling protocols, preservation and sanctions, and other rule development in the e-discovery arena.

Cost Allocation

Cost allocation case law is perhaps one of the fastest growing areas in e-discovery jurisprudence. The recent set of *Zubulake* decisions by Judge Scheindlin [*Zubulake v. UBS Warburg*, 2003 WL 21087884 (S.D.N.Y. May 13, 2003); *Zubulake v. UBS Warburg*, 216 F.R.D. 280 (S.D.N.Y. 2003); *Zubulake v. UBS Warburg*, 2003 WL 22410619 (S.D.N.Y. Oct. 22, 2003)] reflect a fundamental shift in how attorneys and courts must approach the discovery of digital data. Given that some of the most intense arguments ensue over which party should bear the costs associated with electronic discovery, counsel facing large-scale discovery of electronic information should consider the following points. Like other areas of potential disagreement, counsel for both sides are encouraged to meet and discuss these issues before seeking judicial intervention.

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Chair's Message

BY KELLY G. HAMER

I would like to extend my thanks, on behalf of the Trial Lawyers Section and its Executive Council, to all those members who have contributed to making this a productive year for the Trial Lawyers Section. We have continued in our efforts to advance issues relating to Trial Lawyers while protecting the interests of our clients and focusing on the professionalism that is necessary and vital to our practice of law.

This Section continues to work tirelessly, with the help of Buddy Jacobs, to actively participate in the legislative process when it concerns access to courts and issues particularly relevant to the trial practice. We continue to focus on legislation involving the independence of the judiciary, Article V funding and medical malpractice reform. These issues are still being actively debated and we are monitoring their progress and will weigh in on those which we believe affect trial lawyers and client's rights.

Previously, the Section had been asked to address changes to the Uniform Cost Guidelines. From the results of that task force, we then specifically focussed on the high costs of expert witness fees in civil litigation and how to reduce or contain those fees, and thus reduce overall litiga-

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tion costs. We made specific recommendations to promote uniformity and to reduce costs which we disseminated to other interested groups to get their input before forwarding these recommendations on to the Supreme Court.

Our CLE Committee, chaired by Brad Powers, has again offered a variety of courses for the trial lawyer which includes alternative dispute resolution, damages, evidence, trial certification review and the ever popular trial advocacy programs. The Advanced Trial Advocacy Program, held in Gainesville every year, continues to offer seasoned practitioners an opportunity to hone their advocacy skills in a friendly environment with the benefit of advice from some of the best trial lawyers in the state. It also includes participation by London barristers which adds an extra aspect of advocacy training not available anywhere else.

The Section also continued its very successful Chester Bedell Mock Trial Competition at the mid-year meeting. Outstanding teams from six Florida law schools competed. This provided a great opportunity for these young advocates to interact with trial lawyers and judges from across the state to begin learning the art and professionalism of being a trial lawyer.

First published by the Section in 1995, the Handbook on Discovery Practice continues to be a vital tool to the practicing trial lawyer regarding current law on discovery issues. The Handbook has been updated each year by Mark Buell and his committee to reflect the ever changing landscape of discovery in civil litigation. The Handbook has been endorsed by the Conference of Circuit and County Judges and has become required reading in some Florida courtrooms.

Similarly, the Section also developed the Guidelines for Professional Conduct which has been disseminated to lawyers since 1994. These Guidelines help provide direction to lawyers in their efforts to zealously represent their clients while maintaining professionalism which is so important to the successful practice of law.

Both the Guidelines and the Handbook can be found at the Trial Lawyers Section website (www.flatls.org). This website is continuously updated to provide members access to a variety of information concerning CLE, membership, recent newsletters, discovery sanction orders and other information valuable to the practicing trial lawyer.

The Advocate, our quarterly newsletter, provides a forum for trial lawyers to express opinions and to educate their fellow trial lawyers on topics which are currently on the forefront of the trial practice.

Finally, I would like to express my personal thanks and gratitude to the members of the Executive Council who have worked tirelessly to make this trial bar one of the most recognized and respected ones in the nation. I appreciate the opportunity granted to me to serve not only as a past council member, but as the Chair of such an honorable organization. I would also like to thank our Section Administrator, Connie Stewart, for all that she does to help the Section run smoothly. I leave the leadership of the Section in the capable hands of the incoming Chair, Tom Masterson and Chair-Elect, Mark Buell. These two gentlemen will continue to lead this strong and successful section into the future.

E-DISCOVERY UPDATE 2003

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Become familiar with the case law.

Currently, the law governing electronic discovery cost allocation is unsettled, inconsistent, and highly case specific. No clear protocol has developed. As such, plenty of room exists for strong legal advocacy. The traditional rule when dealing with discovery is that each side bears its own costs; thus, the responding party must bear the expense of complying with discovery requests. *See Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978). However, especially in the electronic evidence context, courts are willing to entertain cost shifting arguments to protect from "undue burden or expense." *See e.g., Playboy Enters., Inc. v. Welles*, 60 F.Supp.2d 1050 (S.D. Cal. 1999). *But see In re Brand Name Prescription Drugs Antitrust Litig.*, 1995 WL 360526 (N.D. Ill. June 15, 1995). It is important to continually monitor the case law in this area as new decisions affecting the legal landscape are issued almost each month.

Evaluate the Burden and Expense.

The court in *Zubulake* stated that cost shifting should only be considered when e-discovery imposes an undue burden or expense. Demonstrating burden and expense will require both parties to become familiar with the physical location, type, and amount of data. Post-*Zubulake*, particular attention must be given to

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whether the data is in an accessible format (active data on hard drives or servers, near-line data housed on optical disk or magnetic tape, data stored on removable media) or an inaccessible format (data contained on backup tape, erased/fragmented/damaged data). Responding parties should be prepared to specifically demonstrate to the court the burden and expense of producing the electronic data. This means quantifying the resources, time and cost involved in restoring, converting, searching, reviewing, and producing the data. Requesting parties should closely scrutinize the responding party's estimations and argue inaccuracies to the court if necessary.

Prepare Cost Shifting Arguments and Responses.

The seven factor *Zubulake* decision, which modifies the eight factor test set forth in *Rowe Entertainment, Inc. v. The William Morris Agency*, 205 F.R.D. 421 (S.D.N.Y. 2002), is the most recent reported decision addressing cost allocation. The seven factors include:

(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.

(7)The relative benefits to the parties of obtaining the information.

According to the *Zubulake* court, the *Rowe* test generally favors cost-shifting, undercutting the presumption that the responding party pays. In addition, unlike *Rowe*, the *Zubulake* court discourages treating the seven factors as a checklist. Instead, the factors are listed in the order of importance, with the first two factors being the most important and the seventh factor carrying the least value.

In the second *Zubulake* decision, the court utilized the seven factor cost shifting test set forth in *Zubulake I*, determining that some cost shifting was appropriate. However, as stated by the court, "[P]recise allocation is a matter of judgment and fairness rather than a mathematical consequence of the seven factors discussed above." The court ordered the costs of backup tape restoration to be allocated between UBS and Zubulake seventy five percent and twenty-five percent, respectively.

Judge Scheindlin had the opportunity to utilize her seven factor test in another case involving electronic discovery, *Xpedior Credit Trust v. Credit Suisse First Boston*, 2003 WL 22283835 (S.D. N.Y. Oct. 2, 2003). In this case, the plaintiff moved for an order to compel the defendant to produce certain electronic documents in connection with the breach of contract action. The defendant countered with a motion for a protective order requiring the plaintiff to bear half the costs of producing the electronic documents. The documents at issue resided on optical disks and DLT tapes. Applying the *Zubulake* seven factor cost shifting test, the court found that cost shifting was not appropriate and ordered the defendant to bear its own costs in producing the

The fastest growing issue in electronic discovery is cost sharing.

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electronic data.

Counsel for both the requesting party and the responding party should become familiar with *Rowe*, *Zubulake*, and all future decisions in the cost allocation arena, and be prepared to craft arguments and responses accordingly.

Data Sampling

Data sampling protocols also continued to develop throughout the last year. In the first *Zubulake* decision, the court ordered the defendant to produce, at its own expense, all responsive email existing on five backup tapes as selected by the plaintiff. Only upon reviewing this sample data did the judge determine (in the second *Zubulake* opinion) that a broader search was necessary.

Several cases prior to *Zubulake* relied on this sampling approach to determine if producing a larger volume of electronic evidence is worth the cost involved. For example, in its August 1, 2001 Order, *McPeek v. Ashcroft*, 202 F.R.D. 31 (D.D.C. 2001), the *McPeek* court ordered the defendant to search a small number of 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. In *McPeek v. Ashcroft*, 212 F.R.D. 33 (D.D.C. 2003), 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 *McPeek* magistrate ordered additional searches of selected backup tapes likely to contain relevant evidence.

Most frequently sampling approaches, such as those used in *McPeek* and *Zubulake*, are utilized with inaccessible data, such as data contained on backup tape. Requesting parties should be prepared to identify which of their opponents' backup tapes would most likely produce the largest amount of responsive data to support their case. Once the backup tapes have been selected and the search terms have been solidified, production is relatively straightforward. The results of the sample are then presented to the court to determine if additional data restoration and production is necessary.

Preservation and Sanctions

Several cases over the past year have demonstrated the bench's commitment to preservation of electronic evidence and sanctioning those who would thwart justice inadvertently or through technological "gamesmanship."

As litigators and the courts become more conscious of the unique nature of electronic evidence, there have been an increasing number of cases involving preservation of that electronic evidence. *In Dodge, Warren, & Peters Ins. Servs. v. Riley* (130 Cal.Rptr.2d 385 (Cal. Ct. App. 2003)), the plaintiff claimed misappropriation of trade secrets, unfair business practices, breach of fiduciary duty and breach of contract. Before their employment was terminated, defendants copied and took with them volumes of computerized data maintained in plaintiff's files and storage media. The appellate court affirmed the trial court's order enjoining the defendants from destroying electronic evidence and ordered them to allow a court-appointed expert to make a snapshot preservation copy of 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.

But even where failure to preserve electronic evidence is unintentional, courts do not look any more favorably upon destruction of evidence. In *Keir v. UnumProvident*, 2003 WL 21997747 (S.D.N.Y. Aug. 22, 2003), plaintiffs brought and ERISA class action and sought an order from the court directing defendant to preserve all electronic evidence relevant to the issues of the case. After noting that the defendant "already had a duty to preserve any tapes containing emails as of the date litigation commenced," the court ordered the defendant to preserve all relevant electronic data and to specifically preserve six days of email records which were contained on backup tapes and hard drives. Instead of preserving all existing backups, or conducting a full tape email backup, the defendant's technical staff decided to implement a special snapshot backup which would only preserve emails on the system as of the day or days the snapshot was taken. In evaluating the defendant's conduct with respect to the preservation order, the court stated that "UnumProvident had ample time in the weeks before the December 27 [preservation] Order was signed to consult with its IT Department and with IBM to inform itself about the technological issues relevant to the preservation of electronic data so that it could bring accurate information to the negotiations of the preservation order and the conferences with the Court in which the December 27 Order was shaped, and comply promptly with the Order after it was issued." The court found the defendant's failure to preserve was unintentional, but nevertheless criticized the Defendant's poor compliance with the preservation order. The court recommended that further action be taken to determine the feasibility of retrieving the lost data and the extent of prejudice to the plaintiffs in order for the court to fashion a remedy for the plaintiffs. (*see also Hildreth Mfg. v. Semco, Inc.*, 785 N.E.2d 774 (Ohio Ct. App. 2003), in which, on appeal, the court found that even though 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.).

Along with preservation issues, new technology has clearly provided conniving and crafty counsel with new opportunities to "game" the system. But when are sanctions for technological gamesmanship appropriate? The most notable case from 2003 addressing the issue of sanctions for spoliation of electronic evidence was *Metropolitan Opera Assoc., Inc. v. Local 100*, 212 F.R.D. 178 (S.D.N.Y. 2003). In *Metropolitan Opera* the court granted harsh sanctions, finding the defendants liable and ordering the defendants to pay plaintiff's attorneys' fees necessitated by defendants' abuse of electronic discovery. Specifically, the defendants failed to comply with discovery rules by failing to search for, preserve, or produce electronic documents. The court stated that defense counsel:

"(1) never gave adequate instructions to their clients about the clients' overall discovery obligations, what constitutes a 'document'…;

(2)knew the [Defendants] 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 [Plaintiff's] persistent questioning and showings that the production was faulty and incomplete, ridiculed [Plaintiff's] 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 found that lesser sanctions, such as an adverse inference or preclusion, simply would not be effective in this case "because it is impossible to know what the [plaintiff] would have found if the [defendant] and its counsel had complied with their discovery obligations from the commencement of the action."

In other cases, an award of sanctions may not be appropriate, but an award of fees will be ordered by the court. For example, during the course of discovery in the *Zubulake* case, the parties discovered that certain backup tapes were missing and that emails had been deleted. The plaintiff moved for evidentiary and monetary sanctions against the defendant for its failure to preserve the missing tapes and emails. The court found that the defendant had a duty to preserve the missing evidence, since it should have known that the emails may be relevant to future litigation. Although the plaintiff did not file her charges until August 2001, by April of that year, "almost everyone associated with Zubulake recognized the possibility that she might sue," the court wrote. The court also found that the defendant failed to comply with its own document retention policy, which would have preserved the missing evidence. The judge found that although the defendant had a duty to preserve all of the backup tapes at issue, and destroyed them with the requisite culpability, the plaintiff could not demonstrate that the lost evidence would have supported her claims. Therefore, even though the court determined that an adverse inference instruction to the jury was not warranted, the court ordered the defendant to bear the plaintiff's costs for re-deposing certain witnesses for the limited purpose of inquiring into the destruction of electronic evidence and any newly discovered emails. *See Zubulake v. UBS Warburg*, 2003 WL 22410619 (S.D.N.Y. Oct. 22, 2003).

Other developments influencing Electronic Discovery legal corpus

In other developments concerning electronic evidence, there have been changes proposed to the ABA's Civil Discovery Standards and changes have already occurred in local court rules. This year's Sedona Principles also represent a significant movement among practitioners to come to a consensus on the appropriate approach to electronic discovery.

In August 1999 the American Bar Association adopted Civil Discovery Standards to address practical aspects of the discovery process that are not covered by state or federal rules. Two of these Standards, Numbers 29 and 30, address electronic discovery and have been cited in some of the most influential e-discovery jurisprudence, including *Zubulake*. Given the changes in this area in the last four years, the ABA Section of Litigation has reviewed and revised the Standards, and is now circulating for public comment a new set of draft electronic discovery Standards (http://www.abanet.org/litigation/public/home_discoverystandards.html).

The courts seem more willing to enter orders preserving electronic data for discovery purposes.

The Committee revised two existing Standards and added three new Standards:

Existing Standard 29 – Preserving and Producing Electronic Information.

Existing Standard 30 – Using Technology to Facilitate Discovery.

New Standard 31 – Effective Use of Discovery Conferences.

New Standard 32 – Attorney Client Privilege and Attorney Work Product.

New Standard 33 – Technological Advances.

Among other things, the proposed new rules raise some novel ap-

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proaches to handling discovery. For instance, under New Standard 33, under the heading, "Using Technology to Facilitate Discovery," the proposed Standard suggests that "(a) In appropriate cases, the parties may agree or the court may direct that some or all discovery materials be produced, at least in the first instance, in an electronic format and how the expenses of doing so will be allocated among the parties." That provision alone, if accepted as a practical standard, would go a long way toward streamlining electronic discovery. Among litigators and practitioners nationwide, there is no consensus as to method of electronic production; only consensus that there needs to be some standard.

While the Standards are simply standards, and not rules, they do provide much needed direction in areas such as e-evidence where there often is none. However, as rules are concerned, one notable pointer in the directional void is in New Jersey. The New Jersey Federal District Courts recently imposed new local rules relating to Fed. R. Civ. P. 26(f), specifically with respect to electronic discovery. The local rules address the duty to investigate, the duty to notify and the duty to meet and confer as those duties relate to electronic discovery during litigation (http://pacer.njd.uscourts.gov/njdc/rules/rules.htm).

As of October of 2003, District of New Jersey Local Civil Rule 26.1(d)(1) – (3) takes into account some of the unique aspects of electronic discovery. For example, sub-part (1) now requires that counsel, prior to the Rule 26(f) conference, "review with the client the client's information management systems including computer-based and other digital systems, in order to understand how information is stored and how it can be retrieved." The local rule further requires counsel to review with the client the client's active, archived and legacy data to determine what part, if any, of that data may be discoverable. Of particular note are changes to the meet and confer provisions of the local rule. In an effort to streamline the e-discovery process, the local rule requires the parties to confer and attempt to agree on issues concerning e-evidence preservation and inadvertent waiver of privilege,

Report from the ADR Committee

Colleagues:

I am pleased to report that our recent seminar "Success at Mediation and Arbitration Doesn't Just Happen! in Orlando was, like its title, a terrific success.

The morning session began with Perry Itkin and his always informative mediation case law update. The morning panel highlighted multiparty mediations. Much thanks to Peter Grilli, Michael Lax, Michelle Grocock, Richard Reinhart, James Edwards and Dan Gerber for their excellent ideas and suggestions on how to achieve positive results in these complicated situations.

Following a fascinating presentation by Professor Don Peters from the University of Florida Law School on ethics in negotiating, the afternoon was devoted to securities arbitration. First was a comprehensive legal update by Melanie Cherdack and Keith Olin. Patricia Cowart then led her distinguished panel of experts: Melanie, Keith, Howard Tescher, Roy Gonas and Rose Schindler through a a detailed series of scenarios filled with practical tips on how to guarantee a better result for you and your clients in arbitration proceedings.

Thanks to all of you who attended and participated in the seminar. Audiotapes are available from The Florida Bar.

The Committee will soon begin work on next year's event. If you have any suggestions for topics to be covered, feel free to contact me via email at john@salmondulbergmediation.com or by phone at 305-371-5490. Your input is always welcome.

John W. Salmon, Esq.
Chair, Alternative Dispute Resolution Committee

whether recovery of deleted, backed-up or legacy data will be necessary, in what format the digital information will be ultimately produced and who will bear the cost of the electronic discovery. As increasing numbers of courts and litigators deal with electronic discovery it will be interesting to see how many jurisdictions adopt similar requirements for dealing with electronic evidence.

One of the most encouraging electronic discovery developments of 2003 came with the Sedona Conference, an Arizona-based law and policy think tank, which published the first paper in its working group series. The paper, titled *The Sedona Principles: Best Practices Recommendations and Principles for Addressing Electronic Document Production* (available at http://www.thesedonaconference.org/publications_html), embodies consensus views of many respected lawyers and practitioners, and represents a reasoned and balanced approach to electronic discovery. The Sedona Principles have stimulated significant thought and debate on e-discovery issues.

Of particular interest were comments on the Sedona Principles from two thought leaders in the electronic evidence arena, Ken Withers and John Carroll. Their document, entitled "Observations on the Sedona Principles" (available at http://www.thesedonaconference.org/publications_html), critique the Principles from a neutral perspective. Even from a critical perspective, Withers and Carroll comment that, "[w]ithout endorsing the Principles themselves, we can say that the recommended business practices found in The Sedona Principles will assist judges in determining what benchmarks or baselines exist for business parties responding to electronic discovery requests." While the Sedona Principles are not the absolute last word on electronic discovery standards, they do represent a significant step forward toward the ultimate goal of generally accepted standards for handling electronic discovery.

Conclusion

These developments illustrate a trend toward embracing technology's role in the legal system. No longer is it appropriate to hide behind the technology, claiming that the systems are too antiquated, damaged, or burdensome to be searched for responsive documents and email. No longer can parties claim that e-document productions will take several months and are impossible to facilitate. Instead, judges are expecting litigators to turn to technological solutions for the problems that technology has created. The careful practitioner must develop an awareness of the unique challenges posed by the modern floodwaters of electronic discovery and stayed tuned for further common law and statutory developments in 2004.

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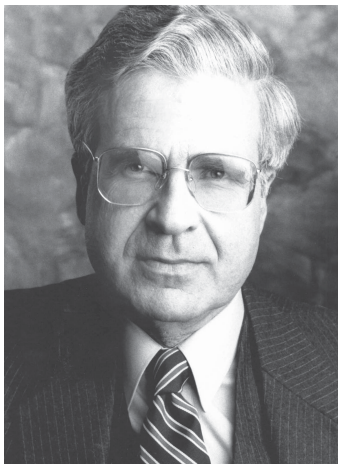

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New Tool Adds Strength to Damages Assessments

by Steven M. Collard[1]

When a case involving permanent partial disability is being litigated, often the medical outcome of the client s expressed in a percentage as an impairment rating. A zero impairment rating implies no limits, and as the impairment percentage rating goes up, the implication is that the degree of the severity of the condition is increased, and assumed difficulties in functioning are increased.

Medical doctors routinely provide impairment ratings, but there is a transparent stretch of logic, usually, for the jury to connect a quantity of ability to function from an impairment rating. Occasionally, a functional capacity evaluation is done, which reveals the effect of the impairment on the person's ability to perform a given function, and for the amount of time or tolerance for doing that particular task.

In 1980, the International Classification of Impairments, Diseases and Handicaps (ICIDH) was developed as a part of a global health measurement system. With this, the pluses and minuses of different medical treatments for similar conditions can be more readily analyzed to help improve health care, in both overall costs and patient outcomes. After nine years of international revision efforts coordinated by the World Health Organization (WHO), the World Health Assembly on May 22, 2001, approved the International Classification of Functioning, Disability and Health and its abbreviation of "ICF".

After nine years of revisions the ICF has now been approved by international organizations.

The ICIDH used a linear progression to describe the framework of a non-fatal health outcome from disease (injury0 to pathology to manifestation to impairment to disability to handicap. However, the new ICF is structured around the following broad components:

- Body functions and structure;
- Activities (related to tasks and actions by an individual) and participation (involvement in a life situation);
- Additional information on severity and environmental factors.

Functioning and disability are viewed as a complex interaction between the health condition of the individual and the contextual factors of the environment as well as personal factors. The picture produced

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Statute of Limitations Warning System

by Mike Flynn, Editor, *The Advocate*

The worst nightmare for any lawyer is blowing a statute of limitations! Every law office has (or should have!) A system in place to make sure that the statute of limitations does not run out on any case. Well, now there is a company that offers to take the worry out of missing a statute of limitations deadline.

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by this combination of factors and dimensions is of "the person in his or her world." The classification treats these dimensions as interactive and dynamic rather than linear or static. It allows for an assessment of the degree of disability, although it is not a measurement instrument. It is applicable to all people, whatever their health condition. The language of the ICF is neutral as to etiology, placing the emphasis on function rather than condition or disease.

In a recent case, the orthopedic surgeon opined, ". . .surgery wasn't indicated at t his time, but extensive soft tissue damage is causing pain in her neck and lower back, and the combined impairment rating for cervical and lumbar spine was 15% to the body as a whole."

Unfortunately, most doctors are not trained to know, for the more than 12,000 job titles, the worker characteristics or physical demands of a particular job.

As a vocational economist, I find that often there is a missing bridge from the impairment rating to the diminished level of functional ability. Questions are posed in cross-examination like, "Did any doctor tell you Mrs. Smith couldn't stand for more than 20 minutes, or maintain posture at her computer for more than 20 minutes per day?" "Did any doctor tell you that she couldn't go back to driving the truck cross-country?

The reply to these kinds of questions explains that there is an unexplained rationale within that medical impairment rating which covers the loss of functioning. If a person has ligament damage and self-reported limits that jibe with that type of damage, which didn't exist prior to the precipitating event, the doctor would agree with the cause and effect, and would tell you that's why an impairment rating was assignment. Yet, on the surface, it appears that the functional losses are being revealed by a non-medical professional.

As medical professions begin using the ICF, this transparent rationale of functional disenablement will become apparent. Level of functioning will be defined by the doctor through structured frameworks involving multiple life areas of the patient. Using the International Classification of Functioning, Disability and Health, a doctor will be lead to recognize the effect of an impairment on the individual in that individual's environment, and would detail it as such in the probable outcome, instead of as a mere percentage. The resulting base opinion from the doctor on the patient's health outcome will add significant strength to the damages portion of the case, and your vocational economist's testimony won't appear to be reaching into the medical domain.

[1].Steven M. Collard, M.Ed. is a vocational economist who lives in Venice, Florida.

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Look for registration information
in the 2004 Annual Meeting brochure
in the May Bar *Journal*.

NOTICE OF 2004 FEDERAL JUDICIAL ROUNDTABLE PROGRAM

The 2004 Federal Judicial Roundtable Program, hosted by the Federal Court Practice Committee, the Criminal Law Section and the Trial Lawyers Section of The Florida Bar, will be held on June 24, 2004, from 2:30 p.m. to 5:30 p.m., at the Florida Bar's Annual Meeting at the Boca Raton Resort and Club in Boca Raton, Florida.

More than one dozen federal judges will be serving as panelists in the Federal Judicial Roundtable Program. Those judges that have thus far committed to serve as panelists in the program include Judge Gerald Bar Tjoflat from the United States Court of Appeals for the Eleventh Circuit; Chief Judge Patricia C. Fawsett, Judge Henry Lee Adams, Jr., Judge William J. Castagna, Judge Mary S. Scriven and Judge Alexander L. Paskay from the Middle District of Florida; Judge Donald L. Graham, Judge Daniel T. K. Hurley, Judge Patricia A. Seitz, Judge Paul C. Huck, Judge Ursula Ungaro-Benages, Judge Adalberto Jordan and Judge Jose E. Martinez from the Southern District of Florida; and Judge Stephan P. Mickle from the Northern District of Florida.

The Federal Judicial Roundtable Program affords a unique opportunity for practitioners to interface with the federal judiciary in an intimate and stimulating atmosphere. During the first portion of the program, roundtable discussions will be conducted among the judges and practitioners in small group settings. During the second part of the program, the judges will participate in a lively and informative panel discussion which will be moderated by retired Judge Joseph W. Hatchett, Tod Aronovitz, Esquire and Robert Josefsberg, Esquire. Immediately following the program a reception will be held for the judges, moderators and practitioners.

There is no admission fee to attend the Federal Judicial Roundtable Program, however, seating is limited and reservations are strongly recommended. In that regard, please complete and return the reservation form at your earliest convenience.

Finally, it is anticipated that 3.0 CLE credits will be awarded by The Florida Bar for attendance at the Federal Judicial Roundtable Program.

Please contact Committee Chair, Lawrence Goodman, Sub Committee Chairs Jerry Gewirtz and Eileen Parsons, and Florida Bar Liaison, Gerry Rose, for further information.

TO MAKE A RESERVATION:

Please mail, or fax, your reservation to Connie Stewart at the address below:

To:
Ms. Connie Stewart
Program Administrator
The Florida Bar
651 East Jefferson Street
Tallahassee, Florida 32399-2300
Fax # (850) 561-5825

From:
FL Bar # _____
Name _____
Address _____
Phone # _____
Fax # _____

Please reserve ___ seats for me at the 2004 Federal Judicial Roundtable Program.

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The Honorable Harry L. Anstead
Justice, Supreme Court of Florida

Currently, there are nearly 4,000 attorneys Board Certified by the Florida Bar. Board certification symbolizes specialized skills, experience, and professionalism in the practice of law. It is one way of helping the public make a more informed decision when selecting a lawyer and it is a valuable resource for referrals among those within the profession. The Supreme Court of Florida has approved standards for certification in the following specialty practice areas:

- Admiralty & Maritime
- Antitrust & Trade Regulation
- Appellate Practice
- Aviation Law
- Business Litigation
- Civil Trial
- City, County & Local Gov't
- Criminal Appellate
- Criminal Trial
- Elder Law
- Health Law
- Immigration & Nationality
- International Law
- Labor & Employment Law
- Marital & Family Law
- Real Estate Law
- Tax Law
- Wills, Trusts & Estates
- Workers' Compensation

* To review the specific standards for each practice area, please refer to Chapter 6, Rules Regulating The Florida Bar.

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Minimum Requirements*

- ✔ A minimum of 5 years in the practice of law
- ✔ Substantial Involvement
- ✔ Passage of an exam
- ✔ Satisfactory peer review
- ✔ Completion of the certification area's CLE requirement

Important Dates

Application Filing Periods Each Year:
1st Cycle: July 1 - August 31
2nd Cycle: September 1 - October 31

Exam Dates Each Year (Day to be Announced):
1st Cycle: March
2nd Cycle: May

If you are interested in becoming Board Certified, please contact the area's staff liaison below:

800/342-8060 or 850/561-5842

Linda Cook - ext. 5735
lcook@flabar.org
* Criminal Trial (2nd Cycle)
* Criminal Appellate (2nd)

Cherie Morgan - ext. 5693
cmorgan@flabar.org
* Civil Trial (1st Cycle)
* Elder (1st)
* Antitrust & Trade Regulation (2nd)

Michelle Francis - ext. 5737
mfrancis@flabar.org
* Aviation (1st)
* Labor & Employment (1st)
* Workers' Compensation (2nd)

Kathryn Cope - ext. 5736
kcope@flabar.org
* Marital & Family (1st)
* Immigration & Nationality (1st)
* Wills, Trusts & Estates (2nd)

Carol Vaught - ext. 5738
cvaught@flabar.org
* Appellate Practice (1st)
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* International (1st)
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