UNC SCHOOL OF LAW

NORTH CAROLINA JOURNAL OF LAW & TECHNOLOGY

Volume 8
Issue 1 *Fall 2006*

Article 3

10-1-2006

Preserve or Perish; Destroy or Drown - eDiscovery Morphs into Electronic Information Management

Robert D. Brownstone

NORTH CAROLINA JOURNAL OF LAW & TECHNOLOGY
VOLUME 8, ISSUE 1: FALL 2006

PRESERVE OR PERISH; DESTROY OR DROWN— EDISCOVERY MORPHS INTO ELECTRONIC INFORMATION MANAGEMENT*

Robert D. Brownstone[1]

Electronic discovery—including the contents of e-mail messages and/or the deletion of e-mails—has driven the outcome of many high-profile cases. We live in a progressively more digital world. Thus, when disputes ripen into litigation, clients, attorneys, and judges have had to focus increasingly on preserving, gathering, culling, reviewing, and producing electronic information. The complexity of information technology (IT) and the costs of mastering IT have burgeoned. Only some eDiscovery issues are resolvable by resort to traditional discovery principles. Consequently, many unique digital issues have infiltrated not only civil litigation, but also companies' overall records policies, procedures, and protocols.

---

[1] Robert D. Brownstone, Esq., the author of this paper, is the Law & Technology Director at Fenwick & West LLP. He is a member of four state bars and of the Information Systems Auditing and Control Association. Mr. Brownstone is a nationwide speaker and prolific writer on law and technology issues. In each of his three roles at Fenwick & West, where Mr. Brownstone has worked since 2000, he has been a combination lawyer and IT leader. Mr. Brownstone's current responsibilities include advising clients, colleagues, and co-workers on electronic discovery, on electronic information management, and on retention/destruction policies and protocols. Prior to joining Fenwick & West, Robert had a varied thirteen-year career as a litigator, law school administrator, law school teacher, and consultant. He received his J.D. Magna Cum Laude from Brooklyn Law School in 1986. Mr. Brownstone's full biography and contact information are at http://www.fenwick.com/attorneys/4.2.1.asp?aid=544 (last visited Nov. 9, 2006).

I. ELECTRONIC INFORMATION & EVIDENCE

A. *Introduction: Digital Information's Pre-Eminence*

Electronic discovery[2] has driven the outcome of many recent high-profile cases. For example, the litigation and settlement of proceedings involving Merck, Phillip Morris, Adelphia, Arthur Andersen, Boeing executives, Enron, Frank Quattrone, Martha Stewart, and Tyco have centered on the content of e-mail communications and/or the deletion of e-mails.[3]

Why? Because we live in an increasingly digital world. In the modern age, less than 1% of business information is being created exclusively in paper form.[4] Thus, upwards of 99% of the world's information initially existed as a data file.[5] Though estimates vary,

---

[2] A recent attempt at a formal definition follows:

> e·lec·tron·ic dis·cov·er·y[—(n.)] 1. The act or process of providing or obtaining pertinent information stored on a computer, a computer network or computer storage devices, usually in a civil action. 2. The information provided or obtained through the act or process of electronic discovery.

George Socha, L. Tech. News, No Need for Intimidation (Jan. 2005), http://www.denniskennedy.com/blog/2005/01/socha_and_kennedy_on_the_edisc.html ("One EDD grande please, de-duped with double metadata and a dash of OCR. Native only, no conversion today.") (last visited Nov. 9, 2006).

[3] Alan Murray, *Indiscreet E-Mail Claims a Fresh Casualty*, WALL ST. J., Mar. 9, 2005, at A2; George Cahlink, Boeing CFO Gets Four-Month Jail Sentence (Feb. 18, 2005), http://www.govexec.com/dailyfed/0205/021805g1.htm; Charles Pope, *Guilty Plea in Boeing Hiring Scandal: Former CFO Likely to Help Prosecutors*, SEATTLE POST-INTELLIGENCER, Nov. 16, 2004, http://seattlepi.nwsource.com/business/199821_sears16.html; *cf.* ROGER KELLEHER & NANCY FLYNN, 2004 SURVEY ON WORKPLACE E-MAIL & INSTANT MESSAGING REVEALS UNMANAGED RISKS, AMER. MGMT. ASS'N (Jul. 13, 2004), http://www.amanet.org/research/pdfs/IM_2004_Summary.pdf.

[4] *See* PETER LYMAN & HAL R. VARIAN, HOW MUCH INFORMATION? 1 (Oct. 30, 2003), http://www2.sims.berkeley.edu/research/projects/how-much-info-2003/printable_report.pdf [hereinafter LYMAN & VARIAN 2003] (reporting only 0.01% of new information is stored in paper form); *cf.* PETER LYMAN & HAL R. VARIAN, HOW MUCH INFORMATION? 1 (Nov. 10, 2000), http://www2.sims.berkeley.edu/research/projects/how-much-info/how-much-info.pdf [hereinafter LYMAN & VARIAN 2000] (reporting printed documents comprise only 0.003% of total documents).

[5] LYMAN & VARIAN 2003, *supra* note 4; LYMAN & VARIAN 2000, *supra* note 4.

in most companies, 70% to 95% of information ends up being stored only in electronic form.[6]

Accordingly, when disputes ripen into litigation, clients, attorneys, and judges have had to focus more and more on preserving, gathering, reviewing, and producing electronic information. Many eDiscovery issues are resolvable by resort to traditional discovery principles and strategies. Yet, over the past few years, some unique electronic information issues—such as preservation obligations and cost-shifting—have increasingly crept into civil litigation.

B. *Liability Evidence—the Quest for "Smoking Guns"*

In general, a requesting party seeks to fulfill the overall discovery goal of developing evidence to support a claim or defense. Likewise, a requesting party also pines for the revelation of the proverbial "smoking gun" e-mail or other electronic files. As one commentator so aptly pointed out:

> Once discovery begins, the chase is on for . . . memos admitting liability, deleted design documents, and other documents never intended to see the light of day. . . . It has been proven time and time again that e-mails are fertile ground for unearthing damaging documents. Individuals believe them to be private communication.[7]

E-mail authors tend to include candid comments that they would censor from other forms of communication, either written or

---

[6] "[Seventy percent] of corporate records may be stored in electronic format, and [thirty percent] of electronic information is never printed to paper." *See* SEDONA CONFERENCE, THE SEDONA PRINCIPLES: BEST PRACTICES, RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 4 (July 2005), http://www.thesedonaconference.org/dltForm?did=7_05TSP.pdf#page=14 (last visited Nov. 9, 2006); *cf.* WILLIAM A. FENWICK, ELECTRONIC RECORDS: OPPORTUNITY FOR INCREASED EFFICIENCY, APPLIED DISCOVERY ORANGE PAGES ELECTRONIC DISCOVERY NEWSL. 4 (June 2003) http://www.lexisnexis.com/applieddiscovery/lawlibrary/newsletter/TheOrangePages_Jun03_.pdf (estimating that 90% to 95% of corporate documents are stored only electronically) (last visited Nov. 9, 2006).

[7] J. Robert Keena, *E-Discovery: Unearthing Documents Byte by Byte*, BENCH & B. MINN., Mar. 2, 2002, at 25, 275, *available at* http://www2.mnbar.org/benchandbar/2002/mar02/ediscovery.htm.

oral. Once such comments morph from private to public during the discovery process, they can have significant impact.[8]

1. *Damaging E-mails*

Ironically, in the seminal eDiscovery case of *Zubulake I*,[9] a paper copy of a smoking gun e-mail played a crucial role. Relatively late in the discovery process, that hardcopy e-mail message helped convince a court to order the disclosure of the electronic versions of many additional e-mails. In that employment-discrimination and retaliation lawsuit, the plaintiff had a packrat-like tendency to retain many paper copies of e-mails. She "produced over 450 pages of relevant e-mails, including e-mails that would have been responsive to her discovery requests but were never produced by [the defendant]."[10]

Thus, in resolving the first of five opinion-generating disputes in the *Zubulake* saga, the court agreed with the plaintiff that the defendant likely possessed additional pertinent e-mails warranting restoration from back-up tapes. In particular, *Zubulake I* reasoned that the plaintiff "ha[d] already produced a sort of 'smoking gun'—an e-mail suggesting that she would be fired 'ASAP' after her [Equal Employment Opportunity Commission (EEOC)] charge was filed, in part so that she would not be eligible for year-end bonuses."[11]

Whether or not a plaintiff is a hardcopy hoarder, hope springs external as to unearthing gold nuggets, egged on by some widely

---

[8] *See generally* Pierre Chamberland, eDiscovery Advisor, Avoid the E-mail Litigation Risk (Jan.–Feb. 2006), http://my.advisor.com/Articles.nsf/dp/2CFA200D0EE5E8DA8825703C007A042C (subscription required) (last visited Nov. 9, 2006); Sharon Gaudin, Datamation, Avoiding the Seven Deadly Sins of Email (Mar. 16, 2006), http://itmanagement.earthweb.com/career/article.php/3592046 (summarizing ERIC M. ROSENBERG, THE SEVEN DEADLY SINS OF ELECTRONIC COMMUNICATIONS AND HOW YOU CAN PROTECT AGAINST THEM (2005), http://www.re-soft.com/zipfiles/7deadlysins.pdf).

[9] Zubulake v. UBS Warburg, LLC (*Zubulake I*), 217 F.R.D. 309, 317 (S.D.N.Y. 2003).

[10] *Id.*

[11] *Id.* at 311.

publicized examples.[12] For example, a Chevron Corporation subsidiary was apparently induced to settle a sexual harassment claim in 1995 for $2.2 million, based on unearthed evidence that included an e-mail containing such jokes, such as "'[twenty-five] reasons beer is better than women.'"[13] Similarly, in one of the fen-phen diet drug litigations, a plaintiff's computer forensics experts uncovered a damaging e-mail message, which was ultimately leaked to the press. The message is universally claimed to have read: "'Do I have to look forward to spending my waning years writing checks to fat people with a silly lung problem?'"[14] In many recent criminal cases, one or more indiscreet e-mails have been pivotal.[15]

---

[12] For some "real" (though seemingly apocryphal) examples, see David S. Bennahum, Daemon Seed: Old Email Never Dies (May 1999), http://www.wired.com/wired/archive/7.05/email_pr.html (last visited Nov. 9, 2006).

[13] Ann Carns, *Prying Times: Those Bawdy E-Mails Were Good for a Laugh—Until the Ax Fell*, WALL ST. J., Feb. 4, 2000, at A8 (stating in harassment suits, "[o]ne or two explicit e-mail messages typically aren't enough . . . to prove that a workplace environment was hostile; [b]ut such e-mails can bolster other damaging evidence").

[14] Keena, *supra* note 7, at 27; *see also* Kristin M. Nimsger, *Same Game, New Rules: E-discovery Adds Complexity to Protecting Clients and Disadvantaging Opponents*, LEGAL TIMES, Mar. 25, 2002, at 2, *available at* http://www.krollontrack.com/Publications/samegame.pdf.

[15] *See, e.g.*, Complaint, United States v. Quattrone, No. 03 CR.582(RO), 2003 WL 22253325 (S.D.N.Y. Sept. 30, 2003) (referencing pleadings in that case and in related Credit Suisse proceedings); Matthew L. Wald, *Fraud Is Seen in Nuclear-Waste Site Study*, N.Y. TIMES, Apr. 2, 2005, at A9; Dan Richman, *E-mails Sent at Work Anything but Private*, SEATTLE POST-INTELLIGENCER, Mar. 9, 2005, at A1, http://seattlepi.nwsource.com/business/215147_email09.html; Matthew Barakat, Former Boeing Executive Gets Four Months in Prison (Feb. 18, 2005), http://www.detnews.com/2005/business/0502/20/business-94555.htm; Alex Berenson, *Once Again, Spitzer Follows E-Mail Trail*, N.Y. TIMES, Oct. 18, 2004, at C1; Thor Valdmanis, Adam Shell, & Elliot Blair Smith, *Marsh & McLennan Accused of Price Fixing, Collusion*, USA TODAY, Oct. 15, 2004, at 1B, *available at* http://www.usatoday.com/money/industries/insurance/2004-10-15-spitzer-insurance_x.htm; L. Stuart Ditzen, *You've Got Evidence*, PHILA. INQUIRER, Jan. 11, 2004, at D1 ("[E]-mails sent as casually as water-cooler chatter never truly die; [t]hey can come back to haunt the senders in court cases."). *See also* Catherine Tomasko, Esq., *Boeing Pays Record $615 Million to End Fraud Charges,* 20 GOV'T CONT. LITIG. REP., No. 6, July 14, 2006,

More recently, in one of the Merck product liability cases based on the Vioxx drug, a pivotal trial exhibit was an e-mail message stating, "'The possibility of increased C.V. events [like strokes or heart attacks] is of great concern . . . . I just can't wait to be the one to present those results to senior management.'"[16] "'C.V.' was scientific shorthand for cardiovascular problems like strokes or heart attacks."[17] That e-mail was written by Dr. Alise Reicin, a Merck scientist, in 1997, two years before Merck began selling Vioxx.[18] The ultimate result in that Texas jury trial was a plaintiff's verdict of $253,500,000.[19]

Among the many people bitten by the e-mail bug in the court of public opinion are former Federal Emergency Management Agency (FEMA) Secretary Michael Brown,[20] and an international law firm's senior associate ridiculed for an e-mail string in which he repeatedly asked a secretary to reimburse him four British pounds (about seven U.S. Dollars) for dry-cleaning expenses resulting from a lunchtime ketchup spill.

Back in the day, such damaging documents might have remained undetected because they were buried in a mountain of boxes of paper. Now, however, automated search and retrieval methods exist and keep becoming more robust. Consequently, such smoking gun e-mails have morphed into possibly attainable brass rings.

---

available at http://news.public.findlaw.com/andrews/bf/gov/20060714/20060714_boeingsettlement.html.

[16] Alex Berenson, *For Merck, the Vioxx Paper Trail Won't Go Away*, N.Y. TIMES, Aug. 21, 2005, at A29, *available at* http://www.nytimes.com/2004/10/18/business/18insure.html?ei=5090&en=d450dd32aecaf0a2&ex=1255838400&partner=rssuserland&pagewanted=print&position=.

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *See* CNN.com, 'Can I Quit Now?' FEMA Chief Wrote as Katrina Raged, http://www.cnn.com/2005/US/11/03/brown.fema.emails (last visited Nov. 9, 2006).

2. *Damaging Internet Use and Blog Postings*

In addition to chatrooms, online bulletin boards, and Web surfing, there is now the "blog," also known as "weblog." A blog is an often updated Web-based diary that has become the "hottest phenomenon on the Internet."[21] Built on a conversational model, paradoxically, a blog is often not only intimate, but also encourages public discussion.[22]

One ramification of employee blogs can be "doocing"—namely, the firing of an employee for his or her posting of negative comments about the company on a personal blog.[23] The ramifications for employers from the content of employee blogs or from leaks to non-employee blogs include intentional[24] or unintentional[25] disclosure of confidential information, and vicarious liability for content deemed to be harassing.

As to harassment, even non-sponsored bulletin boards can be so closely related to the environment and/or so beneficial that they

---

[21] Walter S. Mossberg, *Taking the Mystery Out of Blog Creation*, WALL ST. J., June 15, 2005, at D4, *available at* http://Blog-Article-WSJ-6-15-05.notlong.com.

[22] *Id.*; Lee Rainie, *The State of Blogging*, PEW INTERNET & AM. LIFE PROJECT, Jan. 1, 2005, http://www.pewinternet.org/pdfs/PIP_blogging_data.pdf; Yuki Noguchi, *Cyber-Catharsis: Bloggers Use Web Sites as Therapy*, WASH. POST, Oct. 12, 2005, at A1, *available at* http://Blog-Article-WSJ-6-15-05.notlong.com.

[23] *See* Heather Armstrong, About This Site, http://www.dooce.com (coining the phrase "dooce") (last visited Nov. 9, 2006); *see also* Joyce Cutler, *Beware Pitfalls Created by Employee Blogging*, PIKE & FISCHER DDEE, May 16, 2005 (citing Konop v. Hawaiian Airlines Inc., 302 F.3d 868 (9th Cir. 2002)); Stephanie Armour, *Warning: Your Clever Little Blog Could Get You Fired*, USA TODAY, June 14, 2005, http://www.usatoday.com/money/workplace/2005-06-14-worker-blogs-usat_x.htm.

[24] *See, e.g.*, O'Grady v. Super. Ct., 44 Cal. Rptr. 3d 72 (Cal. App. 6 Dist. 2006) (deciding, unanimously, to strike down subpoenas to Internet "news" sites seeking source of trade secret information leaked to bloggers), *rev'g* Apple Computer, Inc. v. Does, No. 1-04-CV-032178, 2005 WL 578641 (Cal. Super. Mar. 11, 2005) (denying motion for protective order where anonymous, fame-seeking employees had leaked confidential product information to bloggers). *See also* case archive at http://www.eff.org/Censorship/Apple_v_Does/ (last visited Nov. 9, 2006).

[25] Michael Hanscom, Eclecticism, Even Microsoft Wants G5s (Oct. 23, 2003), http://www.michaelhanscom.com/eclecticism/2003/10/even_microsoft.html.

are deemed part of the workplace.[26] Moreover, employee Web-surfing can entail visiting pornographic websites,[27] not only cutting into productivity but potentially creating a hostile work environment.

On the other hand, as to innocent Web-surfing on company time, the law is still developing. A recent administrative decision analyzed non-business Internet use for personal needs, such as checking on weather reports or finding a store location.[28] The ruling deemed such use of the Web for a "non-work-related matter to be a minor transgression."[29] The judge deemed the Internet to be the "modern equivalent of a telephone or a daily newspaper, providing a combination of communication and information that most employees use as frequently in their personal lives as for their work."[30]

---

[26] Blakey v. Cont'l Airlines, 751 A.2d 538 (N.J. 2000) (holding cyberspace activity can give rise to workplace discrimination liability; employer obligated to investigate and redress harassment complaint, lest it be vicariously liable).

[27] *See* The ePolicy Institute, eDisaster Stories, http://www.epolicyinstitute.com/disaster/stories.html (noting as to firefighters in Columbus, Ohio, "a routine scan of on-the-job web surfing revealed that the division headquarters' staff members were visiting as many as 8,000 pornographic sites a day") (last visited Nov. 9, 2006); *see also* The ePolicy Institute, Beware Cyberslackers, Spammers, http://www.epolicyinstitute.com/i_policies/index.html (noting "90% of workers admit to recreational surfing on company time, accounting for nearly one third of their online activity;" and "[c]yberslackers' favorite sites [were] general news 29.1%; investment 22.5%; [and] pornography 9.7%") (last visited Nov. 9, 2006).

[28] Dep't of Educ. v. Choudhri, OATH Index No. 722/06 (N.Y.C. Off. of Admin. Trials & Hearings), Mar. 9, 2006, http://files.findlaw.com/news.findlaw.com/hdocs/docs/nyc/doechoudri30906opn.pdf (mitigating insubordination punishment where employee: (1) only surfed after completing all of his work and was awaiting more work; and (2) never neglected a work assignment).

[29] *Id.* (emphasis added) (finding selective "prohibit[ion on one employee's] using the internet for *any* personal reasons was unusually harsh and arbitrary, motivated by anger rather than a concern for office productivity").

[30] *Id.* at 12.

3. *Damaging Metadata and Embedded Data*

As discussed in Section III(D) infra, metadata is "data about data." File system metadata "describes when a file was created, where it was stored, and what programs the computer uses to help access the file."[31] More significantly, an electronic file—especially if disseminated as an e-mail attachment—may contain embedded data, i.e., evidence of prior revisions that could come back to haunt the sender.[32]

There are concerns that embedded data may be hidden in documents drafted by counsel on one side,[33] or counsel on both sides (such as settlement agreements[34] and/or stipulations). Significantly, a recipient can manipulate a file to "peel back the

---

[31] Krumwiede v. Brighton Assocs., No. 05 C 3003, slip op. at 2006 WL 1308629 (N.D. Ill. May 8, 2006) (entering default judgment for breach of non-compete against a former employee based on metadata showing the employee had deleted and altered thousands of files during delay to produce company-provided laptop, *enforced* Krumweide v. Brighton Assoc., L.L.C., No. 05C3003, 2006 WL 2349985 (N.D. Ill. Aug. 9, 2006)).

[32] *See, e.g.*, David H. Schultz, *Defining Metadata; Counsel's Duty to Preserve and Produce Brought Forefront In Recent Case*, LAW JOURNAL NEWSLETTERS EDISCOVERY LAW & STRATEGY, Nov. 1, 2005, http://www.ljnonline.com/pub/ljn_ediscovery/2_7/news/145513-1.html (subscription required); Gail Cookson, Lawyer Opportunity: What is Metadata Anyway? (Nov. 2, 2005), http://www.pglewis.com/newsletter/Nov05/Nov2005RecentDecisions.html.

[33] Stephen Shankland, Hidden text shows SCO prepped lawsuit against BofA (Mar. 18, 2004), http://news.com.com/2102-7344_3-5170073.html?tag=st.util.print (last visited on Nov. 9, 2006).

[34] ABA Comm. On Ethics & Prof'l Responsibility, Formal Op. 06-442 ("[I]f the embedded information is on a subject such as her client's willingness to settle at a particular price, then there might be no way to 'pull back' that information."); NYC Ass'n B. Comm. Prof. Jud. Eth., Formal Op. 2003–04, 2004 WL 837937, http://www.abcny.org/Ethics/eth2003.html (finding, in some instances, lawyers "will have learned confidential information that cannot simply be erased from memory" and it would be unrealistic to expect the lawyer to forget it, e.g., when he or she "receives a one-page fax [that could have been a Word file with embedded data] saying, 'Offer $100,000, but you have authority to settle for up to $300,000'"). In addition, consider the situation where a first draft of an agreement is the result of undoing edits to the final agreement from a prior transaction. That final agreement was likely the result of a compromise reached via negotiation. Thus, at the start of the later transaction, the sender will not wish to share with opposing counsel any revisions that would reveal concessions made in the prior transaction.

layers" to see prior iterations of a file's contents or use a tool to extract metadata in searchable form. There are heightened confidentiality concerns for attorneys who, like other drafters, often use "File/Save As" to adapt a file created for one client to a second client's needs.[35]

Yet all computer users are subject to the nuances of word processing and spreadsheet files.[36] In the last year alone, those bitten by the metadata bug include high level individuals at the Pentagon, the British Prime Minister's office, the United Nations, the Democratic National Committee and the California Attorney General's office.[37]

Beyond the scope of this paper is a discussion of the range of views espoused by bar associations and courts as to the obligations of a recipient of inadvertently disclosed metadata.[38] Suffice it to

---

[35] "[Ninety percent] of documents in circulation began as something else." Shankland, *supra* note 33.

[36] *See, e.g.*, Diane Karpman, *Metadata Can Bite You Where It Hurts, Law-wise*, CAL. BAR J., Nov. 1, 2005, at 20, *available at* http://Metadata-CalBJ-11-1-05.notlong.com; COMMENTARY, DANGERS OF DOCUMENT METADATA, WORKSHARE (2004), http://www.workshare.com/collateral/misc/Dangers_of_Document_Metadata.pdf (last visited Nov. 9, 2006).

[37] *See, e.g.*, Declan McCullagh, AT&T Leaks Sensitive Info in NSA Suit (May 30, 2006), http://news.com.com/2102-1028_3-6077353.html?tag=st.util.print; Brian Bergstein, Cos., Gov't Seek to Keep Lid on Metadata (Feb. 3, 2006), http://www.boston.com/business/technology/articles/2006/02/03/cos_govt_seek_to_keep_lid_on_metadata/?page=full; Dennis Kennedy, Evan Schaeffer, & Tom Mighell, Thinking eDiscovery: Mining the Value from Metadata (Jan. 2006), http://www.discoveryresources.org/04_om_thinkingED_0601.html (last visited Nov. 9, 2006); Tom Zeller Jr., *Beware Your Trail of Digital Fingerprints*, N.Y. TIMES, Nov. 7, 2005, http://Metadata-NYT-11-7-05.notlong. com.

[38] This murky area has evolved in part from various opinions as to misdirected faxes reaching unintended recipients. *See* State Comp. Ins. Fund v. WPS, Inc., 82 Cal. Rptr. 2d 799 (1999) (stating unintended recipient of confidential material must notify sender; but, absent a court order, the recipient is not required to return or destroy the material); ABA Comm. On Ethics And Prof'l Responsibility, Formal Op. 06-442 (2006) (stating no "specific prohibition against a lawyer's reviewing and using embedded information in electronic documents, whether received from opposing counsel, an adverse party, or an agent of an adverse party"); N.Y. St. B.A. Ethics, Op. 782 (2004) (stating, under DR 4-101, sender has duty "to use reasonable care when transmitting documents

say, though, that once confidential information gets to an adversary, he or she will remember the content, independent of whether the misdirected information ends up being returned to the sender.

For further discussion regarding metadata in client-created files, refer to Section III(D)(4), *infra*, about recent litigation developments on the obligation to produce electronic files with the metadata intact.

II. ELECTRONIC PRODUCTION RESPONSIBILITY

A. *Modern Scope of Discovery*

Broad discovery remains paramount in civil litigation such that, in the litigation context, the transition to a predominantly electronic mode has been accelerating at a rapid pace.[39] Black letter case law now universally supports the assertion that electronic information is as susceptible to discovery rules and principles as paper.[40] The recent changes to the Federal Rules of

---

by e-mail to prevent the disclosure of metadata containing client confidences or secrets"); N.Y. St. B.A. Ethics, Op. 749 (2001) (stating that, ethically, lawyers may not use software to extract information regarding drafting history of adversary's e-mail attachments). N.Y.C. Ass'n. B. Comm. Prof. Jud. Eth., *supra* note 34 (considering use of inadvertently disclosed information to be an ethical violation would unfairly penalize innocent attorney and client for error of another).

[39] *See generally* Robert D. Brownstone, *Collaborative Navigation of the Stormy eDiscovery Seas*, 10 RICH. J.L. & TECH. 53, ¶¶ 6–7 & nn.13–21 (2004), *available at* http://law.richmond.edu/jolt/v10i5/article53.pdf#page=3.

[40] *See generally* Lisa M. Arent, Robert D. Brownstone, & William A. Fenwick, *Preserving, Requesting and Producing Electronic Information*, 19 SANTA CLARA COMPUTER & HIGH TECH. L.J. 131 (Dec. 2002), *as revised* (June 12, 2003) § II(A)(1), at 2–4, § III(A)(3)(b), at 40–41, *available at* http://www.fenwick.com/docstore/publications/Litigation/ediscovery.pdf (citing Fed. R. Civ. P. 34(a), defining the term "document" broadly to include information in any tangible format). *See also* Fed. R. Civ. P. 26(b)(1), cited in Kucala Enters. v. Auto Wax Co., 2003 U.S. Dist. LEXIS 8833 (N.D. Ill. May 27, 2003), *aff'd in part and rev'd in part*, 2004 U.S. Dist. LEXIS 5723 (N.D. Ill. Apr. 6, 2004) (dismissing with prejudice based in part on eleventh hour deletion of 12,000 files); *cf.* Jones v. Goord, 2002 U.S. Dist. LEXIS 8707 (S.D.N.Y. May 16, 2002) ("Broad discovery is a cornerstone of the litigation process;" practical

Civil Procedure codified that view by adding the phrase "electronically stored information" to Rule 34's title and to numerous of its sub-sections.[41] Similar provisions are now components of some state procedural rules and some federal court local rules.[42]

---

concerns kept judge from ordering production of "data in electronic, manipulable form [to] facilitate expert analysis.").

[41] *See* AMENDMENTS TO THE FED. RULES OF CIVIL PROCEDURE, at 29–33 [hereinafter FRCP EDISCOVERY AMENDMENTS], *available at* http://www.uscourts.gov/rules/EDiscovery_w_Notes.pdf (last visited Nov. 13, 2006). *See also* ADVISORY COMM. ON FED. RULES OF CIVIL PROCEDURE, REPORT OF THE CIVIL RULES ADVISORY COMM., at 28, *passim* (July 25, 2005), http://www.uscourts.gov/rules/Reports/ST09-2005.pdf#page=30 [hereinafter REPORT]. A series of eDiscovery-related proposed amendments were published for comment in May 2004 and re-published, as revised, in August 2004. The comment period closed in February 2005. Culminating a multi-year process, the proposed changes were approved by the United States Supreme Court on April 12, 2006. *See* Patrick E. Premo, Robert D. Brownstone, & Anthony P. Dykes, *Electronic Discovery is Focus of Pending Federal Rule Changes* (Fenwick & West LLP Litigation Alert Apr. 25, 2006), http://www.fenwick.com/docstore/Publications/Litigation/Litigation_Alert_04-25-06.pdf. Then, when Congress took no pertinent action, these rules took effect on December 1, 2006. *See generally* Admin. Office of the United States Courts, Federal Rulemaking, http://www.uscourts.gov/rules/congress0406.html (last visited Nov. 9, 2006). *See* Ken Withers, Electronic Discovery Rules, Proposed Rules, Commentary, and Debate, http://www.kenwithers.com/rulemaking/index.html (discussing the history of the development of these proposals) (last visited Nov. 9, 2006); Pike & Fischer DDEE, *The Future of E-discovery*, May 27, 2005 (subscription required); *Key Judicial Panel Approves New Civil Rules for Handling Electronic Data in Litigation*, P&F ILR WEEKLY ALERT, Apr. 20, 2005, http://internetlaw.pf.com/; Gwendolyn Mariano, EDD Rules: The Great Debate (Apr. 18, 2005), http://www.law.com/jsp/article.jsp?id=1113469509165; ADAM I. COHEN, UNDERSTANDING THE PROPOSED FRCP AMENDMENTS (Apr. 19, 2005), http://www.fiosinc.com/events/pdfFiles/FRCPamendments_041905.pdf. *See also* Brenda Sandburg, *E-Confusion Reigns*, S.F. RECORDER, May 23, 2005, http://www.law.com/jsp/legaltechnology/pubArticleLTN.jsp?id=1116851712954 (assessing landscape of preservation obligations, eDiscovery review costs, and proposed amendments to Federal Rules of Civil Procedure).

[42] For summaries of and links to such rules, see Applied Discovery, Court Rules, http://www.lexisnexis.com/applieddiscovery/lawLibrary/courtRules.asp (last visited Nov. 9, 2006); Kroll Ontrack, Rules and Statutes by Location, http://www.krollontrack.com/legalresources/rules.aspx (last visited Nov. 9, 2006).

B. *Overview of Key Categories of Producible Electronic Information*

In contemplating the scope of discovery, employers are now faced with the same challenges as are other modern day litigants. Employers must account for information stored in electronic form and consider the most effective and efficient means of accessing various types of such information. Hard drives, back-up tapes, storage devices, web server logs, databases, and "deleted"[43] files are among the many formats and environments that often need to be navigated.[44]

The best judicial description of the world of electronic information was propounded in 2003 by Southern District of New York Judge Shira A. Scheindlin. Judge Scheindlin promulgated a two-part framework in the first of her several landmark electronic discovery decisions in an employment discrimination case, *Zubulake I*.[45] As its threshold issue in assessing the plaintiff's

---

[43] The continued existence on hard drives of one or more ostensibly "deleted" files can haunt many a litigant. The reason is, especially in the Windows operating system, "deleted" does not necessarily mean gone forever. *See Zubulake I*, 217 F.R.D. 309 (S.D.N.Y. 2003). *See also* Craig Ball, L. Tech. News, Can Your Old Files Come Back to Life? (Jan. 15, 2004), http://www.law.com/special/supplement/e_discovery/old_files.shtml; TOM COUGHLIN, COUGHLIN ASSOCIATES, RUMORS OF MY ERASURE ARE PREMATURE (2003), http://www.tomcoughlin.com/Techpapers/Rumorsofmyerasure,%20061803.pdf (last visited Nov. 9, 2006); James M. Rosenbaum, *In Defense of the DELETE Key*, 3 THE GREEN BAG 2D 393, 393–95 (Summer, 2000), *available at* http://www.greenbag.org/rosenbaum_deletekey.pdf (last visited Nov. 9, 2006).

[44] "The broad definition of 'documents' typically used in requests for production encompasses information stored on computers and on computer media, such as floppy disks, zip drives, jaz drives, and archival or emergency storage devices (such as back-up tapes)." Arent, Brownstone, & Fenwick, *supra* note 40, § II(A)(1), at 3. *See also* R.S. Creative, Inc. v. Creative Cotton, Ltd., 89 Cal. Rptr. 2d 353, 355–56 (Cal. Ct. App. 1999) (holding "'document' . . . included computer tapes, discs and any information stored in a computer"); Linnen v. A.H. Robins Co., 11 MASS. L. RPTR. 203 (1999) No. 97-2307, Mass. Super. LEXIS 240, at *16 (June 15, 1999) (agreeing with the plaintiff that "documents," as defined in preservation order and in document requests, encompassed data contained on back-up tapes).

[45] *Zubulake I*, 217 F.R.D. 309, 324 (S.D.N.Y. 2003) (establishing a seven-factor test, under which some cost-shifting could be appropriate as to restoration

motion to compel production and allocation of consequential costs, *Zubulake I* divided the world of electronic information into two distinct broad categories:

1. "[D]ata that is kept in an *accessible* format," broken down into three sub-categories, "listed in order from most accessible to least accessible:"
   a. "Active, online data," such as hard drives;
   b. "Near-line data," such as optical disks; and
   c. "Offline storage/archives . . . [which] lack[] 'the coordinated control of an intelligent disk subsystem,' . . . in the lingo, JBOD ('Just a Bunch of Disks')."[46]
2. "Electronic data [that] is relatively *inaccessible*," broken down into two sub-categories, also ranked in order of accessibility:
   a. "Backup tapes;" and
   b. "Erased, fragmented or damaged data."[47]

For the first category, accessible data, *Zubulake I* followed the traditional approach of having the responding party bear all costs.[48] For the second category, relatively inaccessible data, following application of a seven-factor test, some cost-shifting to the requesting party could be appropriate but only if the marginal utility of restoring such data is evinced by a "fact-intensive" review of results of "small sample" restoration.[49]

The newly amended Rule 26(b)(2)(B) provides that, once the responding party shows undue burden, electronic information that

---

of inaccessible data only if the marginal utility thereof is evinced by a "fact-intensive" review of results of "small sample" restoration).

[46] *Id.* at 318–20 (emphasis added).

[47] *Id.* at 319 (emphasis added).

[48] *Id.* at 324.

[49] *Id.* Restoration of data from back-up tapes is very costly because such tapes take an indiscriminate snapshot of data without preserving a directory. McPeek v. Ashcroft (*McPeek I*), 202 F.R.D. 31 (D.D.C. 2001); Ian Austen, *Storage Methods Come and Go, But Tape Holds Its Own*, N.Y. TIMES, June 5, 2003, at G8.

is "not reasonably accessible" need not be produced unless a court so orders on a showing of "good cause."[50]

The *Zubulake I* accessible/inaccessible divide is a construct for coping with the all-important civil discovery issue of spiraling costs. As discussed in more detail in Section III(B), *infra*, *Zubulake I* and the related follow-up decision in *Zubulake III*[51] laid the groundwork for the potential future development of an overall multi-step eDiscovery process that is not only cost-sensitive but also conceptually sound and pragmatic.

C. *Preservation and its Flip-Side, Spoliation*

Modern-day judges treat with utmost seriousness the duty to preserve potentially relevant electronic information and paper documents. Once a dispute merely ripens to the point where litigation is "reasonably anticipated," there is a "duty to suspend any routine document purging system . . . and to put in place a litigation hold to ensure the preservation of relevant documents—failure to do so constitutes spoliation."[52]

---

[50] FRCP eDISCOVERY AMENDMENTS, *supra* note 41, at 6–7.

[51] Zubulake v. UBS Warburg, LLC (*Zubulake III*), 216 F.R.D. 280 (S.D.N.Y. 2003).

[52] Rambus, Inc. v. Infineon Technologies AG, Inc., 222 F.R.D. 280, 288 (E.D. Va. 2004) (enforcing "litigation hold" by granting motion to compel production of documents and testimony relating to Plaintiff Rambus's document retention, collection, production, and "Shred Days"). On March 1, 2005, the court orally granted Defendant Infineon's motion to dismiss Rambus's patent infringement claims based on Rambus's spoliation. Less than three weeks later, before a written decision could issue, the parties settled the five-year old litigation. *See* Tom Krazit, *Rambus, Infineon End DRAM Dispute, Sign Licensing Deal*, IDG NEWS SERVICE, Mar. 21, 2005. *But see* Rambus v. Hynix, No. C-00-20905 RMW, 2006 WL 565893 (N.D. Cal. Jan. 5, 2006) (stating unclean hands defense failed because Rambus had not targeted "any specific document or category of relevant documents with the intent to prevent production in a lawsuit such as th[is] one"). *See also* Brenda Sandburg, *E-Confusion Reigns*, S.F. RECORDER, May 23, 2005, http://www.law.com/jsp/legaltechnology/pubArticleLTN.jsp?id=1116851712954 (assessing landscape of preservation obligations, eDiscovery review costs and proposed FRCP amendments). *Cf.* Samsung Elecs. Co. v. Rambus, 439 F. Supp. 2d 524, 569 (E.D. Va. 2006) (finding spoliation based on preservation duty having arisen upon Rambus's hiring of outside counsel and

Once the heightened duty kicks in, the "[d]estruction of evidence raises [a] presumption that disclosure of the materials would be damaging."[53] Thus, on top of potential criminal law and ethical violations,[54] the litigation ramifications for spoliation can

---

adoption of licensing program that had made patent litigation a "foregone conclusion").

[53] Arista Records v. Sakfield Holding, 314 F. Supp. 2d 27, 34 (D.D.C. 2004) (finding that the defendant's destruction of electronic information precluded the defendant from attacking the plaintiff's analysis of existing electronic information, while denying the defendant's motion to dismiss on jurisdictional grounds).

[54] *See generally* Arent, Brownstone, & Fenwick, *supra* note 40, § II(A), at 2-13, *available at* http://www.fenwick.com/docstore/publications/Litigation/ediscovery.pdf#page=16 (last visited Nov. 9, 2006); SEDONA GUIDELINES: BEST PRACTICE GUIDELINES & COMMENTARY FOR MANAGING INFORMATION & RECORDS IN THE ELECTRONIC AGE (Sept. 2005) http://www.thesedonaconference.org/dltForm?did=TSG9_05.pdf (last visited Nov. 9, 2006). For Sedona Guidelines highlights, see SEDONA GUIDELINES, COMMENT 1.B, http://www.thesedonaconference.org/dltForm?did=TSG9_05.pdf#page=25 ("Defensible policies need not be universal, nor do they need to address the retention of all information.") (last visited Nov. 9, 2006); SEDONA GUIDELINES, GUIDELINE 5, http://www.thesedonaconference.org/dltForm?did=TSG9_05.pdf#page=5 ("An organization's policies . . . must mandate the suspension of ordinary destruction . . . to comply with preservation obligations related to actual or reasonably anticipated litigation, governmental investigation or audit.") (last visited Nov. 9, 2006); SEDONA GUIDELINES, COMMENT 5.H, http://www.thesedonaconference.org/dltForm?did=TSG9_05.pdf#page=59 ("If an organization takes reasonable steps to implement a legal hold, it should not be held responsible for . . . an individual acting outside the scope of authority and/or . . . inconsistent with the legal hold.") (last visited Nov. 9, 2006); SEDONA GUIDELINES, NOTES ON COMMENT 5.H, http://www.thesedonaconference.org/dltForm?did=TSG9_05.pdf#page=60 ("The recognition . . . of a 'safe harbor' against culpability in such circumstances is essential[; a]s is abundantly clear from the body of this document, the nature and volume of electronic documents is such that there is no possibility that any preservation system can be perfect.") (last visited Nov. 9, 2006). *See also* Jason Velasco, *Proactive Preservation Mgmt. Best Practices: Findings and Best Practices from 2002–2004*, RENEWDATA, Mar. 28, 2005; ROBERT F. WILLIAMS & LORI J. ASHLEY, 2005 ELECTRONIC RECORDS MANAGEMENT SURVEY; A RENEWED CALL TO ACTION, COHASSET ASSOCS. (2005), http://www.merresource.com/pdf/survey2005.pdf; *In re* Grand Jury Investigation, 445 F.3d 266 (3d Cir. 2006) (holding that, in a criminal case, based on an indication that the client likely obstructed justice by deleting e-mails, the crime-fraud exception warranted compelled production of evidence of attorney-client communication).

include: monetary penalties (such as attorney fees, costs, and/or pay-for-proof sanctions);[55] exclusion of evidence; delay of the start of trial; mistrial; adverse inference jury instructions;[56] and, in an extreme case, a dismissal or judgment on the merits.[57]

---

[55] Some exemplary orders include Mosaid Techs. Inc. v. Samsung Elecs. Co., 224 F.R.D. 595 (D.N.J. Sept. 1, 2004) (awarding $566,838 for destruction of e-mails in patent infringement case), *aff'd by and appeal denied*, 348 F. Supp. 2d 332 (D.N.J. 2004); United States v. Philip Morris USA, Inc., 2004 U.S. Dist. LEXIS 13580 (D.D.C. July 21, 2004) (awarding $2.75M spoliation fine plus costs associated with discovery dispute); Advantacare Health Partners, LP v. Access IV, 2004 U.S. Dist. LEXIS 16835 (N.D. Cal. Aug. 17, 2004) (awarding evidentiary and monetary sanctions against former employees who participated in setting up a competing company and intentionally destroyed electronic information in contravention of TRO); Network Computing Services Corp. v. Cisco Systems, Inc., 223 F.R.D. 392 (D.S.C. 2004) (awarding monetary sanctions supplemented by adverse instruction).

[56] *See, e.g.*, Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., No. 502003CA005045XXOCAI, 2005 WL 679071 (Fla. 15th Cir. Mar. 1, 2005) (granting instruction request based on the defendant's repeated knowing failures to produce e-mails and pattern of deliberate misrepresentations to court), discussed in Section III(A)(4) *infra*; United States v. Philip Morris USA, Inc., 2004 U.S. Dist. LEXIS 13580 (D.D.C. July 21, 2004) (granting instruction based on the defendant's "reckless disregard and gross indifference" to e-mail preservation obligations); Network Computing Services Corp. v. Cisco Systems, Inc., 223 F.R.D. 392, 401 (D.S.C. 2004) (agreeing to instruct jury that it could consider the plaintiff's disingenuous repeated representations to court that it was certain that some ultimately produced and "garden variety" electronic files did not exist); Zubulake v. UBS Warburg, LLC (*Zubulake V*), 229 F.R.D. 422, 94 Fair Empl. Prac. Cas. (BNA) 1, 85 Empl. Prac. Dec. (CCH) ¶ 41,728 (S.D.N.Y. July 20, 2004); Trigon, Inc. v. United States, 204 F.R.D. 277 (E.D. Va. 2001) (finding Government's retained litigation consulting company willfully and intentionally destroyed testifying experts' draft reports and correspondence in corporate taxpayer's refund action, warranting adverse inferences and other sanctions); RKI, Inc. v. Grimes, 177 F. Supp. 2d 859, 877 (N.D. Ill. 2001) (finding, at bench trial, "[D]efendants' spoliation of evidence on their computer support[ed] negative inference that [D]efendants destroyed evidence of misappropriation" of trade secrets; "highly suspicious" deletions and defragmentation were "circumstantial evidence" of misappropriation), *mot. for new trial denied*, 2002 U.S. Dist. LEXIS 7974 (May 2, 2002); *cf.* Med. Lab Mgmt. Consultants v. ABC, 306 F.3d 806, 824 (9th Cir. 2002) (affirming refusal to give adverse instruction, but acknowledging that trial court's "inherent discretionary power to make appropriate evidentiary rulings in response to the destruction or spoliation of relevant evidence . . . includes the power to sanction

A court can deem a litigant's lack of compliance with preservation, collection, or production responsibilities to be an inappropriate, intentional, or negligent destruction of evidence, i.e., spoliation. The current trend is to sanction even unintentional-but-negligent destruction or untimely productions. The requisite "culpable state of mind"[58] is, in some federal circuits, surprisingly low. In 2002, the Second Circuit found that "discovery sanctions, including an adverse inference instruction, may be imposed where a party has breached a discovery obligation not only through bad faith or gross negligence, but also through ordinary negligence."[59]

On the other side of the coin, courts in other circuits have been more lenient.[60] Additionally, the recent *Andersen*[61] and *Quattrone*[62]

---

the responsible party by instructing the jury that it may infer that the spoiled or destroyed evidence would have been unfavorable to the responsible party").

[57] *See, e.g.*, Krumwiede v. Brighton Assocs., No. 05 C 3003, 2006 WL 1308629, *4 (N.D. Ill. May 8, 2006) (entering default judgment for breach of non-compete agreement against ex-employee who had deleted and altered thousands of files during delay to produce laptop); Metro. Opera Ass'n v. Local 100 Hotel Empl. & Rest. Empl. Int'l Union (*MetOpera*), 212 F.R.D. 178 (S.D.N.Y. 2003) (granting the plaintiff's motion for judgment against labor union), *adhered to on reconsideration by*, 175 L.R.R.M. 2870 (S.D.N.Y. Aug. 27, 2004). *See also* Coleman (Parent) Holdings v. Morgan Stanley & Co., No. CA 03-5045 AI, 2005 WL 674885 (Fla. 15th Cir. Mar. 23, 2005) (partial default judgment).

[58] Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 107, 113 (2d Cir. 2002) (vacating jury verdict and remanding for reconsideration of whether the plaintiff's failure to timely or fully produce e-mail back-up tapes warranted adverse inference).

[59] *Id.* at 101.

[60] *See, e.g.*, Advantacare Health Partners, LP v. Access IV, 2004 U.S. Dist. LEXIS 16835, at *9 (N.D. Cal. Aug. 17, 2004) (finding original entry of default judgment too severe but still granting evidentiary and monetary sanctions in the amount of $20,000 against former employees); MasterCard Int'l, Inc. v. Moulton, 2004 U.S. Dist. LEXIS 11376, at *16 (S.D.N.Y. June 16, 2004) (finding that *permissive* trademark dilution inference could be raised, but the defendants' lack of bad faith and failure to alter normal document retention practices did not warrant *conclusive* dilution determination); *cf.* Jones v. Boeing Co., 2004 U.S. App. LEXIS 18105, *4 (8th Cir. Aug. 26, 2004) (finding that adverse inference instruction was not warranted in sex discrimination case due to lack of showing that the defendant intentionally destroyed hardcopy documents to suppress the truth or that there had been resulting prejudice); *see generally* Shira A. Scheindlin & Kanchana Wangkeo, *Electronic Discovery*

reversals, albeit in the criminal context, may have an impact on the civil culpability standard.[63]

In the civil employment litigation setting, a Southern District of New York judge went even farther than an adverse instruction in *Metropolitan Opera Association v. Local 100 Hotel Employees*[64] ("*MetOpera*"). The misconduct was so extreme that the judge granted the plaintiff's motion for "final judgment *as to liability* against [the] defendants and for . . . attorneys fees necessitated by the discovery abuse[s] by [the] defendants and their counsel."[65] As a basis for the lawsuit's ultimate "result [being] driven by discovery abuse" rather than by resolution "on the merits," *MetOpera* relied on Federal Rule of Civil Procedure (FRCP) 37, 28 U.S.C. § 1927, as well as the court's inherent power to sanction.[66]

Sanctions in the Twenty-First Century, 11 MICH. TELECOMM. & TECH. L. REV. 71 (2004) (surveying spoliation sanctions decisions, and concluding that calls to incorporate a safe harbor provision into Rule 37 as a basis for sanctions are unnecessary as courts have taken a balanced approach to sanctions).

[61] Arthur Andersen LLP v. United States, 544 U.S. 696, 706 (2005) (reversing obstruction of justice conviction under 18 U.S.C. §§ 1512(b)(2)(A)–(B) "because the jury instructions . . . failed to convey the requisite consciousness of wrongdoing").

[62] United States v. Quattrone, 441 F.3d 153, 180 (2d Cir. 2006) (holding that the defendant's lack of knowledge of the specific focus of the investigation was erroneously not told to the jury).

[63] Arthur Andersen LLP v. United States, 544 U.S. 696, 706 (2005) (reversing obstruction of justice conviction under 18 U.S.C. §§ 1512(b)(2)(A)–(B) "because the jury instructions . . . failed to convey the requisite consciousness of wrongdoing"); *see also* United States v. Quattrone, 441 F.3d 153, 180 (2d Cir. 2006) (holding that defendant's lack of knowledge of the specific focus of the investigation was erroneously not told to the jury).

[64] Metro. Opera Ass'n v. Local 100 Hotel Employees (*MetOpera*), 212 F.R.D. 178 (S.D.N.Y. 2003), *adhered to on reconsideration by and clarified by*, 2004 U.S. Dist. LEXIS 17093, 175 L.R.R.M. (BNA) 2870 (S.D.N.Y. Aug. 27, 2004).

[65] *MetOpera*, 212 F.R.D. at 231 (emphasis added).

[66] *Id.* at 181, 230. Court held:

> The discovery process in this case . . . transcended the usual clashes between adversaries, sharp elbows, spitballs and even Rambo litigation tactics. This case was qualitatively different. It presented the unfortunate combination of lawyers who completely abdicated their responsibilities under the discovery rules and as officers of the court

D. *What To Do: Retention/Destruction Policies*

It is advisable for every client to adopt a formal, written retention (i.e., destruction) policy and concomitant implementation protocols. An effective regime can help shield the company from negative inferences or defaults due to deletion or other disposition of information. To be effective, a retention and destruction process must: (1) include an adequate suspension ("litigation hold") provision,[67] and (2) not have been instituted or followed in bad faith (i.e., suddenly followed to limit damaging evidence available to potential litigation adversaries).[68]

An effective litigation hold stops any and all purging of potentially relevant information upon reasonable anticipation of legal dispute. Thus, before implementing or changing a retention and destruction regime, a company should segregate and collect all electronic information (and paper) pertinent to all currently pending and reasonably anticipated disputes. In trying to assess whether a potential dispute is likely to develop into an actual

---

> and clients who lied and, through omission and commission, failed to search for and produce documents and, indeed, destroyed evidence—all to the ultimate prejudice of the truth-seeking process.

Id.

[67] *See infra* Section III(A)(2)–(3).

[68] *See* Rambus, Inc. v. Infineon Technologies Techs. AG, Inc., 222 F.R.D. 280, 298–99 (E.D. Va. 2004) (granting motion to compel production of documents and testimony relating to Plaintiff Rambus's document retention, collection, production, and "Shred Days," and finally dismissing case based on spoliation); *see also* Rambus v. Hynix Semiconductor Inc., No. C-00-20905 RMW, 2006 WL 565893, at *28 (N.D. Cal. Jan. 5, 2006) (finding that the unclean hands defense failed because Rambus had not "targeted any specific document or category of relevant documents with the intent to prevent production in a lawsuit such as th[is] one"). In *Hynix*, a planned "licensing" campaign was viewed as one that would "probably push [Ramb]us into litigation quickly." *Id.* at *5. Thus, Rambus adopted a retention and destruction policy in part to be "battle ready." *Id.* (finding that, although the plaintiff started to recycle back-up tapes every three months, as well as to discard all drafts of all documents, it kept documents relating to patent disclosures and proof of invention). *Cf.* Samsung Elecs. Co. v. Rambus, 439 F. Supp. 2d 524, 568 (E.D. Va. 2006) (finding spoliation based on "bad faith" adoption of "retention" policy in order to "prepar[e] for the coming litigation").

litigation, proceeding, or investigation, the company might consider the frequency and scope of similar past disputes.

The company should divide its information into two categories; setting aside those items needing retention based on legal and/or business requirements from everything else. Whether or not litigation is pending, Information Technology leaders, legal leaders, and corporate officers need to communicate frequently to identify and map all storage locations and formats, including shared network drives, intranets, and back-up tapes.

Wherever possible, retention/destruction policies and protocols should reject printing to paper, and enable central storage rather than encourage local storage. However, each company's culture is unique, thus, a realistic, tailored approach is needed. Consistency in applying policies and protocols, commissioning outside audits, periodic training and quality control tests are advisable.

The goal is to walk the tightrope between saving too much and destroying too much. The end game is to have a defensible process in place in the event of a spoliation motion in a future litigation. In today's environment of huge data storage capacity, some business reasons for declining to retain all electronic information include improved retrieval capability, avoiding excessive storage costs, and streamlining operations and project transitions.

Although it is not an argument likely to wind up in a formal response to a motion to compel or a motion for sanctions, there is an elephant in the room. If one's metaphorical house is "not in order," response times and costs can be overwhelming for the collection, review, and production needed to answer a government inquiry or litigation discovery request.

E. *Spiraling eDiscovery Costs*

The need for cost-sensitivity is great because the expenses associated with vast data sets of electronic information can be astronomical. One survey estimated the aggregate costs of preserving, collecting and producing commercial litigation in the United States has grown to almost $1.8 billion in 2006, and will

expand to more than $3.1 billion by 2008.[69] The reasons some firms handle as much eDiscovery activity in-house as possible are cost sensitivity and quality control.[70]

III. "IN THE TRENCHES ISSUES" ARISING OUT OF PLAN AND PRESERVE, COLLECT, F.I.N.D., REVIEW, AND PRODUCE

The eDiscovery process is comprised of five steps: (1) plan (and preserve); (2) collect; (3) F.I.N.D. (File Identification Narrowed by Definition)—also known as "culling" or "winnowing"; (4) review; and (5) produce. As to issues arising under each of those five steps, the law is in flux. However, one thing is certain: in modern-day litigation, eDiscovery has become a pivotal issue. Hot topics in eDiscovery include: preservation and retention obligations; collection of evidence, including assessing cost allocation; litigation strategies, including potential collaboration as to search criteria during the winnowing process; form of review and production; and doing the utmost to avoid inadvertent disclosure that waives either privilege or work product protection.

---

[69] George J. Socha & Tom Gelbmann, The 2006 Socha-Gelbmann Electronic Discovery Survey Results, http://www.sochaconsulting.com/2006surveyresults.htm (last visited Nov. 13, 2006).

[70] *See* Peter Darling, *Seeking Out New Markets: Tapping Into Client Trends for New Business and Bigger Profits*, A.B.A. L. PRAC. MAG. (Sept. 2006), http://www.fenwick.com/docstore/publications/EIM/20060901_Law_Practice.pdf (last visited Nov. 12, 2006). *See also* Richard E. Davis, *In-House EDD: Pot of Gold or Can of Worms?*, EDISCOVERY LAW & STRATEGY, at 5 (Nov. 3, 2004), http://www.law.com/jsp/legaltechnology/pubArticleLTN.jsp?id=1099217123685 ("For firms with in-house e-discovery processing capability, benefits include greater consistency of document-production methodology and better cost control.").

A. *Plan, Preserve—Case Studies in Lack of Compliance*

1. *MetOpera: Plaintiff Union's Deficiencies Enumerated*

In *MetOpera*, the plaintiffs and their counsel exhibited a lack of good faith regarding the discovery process.[71] Among the litany of bad acts warranting the supreme sanction of entry of judgment were:

> In response to [Plaintiff] Met[Opera's] counsel's continuing assertions of lack of an adequate document search and demonstrations of non-production, the [Defendant] Union's counsel repeatedly represented to the Court that all . . . [responsive] documents . . . had been produced when . . . a thorough search had never been made and counsel had no basis for so representing;
>
> counsel knew the Union's files were in disarray and that it had no document retention policy but failed to cause a retention policy to be adopted to prevent destruction of responsive documents, both paper and electronic;
>
> counsel failed to explain to the non-lawyer in charge of document production . . . that a document included a draft or other non-identical copy and included documents in electronic form;
>
> the non-lawyer the Union put in charge of document production failed to speak to all . . . who might have relevant documents, never followed up with the people [to whom] he did speak . . . and failed to contact all of the Union's internet service providers ('ISPs') to attempt to retrieve deleted e-mails as counsel represented to the Court that [the non-lawyer] would;
>
> no lawyer ever doubled back to inquire of the Union employee in charge of document production whether he conducted a search and what steps he took to assure complete production; [and]
>
> in the face of Met counsel's constant assertions that no adequate document search had been conducted and responsive documents had not been produced, Union counsel failed to inquire of several important witnesses about documents until the night before their depositions.[72]

---

[71] *MetOpera*, 212 F.R.D. 178, 226–27 (S.D.N.Y. 2003) (regarding lying to the court about a court-ordered deposition witness' vacation schedule, finding "counsel's conduct was not 'merely discourteous' but rather a breach of their responsibility to opposing counsel and the Court, *inter alia*, to engage in discovery in good faith, comply with court orders and, more fundamentally, to tell the truth").

[72] *Id.* at 181–82.

The list of bad faith acts in *MetOpera* serves as a veritable guidebook on the notification aspects of the preservation, collection, and production obligations.

2. *Zubulake V: Expansion of Corporate Counsel's Obligations*

Since the summer of 2004, under the new regime ushered in by *Zubulake V*,[73] notice of an employee dispute triggers significant and expanded legal obligations. A company and its counsel must take all reasonable steps to locate and preserve all relevant electronic and hardcopy information.[74] Outside counsel and in-house counsel are responsible for coordinating and overseeing the preservation and production process[75] by: (1) instituting immediately, *and periodically re-issuing*,[76] a litigation hold on deletion or destruction of information; (2) communicating immediately and directly with all key players, i.e., those individuals identified in a party's initial and supplemental disclosures;[77] and (3) safeguarding all pertinent electronic archival/back-up media.[78]

In *Zubulake*, some key employees had deleted relevant e-mails after being instructed by in-house counsel to retain them.[79] In addition, some relevant e-mails stored on an active server had been produced only after thirteen depositions (and four re-depositions).[80]

---

[73] Zubulake v. UBS Warburg, LLC (*Zubulake V*), 229 F.R.D. 422 (S.D.N.Y. 2004).

[74] *Id.* at 432–33.

[75] *Id.* at 435.

[76] *Id.* at 433 ("[T]he litigation hold should be periodically re-issued so that [(1)] new employees are aware of it, and [(2)] so that it is fresh in the minds of all employees.").

[77] *Id.* at 433–34. As of December 1, 2006, under newly amended Fed. R. Civ. P. 26(a)(1)(B) entitled "Initial Disclosures," "a party must, without awaiting a discovery request, provide: a copy of, or a description by category and location of, all documents, electronically stored information, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses." FED. R. CIV. P. 26(a)(1)(B), at 4–5, *available at* http://www.uscourts.gov/rules/EDiscovery_w_Notes.pdf (last visited Nov. 13, 2006)

[78] *Zubulake V*, 229 F.R.D. at 439.

[79] *Zubulake V*, 229 F.R.D. 422, 424 (S.D.N.Y. 2004).

[80] *Id.* at 429.

Moreover, some backup tapes had been lost after a specific preservation directive had been issued.[81] Finally, counsel had not issued "litigation hold" instructions to a senior Human Resources staffer intimately involved with the plaintiff's termination.[82]

The court imposed sanctions for willful spoliation, including an adverse inference instruction as to deleted and lost e-mails[83]—with the imposition of the costs of re-depositions required by tardy productions[84]—as well as the costs of additional restoration[85] and of the sanctions motion.[86] Not surprisingly, eight months later, the jury awarded Plaintiff Laura Zubulake $29.2 million in damages.[87]

3. *Broccoli v. EchoStar: "Litigation Hold" Failings*

The case of *Broccoli v. Echostar Communications* illustrated the point that one cannot blindly follow a retention policy and be protected from potential legal ramifications.[88] In that case, the employer had an "extraordinary" and "risky" retention, destruction, and purging policy.[89] First, unsorted e-mails were auto-purged every twenty-one days and not retained anywhere. "Sent Items" over seven days old were automatically migrated to "Deleted Items," and then "Deleted Items" over fourteen days old were purged.[90] Second, an employee's folders of electronic files and e-mails were deleted thirty days after he or she left the company.[91]

---

[81] *Id.* at 427.
[82] *Id.* at 424.
[83] *Id.* at 440.
[84] *Id.*
[85] *Zubulake V*, 229 F.R.D. 422, 438 (S.D.N.Y. 2004).
[86] *Id.* at 437.
[87] Eduardo Porter, *UBS Ordered to Pay $29 Million in Sex Bias Lawsuit*, N.Y. TIMES, Apr. 7, 2005, at C3.
[88] Broccoli v. Echostar Commc'ns. Corp., 229 F.R.D. 506 (D. Md. 2005).
[89] *Id.* at 510.
[90] *Id.* (finding "Sent Items" over seven days old were automatically migrated to "Deleted Items," and then "Deleted Items" over fourteen days old were completely purged).
[91] *Zubulake V*, 229 F.R.D. 422, 510 (S.D.N.Y. 2004).

The court quoted *Arthur Andersen v. United States*[92] to assess a post-trial sanctions motion and explain its prior adverse inference jury instruction:

> 'Document retention policies,' which are created in part to keep certain information from getting into the hands of others, including the Government, are common in business .... It is not wrongful for a manager ... to instruct its employees to comply with a valid document retention policy under normal circumstances.[93]

The *Echostar* court then found that, "[u]nder normal circumstances, [a twenty-one-day purge] policy may be a risky but arguably defensible business practice undeserving of sanctions."[94] Yet, the employer had not satisfied its *Zubulake V* "litigation hold" obligation:

> Echostar plainly had a duty to preserve employment and termination documents when its management learned of [the plaintiff's] potential Title VII claim ....
>
> ... [Yet] none of the [e-mails] exchanged between [the plaintiff], [his] supervisors, and Echostar's upper management regarding his complaints ... were preserved. Moreover, Echostar admits that it never issued a company-wide instruction regarding the suspension of any data destruction policy ....
>
> Given Echostar's status as a large public corporation with ample financial resources and personnel management know-how, the court finds it indefensible that such basic personnel procedures and related documentation were lacking.[95]

The court thus sanctioned the defendant for "gross spoliation" and "bad faith."[96]

4. *Other Anti-Spoliation Cautionary Tales*

In other non-employment litigation contexts, a responding party has paid a huge price for non-compliance with preservation and production obligations. In a notable Florida state court securities fraud case, Defendant Morgan Stanley repeatedly failed, not only to produce responsive e-mails, but also to be frank with its

---

[92] 544 U.S. 696 (2005).

[93] *Id.* (quoting Arthur Andersen LLP v. United States, 544 U.S. 696, 704 (2005)).

[94] *Id.*

[95] *Id.* at 511–12.

[96] *Id.* at 512.

adversary or with the court about the status of collecting those e-mails.[97] The consequences were disastrously outcome-determinative.

The Morgan Stanley suit entailed claims of fraud and conspiracy as to an acquisition in which the plaintiff sold its 82% stake in Coleman Inc. to Sunbeam. The Sunbeam shares the plaintiff had received turned out to be undesirable once Sunbeam filed for bankruptcy. Morgan Stanley had been Sunbeam's financial adviser and underwriter.

On March 1, 2005, Judge Elizabeth Maas granted the plaintiff's motion for an adverse inference jury instruction, based on the defendants' knowingly failure to: stop the systematic overwriting of e-mails every twelve months; conduct proper searches for back-up tapes that might have contained e-mails; promptly retract a previously submitted certificate of compliance it knew to be false (there were *1,400* outstanding back-up tapes); notify the plaintiff when additional tapes had been located; use reasonable efforts to search the newly discovered tapes in a timely manner; process and search data it had isolated for production; or draft search protocols consistent with previously entered court orders.[98]

The March 1 Order granted the plaintiff's request for an adverse inference instruction based on the defendant's violation of its "affirmative duty . . . to produce its e-mails."[99] The Order went as far as to delineate the judge's agreement to read to the jury, at a time chosen by opposing counsel, a three page "conclusive" statement of facts detailing the defendant's eDiscovery failings.[100]

Two weeks later, when the defendant had still not fully complied, the plaintiff renewed a prior motion for entry of default judgment. On March 23, in partially granting the motion, the

---

[97] Coleman (Parent) Holdings, Inc. v. Morgan Stanley (*Coleman I*), No. 502003CA005045XXOCAI, 2005 WL 679071 (Fla. Cir. Ct. Mar. 1, 2005); Coleman (Parent) Holdings, Inc. v. Morgan Stanley (*Coleman II*), 2005 WL 674885 (Fla. Cir. Ct. Mar. 23, 2005).

[98] *Coleman I*, No. 502003CA005045XXOCAI, 2005 WL 679071 at *5.

[99] *Id.*

[100] *Id.* at *7.

judge found that the defendant had "deliberately and contumaciously violated numerous discovery orders" and committed to reading a redacted version of the twenty seven page amended complaint to the jury.[101] The prior March 1 three-page fact statement was to be supplemented with additional eDiscovery-failure facts found in the subsequent March 23 order, then also read to the jury.[102] The impact of the adverse fact findings was not limited to consciousness of guilt. Per the March 23 order, the jury was also to be "instructed that it may consider [the e-mail destruction] facts in determining whether [the defendant] sought to conceal its offensive conduct when determining whether an award of punitive damages is appropriate."[103]

When the trial began in early April, the defendants' searches and retrievals were not yet completed and had to be abandoned. As planned, Judge Maas read the nine-person jury a lengthy statement, saying, in part: "Morgan Stanley participated in a scheme to mislead [the plaintiff company] and others and cover up the massive fraud at Sunbeam until Morgan Stanley and Sunbeam could close the purchase of Coleman." A few weeks later, a $608 million verdict was reached in favor of the plaintiff, with a further award of punitive damages over $800 million.[104] Athough on appeal, the case remains a cautionary tale.

5. *New "Safe-Harbor" Amendment to Federal Rules*

Help has arrived for entities that have their houses in order. Though the defense bar did not get everything it wanted in the newly amended version of FRCP 37,[105] the change does provide a

---

[101] *Coleman II*, No. CA 03-5045 AI, 2005 WL 674885, at *10.

[102] *Id.*

[103] *Id.* at *22.

[104] Marietta Cauchi, *Morgan Stanley Appeals Decision to Award Perelman $1.45 Billion, Jury Sides With Perelman In Case Against Morgan Stanley*, WALL ST. J., Dec. 13, 2005, at C4; Susanne Craig, *How Morgan Stanley Botched A Big Case by Fumbling E-mails*, WALL ST. J., May 16, 2005, at A1.

[105] *See* STAFF OF ADVISORY COMM. ON THE FED. RULES OF CIVIL PROCEDURE, REPORT OF THE CIVIL RULES ADVISORY COMM. 31–32 (Aug. 3, 2004), http://Reportat51.notlong.com [hereinafter ADVISORY RULES AUGUST REPORT]. The defense bar was in favor of a prior alternative draft, which had provided that a responding party would not be sanctioned unless its deletion of pertinent

safe harbor.[106] The "safe harbor" in the newly amended Rule 37(f) provides that: "Absent exceptional circumstances, a court may not impose sanctions *under these rules* for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system."[107]

This change should provide some relief to entities called upon to preserve—and thus not, in bad faith, overwrite—electronic information.[108] However, an accompanying change will expand a litigant's obligations by forcing it to keep abreast of its electronic information, anywhere that data resides. Whereas an earlier draft of the new Rule 37(f) had referenced "*the party's*" electronic information system,[109] the current draft describes "*an* electronic information system."[110] This broadening is an intentional effort to encompass and "protect[] a party who has contracted with an outside firm to provide electronic information storage, avoiding potential arguments whether the system can be characterized as 'the party's.' The party remains obliged to . . . avoid loss of information . . . by the outside firm."[111] The protection consists of the safe harbor coverage obtained by acting in good faith.

---

information resulted from violation of a court order or from intentional or reckless conduct. Residential Funding Corp. v. DeGeorge Fin Corp., 306 F.3d 99, 112–13 (2d Cir. 2002) (remanding for reconsideration of denial of instruction). This backlash was at least partially in response to the Second Circuit's establishment of "ordinary negligence" as the "culpable state of mind" triggering an adverse inference instruction.

[106] Shira A. Scheindlin & Kanchana Wangkeo, *Electronic Discovery Sanctions in the Twenty-First Century*, 11 MICH. TELECOMM. TECH. L. REV. 71 (2004) (concluding that calls from the defense bar to strengthen the proposed "safe harbor" protection were unnecessary because courts had already been taking a balanced approach). Some experts have claimed that judges have been fair when assessing whether sanctions are warranted on a case-by-case basis.

[107] FRCP eDISCOVERY AMENDMENTS, *supra* note 41, at 40 (emphasis added). A judge still retains his or her authority to sanction premised on the inherent power to oversee case management. *Id.* at 42. *See also* REPORT, *supra* note 41, at C-87–88.

[108] FRCP eDISCOVERY AMENDMENTS, *supra* note 41, at 41.

[109] *See* ADVISORY RULES AUGUST REPORT, *supra* note 105, at 32.

[110] REPORT, *supra* note 41, at C-86 (emphasis added).

[111] *Id.* at C-89.

6. *TIPS and Takeaways*

Zubulake V placed the following duties on in-house and outside counsel: "to effectively communicate to her client its discovery obligations;"[112] to "become fully familiar with her client's document retention policies [and] ... data retention architecture;"[113] and to "take *affirmative steps* to monitor compliance so all sources of discoverable information are identified and searched."[114]

The ominous implications of *Zubulake V*—especially the specter of an adverse inference jury instruction—are evident. In addition, practically speaking, the sooner in-house and outside counsel learn of the scope and contents of the universe of an entity's relevant information, the better. Pinning down those parameters early will enable counsel to provide the most effective, efficient legal and strategic advice.

Additionally, a strict preservation and notification regime can go a long way toward keeping a client from getting blind-sided down the line. When previously missing e-mails crop up months or years later in accessible electronic message strings or in hardcopy printouts, it can be a major blow to the confidences of the client and counsel in both the quality of their collection efforts and in each other.

At the earliest possible juncture, try to identify key time frames, key players (including those in Human Resources), and key subject matter (including pertinent acronyms, if any). Ascertain whether retention, destruction or recycling protocols exist *and* are being followed, not only in general but also once litigation should have been anticipated, let alone commenced. If such procedures do not exist or have not been triggered, then advise your client post haste to implement them. Do your best to

---

[112] *Zubulake V*, 229 F.R.D. 422 (S.D.N.Y. July 20, 2004).

[113] *Id.* at 432.

[114] *Id.* at 433 (emphasis added) ("[A] party cannot reasonably be trusted to receive the ... instruction once and to fully comply with it without the active supervision of counsel.").

obtain from your client the identities and contact information for all key Information Technology personnel.[115]

As to the litigation hold notice, advise your client as to the ideal content, recipients and dissemination method (perhaps using the e-mail system's return receipt confirmation feature). Prepare a draft cover e-mail and draft message. Follow up periodically. Make sure you and your client document all preservation steps taken.

7. *Meet and Confer—26(f) Conference*

An efficient approach could be to address with opposing counsel many eDiscovery issues early. The recent changes to Federal Rules 26 and 16 (and to Form 35) contemplate a wide-ranging Rule 26(f) conference.[116] Examples of helpful topics are whether one or more parties will be requesting the restoration of relatively inaccessible data,[117] potential collaboration as to search criteria,[118] format(s) of exchange of electronic information,[119] and avoiding inadvertent waivers of privilege.[120]

The newly amended rules identify those topics as warranting early discussion, as well as the parties' respective information systems technology, the scope and sources of discovery and

---

[115] It is also wise to quickly identify current and former employees whose hard discs need to be forensically captured, as well as the locations of those desktops, PC's, and laptops. *See generally infra* Section III(B)(1); Mary Mack, *Electronic Discovery v. Computer Forensics: The Differences You Need to Know*, LJN'S LEGAL TECH NEWSL., Aug. 2003, http://www.fiosinc.com/resources/pdfFiles/200308_ed_computer_forensics.pdf (last visited Nov. 9, 2006).

[116] The newly amended versions of Fed. R. Civ. P. 16(b)(3)–(6), Fed. R. Civ. P. 26(f)(1)–(6) and Form 35 are designed to create a framework "to discuss 'any issues relating to preserving discoverable information' [such as] . . . preservation[,] . . . any issues relating to . . . electronically stored information, including the form or forms in which it should be produced [and] issues relating to the assertion of privilege and work-product protection . . . in the parties' initial conference." REPORT, *supra* note 41, at C-24; *cf.* D. Del. Default Standard for Discovery of Electronic Documents at §§ 2–3, http://www.ded.uscourts.gov/Announce/HotPage21.htm (last visited Nov. 9, 2006).

[117] *See infra* Section III(B).

[118] *See infra* Section III(C).

[119] *See infra* Section III(D).

[120] *See infra* Section III(E).

"individuals with special knowledge" of same (likely to be the litigants' IT leaders).[121] There were already multiple examples of court-ordered IT involvement in the interim period leading up to the official enactment of the new rules.[122]

B. *Collect*

1. *Some Lessons from Recent Collection Case Law*

A thorough array of effective employee agreements and policies, coupled with additional prior planning, can lead to relatively easy collections. Contracts governing employees' use of employer-provided networks and computers can trump any ultimate employee arguments as to the reasonableness of a purported expectation of privacy.[123]

Furthermore, as soon as there is concern that a particular employee may bring a claim, an employer should consider obtaining a forensically sound image of each computer and laptop provided to that employee.[124] Similarly, where misappropriation of trade secrets is suspected, prompt confiscation of computers, if possible, would be a sound proactive approach.

If prompt action is not, or cannot be, taken, then it may take multiple courthouse trips—for temporary restraining orders, "freeze" orders, and/or search orders—to prevent alteration or

---

[121] FRCP EDISCOVERY AMENDMENTS, *supra* note 41, at 20–26.

[122] *See, e.g.*, Fischer v. UPS, 2006 U.S. Dist. LEXIS 21047 (E.D. Mich. Apr. 19, 2006) (ordering employer to produce an IT staffer for a phone conference about efforts to locate missing e-mail attachment containing managers' draft salaries in retaliation suit following racial-discrimination suit); Tilberg v. Next Mgmt. Co., No. 04CIV7373, 2005 WL 2759860 (S.D.N.Y. Oct. 24, 2005) (requiring the defendant—former manager/agent—to allow the plaintiff's expert access to central servers and local machines after the defendant's IT consultant conceded error in prior statement that there were no relevant active files in case comprised of fraud, contract and fiduciary duty claims by model).

[123] *See, e.g.*, Biby v. Bd. of Regents of Univ. of Neb., 419 F.3d 845 (8th Cir. 2005); TBG Ins. Servs. v. Super. Ct. (*Zieminski*), 117 Cal. Rptr. 2d 155 (Cal. Ct. App. 2002) (including work-at-home PC).

[124] Henry v. IAC/Interactive Group, No. C05-1510RSM, 2006 WL 354971 (W.D. Wash. Feb. 14, 2006) (finding that a manager who had threatened to bring discrimination claims took employer-issued laptop with her when told to go on leave).

spoliation.[125] Note, though, that even if early confiscation or imaging does not occur, later uses—especially mass deletions of any pertinent computer files—will only make matters worse for the party who engages in such activity.[126]

2. *eDiscovery Costs Allocation*

a. Some Quick Background

One key legal and logistical issue at the "Collect" step is which side(s) will foot the bill for extraordinary costs. Nowadays, responding parties have a tougher row to hoe. Frequently, requesting parties—often plaintiffs—successfully argue that, as in the paper world, they should not be forced to bear an eDiscovery cost burden that is "a product of the defendant[s] record-keeping scheme over which the [p]laintiffs have no control."[127]

---

[125] *See also* Yanaki v. Iomed, Inc., 415 F.3d 1204 (10th Cir. 2005) (ordering, *ex parte*, to direct sheriff to lead search of ex-employer's house, no actionable § 1983 civil rights claim), *cert. denied*, 74 U.S.L.W. 3617 (U.S. May 1, 2006); Dodge, Warren & Peters Ins. v. Riley Serv, Inc., 130 Cal. Rptr. 2d 385 (Cal. Ct. App. 2003) (issuing a "freeze" order to "preclude the innocent or intentional alteration or destruction of evidence" as to electronic files taken from former employer when the defendants had left to open their own company); AutoNation, Inc. v. Hatfield, Appellate Case No. 05-02037, 2006 WL 60547 (Fla. Cir. Ct. Jan. 1, 2006) (ordering not only the return of all confidential documents but also the imaging of personal PC of non-employee, who had been e-mailed by former employee suspected of misappropriating trade secrets); Henry v. IAC/Interactive Group, No. C05-1510RSM, 2006 WL 354971 (W.D. Wash. Feb. 14, 2006) (issuing injunction mandating that laptops be returned to former employer rather than merely tendered to "neutral" forensics firm where employment contract required return of all company equipment).

[126] *See, e.g.*, Krumwiede v. Brighton Assocs., L.L.C., No. 05 C 3003, 2006 WL 1308629 (N.D. Ill. 2006) (entering default judgment for breach of non-compete against former employee who had deleted and altered thousands of files while delaying the production of laptop); *see also* Kucala Enters. Ltd. v. Auto Wax Co., Inc., 56 Fed. R. Serv. 3d (West) 487 (N.D. Ill. 2003) (May 27, 2003) (dismissing with prejudice the plaintiff's patent infringement suit based on one company owner's eleventh-hour deletion of 12,000 files with "Evidence Eliminator" software).

[127] *In re* Brand Name Prescription Drugs Antitrust Litig. (*Ciba*), 1995 U.S. Dist. LEXIS 8281, at *6, Nos. 94 C 897, MDL 997, 1995 WL 360526 (N.D. Ill. June 15, 1995) (granting class plaintiffs' motion to compel defendant corporations, including Ciba-Geigy Corp., to produce its responsive computer-

Furthermore, given a more technologically savvy judiciary, responding parties can no longer count on a judge to have a knee-jerk reaction of engaging in cost-shifting analysis whenever there is a discovery dispute regarding electronic evidence.[128]

b. Federal Case Law (*Zubulake I & III* and its progeny)

i. *Zubulake I's* Tripartite Framework

The landscape on the cost-shifting issue changed[129] in 2003 due to the multi-factor test pronounced in *Zubulake I*.[130] There, a grant of a motion to compel arose in a case entailing claims for gender discrimination and retaliation.[131] The court criticized prior decisions as having engaged in a cost-shifting analysis as a knee-jerk reaction based on the faulty "assum[ption] that an undue burden or expense may arise simply because electronic evidence is involved."[132] "[C]ost-shifting may effectively end discovery, especially when private parties are engaged in litigation with large corporations."[133]

As discussed in Section II(B) above, the threshold issue in *Zubulake I* divided the world of electronic information into two distinct but broad categories:

---

stored e-mail) (citing Delozier v. First Nat'l Bank of Gatlingurg, 109 F.R.D. 161, 164 (E.D. TN 1986) (citing Kozlowski v. Sears Roebuck & Co., 73 F.R.D. 73 (D. Mass. 1976))).

[128] *Zubulake I*, 217 F.R.D. 309, 318 (S.D.N.Y. 2003).

[129] Landon Thomas, Jr., *A Ruling Makes E-mail Evidence More Accessible*, N.Y. TIMES, May 17, 2003., at C1.

[130] *Zubulake I*, 217 F.R.D. at 316.

[131] *Id.*

[132] *Id.* at 318 (describing a predecessor decision as follows: "Murphy Oil USA, Inc. v. Fluor Daniel, Inc., No. Civ.A. 99-3564, 2002 WL 246439, at *3 (E.D. La. Feb. 19, 2002) (suggesting that "application of [multi-factor cost-shifting analysis] is appropriate whenever 'a party . . . contends that the burden or expense of the discovery outweighs the benefit of the discovery'")).

[133] *Id.* ("As large companies increasingly move to entirely paper-free environments, the frequent use of cost-shifting will have the effect of crippling discovery in discrimination and retaliation cases.").

(1) "[D]ata that is kept in an ***accessible*** format, [as to which] the usual rules of discovery[134] apply: the responding party should pay the costs of producing responsive data . . . ."[135]

(2) "[E]lectronic data [that] is relatively ***inaccessible***, such as in backup tapes," as to which a "court should consider cost-shifting."[136]

Thus, under *Zubulake I*, cost-shifting is contemplated only when there is a pending request to restore relatively inaccessible data to status as accessible, active data.

Zubulake I then modified the multi-factor test espoused by a prior decision.[137] Once a small sample of inaccessible data has been produced,[138] the court held that, "in conducting the cost-

---

[134] *See* FED. R. CIV. P. 26–37. *See also Zubulake I*, 217 F.R.D. 309, 315–16 (S.D.N.Y. 2003) (discussing rules at length).

[135] *Zubulake I*, 217 F.R.D. at 324 (emphasis added). The case further defines the three subsets of "accessible" media, "listed in order from most accessible to least accessible:" (1) "Active, online data," such as hard drives; (2) "Near-line data," such as optical disks; and (3) "Offline storage/archives[,] . . . lack[ing] 'the coordinated control of an intelligent disk subsystem,' and is, in the lingo, JBOD ('Just a Bunch of Disks')." *Id.* at 318–19.

[136] *Zubulake I*, 217 F.R.D. at 319–20 (emphasis added) (defining "[b]ackup tapes" and "[e]rased, fragmented or damaged data" as "inaccessible" media).

[137] Rowe Entm't, Inc. v. William Morris Co., 205 F.R.D. 421 (S.D.N.Y. 2002) (ordering the plaintiffs to bear costs of production and the defendants to continue to bear expense of reviews for privileged or confidential material upon applying eight-factor balancing approach). The *Zubulake I* test eliminated two of the *Rowe* factors, namely "the specificity of the discovery request" and "the purposes for which the responding party maintains the requested data." *Zubulake I*, 217 F.R.D. at 321. The "purposes" concept was eclipsed by Judge Scheindlin's accessibility/inaccessibility demarcation: "[w]hether the data is kept for a business purpose or for disaster recovery does not affect its accessibility, which is the practical basis for calculating the cost of production." *Id.* at 321–22. Even in "certain limited instances where the very purpose of maintaining the data will be to produce it to the opposing party . . . cost-shifting would not be applicable in the first place; the relevant statute or rule would dictate the extent of discovery and the associated costs." *Id.* at 322 (citing, as an example, SEC requests for "communications sent by [a] broker or dealer . . . relating to his business as such" because "such communications must be maintained pursuant to SEC Rule 17a-4," namely 17 C.F.R. § 240.17a-4).

[138] *Zubulake I*, 217 F.R.D. at 324.

shifting analysis, the following factors should be considered, weighted more-or-less in the following order":[139]

1. The extent to which the request is specifically tailored to discover relevant information;
2. The availability of such information from other sources;
3. The total cost of production, compared to the amount in controversy;
4. The total cost of production, compared to the resources available to each party;
5. The relative ability of each party to control costs and its incentive to do so;
6. The importance of the issues at stake in the litigation; and
7. The relative benefits to the parties of obtaining the information.[140]

This new test was applied to ninety-four back-up tapes previously identified as responsive. The court ordered the defendant to: (1) produce "*all* responsive e-mails that exist on its optical disks or on its active servers . . . ;" (2) produce "responsive emails . . . from any *five* backups [sic] tapes selected by [the plaintiff];" and (3) "prepare an affidavit detailing the results of its search, as well as the time and money spent."[141] After reviewing the contents of the . . . tapes and [the] certification, the Court will conduct the appropriate cost-shifting analysis."[142]

ii. *Zubulake III's* Application of Seven-Factor "Marginal Utility" Test

A month later, in a hearing that would generate *Zubulake III*,[143] the parties came back to court and, of course, expressed different views as to their respective results of analyzing the small sample. The court applied the seven-factor test to the information pulled

[139] *Id.*
[140] *Zubulake I*, 217 F.R.D. 309, 324 (S.D.N.Y. 2003).
[141] *Id.*
[142] *Id.*
[143] Zubulake v. UBS Warburg, L.L.C. (*Zubulake III*), 216 F.R.D. 280 (2003).

from the five back-up tapes chosen by the plaintiff from what turned out to be seventy-seven (rather than ninety-four) responsive back-up tapes. Restoration (conducted by a vendor) plus production (including attorney and paralegal review fees) had cost the defendant $19,000.[144]

Per *Zubulake I*, the list of factors was a guide rather than a rigid directive to mechanically count, add, and compare.[145] The court assigned heavy weight to the first two factors, namely narrow tailoring and (lack of) availability from other sources.[146] The weighing of the first two factors led the court to conclude that the sample restoration, resulting in the production of relevant e-mail, had demonstrated that the plaintiff's discovery request was indeed narrowly tailored to discover relevant information.[147] While some subject matter had been addressed in other documents, the additional e-mails containing the related content were only available from the back-up tapes.[148]

Given the nature of the claims, the court reasoned that direct discrimination evidence might only be available through restoration.[149] Thus, the marginal utility of the requested further discovery might be quite high.[150] Given that the existence of such evidence was still speculative at best, the plaintiff had shown "that the marginal utility was *potentially* high."[151] In that the defendant

---

[144] *Id.* at 283.

[145] *Id.* at 289 (citing *Zubulake I*, 217 F.R.D. at 322).

[146] *Id.* at 284. The court explained that "the first two factors together comprised the 'marginal utility test' announced in *McPeek v. Ashcroft*: The more likely it is that the backup tape contains information that is relevant to a claim or defense, the fairer it is that the [responding party] search at its own expense. The less likely it is, the more unjust it would be to make the [responding party] search at its own expense. The difference is 'at the margin.'" *Id.* (alteration in original) (quoting McPeek v. Ashcroft, 202 F.R.D. 31, 34 (D.D.C. 2001)).

[147] *Zubulake III*, 216 F.R.D. at 288.

[148] *Id.*

[149] *Id.* at 287.

[150] *Id.*

[151] *Id.*

bore the burden of proving that cost-shifting was warranted, the two-factor marginal utility test tipped slightly against shifting.[152]

As to the five other less important factors, the court found that factors 3 and 4 militated against cost-shifting, factors 5 and 6 were "neutral," and factor 7 supported cost-shifting.[153] When weighing the likelihood of recovery of additional valuable information against some factors that cut slightly in the other direction, the court deemed it appropriate to shift a minority of the costs to the plaintiff, i.e., the requesting party.[154]

iii. *Zubulake III's* Shift of Some Restoration-plus-Search Costs and Prohibition on Shift of Review-plus-Production Costs

The *Zubulake III* court concluded that a 25% cost assignment to the requesting party comported with the policies behind the two key countervailing pitfalls of (1) "chill[ing] the rights of litigants to pursue meritorious claims," and (2) "unduly burdening" the defendant with too much of the expense of a "somewhat speculative" search.[155] Once the 25/75 split was pronounced, a pivotal issue remained: whether the 25% shift should apply to the entire $274,000 cost, or only to the $166,000 portion needed to restore the remaining seventy-two backup tapes.[156] So, the big practical difference was whether there would be a shift of $68,000 or of $41,500.

Under the *Zubulake III* approach, two basic principles govern allocation. First, *only restoration and search costs* could be subject to shifting in that "[r]estoration[,] the act of making inaccessible material accessible[, is a] 'special purpose' or 'extraordinary step,'"[157] and "[s]earch costs should also be shifted

---

[152] *Id.*

[153] *Zubulake III*, 216 F.R.D. 280, 287–89 (2003).

[154] *Id.* at 289.

[155] *Id.*

[156] The estimated total cost of producing those seventy-two tapes (restoration-and-searching costs *plus* attorney/paralegal review time costs) was calculated as follows: 72 X $3,800.69 (i.e., $19,003.43 ÷ 5) per tape = $273,649.39. *Id.* at 283, 287, 289–90. The breakdown between the estimated costs of restoring and searching and attorney/paralegal review, respectively, was $165,954.67 and $107,694.72. *Id.* at 283, 287, 289–90.

[157] *Id.* at 290.

because they are so intertwined with the restoration process; a vendor . . . will not only develop and refine the search script, but also necessarily execute the search as it conducts the restoration."[158] "[C]ost-shifting is only appropriate for inaccessible—but otherwise discoverable—data."[159] Second, "the responding party should *always* bear the cost of reviewing and producing electronic data once . . . converted to an accessible form."[160] "[T]echnology may increasingly permit litigants to reconstruct lost or inaccessible information, but once restored to an accessible form, the usual rules of discovery apply."[161]

iv. *Zubulake's* Progeny

For the most part, over the past year and a half the *Zubulake* approach has become the benchmark in federal eDiscovery cost allocation case law. Give or take a factor or two,[162] many decisions have followed the seven-factor marginal-utility-based approach. Some recent decisions have shifted a percentage of costs to the requesters; while others have ordered that all costs remain the burden of the responding party.[163]

---

[158] *Id.*

[159] *Zubulake III*, 216 F.R.D. 280, 291 (2003).

[160] *Id.* at 290.

[161] *Id.* at 291 ("Notwithstanding this ruling, [the defendant/producing-party] can potentially impose a shift of all of its costs, attorney's fees included, by making an offer to the plaintiff under [Fed. R. Civ. P.] 68.").

[162] *See, e.g.*, Wiginton v. CB Richard Ellis, Inc., 229 F.R.D. 568 (N.D. Ill. 2004) (adding eighth factor in employment case,—"the importance of the requested discovery in resolving the issues at stake in the litigation"—to *Zubulake's* Step 3 and then shifting 75% of restore and search costs to putative class action plaintiffs).

[163] Applied Discovery's "Law Library" provides summaries of pre- and post-*Zubulake* cost allocation decisions. *See* LexisNexis Applied Discovery, http://www.lexisnexis.com/applieddiscovery/lawLibrary/caseSummariesByTopic.asp (follow "Costs shifted to requesting party" hyperlink, "[f]actors" hyperlink and "[p]roducing party pays costs of production" hyperlink) (last visited Nov. 9, 2006).

c. Reminder: Your State's Rules May Differ[164]

As the cliché goes: don't try this at home. Though the *Zubulake* framework has generally been gaining approval in the United States District Courts, remember that this decision is not binding anywhere, let alone in state courts. Indeed, as two bi-coastal decisions made clear last year, some states' procedural rules mandate that the requesting party bear production costs.

In New York's inaugural eDiscovery decision,[165] a judge invoked the general rule of C.P.L.R. § 3103(a) to preclude cost-shifting from even being contemplated:

> [C]ost shifting of electronic discovery is not an issue in New York since the courts have held that, under the CPLR, the party seeking discovery should incur the costs incurred in the production of discovery material. CPLR 3103(a) specifically grants the court authority to issue a protective order to prevent a party from incurring unreasonable expenses in complying with discovery demands. Therefore, the analysis of whether electronic discovery should be permitted in New York is much simpler than it is in the federal courts. The court need only determine whether the material is discoverable and whether the party seeking the discovery is willing to bear the cost of production of the electronic material.[166]

Thus, the judge would not compel production until the plaintiffs agreed to pay for "the costs incurred for the production of [the] data."[167] However, the following year, a different New York decision pointed out that the same statute contemplates an after-the-fact motion for cost allocation if needed "to prevent unreasonable annoyance, *expense*, . . . or other prejudice."[168]

---

[164] In addition, always be on the lookout for any federal and/or state statute providing a basis for fees. *See, e.g.*, United States v. Gordon, 393 F.3d 1044, 1057 (9th Cir. 2004) (citing 18 U.S.C. §§ 3663(a), 3664 (1996)) (upholding repayment to employer of fees incurred in computer forensic investigation of employee/inside trader, who had not only embezzled but also "purposefully covered his tracks as he concealed his numerous acts of wrongdoing . . . over a period of years").

[165] Lipco Elec. Corp. v. ASG Consulting Corp., 2004 N.Y. slip op. 50967U (N.Y. Misc. 2004).

[166] *Id.* at 8 (citations omitted).

[167] *Id.* at 25.

[168] Weiller v. N.Y. Life Ins., 2005 N.Y. slip op. 50341U at 1 (N.Y. Misc. 2005) (quoting N.Y. C.P.L.R. § 3103(a)).

California's highest court's let stand the first published cost allocation decision in late 2005 in *Toshiba v. Superior Court (Lexar Media)*.[169] There, the Sixth District Court of Appeals relied on the "data compilations" translation exception of California Code of Civil Procedure 2031(g)(1)[170] to reverse an order that had declined to shift any back-up tape restoration costs.[171] *Toshiba* started with the premise that the responding party bears its own costs.[172] It then addressed California's statutory exception for "data compilations translation" in the context of back-up tapes requiring manipulation to be restored to "reasonably usable form."[173] Thus, California law apparently diverges from the federal *Zubulake* approach—the latter ostensibly applying the three-phase framework *whenever* there is a dispute as to "relatively inaccessible data," such as back-ups.[174]

The appellate court ruled that cost-shifting of reasonable expenses should occur wherever the trial judge finds that the at-issue restoration is indeed a "translation."[175] However, the

---

[169] Toshiba v. Super. Ct. (*Lexar Media*), 2005 Cal. LEXIS 11999 (Cal. 2005).

[170] As of July 1, 2005, Section 2031(g)(1) was relocated to Cal. Code Civ. Proc.§ 2031.280.

[171] Toshiba Am. Elec. Components, Inc. v. Super. Ct., 124 Cal. App. 4th 762 (Cal. Ct. App. 2004).

[172] *Id.* at 772 ("Code Civ. Proc § 2031(g)(1) is a legislatively determined exception to the general rule that the responding party should bear the cost of responding to discovery.").

[173] *Id.* at 764 ("When there is no dispute about the application of the statute, the statute automatically shifts the expense of translating a data compilation into usable form to the demanding party.").

[174] *Id.* at 771 (approving the federal *Zubulake/McPeek* "small sample" approach as an effective way for the trial court to analyze the underlying factual issues in a back-up tapes dispute); *see also supra* text accompanying notes 45–50, 134–38 & 143–44.

[175] *Id.* at 773. As to policy:

> If the respondent is expected to bear its own expense, the demanding party has no incentive to demand anything less than all electronic data in any form .... [S]uch an unlimited demand can result in astronomical costs to the responding party.... If the demanding party were required to bear the expense, then presumably that party would only demand what it really needs. 'There is certainly no controlling authority for the proposition that restoring all backup tapes is necessary in every case ....' [T]he statute requires that the demanding party

appellate court did stop short of ruling that "the demanding party must always pay *all* the costs associated with retrieving usable data from backup tapes," instead pointing out that "Section 2031(g)(1) is clear that the demanding party is expected to pay only its reasonable expense for a necessary translation."[176] Nor did *Toshiba* identify the categories of the costs to be covered therein.

Unlike *Zubulake III*, which opined on the cost categories that are "shift-able" (e.g., restoration and searching) and those that are not (e.g., review and production), *Toshiba* characterized these issues as "purely factual" ones left to the trial judge's discretion.[177] On remand, the trial court was to assess the applicability of Section 2031(g)(1) to the back-up tapes. In that those tapes ostensibly required much manipulation to be restored to "reasonably usable form" and the utility of their contents was still unclear, the appellate court suggested that a *Zubulake*-Step-2-type "small sample" approach might be wise.[178]

C. *F.I.N.D. (File Identification Narrowed By Definition)*

Technologists and eDiscovery tools provide their greatest value by processing and culling the collected data to greatly narrow the size and scope of the amount of data that will proceed to the "Review" phase. Winnowing methods can include data de-duplication, keyword searching, metadata parameters and other data definitions. If required by the project's plan, it is also possible during this phase to use a variety of litigation tools to convert

---

> bear only its reasonable expense and then only when translation is necessary to obtain usable data.

Id. at 771 (quoting McPeek v. Ashcroft, 202 F.R.D. 31, 33–34 (D.D.C. 2001)) (citations omitted).

[176] *Id.* at 773 (emphasis added).

[177] *Id.* ("Section 2031(g)(1) is clear that the demanding party is expected to pay only its reasonable expense for a necessary translation. Reasonableness and necessity are purely factual issues.").

[178] *Id.* at 772 (citing *Zubulake I*, F.R.D. 309, 323–24 (S.D.N.Y. 2003)) ("Since it may be impossible to determine in advance whether or to what extent the backup tapes will yield relevant material, the court should encourage the parties to meet and confer about translating a sample of the tapes . . . and to otherwise develop information in order to inform the analysis of the extent to which [plaintiff/requestor] should bear the expenses [defendant/responder] has claimed.").

native files to either TIFF or PDF images for review and/or production. This conversion process can also occur following the Review phase.

Unless there are countervailing strategies, there may be benefits to be derived from collaborating with opposing counsel regarding selection criteria.[179] If that is the case, the question of *when* a propounding party gains input into the responding party's selection criteria can be very tricky.[180] A responding party will tend to insist on the right to "go it alone" in the first instance.[181] That approach, especially when coupled with sweeping early representations that "everything" has already been produced, may ultimately lead to an implicit finding of an ethical violation of the fraud-on-the-court variety.[182] In contrast, a requesting party will want to have input *ab initio*,[183] unless of course, it fears a reciprocal request from its litigation adversary.

Yet, the alternative and more adversarial approach may result in inefficiencies as well as failure to comply with the types of obligations discussed in Section III(A) above.[184] Thus, potential selection criteria collaboration is an apt topic for the beefed-up Rule 26(f) conference found in the recent Federal Rule amendments.[185]

---

[179] *See* Brownstone, *supra* note 39, at 48–53 (discussing Tulip Computers Int'l B.V. v. Dell Computer Corp., 2002 U.S. Dist. LEXIS 7792 (D. Del. Apr. 30, 2002); McPeek v. Ashcroft, 202 F.R.D. 31 (D.D.C. 2001)).

[180] *See* Brownstone, *supra* note 39, at 48–53 (discussing Tulip Computers Int'l B.V. v. Dell Computer Corp., 2002 U.S. Dist. LEXIS 7792 (D. Del. Apr. 30, 2002); McPeek v. Ashcroft, 202 F.R.D. 31 (D.D.C. 2001)).

[181] When responding to a government inquiry, one should expect entirely different atmospherics. In other words, the DOJ or SEC will want complete disclosure and cooperation as to search parameters.

[182] *See, e.g.*, Tulip Computers Int'l B.V. v. Dell Computer Corp., 2002 U.S. Dist. LEXIS 7792 (D. Del. Apr. 30, 2002).

[183] *See id.*

[184] *Id.*

[185] *See supra* Section III(A)(7).

D. *Review—Form and Format Of Exchange*

1. *Introduction*

The focus of the Review and Produce steps is on the format(s) in which the parties exchange information. Some of the most frequently litigated sub-issues have been whether paper production suffices,[186] discoverability of metadata and/or embedded data, and whether to request and produce in native format or in "uniform image format" (TIFF or PDF).[187] Other oft-disputed issues beyond the scope of this paper are the (in)sufficiency of unorganized sets of electronic information and the produce-ability of databases and/or software proprietary to the responding party.[188]

---

[186] *In re* Honeywell Int'l, Inc. Securities Litig., 2003 U.S. Dist. LEXIS 20602 (S.D.N.Y. Nov. 18, 2003) (ordering electronic production and holding that in putative securities class action, third party accounting firm's previous production of hardcopies of workpapers insufficient under Fed. R. Civ. P. 34(b) because information "not produced as kept in the usual course of business"). For the rare modern case in which paper *was* sufficient, see Northern Crossarm Co. v. Chem. Specialties, 2004 U.S. Dist. LEXIS 5381 (W.D. Wis. Mar. 3, 2004) (presenting unique circumstances, in which production request and meet-and-confer correspondence failed to specify "electronic" and prior costly production of hardcopies, 65,000 e-mails had "mimicked the manner in which . . . information was stored electronically").

[187] *See generally* Kristin M. Nimsger & Michele C.S. Lange, *E-Document Conversion & Native Document Review*, LJN LEGAL TECH NEWS, Dec. 2003; KROLL ONTRACK, E-EVIDENCE THOUGHT LEADERSHIP LUNCHEON: ROWE V. ZUBULAKE (Sept. 23, 2003), http://www.krollontrack.com/upcomingevents/documents/zubulake.pdf [hereinafter JUDGES]; *see also* Mary Mack, *Native File Review: Simplifying Electronic Discovery?*, LJN'S LEGAL TECH NEWSL., May 1, 2005; Mark Reber, *Native File Review: What Problem Are We Solving?*, TECHNOLAWYER, Mar. 8, 2005, http://Native-Reber.notlong.com.

[188] Jinks-Umstead v. England, No. CIV.A.99-2691 GK/JMF, 2005 WL 775780 (D.D.C. Apr. 7, 2005) (granting new trial in discrimination case to allow the plaintiff to present its case using new electronic evidence that the defendant had initially claimed it no longer possessed but which turned out to be retrievable from database); *In re* Plastics Additives Antitrust Litig., 2004 U.S. Dist. LEXIS 23989, 2004-2 Trade Cas. (CCH) 74,620 (E.D. Pa. Nov. 29, 2004) (ordering parties to provide all transactional data in electronic format, to extent reasonably feasible; not requiring the defendant to provide technical assistance to help the plaintiffs understand and make use of electronic data).

2. *Key Definitions*

Metadata is "data about data."[189] In eDiscovery, the three principal kinds of such data are: e-mail, file system, and document (imbedded/embedded). Each such type of data requires slightly different review and production strategies.

A "native data" file is one "[i]n the original file format in which [it was] created (i.e., in the specific software applications used to create each individual document)."[190] Some examples of native data are Microsoft Word, Microsoft Excel, and WordPerfect.

In contrast, "uniform" or "standard" image format is an agreed-upon file format into which all different types of native files are converted solely for review and/or production in civil litigation.[191] Often tagged image format (TIFF) plus searchable index is a uniform format; sometimes portable document format (PDF) is used as a uniform format as well.

"Searchable TIFF" is an oxymoron. It is a litigation fiction reflecting the exchange of a set of imaged electronic files that are accompanied by searchable text associated with those files.

3. *Native vs. Electronic-Evidence Discovery (EED) Platforms*

Many strategies and cost issues inform the decision of whether to review, produce, and/or seek files in their native format(s).[192] The relative technological and financial resources of the parties are likely to play a big role, as well as the significance, or lack thereof, of metadata—such as spreadsheet formulas, tracked changes, creation date, e-mail fields, cross-file links, etc.—its relationship to the matter at hand.[193] In some instances, it may be better for a

---

[189] *See Brownstone*, *supra* note 39, at ¶¶ 2, 3, 19, 31 & nn.5–7, 56, 95–96.

[190] Nimsger & Lange, *supra* note 187, at 2.

[191] *Id.* at 1–2.

[192] Brownstone, *supra* note 39, at ¶¶ 2, 23.

[193] *See, e.g.*, Medtronic Sofamor Danek, Inc. v. Michelson, No. 01-2373-MLV, 2003 WL 21468573 229 F.R.D. 550 (W.D. Tenn. 2003) (ordering non-privileged files produced to the defendant in their native electronic formats, rather than as image files in trade secret and patent cases regarding spinal fusion medical technology; appointing special master technology or computer expert to oversee discovery and setting forth detailed protocol).

party to review and/or produce in native format. In other instances, an EED platform or database may be preferable.

In the past year, the trend toward reviewing and producing in native file formats has accelerated. In their meet and confer discussions, civil litigants are often agreeing to exchange in native. However, at times, strategies may militate against requesting native. One consideration is reciprocity, namely that a party requesting native can expect to, in turn, be asked for native.

When a requesting party assesses whether to ask for native, some factors a party might weigh entail the relative position of the opposing party as to whether the party is: (1) a plaintiff; (2) a defendant who has interposed cross-claims or counter-claims; (3) an individual or an entity likely to produce much data; and/or (4) an individual or entity able to expend or marshal the monetary and technology resources needed to deal effectively with native file formats.

When the parties cannot agree, the current judicial trend continues to be toward native production and away from TIFF. For example, one recent decision deemed TIFF files to be inadequate because their content and design differ from native file formats.[194] Another recent opinion required native file production, so that the requesting party could run searches and review the metadata.[195]

---

[194] Hagenbuch v. 3B6 Systemi Elettronici Industriali S.R.I., 2006 U.S. Dist. LEXIS 10838 (N.D. Ill. Mar. 8, 2006) (patent case).

[195] Nova Measuring Instruments Ltd. v. Nanometrics, Inc., 417 F. Supp. 2d 1121 (N.D. Cal. Mar. 23, 2006).

4. *Metadata—When Discoverable?*

Metadata or Imbedded-Data is discoverable when needed or relevant to a matter at hand.[196] A stark example of a past context in which metadata was discoverable was when a contention of back-dating a file was at issue.[197] Yet the trend toward native may tip the balance in other types of situations.

The recent amendment to Federal Rule 26(b)(2)(B)–(C) intentionally avoids specific reference to metadata, yet the associated comment evinces a desire to keep metadata from being produced absent an affirmative showing of need.[198]

---

[196] S.D.N.Y. Magistrate Judge Francis has informally stated:

> [T]he touchstone... is the purpose or ... relevance of the particular document at issue. [Whether] the metadata or the embedded data is going to be highly relevant ... dictates [the] form of production.... [I]n any large document case these days, it's probably irresponsible for the requesting party not to ask for it in searchable form in any event.... I think the days of producing large volumes of paper documents are pretty close to over but that doesn't solve the situation about what form of searchable data.

JUDGES, *supra* note 187, at 25.

[197] *See, e.g.*, Munshani v. Signal Lake Venture Fund II, 805 N.E.2d 998 (Mass. App. Ct.2004) (affirming dismissal of breach of contract action and award of expert and attorney fees, in light of determination by court-appointed, neutral expert of the lack of authenticity of copy of e-mail submitted by the plaintiff as part of opposition to dismiss motion based on statute of frauds); Premier Homes & Land v. Cheswell, Inc., 240 F. Supp. 2d 97, 100 (D. Mass. 2002) (awarding $24,000 in expert and attorney fees, upon the plaintiff's voluntary dismissal with prejudice of eviction dispute between two corporations, where, once imaging of the plaintiff's President's hard disc had begun, he confessed that, after the fact, he had fabricated a lease addendum and a transmittal e-mail, the latter by "pasting most of a heading from an earlier, legitimate message and altering the subject matter line").

[198] In a prior draft, the pertinent Advisory Committee Note quoted the Manual for Complex Litigation (4th) § 11.446 to the effect that "production of word-processing files with all associated metadata ... should be conditioned upon a showing of need or sharing expenses." *See* Report's August 3, 2004 draft, at 14. *Cf.* D. Del. Default Standard for Discovery of Electronic Documents, http://www.ded.uscourts.gov/Announce/HotPage21.htm, providing:

> If, during ... [the] Rule 26(f) conference, the parties cannot agree to the format ..., electronic documents shall be produced ... as image files (e.g., PDF or TIFF).... [T]he producing party must preserve the integrity of the electronic document's contents, i.e., the original

However, last year in the employment case *Williams v. Sprint/United Management*,[199] a federal judge attempted to fill the gap in this area of law. The court analyzed the then-pending Federal Rules changes, found them inconclusive, and came up with a framework of its own.

Williams found that, absent a timely objection or a stipulation to the contrary, an order to produce in native format presumptively encompasses metadata—even if the request for production did not explicitly reference metadata.[200] Consequently, the court lambasted an employer/defendant that had responded to a native-production order by scrubbing metadata out of thousands of Excel spreadsheets.

Williams was a class action reduction-in-force (RIF) case based on allegations of age discrimination.[201] Relatively late in the discovery process, the parties stipulated in open court that the employer would produce thousands of Excel spreadsheets in native format. The stipulation did not authorize the employer to scrub metadata or lock cells in the spreadsheets. Yet the employer unilaterally took both actions before producing the spreadsheets in electronic form. It did not make a log of its activities.

The court found that the then-pending new version of Federal Rule 34(b) and its accompanying reports and notes were inconclusive.[202] It analyzed, but then deviated from, the non-binding Sedona Principles' presumption against producing metadata absent a showing of relevance.[203] Instead, the *Williams* court analyzed the new Rule 34's phrase "as . . . maintained in the ordinary course of business" to mean electronic files "with their metadata intact."[204] *Williams* further ruled that, in the context of

---

formatting of the document, its metadata and, where applicable, its revision history. After initial production in image file format is complete, a party must demonstrate particularized need for production of electronic documents in their native format.

[199] 30 F.R.D. 640 (D. Kan. 2005).

[200] *Id.* at 653–54.

[201] *See* 30 F.R.D. 640 (D. Kan. 2005).

[202] *See id.*

[203] *See id.*

[204] *Id.*

meet-and-confer discussions as to native, metadata *is* to be produced even if not specifically sought in the request for production.[205]

As to the significance of metadata found in various computer applications, *Williams* held that, on a spectrum of metadata's relative importance, Excel spreadsheets were in between the extremes of: (1) word processing applications, "where the metadata is usually not critical to understanding the substance of the document;" and (2) database applications, where any given "database is a completely undifferentiated mass of tables of data [and t]he metadata is the key to showing the relationships between the data."[206]

In that factual situation, since the beginning of the lawsuit, the class of plaintiffs had alleged that the defendant had, based upon workers' ages, re-worked employee pools to improve distribution so as to pass adverse-impact analysis. Hence, the spreadsheets' metadata's relevance included: the content of changes; the dates of changes; the identities of individuals who had made changes; and any other metadata useable to determine the relative contents of drafts and final versions of the respective files. Thus, when it knew it had to produce in native format, absent first making a timely objection, it was disingenuous for the producing party, at the eleventh hour, to unilaterally decide to scrub metadata and to lock formulas and then produce anyway.

---

[205] *Id.* at 653–54; *cf.* new Rule 26(b)(2)(B), *supra* note 41 and accompanying text. New Rule 26(b)(2)(B) reflects, in the context of data not reasonably accessible, a different type of burden-shift. Note also that, in contrast to the restoration of inaccessible data, metadata scrubbing consists of an affirmative act designed to *reduce* the set of details to be disclosed to an adversary.

[206] Williams v. Sprint/United Mgmt., 30 F.R.D. 640, 647 (D. Kan. 2005).

E. *Produce—Inadvertent Disclosure*

1. *Privilege Waiver—Introduction*

The larger the amounts of electronic material produced in native format, the greater the odds that privileged content and/or metadata will get disclosed.[207]

Electronic information is protected by the same traditional legal privileges applicable to paper, including the attorney-client privilege and the work product doctrine.[208] There are three case law approaches to privilege waiver: strict (intent is irrelevant);[209] lenient (no waiver absent intentional conduct);[210] and case-by-case multi-factor balancing tests.[211]

---

[207] JUDGES, *supra* note 187, at 24 ("Are you required to review every drop because there's a risk of a complete waiver . . . as to subject matter?"); *see also* Williams v. Sprint/United Mgmt. Co., 2006 U.S. Dist. LEXIS 47853, at * 34–35 & n.57 (D. Kan. Jul. 1, 2006) ("[V]olume . . . and . . . [o]ther aspects of electronically stored information pose particular difficulties for privilege review.") (quoting FRCP EDISCOVERY AMENDMENTS, *supra* note 41, at 24), *adhered to on reconsideration by*, 2006 U.S. Dist. LEXIS 65485 (D. Kan. Sept. 13, 2006) (ordering return of electronic documents deemed inadvertently produced).

[208] *See, e.g.*, Isom v. Bank of Am., 628 S.E.2d 458 (N.C. App. 2006) (affirming trial judge's exercise of discretion in wrongful termination action); Terry L. Hill & Jennifer S. Johnson, *Impact Of Electronic Data Upon An Attorney's Client*, 54 FED'N DEF. & CORP. COUNSEL. Q. 95, n.29 & accompanying text (2004) (citing Michael Marron, *Discoverability of "Deleted" E-Mail: Time for a Closer Examination*, 25 SEATTLE U. L. REV. 895, 913 (2002), *available at* http://fdcc.digitalbay.net/documents/hill-W04.htm) (last visited Nov. 9, 2006).

[209] *See, e.g.*, FDIC v. Singh, 140 F.R.D. 252, 253 (D. Me. 1992); Underwater Storage, Inc. v. U.S. Rubber Co., 314 F. Supp. 546, 549 (D.D.C. 1970).

[210] *See, e.g.*, CIBA-Geigy Corp. v. Sandoz Ltd., 916 F. Supp. 404, 412–14 (D.N.J. 1995); Mendenhall v. Berber-Greene Co., 531 F. Supp. 951, 955 (N.D. Ill. 1982).

[211] *See, e.g.*, Williams v. Sprint/United Mgmt. Co., 2006 U.S. Dist. LEXIS 81574 (D. Kan. Nov. 6, 2006) (determining, under five-factor test, that document was inadvertently produced and thus requiring its return to the other side); United States v. Keystone Sanitation Co., 885 F. Supp. 672, 676 (M.D. Pa. 1994) (finding e-mails as to billing statements between different attorneys for some defendants apparently produced in paper form); Alldread v. City of Grenada, 988 F.2d 1425, 1433 (5th Cir. 1993).

The majority view is the case-by-case approach,[212] with factors including: the reasonableness of the precautions taken relative to the production's size; the number of inadvertent disclosures; the extent of the disclosure(s); and the remedial measures taken (and whether the producing party exhibited delay in effectuating them).[213]

A waiver may extend beyond the file(s) and document(s) in question to encompass the entire covered *subject matter*.[214]

2. *Privilege Waiver—Recent eDiscovery Case Law*

Until recently, most eDiscovery waiver decisions had addressed disclosure of hardcopy printouts of e-mail.[215] Yet, as can be gleaned even from the non-electronic decisions summarized below, the same principles also apply to purely electronic information.

In Spring 2004, two subject-matter waiver decisions came down. First, in a wrongful discharge action in June 2004, an Ohio state court ruled that voluntary disclosure of an e-mail in a prior proceeding had triggered the dreaded consequence of a subject-matter waiver.[216] There, in a separate unemployment benefits matter, the defendant's counsel had examined the plaintiff/employee at a hearing and produced an e-mail from defendant's Human Resources Vice President to defendant's senior

---

[212] Hill & Johnson, *supra* note 208, at n.43 & accompanying text.

[213] *See, e.g.*, FDIC v. Singh, 140 F.R.D. 252, 253 (D. Me. 1992); *Underwater Storage, Inc. v. U.S. Rubber Co.*, 314 F. Supp. at 549.

[214] Hill & Johnson, *supra* note 208, at nn.34–35 & accompanying text. *Cf. In re* Grand Jury Investigation, 445 F.3d 266 (3d Cir. 2006) (finding, in criminal case, based on indication that client likely obstructed justice by deleting e-mails, crime-fraud exception warranted compelling production of evidence of attorney-client communication).

[215] Note, though, that a recent decision in this area found e-mail messages within a thread or string are severable for purposes of attorney-client privilege analysis. *See* Premiere Digital Access, Inc. v. Cent. Tel. Co., 360 F. Supp. 2d 1168 (D. Nev. 2005) (vacating magistrate's decision and granting protective order as to forwarded e-mail from in-house counsel).

[216] Hollingsworth v. Time Warner, 812 N.E.2d 976 (Ohio Ct. App. 2004).

counsel. The e-mail summarized why the employee had been fired.[217]

In the subsequent discharge case, the same e-mail was produced, purportedly involuntarily.[218] Claiming a subject-matter waiver, the employee sought production of related documents.[219] The trial court ordered the plaintiff to return the e-mail and denied the plaintiff's motion to compel. The appellate court reversed, finding abuse of discretion in ordering the return of a voluntarily disclosed e-mail.[220] The trial court should have ordered the supplemental production of the e-mails and other documents (e.g., deposition testimony) reflecting related communications with the defendant's legal department.[221]

Similarly, a few weeks earlier, an inadvertent production argument failed to carry the day for a defendant in a securities class action lawsuit in Massachusetts federal court.[222] In that case, a hardcopy of an e-mail to in-house counsel was in a redacted document that had been produced in a group of eleven boxes of documents.[223] Another e-mail had been redacted because that e-mail was sent from a non-lawyer to the same in-house counsel.[224]

In the subsequent class action, the producing party, an accounting firm, claimed that its disclosure of a manager's e-mail to an in-house lawyer was inadvertent.[225] The court was not persuaded by the fact that the attorneys were reviewing the relevant documents two years after the original listing of the

---

[217] *See id.* at 990.
[218] *Id.*
[219] *Id.*
[220] *Id.* at 991–92.
[221] *See id.*
[222] *See In re* Lernout & Hauspie Sec. Litig., 222 F.R.D. 29 (D. Mass. 2004) (involving bankrupt software company's accounting tricks; disclosure deemed "knowing," i.e., not inadvertent); *see also* VLT v. Lucent, 54 Fed. R. Serv. 3d 1319 (D. Mass. Jan. 21, 2003) (finding in massive patent litigation, stipulated term "inadvertent" did not encompass "reckless" or "grossly-negligent" conduct; "blame-the-paralegal" defense not wholly successful).
[223] *Lernout*, 222 F.R.D. at 33.
[224] *Id.*
[225] *Id.* at 32.

pertinent e-mail on an SEC privilege log.[226] It held that they were still to be charged with knowing that the e-mail had been sent to an in-house counsel.[227] A knowing *or* inadvertent disclosure of a document protected by attorney-client privilege effects a waiver as to other communications on the same subject.[228] Therefore, the defendant had to produce related privileged e-mails.

An earlier decision had found limited waiver via voluntary, but inadvertent, production of a second copy of an e-mail attached to an "undeliverable" e-mail message from a system administrator.[229]

3. *Stipulations to Avoid Waiver Peril*

A litigant can guard against a subsequent privilege waiver, perhaps in conjunction with the Rule 26(f) conference, by entering into a "quick peek"[230] or "claw back"[231] stipulation with its litigation opponent. It has become "[i]ncreasingly popular" for a stipulation to have "explicit provisions as to how [it] . . . will deal with documents inadvertently produced."[232]

---

[226] *Id.* at 33.

[227] *See id.*

[228] *See In re* Lernout & Hauspie Sec. Litig., 222 F.R.D. 29, 34–35 (D. Mass. 2004).

[229] Murphy Oil USA v. Fluor Daniel, No. 2:99-CV-03564 (E.D. La. Dec. 3, 2002) (granting motion to compel where two copies of same e-mail existed on the defendant's backup tapes). Although it appears the crucial e-mail had been produced in paper form, the e-mail metadata was implicitly central to the court's analysis.

[230] JUDGES, *supra* note 187, at 24 (stating that one can amend ten days from awareness of mistake).

[231] *Id.*

[232] Ass'n of the Bar of the City of New York Formal Op. 2003–04, 2004 WL 837937 (N.Y.C. Assn. B. Comm. Prof. Jud. Eth. 2004) ("[U]seful . . . particularly . . . where . . . ethics rules and legal principles do not provide easy answers in all circumstances.").

4. *New FRCP Clawback Process; Proposed FRE Waiver Rule*

a. New FRCP 26(b)(5)(B) and 45(d)(2)(B) Amendments

The newly amended versions of FRCP 26(b)(5)(B) and 45(d)(2)(B) lay out a procedure to guard against inadvertent privilege waivers.[233] New Rule 26 states, in pertinent part:

> If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies . . . and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim.[234]

However, new Rule 26(b)(5)(B) is only procedural; it does "not address the substantive questions whether privilege or work product protection has been waived or forfeited. Instead, [it] sets up a procedure to allow the responding party to assert a claim of privilege or of work-product protection after production."[235] The same goes for new Rule 45(d)(2)(B).[236]

In late 2005, a federal court decision essentially analyzed new Rule 26(b)(5)(B) as if it were already in force.[237] That opinion warned that the new Rule would present multiple traps for the unwary: (1) unless incorporated into a scheduling order or protective order, any non-waiver stipulations (of the claw back variety) will be risky and not necessarily determinative of future

---

[233] New Fed. R. Civ. P. 26(b)(5)(B) aims to create a "procedure to allow the responding party to assert privilege after production." REPORT, *supra* note 41, at Rules App. C-54–57. New Fed. R. Civ. P. 45(d)(2)(B) is designed to be "amended, as is Rule 26(b)(5), to add a procedure for [third-party subpoena recipients'] assertion of privilege after inadvertent production of privileged information." REPORT, *supra* note 41, at Rules App. C-104.

[234] FRCP EDISCOVERY AMENDMENTS, *supra* note 41, at 9–10.

[235] REPORT, *supra* note 41, at Rules App. C-54.

[236] *Id.* at Rules App. C-91.

[237] *See* Hopson v. Mayor & City Council of Baltimore, 232 F.R.D. 228 (D. Md. 2005); *see also* Williams v. Sprint/United Mgmt. Co., 2006 U.S. Dist. LEXIS 47853, at *34–35 & n.57 (D. Kan. Jul. 1, 2006) (ordering return of electronic documents deemed inadvertently produced), *adhered to on reconsideration by*, 2006 U.S. Dist. LEXIS 65485 (D. Kan. Sept. 13, 2006).

disputes;[238] (2) as to the substance of a privilege or work-product dispute, applicable state law principles will control (and privilege standards differ from state to state);[239] (3) a given circuit court's view on waiver may consist of the above "strict accountability" approach;[240] and (4) "selective waiver" concerns.[241]

b. Proposed New FRE 502

In May 2006, the Federal Advisory Committee on Evidence Rules entered the fray by publishing for comment a proposed new Federal Rule of Evidence, namely FRE 502.[242] In part, FRE 502 and its accompanying report and hearing transcript tackle the concerns raised by the *Hopson* decision.[243]

New FRE 502(b) would preclude a waiver if two elements are satisfied: first, if there were an inadvertent disclosure in discovery in federal or state litigation or administrative proceedings; and

---

[238] *See id.* at 239–40 ("[P]roduction . . . of . . . data must be at the compulsion of the court, rather than solely by the voluntary act of the producing party[;] and that the procedures agreed to by the parties and ordered by the court [must] demonstrate that reasonable measures were taken to protect against waiver . . . .").

[239] *See id.* at 235, 244.

[240] *See id.* at 235–37.

[241] *See id.* at 235, n.10. The majority view is that a selective waiver is not valid, such that future litigants are not bound by a non-waiver agreement reached with a government agency. *See, e.g.*, McKesson HBOC v. Super. Ct., 9 Cal. Rptr. 3d 812 (Cal. App. 1 Dist. 2004.) There is a minority view upholding selective waivers based on an old decision. *See* Diversified Indus. v. Meredith, 572 F.2d 596 (8th Cir. 1977) (en banc); *see also* United States v. Bergonzi, 403 F.3d 1048 (9th Cir. 2005) (per curiam) (discussing the open question in the Ninth Circuit whether one can "disclose the results of an internal investigation to an investigating government agency without waiving attorney client privilege or work product protection as to the outside world"); *see generally* Jeremy Burns, *Selective Waiver in the Era of Privilege Uncertainty*, 5 U.C. DAVIS BUS. L.J. 14 (2005). *See also* Regulatory Relief Act of 2006, Pub. L. No. 109-351 § 607(a)–(b), 12 U.S.C. §§ 1785 (j)(1)–(2), 1828 (x)(1)–(2) (adopting selective waiver doctrine as to disclosures to banking authorities and credit unions).

[242] REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES (May 15, 2006), http://www.uscourts.gov/rules/Reports/EV05-2006.pdf [hereinafter FRE REPORT].

[243] *See id.*; ADVISORY COMMITTEE ON EVID. RULES: HEARING ON PROPOSAL 502, http://ddee.pf.com/PDFs/Rule502Hearing.pdf [hereinafter 502 HEARING TRANSCRIPT] (last visited Nov. 9, 2006).

second, if "the holder of the [attorney-client] privilege or work product protection took reasonable precautions to prevent disclosure and took reasonably prompt measures once it knew or should have known of disclosure, to rectify the error," under putative FRCP 26(b)(5)(B).[244]

In terms of the spectrum of the three varying waiver standards, proposed FRE 502(b) thus takes a "middle ground" approach.[245] In other words, it rejects the strict-liability approach, such that inadvertent disclosure does not automatically affect a subject matter waiver. In addition, proposed FRE 502(c) allows for selective waiver as to the government.[246]

FRE 502(b) also attempts to make a federal court non-waiver order (e.g., one establishing a claw-back) binding, even as to third parties, not only in federal but also in state proceedings. The Advisory Committee concedes that such a grant of extraterritorial power would require Congress to enact the rule directly as a statute under the Commerce Clause.[247] Thus, a broad-sweeping rule would likely face due process challenges.[248] Only time will tell how this jurisdictional issue will resolve itself.

5. *Takeaways on Privilege*

Absent a superseding strategy, try to stipulate to a protective order early; namely, at the 26(f) conference. Heed the warnings of *Hopson* and of proposed FRE 502 by making sure that all such stipulations are court-endorsed. Note that while new FRCP 26(b)(5) took effect this December 1, the content of new FRE 502 is still being hashed out and cannot take effect until a year later.[249]

In addition, regarding *lawyer-created files*, ethical guidelines

---

[244] FRE REPORT at 6–7.

[245] *Id.* at 12.

[246] *See id.* at 13.

[247] *Id.* at 10.

[248] *See* 502 HEARING TRANSCRIPT; *see also* Carol Eoannou, *FRE Committee To Consider Remedy for Privilege Problem Discussed in Hopson*, DIGITAL DISCOVERY & E-EVIDENCE 1 (Mar. 2006), http://www.pf.com/pdf/ddee Sample.pdf (last visited Nov. 9, 2006).

[249] Jason Krause, Panel Provides Plug For Privilege Hole; New Federal Rule Could Provide Way To Protect Claw-Back Documents (May 5, 2006), http://www.abanet.org/journal/redesign/my5evidence.html.

and/or decisional law have little, if any, practical effect. Once privileged matter has been disclosed to an opponent, the recipient will not be able to erase it from his or her memory. One cannot un-ring the bell.[250] Therefore, as to lawyer-created files, one prophylactic measure can and should be taken by practitioners in both the transactional and litigation settings:[251] counsel should run metadata-scrubbing software[252] on any electronic files before disseminating such files via e-mail or portable media or file-transfer-protocol (ftp).[253]

---

[250] *See generally* David J. Stanoch, Comment, *Finders ... Weepers?: Clarifying a Pennsylvania's Lawyer's Obligations to Return Inadvertent Disclosures, Even After a New ABA Rule 4.4(b)*, 75 TEMPLE L. REV. 657 (2002). *See also* Thomas E. Spahn, *Litigation Ethics in the Modern Age*, 33 THE BRIEF 13, 13, 16, n.38, *available at* http://www.mcguirewoods.com/news-resources/publications/commercial_litigation/LitigationEthics.Brief.33.2.Winter2004.pdf (last visited Nov. 9, 2006). For further information, see *supra* notes 34 and 38 and accompanying text.

[251] *See, e.g.*, Helen Leah Conroy, Cal. Bus. Law Practitioner, Ten Ways E-mail Can Sabotage Your Deal (Winter 2004), http://www.helenconroylaw.com/index.htm (last visited Nov. 9, 2006).

[252] *See, e.g.*, Workshare Protect: Content Filtering, Software to Remove Metadata, http://www.workshare.com/products/wsprotect/default.aspx (last visited Nov. 9, 2006).

[253] FTP is the protocol for exchanging files between computers over the Internet. *See* Webopedia Computer Dictionary, http://www.pcwebopedia.com/TERM/F/FTP.html (last visited Nov. 9, 2006).

IV. CONCLUSION—THE FUTURE?

It is only a matter of time before voicemail messages and instant messaging (IM) logs become part of the eDiscovery mix as well.[254] Unified messaging—whereby each voicemail ends up as an attachment to an e-mail message received in one's e-mail Inbox—will likely be one catalyst. Individual, as opposed to entity, plaintiffs will probably be another. At some point, such individual plaintiffs, undaunted by mutually-assured-destruction reciprocal requests from entity defendants, will push the envelope.

Beware these next waves.

---

[254] *See* Mary Mack, *Voice Mail Discovery: Look Who's Talking*, E-DISCOVERY ADVISOR (Mar. 10, 2006), http://www.fiosinc.com/resources/pdfFiles/200603_talking.pdf; Bethany Cunningham Gabbert, Esq. & Jason Derting, *Law Technology: Beware of Instant Messaging*, EDISCOVERY ADVISOR, http://e-discoveryadvisor.com/doc/17968 (last visited Nov. 9, 2006).