



The New Frontier of Discovery: Applying the Amended Rules of Electronic Discovery

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Technological innovations have revolutionized the business world. For example, changes in communication technology allow a cell phone user to make calls, send text messages, browse the internet and even send and receive email. These changes have affected the way companies run, and the legal system is beginning to incorporate these changes.

The digital revolution of the 1990s caused emails to replace memos, water-cooler conversations, and even formal letters. Approximately 60 billion emails are sent across the internet each day.¹ Additionally the availability of computers, cell phones, and instant messenger have changed the way data is stored. Documents are not necessarily placed on paper. It is estimated that seventy percent of all electronic files are never converted to paper form.² These electronic files are a hidden treasure trove of information and may become the difference between winning a case and losing it.

In December 2006, the Federal Rules of Civil Procedure were amended to incorporate requests for electronic discovery. The old smoking guns of litigation, memoranda, hand written notes and letters are gone; replaced by emails and documents found on servers, back-up tapes, and the murky regions of unallocated space. As attorneys and the courts become more comfortable with electronic discovery, companies must be prepared to handle requests for electronic documents, and counsel must be prepared to assist them. This article focuses on addressing developments in case law and its applicability since the adoption of the amended Federal Rules.

I. What the Federal Rules Require

The Federal Rules of Civil Procedure govern the discovery process in Federal Court. Although discovery of electronically stored information (ESI) was not unheard of prior to the amendments, attorneys and courts are becoming more familiar with the process and thus are more comfortable with the idea of requesting the information. In 2006, the Federal Rules were amended to specifically include the discovery of electronic information throughout the discovery process.

The Rules require the parties to discuss electronic discovery during the pre-trial conference.³ Additionally, the parties must include their “views and proposals” regarding electronic discovery, including the form in which it should be produced, in the discovery plan.⁴ Because these conferences must be held within 120 days of the defendant being served, these rules introduce the issue of electronic discovery at the very beginning of a law suit.⁵

¹ Daniel E. Harmon, *The New Data Wranglers—Their Motto: “Always Ready” for Electronic Discovery*, 25 N.O. 16 Law. PC 1 (May 15, 2008).

² Jack B. Harrison, Stephen M. Gracey and James D. Schoeny, *New Federal Rules on E-Discovery*, FOR THE DEFENSE, DRI, Dec. 2006, p. 23.

³ FED. R. CIV. P. 16(b)(3)(B)(iii) (2008).

⁴ *Id.* 26(f)(3)(C).

⁵ *Id.* 16(b)(2).

The Federal discovery process demands the parties initially disclose certain information.⁶ The 2006 Amendments require in the initial disclosures a requirement to provide a copy of or description of all electronically stored information (ESI) that may be used to support a claim or defense.⁷

Rule 26 forces electronic discovery to be introduced early into the discovery process. Although the initial disclosures must be made, the rule also places protections on producing them. The traditional discovery privileges such as attorney-client privilege and work-product apply to ESI.⁸ Electronically stored information does not have to be produced if it is not “reasonably accessible because of undue burden or costs.”⁹

Requesting the production of documents will increasingly involve ESI. Parties may request this information and even specify the form in which the information should be produced.¹⁰ Generally, a party must produce the information in the form kept in the usual course of business. However, a particular form or forms may be requested, but a party does not have to produce this information in multiple forms unless an agreed stipulation exists or an order by the court.¹¹ A party may object to the requested form, but must supply in its objection, the form in which it intends to produce the information.¹² Parties have the option of producing business records, including ESI, when answering interrogatories.¹³

The rule drafters placed a final restraint on discovering ESI. Discovery sanctions may not be imposed without “exceptional circumstances” when information is lost as a result of “routine, good-faith” operation of the storage system.¹⁴ Although this “safe harbor” provides some protections, litigants should not rely on it. If a party fails to suspend the deletion of electronic files, the courts may impose sanctions such as adverse jury instructions or exclusion of evidence at trial.¹⁵

II. What the Rules Mean

The Amendments to the Rules of Civil Procedure may seem rather minor but they result in monumental changes. The amount of data stored on even a personal computer may be immense, and the information on a company’s system borders on mind-boggling. To understand what the Rules require, it is important to know how the Rules took shape.

A. How We Got There - The Sedona Principals

⁶ *Id.* 26(a).

⁷ FED. R. CIV. P. 26(a)(1)(ii).

⁸ *See id.* 26(b)(3).

⁹ *Id.* 26(b)(2)(B).

¹⁰ *Id.* 34(b)(1)(C).

¹¹ *Id.*

¹² *Id.* 34(b)(2)(D)

¹³ *Id.* 33(d).

¹⁴ FED. R. CIV. P. 37(e) (in this 2006 Amendments, this was subsection (f). The subsection was re-titled to its current designation in 2007).

¹⁵ *See infra* footnote 36.

As digital mediums began to spread through corporations, court decisions hinted that electronic mediums may be included in discovery requests.¹⁶ The Sedona Conference Working Group sought to establish guidelines for lawyers on how to address electronic discovery.¹⁷ Sedona created fourteen principles which covered many of the issues facing courts today.¹⁸ The duty to preserve electronic data; preservation and production of metadata; production of documents in their normal business form; production of “deleted” data; and sanctions were all covered in the principles.¹⁹ These principles assisted judges in the early cases involving electronically stored information (ESI) and formed the bedrock of the new electronic discovery rules.

B. The Zubulake Opinions

Although the opinions in *Zubulake* were rendered prior to the amendments to the Federal Rules of Civil Procedure, the opinions formed the foundation of the substantive changes. *Zubulake I* provided a discussion of how electronic information is stored and whether that data was “accessible”.²⁰ The court looked at electronic discovery in terms of cost-shifting and modified the existing eight-factor test into seven: (1) the extent 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 incentives to do so; (6) the importance of the issues at stake in litigation; and (7) the relative benefits to the parties of obtaining the information.²¹

In *Zubulake III*, the court applied these cost-shifting factors and required the plaintiff to pay for some of the costs for restoring back-up tapes.²² The court limited the application of cost-shifting to the process of restoring the tapes but found that “the responding party should *always* bear the costs of reviewing and producing electronic data once it has been converted to an accessible form.”²³ The court determined that this was appropriate because the responding party has the ability to control the costs associated with production.²⁴ Cost-shifting only applies when the data is inaccessible—any costs occurring after the data has been made accessible falls under the traditional American rule.²⁵

Zubulake IV and *V* demonstrate the repercussions of failing to produce electronic data.²⁶ The court ordered the defendant to pay the expenses associated with re-deposing certain witness

¹⁶ See *Armstrong v. Executive Office of the President*, 1 F.3d 1274 (D.C. Cir. 1993); *Sattar v. Motorola, Inc.*, 138 F.3d 1164 (7th Cir. 1997); *Playboy Enterprises, Inc. v. Welles*, 60 F.Supp. 1050 (S.D. Cal. 1999).

¹⁷ THE SEDONA PRINCIPLES, preface (July 2005).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ 217 F.R.D. 309, 318-320 (S.D.N.Y. 2003).

²¹ *Id.* at 324.

²² *Zubulake v. UBS Warburg, LLC*, 216 F.R.D. 280, 289 (S.D.N.Y. 2003).

²³ *Id.* at 290.

²⁴ *Id.*

²⁵ *Id.*

²⁶ 220 F.R.D. 212 (S.D.N.Y. 2004) (*Zubulake IV*); 229 F.R.D. 422 (S.D.N.Y. 2004) (*Zubulake V*).

regarding newly discovered documents.²⁷ The court also found that the defendant willfully failed to preserve documents and issued an adverse inference instruction to the jury.²⁸

C. Following the Leader

Emboldened by the changes to the Rules of Civil Procedure and following the Southern District of New York's example, the courts are now handing down opinions regarding discovery of electronically stored information. The courts are placing a large burden on counsel to know the preservation and deletion procedures of their clients.²⁹ Attorneys are expected to know the methods of data retention used by their clients early in the litigation process.³⁰ This may need to be one of the initial questions asked after being hired. Not knowing how electronic data is stored may result in a swift reprimand from judges. Judges are expecting that attorneys be "fully familiar with [a] client's document retention policies, as well as the client's data retention architecture."³¹ Attorneys are also responsible for ensuring their clients comply with discovery requests in a timely manner.³²

In addition to knowing how the client maintains their information, attorneys must also be aware of how the opposing party maintains their documents and the correct way to request the information. Courts have no sympathy for parties requesting discovery which results in numerous pages of information based on the search parameters provided by the requesting party.³³ Courts have also not been very sympathetic to those parties who fail to request the ESI in particular forms.³⁴ The courts will not require the reproduction of the documents but may order that all future disclosures be in the native forms.³⁵

Ideally, discovery should occur with minimal or no involvement from the courts.³⁶ However, failing to comply with electronic discovery has caused the courts to intervene in the process—sometimes repeatedly.³⁷ These "discovery shenanigans" have forced some courts to impose severe discovery sanctions when parties are uncooperative with producing electronically stored data.³⁸ Monetary sanctions, attorneys' fees, adverse instructions and dismissals have all resulted from parties failing to comply with discovery requests.³⁹

D. And the States Join the Bandwagon

²⁷ *Zubulake IV*, 220 F.R.D. at 222.

²⁸ *Zubulake V*, 229 F.R.D. at 437.

²⁹ See Electronic Discovery Guidelines, District Court of Kansas, available at <http://www.ksd.uscourts.gov/guidelines/electronicdiscoveryguidelines.pdf>.

³⁰ FED. R. CIV. P. 16(b), 26(f).

³¹ *Zubulake V.*, 229 F.R.D. at 432.

³² *Id.*

³³ See *Perfect Barrier LLC v. Woodsmart Solutions Inc.*, 2008 WL 2230192 (N.D. Ind. May 27, 2008).

³⁴ *Autotech Techs. Ltd. V. Automationdirect.com, Inc.*, 248 F.R.D. 556 (N.D. Ill. 2008).

³⁵ *Id.*

³⁶ *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 2008 WL 2487835 (W.D. Pa. June 16, 2008).

³⁷ *Id.*

³⁸ *Id.*

³⁹ See *Acker v. Workhorse Sales Corp.*, 20085 WL 1902034 (E.D. Mich April 28, 2008) (attorney fees); *Connor v. Sun Trust Bank*, 2008 WL 623027 (N.D.Ga. Mar. 5, 2008) (adverse instruction); *Gaddis v. Smith & Nephew*, 2008 WL 2415183 (S.D.Miss. June 11, 2008) (dismissal).

Nearly half of the states have enacted rules that either adopt the federal rules or provide specific language about ESI particular to that state including: Alaska, Arizona, California, Delaware, Florida, Illinois, Idaho, Indiana, Iowa, Kansas, Louisiana, Maryland, Minnesota, Mississippi, Montana, Nebraska, New Mexico, New Hampshire, New Jersey, Ohio, Tennessee, Texas, Utah, Virginia, and the District of Columbia.⁴⁰ Some of the states have declined to adopt aspects of the federal rules such as the meet and confer provision or the safe harbor provision under Rule 37.⁴¹

In addition, the courts have not shied from tackling electronic discovery issues. The Georgia and Colorado courts have even introduced their own electronic discovery protocols to handle disputes between parties.⁴² Minnesota state courts have amended their rules of civil procedure to incorporate aspects of the federal rules, including protection for reasonably inaccessible ESI due to undue burden or costs, requiring the return of inadvertently produced privileged materials, and providing a safe harbor provision for destroyed ESI.⁴³ Yet in some states such as Indiana where the rules of civil procedure have been amended to include electronic discovery provisions, the practice of discovery has not been altered much at either the district court or state court level.⁴⁴

For attorneys and companies that are more familiar with the federal rules, the state courts may be a welcomed change. Although the states generally enact rules very similar to the federal ones, the state rules do have substantial differences—particularly in allocating discovery costs. Texas enacted a unique e-discovery rule (Texas Rule of Civil Procedure 196.4) that permits the court to order a party to produce inaccessible data, but the requesting party must pay the cost of the production.⁴⁵ Both Mississippi and Idaho have also implemented nearly identical civil procedure rules.⁴⁶ Arguably, requiring the requesting party to pay for the production of inaccessible data reduces the number of excessive and abusive electronic discovery requests and prevents a party from using discovery to force a settlement.⁴⁷

As the federal courts become more comfortable with electronic discovery, more states will eventually address the issue.⁴⁸

E. Where to Look – Potential Sources of ESI

⁴⁰ Jason Fliegel and Rochelle Outlaw, *State Rulemaking and Electronic Discovery*, FOR THE DEFENSE, DRI, January 2008, p. 47-50.

⁴¹ *Id.*

⁴² See *Williams v. Taser Int'l Inc.*, 2007 WL 1630875 (N.D.Ga. June 4, 2007), *Palgut v. City of Colo. Springs*, 2006 WL 3483442 (D. Colo. Nov. 29, 2006).

⁴³ See Minnesota Rules of Civil Procedure, Minnesota Supreme Court, available at

[http://www.mncourts.gov/Documents/0/Public/Rules/Civil_Rules_effective_07-01-2008_\(current\).pdf](http://www.mncourts.gov/Documents/0/Public/Rules/Civil_Rules_effective_07-01-2008_(current).pdf)

⁴⁴ See Lisa J. Berry-Tayman, *Indiana State E-Discovery Rules: Comparison to Other State E-Discovery Rules and to the Federal E-Discovery Rules*, RES GESTAE, April 2008.

⁴⁵ Fliegel, *supra*, n. 40.

⁴⁶ *Id.*

⁴⁷ *Id.* at 47-50.

⁴⁸ See the National Conference for Commissioners on Uniform State Laws (NCCUSL). See final act available at http://www.law.upenn.edu/bll/archives/ulc/udoera/2007_final.htm.

When evaluating where ESI might reside it is important to realize that it encompasses everything from the hardware consisting of desktop computers, flash drives, backup disks, etc. to the software and the word processing documents, emails, spreadsheets, databases, etc. created by that software. It can even include deleted data and data created on old or obsolete hardware and/or software. It would be impossible to provide an exhaustive list of potential sources of ESI, but the courts have begun to recognize many different sources including text messages,⁴⁹ RAM,⁵⁰ cell phone images,⁵¹ and web chats.⁵²

The courts have been divided about the production of hard drives. The production or mirror imaging of data from hard drives can be costly and can compromise the privacy and confidentiality of information. Some courts have required the production of hard drives, especially when plaintiffs have been able to show that a defendant failed to produce documents that are contained on a hard drive.⁵³

The courts have been consistent about ordering non-parties and third-parties to produce ESI.⁵⁴ However, some courts have required the requesting party to pay for the production of the non-party's ESI.⁵⁵ One case tackled both of the issues of third-party discovery and hard drive production.⁵⁶

⁴⁹ *Flagg v. City of Detroit*, 2008 WL 787061 (E.D. Mich. Mar. 20, 2008) (Court ordered defendants to produce discoverable text messages by detailing a set of parameters for review under seal and production of the text messages).

⁵⁰ *Columbia Pictures v. Bunnell*, 245 F.R.D. 443 (C.D. Cal. 2007) (Relying upon the committee advisory notes to FED.R.CIV.P. 34 and limited application to this defendant only, the Court ordered production of server log data stored in random access memory (RAM)).

⁵¹ *Smith v. Café Asia*, 246 F.R.D. 19 (D.D.C. 2007) (Court ordered stored images on cell phone to be produced after conducting an analysis under FED.R.CIV.P. 26 and FED.R.EVID 412 where the Court found that FED.R.CIV.P. 26 is not an "all-or-nothing proposition" and the probative value of the request information must outweigh its prejudice).

⁵² *Malletier v. Dooney & Bourke, Inc.*, 2006 WL 3851151 (S.D.N.Y. Dec. 22, 2006) (Court held that chat room discussions on the defendant's Web site do not fall under the same discovery requirements as e-mail, and the defendant could not be sanctioned for failure to preserve the discussions).

⁵³ See *Ameriwood Industries v. Liberman*, 2006 WL 3825291 (E.D. Mo. Dec. 27, 2006); See also *Ameriwood Industries v. Liberman*, 2007 WL 685623 (E.D. Mo. February 23, 2007) (Court clarified prior order); *Thielen v. Buongiorno USA, Inc.*, 2007 WL 465680 (W.D. Mich. February 8, 2007) (Court ordered plaintiff to produce his hard drive for inspection by defendant); *G.D. v. Monarch Plastic Surgery, P.A.*, 239 F.R.D. 641 (D. Kan. 2007) (Court ordered production of hard drive because it was NOT a "fishing expedition"), but contrast *Hedenburg v. Aramark Am. Food Services*, 2007 WL 162716 (W.D. Wash. January 17, 2007) (Court denied defendant's request to image personal hard drive because it was viewed as a "fishing expedition").

⁵⁴ See *In Re Rule 45 Subpoena Issued to Robert K. Kochan*, 2007 WL 4208555 (E.D. N.C. November 26, 2007) (Court granted motion to compel non-party's production but refused to impose sanctions); *Tomlinson v. El Paso Corp.*, 245 F.R.D. 474 (D. Colo. 2007) (Court orders defendant to produce documents in third party's possession where ERISA language required the defendant to maintain the documents for inspection or examination).

⁵⁵ See *United States v. Premera Blue Cross*, 2007 WL 852080 (S.D. Ohio March 16, 2007) (Court ordered non-party to produce additional emails despite argument that unduly burdensome and costly, but ordered plaintiff requesting the emails to pay the costs associated with production).

⁵⁶ See *Daimler Truck N. Am. LLC v. Younessi*, 2008 WL 2519845 (W.D. Wash. June 20, 2008) (Plaintiff's good cause argument under FED.R.CIV.P. 26(b)(1) defeated third party's attempt to quash subpoena based on arguments that request was unduly burdensome and disclosed trade secrets. Third party ordered to conduct search pursuant to *Playboy Enterprises, Inc.*, 60 F.Supp.2d 1050, whereby third party searched its own hard drives, produced relevant information, but was not required to disclose trade secrets); See also, *Playboy Enterprises, Inc.*, 60 F.Supp.2d 1050 (Court ordered Welles to make her computer hard drive available for inspection; however, the court set forth factors to consider in determining whether to order production and whether there was undue burden).

The courts have also been fairly consistent about weighing the burden of producing backup tape data under FED.R.CIV.P. 26(b)(2). However, courts have been reluctant to order a party to produce backup tape data.⁵⁷ In a recent case, a Pennsylvania court denied plaintiff's motion seeking to search and restore backup tapes based on an analysis under FED.R.CIV.P. 26(b)(2).⁵⁸ The court cited to three factors that weighed against production: 1) burden and expenses outweighed the benefit; 2) information could be obtained in a more cost-efficient and less-burdensome manner; 3) resources of parties involved and amount in controversy were small. The court also denied plaintiff's own expert to examine backup tapes citing concerns about privacy and privilege and the cost of supervision by defendant.⁵⁹

However, a court initially found that where discovery of backup tapes is not discussed at the FED.R.CIV.P. 26(f) conference, then the tapes are not readily accessible even if the responding party fails to disclose the presence of backup tapes in its initial response.⁶⁰ Nevertheless, the court found good cause to order production of the backup tapes based on the following factors: 1) resources of the parties; 2) discoverability of the information; 3) specificity of the request; 4) unavailability of the information for other more accessible sources. The court reserved the right to shift the cost of the production to plaintiff after defendant produced the documents and showed evidence of time and costs.⁶¹

A potentially new area of interpretation for the court is the language included in Rule 34(a)(1)(A) which states “. . . after translation by the responding party into a reasonably usable form.”⁶² Courts will have to determine what translation requires and what is considered a reasonably usable form. A Pennsylvania court addressed the issue with regard to the production of computer printouts and records.⁶³ The court ruled that Rule 34(a)(1)(A) did not require a responding party to “create” responsive material, but did require the party to produce the computer printouts.⁶⁴

Identifying what types of ESI are discoverable, relevant, and should be preserved are important aspects of developing an effective litigation hold to make certain the ESI is available if it should be requested. It also provides counsel with essential information to discuss during the FED.R.CIV.P 26(f) conference.

Failing to understand or comply with the new electronic discovery rules can be costly. Defensible cases may be lost for failing to provide the electronic documents. The following sections will provide a practical guide to the new discovery rules.

⁵⁷ See *Palgut v. City of Colorado Springs*, 2007 WL 4277564 (D. Colo. December 3, 2007) (Court held that defendant's backup tapes were not reasonably accessible due to lack of hardware to access them and the cost of restoration outweighed the possible return of relevant information).

⁵⁸ *Young v. Pleasant Valley Sch. Dist.*, 2008 WL 2857912 (M.D. Pa. July 21, 2008).

⁵⁹ *Id.*

⁶⁰ *In re Veeco Instruments, Inc. Sec Litig.*, 2007 WL 983987 (S.D. N.Y. April 2, 2007).

⁶¹ *Id.*

⁶² FED. R. CIV. P. 34(a)(1)(A).

⁶³ *Mon River Towing, Inc. v. Industry Terminal and Salvage Co.*, 2008 WL 2412946 (W.D. Pa. June 10, 2008).

⁶⁴ *Id.*

III. What Counsel Must Do - Practical Guides

Two keys to successfully navigating the minefield of electronic discovery are proper client preparation and communication and effectively utilizing the Rule 26(f) and Rule 16(b) conferences to negotiate as many anticipated e-discovery issues. By focusing one's efforts on these two tasks, hopefully one will avoid numerous contentious motions regarding electronic discovery and the potential spoliation and dreaded sanctions that can follow.

A. Where To Start – The Meeting with the Client

The first step in properly preparing a client to deal with electronic discovery is to review the guidelines established in the *Zubulake* cases prior to the meeting. As described above, these cases provide somewhat of a road map in educating a client about electronic discovery. In addition, they identify when a client needs to begin “preserving” any ESI under a litigation hold. A litigation hold and its importance will be discussed in a latter section. Armed with this knowledge, it is important to meet with the client to develop a plan for managing the possibility of having to produce ESI.

One will need to discuss several issues with the client about appropriately handling the preservation, retention, and production of ESI. Counsel should become familiar with and learn about the client's document retention policies, document handling policies, and any ongoing business practices involving deletion or destruction of data. The client would be well-served to have written policies in place which will provide evidence if any problems should arise regarding potential destruction of relevant ESI. Crafting effective document retention policies is an important component to being able to comply with the production of ESI. Written policies will also help to insure employees are adhering to the systems in place to preserve, retain, and destroy ESI.

It is important to meet with the individuals responsible for handling the management of the client's ESI. These are individuals who will be responsible for preserving the information and enforcing the litigation hold for the ESI. It would also be advisable for the client to appoint one or two individuals from this staff to serve as liaisons to counsel for the purpose of electronic discovery. Those individuals should be able to explain the client's policies and procedures both to a court and a jury, as well as provide guidance and reassurance to counsel that the proper measures are being taken to satisfy the litigation hold. They should also be familiar with how to search for relevant information, since failure to do so may be cause for sanctions.⁶⁵ Discussing

⁶⁵ See *Barker v. Gerould*, 2008 WL 850236 (W.D.N.Y. Mar. 27, 2008) (Where defendant failed to provide an adequate affidavit attesting to the search procedures used to review relevant accessible emails, the Court ordered defendant to identify individuals with knowledge of the search procedures and permitted the plaintiff to depose these individuals); *Heartland Surgical Specialty Hosp., LLC v. Midwest Div. Inc.*, 2007 WL 1054279 (D. Kan. April 9, 2007) (Court ordered additional depositions after plaintiff produced deponent who was unknowledgeable about electronic data. However, the court refused to enforce monetary sanctions because the parties failed to discuss the issue of a FED.R.CIV.P. 30(b)(6) deposition at the FED.R.CIV.P. 26(f) initial conference); *Peskoff v. Faber*, 240 F.R.D. 26 (D.D.C. 2007) (Court held that defendant required to pay costs associated with accessible discovery of ESI where defendant failed to adequately search all places on hard drive for email evidence, even if the costs of obtaining data is now burdensome. Question of cost-shifting only arises after determination that data is reasonably inaccessible; the cost of reasonably accessible data is to be borne by the producing party); See also *Peskoff v. Faber*,

counsel's possible needs with these employees will prepare them to be able to produce documents in an expedient and cost-effective manner. This will save the client money and the counsel time. The better organized the systems and procedures for recovery and production of the ESI, the more likely electronic discovery will flow smoothly and hopefully avoid sanctions.

Counsel should learn as much information from these employees about what types of hardware and software the client uses. It is necessary to understand what data is readily accessible and that which is difficult to access.⁶⁶ This information will be critical in achieving a productive Rule 26(f) conference with opposing counsel and developing a comprehensive electronic discovery plan. It will also help in formulating what ESI will be initially disclosed and what ESI may require an explanation to the court for being unduly burdensome and costly to produce.

It is also important to discuss how preservation of the ESI will be disseminated to all other employees, so to avoid the accidental deletion or destruction of relevant data which could result in sanctions.⁶⁷ These discussions should include providing specific instructions about ceasing all ongoing business practices of deleting or destroying possibly relevant ESI. An inclusive and specific litigation hold letter is the proper vehicle for accomplishing this task.

It is possible that more meetings will be required, depending on the amount of information and types of systems in place. This initial meeting is critical to gathering the information necessary to issue an effective and comprehensive litigation hold for the purpose of preserving ESI related to the anticipated or pending litigation. It is important for counsel to monitor the compliance of the litigation hold since counsel's production of ESI certifies that the proper methods and procedures were followed to produce all relevant accessible information. When necessary one should issue additional litigation holds to encompass more information or scale back the scope of a prior litigation hold. One should reconvene with the client to make sure the litigation hold is being enforced. All of these steps will assist in being properly prepared for the Rule 26(f) conference and for the eventual production of ESI.

B. Meeting with Opposing Counsel – The Rule 26(f) Conference

2006 WL 1933483 (D.D.C. 2006) (Court ordered defendant to explain search efforts used to locate discoverable documents); *Canon U.S.A., Inc. v. S.A.M. Inc.*, 2008 WL 2522087 (E.D. La. June 20, 2008) (Court orders defendant to bear cost of third-party forensic analyst following insufficient production responses because defendant's searches had been conducted "lackadaisically." Plaintiff was awarded sanctions for costs incurred in issuing a third-party subpoena).

⁶⁶ See *Mikron Indus., Inc. v. Hurd Windows & Doors, Inc.*, 2008 WL 1805727 (W.D. Wash. April 21, 2008) (Court denied defendant's motion for protective order and cost-shifting where defendant failed to sufficiently demonstrate inaccessibility of ESI or an undue burden. Defendant only provided a cost estimate, but did not show evidence of the number of backup tapes, different methods used to store ESI, or document retention policies).

⁶⁷ See *Google Inc., v. Am. Blind & Wallpaper Factory, Inc.*, 2007 WL 1848665 (N.D. Cal. June 27, 2007) (Court ordered evidentiary sanctions including acknowledgment of several judicially determined facts and monetary sanctions of \$15,000 for defendant's failure to preserve, collect, and produce evidence. Plaintiff showed evidence that defendant's employees did not recall a preservation plan after litigation began, that employees regularly deleted documents, and defendant only produced documents between the two companies, even though plaintiff already maintained these).

Federal Rule of Civil Procedure 26(f) requires the parties to perform three tasks: 1) “discuss any issues related to preserving discoverable information”, 2) “develop a proposed discovery plan . . . [and] any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced”, and 3) discuss “any issues relating to claim of privilege or of protection.”⁶⁸ Counsel should take the opportunity at the conference to negotiate as much as possible regarding the production of ESI. This includes determining how ESI will be produced (whether native format or TIFF/PDF),⁶⁹ whether metadata will be included,⁷⁰ what is readily accessible, what is reasonably inaccessible ESI, what is relevant ESI, what types of searches will be conducted to locate relevant materials,⁷¹ what keywords will be used to conduct any searches,⁷² who will be conducting the searches, whether a third-party forensic expert may be necessary,⁷³ setting a deadline for the production of discovery,⁷⁴ drafting any proposed orders regarding clawback agreements and other aspects of electronic discovery regulation that the parties want memorialized in the pre-trial order under Rule 16(b).

It may also be beneficial to review some of the jurisdictions that have developed guidelines for the electronic discovery. The District Courts for Delaware⁷⁵, Kansas⁷⁶, and

⁶⁸ FED. R. CIV. P. 26(f).

⁶⁹ See *Autotech Techs. Ltd. P’ship.*, 248 F.R.D. 556 (In response to defendant’s motion to compel production of plaintiff’s ESI in native form with metadata, the court held that ESI must be produced in the form in which it is ordinarily maintained or in a reasonably usable form, despite prior production by plaintiff in PDF and document form. However, the court held that defendant “was the master of its production requests,” and as such the original request did not include metadata); *Wyeth v. Impax Lab. Co.*, 248 F.R.D. 169 (D. Del. 2006) (Court refused to order native format production); *Williams v. Sprint/United Mgmt. Co.*, 245 F.R.D. 660 (D. Kan 2007) (Court denied motion for sanctions where defendant failed to produce documents in native format because defendant lacked bad faith and parties had previously agreed that documents could be produced in TIFF format).

⁷⁰ See *Michigan First Credit Union v. Cumis Ins. Soc’y, Inc.*, 2007 WL 4098213 (E.D. Mich. Nov. 16, 2007) (Court denied plaintiff’s request to produce metadata where the previous court order did not address retrieval of metadata or native files and where the production of metadata would be overly burdensome to defendant because defendant did not store metadata for easy retrieval).

⁷¹ See *L.H. v. Schwarzenegger*, 2008 WL 2073958 (E.D. Cal. May 14, 2008) (Court held that defendants’ production of non-searchable documents violated THE requirement under FED.R.CIV.P. 34 that electronic documents be produced in a reasonably usable form and ordered monetary sanctions, despite plaintiffs’ failure to request native file production); *Treppel v. Biovail Corp.*, 233 F.R.D. 363 (S.D.N.Y. 2006) (Court ordered defendant to search and produce relevant ESI in native form).

⁷² See *Wingnut Films, Ltd. V. Katja Motion Pictures Corp.*, 2007 WL 2758571 (C.D. Cal. Sept. 18, 2007) (Court ordered a third party vendor to conduct keyword searches when defendant failed to produce any discovery after failing to comply with court orders to produce. Court imposed monetary sanctions on defendant of \$125,000.00).

⁷³ See *Peskoff v. Faber*, 2008 WL 2649506 (D.D.C. July 7, 2008) (Court refused to shift costs for third party forensic investigator due to responding party’s inadequate search efforts, failure to preserve ESI, and unwillingness to adhere to discovery obligations which caused need for forensic investigator).

⁷⁴ See *Race Tires Am., Inc. a Div. of Specialty Tires of Am., Inc. v. Hoosier Racing Tire Corp.*, 2008 WL 2487835 (W.D. Pa. June 16, 2008) (Parties failed to specify a completion date for discovery, so defendant was producing documents on “rolling basis.” Court threatened sanctions upon defendant for failure to produce documents four months ago and warned parties about further discovery motions (beyond the five already filed)).

⁷⁵ See Electronic Discovery Guidelines, District Court of Delaware, available at <http://www.ded.uscourts.gov/Announce/AdHoc-Disc.pdf>

Maryland⁷⁷ provide good foundations for addressing all the issues regarding electronic discovery that arise during the Rule 26(f) and Rule 16(b) conferences.

C. How to Preserve ESI – The Litigation Hold

A litigation hold is an instruction issued by the party's attorney ordering that all materials potentially relevant to the anticipated or pending litigation be preserved.⁷⁸ While the amended rules and even the *Zubulake* cases do not intend for every piece of paper and file to be saved by a client, once litigation is anticipated, anything relevant to the litigation should be preserved, including inaccessible data.⁷⁹ The responsibility of counsel does not stop at issuing the litigation hold.⁸⁰ It requires counsel to manage the litigation hold by enforcing its compliance.⁸¹ By taking these steps, a party is more likely to avoid the potential consequences of failing to adhere to the litigation hold.

Some courts have been very strict in sanctioning for failure to properly enact, monitor, or enforce litigation holds.⁸² However, other courts have refrained from issuing sanctions depending on the degree of the violations.⁸³

When a plaintiff requested a defendant to produce its litigation hold for inspection, an Illinois court held that a defendant's litigation hold is protected under the work product doctrine.⁸⁴ However, the court found defects in the defendant's privilege log. The defendant failed to identify all of the recipients of email messages and used ambiguous job title descriptions. The court ordered the defendant to revise the privilege log for an in camera inspection to determine privilege protection, but refrained from issuing sanctions.⁸⁵

The consequences of failing to issue a litigation hold can be devastating and severely damage the viability of a winnable case. A Connecticut court found that the defendants were not protected under the FED.R.CIV.P. 37 "safe harbor" provision because the new rules require a party to act affirmatively in preventing the destruction or alteration of potentially relevant

⁷⁶ See Electronic Discovery Guidelines, District Court of Kansas, available at <http://www.ksd.uscourts.gov/guidelines/electronicdiscoveryguidelines.pdf>

⁷⁷ See Electronic Discovery Guidelines, District Court of Maryland, available at <http://www.mdd.uscourts.gov/news/news/ESIProtocol.pdf>

⁷⁸ *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 218 (S.D.N.Y.2003) ("Zubulake IV").

⁷⁹ *Id.* at 217. See also, *Treppel v. Biovail Corp.*, 249 F.R.D. 111, 119 (S.D.N.Y. 2008).

⁸⁰ *Id.* at 218. See also *Treppel*, at 118.

⁸¹ *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 432 (S.D.N.Y.2004) ("Zubulake V"). See also *Treppel* at 118.

⁸² See *Consolidated Aluminum Corp. v. Alcoa, Inc.*, 244 F.R.D. 335 (E. D. La. 2006) (Delayed litigation hold warrants monetary sanctions); *Bd. Of Regents of Univ. of Nebraska v. BASF Corp.*, 2007 WL 3342423 (D. Neb. Nov. 5, 2007) (Court ordered that no bad faith required for sanctions against plaintiff because plaintiff continued to produce documents after the discovery deadline and a previous court order for production of documents. This included producing documents after plaintiff's deposition. Plaintiff's employee testified that he had not received the litigation hold, but was encouraged to review and eliminate as many files as possible. Court did not find plaintiff's non-compliance willful for order to produce, but ordered plaintiff to pay all costs for defendant's filing of the motion and re-deposing witnesses).

⁸³ See *School-Link Techs, Inc. v. Applied Res., Inc.*, 2007 WL 677647 (D. Kan. February 28, 2007) (Court refused to order sanctions for improper litigation hold and discovery insufficiencies).

⁸⁴ *Muro v. Target Corp.*, 250 F.R.D. 350 (N.D. Ill 2007).

⁸⁵ *Id.*

information.⁸⁶ The defendants made a good faith argument that the destruction occurred in the regular course of business; however the defendants failed to suspend their normal business practice of scrubbing the hard drives, including email, and failed to initiate a litigation hold. The court held that such destruction was not due to routine operation, but was in fact grossly negligent, and potentially in bad faith. As a result, the court ordered an adverse jury instruction and reimbursement to plaintiff of costs associated with its motion for spoliation sanctions.

D. How to Protect ESI – The Clawback Agreement

With the continued increase in the amount of information and data stored electronically, the potential for parties to inadvertently disclose privileged materials also rises. As the amount of ESI to be disclosed rises, so do the costs to review those massive amounts of information for privilege prior to disclosure. In an effort to balance costs against the potential for disclosing privileged information, parties are attempting to use “clawback” agreements. Clawback agreements specify how each party should handle inadvertent disclosures of privileged materials.

The Federal Rules actually provide a detailed procedure for protecting inadvertent disclosure of privileged materials in FED.R.CIV.P. 26(b)(5)(B). Unfortunately, the courts have not always relied upon this rule when making rulings about the waiver of privilege. Some courts have imposed a strict standard that any inadvertent disclosure waives the privilege, regardless of intent.⁸⁷ More lenient courts have ruled that a party only waives the privilege for any inadvertent disclosure if the party was grossly negligent.⁸⁸ Most courts have adopted an approach similar to the Federal Rule, but that requires the parties to be proactive about managing potential inadvertent disclosures.⁸⁹ This includes discussing this risk at the Rule 26(f) conference prior to the initiation of discovery.

As advised above, one of the ways to combat the waiver of privilege is to develop a clawback agreement with counsel at the Rule 26(f) conference. Parties may obtain further protection by requesting the court implement the clawback agreement in its pre-trial order. However, not all courts recognize clawback agreements, and some only apply those agreements to the parties involved in the litigation, thus allowing non-parties to have access to the privileged

⁸⁶ *Doe v. Norwalk Cmty. Coll.*, 248 F.R.D. 372 (D. Conn. 2007), *See also In re NTL, Inc. Sec. Litig.*, 244 F.R.D. 179 (S.D.N.Y. 2007) (Court ordered an adverse instruction against the defendant and payment of plaintiff’s attorney’s fees and costs for “grossly negligent” preservation of ESI and failure to issue a litigation hold when litigation was anticipated prior to the split of a company into two separate entities. The court found that the old company had a duty to preserve ESI for the two new entities); *In re Krause*, 367 B.R. 740 (Bankr. D. Kan. June 4, 2007); *Edmondson v. Tyson Foods, Inc.*, 2007 WL 1498973 (N.D. Okla. May 17, 2007).

⁸⁷ Daniel E. Rohner, *Oops! That Wasn’t Meant for You*, E-DISCOVERY, American Bar Association, pp 30-32, 2007.

⁸⁸ *Id.* *See also Williams v. Sprint/United Mgmt. Co.*, 2006 WL 1867478 (D. Kan 2006) (Court refused to recognize waived privilege for inadvertent disclosure of electronic spreadsheets).

⁸⁹ *See Victor Stanley, Inc., v. Creative Pipe, Inc.*, 2008 WL 2221841 (D. Md. May 29, 2008) (Based on balancing several factors from *Hopson v. Mayor of Baltimore*, 232 F.R.D. 228, 244-246 (D. Md. 2005), regarding waiver of privilege, Court held defendants waived their privilege because defendants failed to take reasonable precautions to prevent inadvertent disclosure and waived the usage of a clawback agreement); *St. Cyr v. Flying J, Inc.*, 2008 WL 2097611 (M.D. Fla. May 16, 2008) (Court held that FED.R.CIV.P. 26(b)(5)(B) applies to both paper and electronic documents regarding waiver of privilege. However, plaintiff in this case voluntarily disclosed the work product document thereby waiving the privilege).

materials if an inadvertent disclosure occurs.⁹⁰ As a result, parties must weigh the risk of inadvertent disclosure against the skyrocketing costs of meticulously analyzing every piece of mounting ESI for privilege concerns.

Hopefully some relief is on the horizon. At the time of this writing, a bill (S. 2450) has been passed in Congress that should provide relief for the waiver of the attorney-client privilege due to an inadvertent privilege disclosure through ESI. The bill is designed to amend FED.R.EVID. 502 and reinforce the procedure outlined in FED.R.CIV.P 26(b)(5)(B). The amendment would protect the privilege of an inadvertent disclosure if the holder of the privilege took reasonable steps to prevent the disclosure and takes reasonable steps to remedy the error.⁹¹ The amendment would also make federal court orders protecting the privilege enforceable in state and federal courts, as well as against non-parties.

Of course the amendment still relies on the courts to determine what are reasonable measures to prevent and protect against the inadvertent disclosure. However, with this amendment, the courts should become more accommodating to clawback agreements developed in the Rule 26(f) conference, and thus more inclined to adopt them in the pre-trial orders. In addition, the amendment should hopefully prevent disclosure of inadvertently disclosed privileged information to non-parties.

IV. What Happens If You If You Don't Produce ESI

The best way to avoid spoliation and sanctions for electronic discovery is to employ the strategies discussed above regarding meeting with the client, managing the litigation hold, and effectively utilizing the pre-conference with opposing counsel. Unfortunately, no matter how meticulous a party may facilitate electronic discovery, the potential for spoliation is always present.

A. What Constitutes Spoliation

Spoliation is not a new term in the law; however, under electronic discovery, spoliation can include many forms.⁹² Spoliation arises when parties negligently, intentionally, or mistakenly destroy, alter, or hide ESI that is relevant or discoverable to the anticipated or pending litigation. Some of the sanctions that courts have enforced for spoliation include monetary damages,⁹³ adverse jury instructions,⁹⁴ recognizing judicially determined facts,⁹⁵ preventing cross examination of plaintiff's expert,⁹⁶ and even default judgment.⁹⁷

⁹⁰ Rohner, *supra*, n. 87.

⁹¹ *Bill to ease Discovery Burdens Moves to White House*, LAW360, September 9, 2008, available at http://productliability.law360.com/print_article/68768.

⁹² See *Whitney v. JetBlue Airways Corp.*, 2008 WL 2156324 (E.D.N.Y. April 29, 2008) (Court ordered defendant to pay monetary award for plaintiff's motion alleging spoliation, but denied sanctions for spoliation. Court held that plaintiff failed to establish relevance of destroyed document and that it contained information beyond what was already produced by defendant in electronic form).

⁹³ See *Sterle v. Elizabeth Arden, Inc.*, 2008 WL 961216, (D. Conn. April 9, 2008) (Court ordered defendants to pay reasonable fees and expenses of plaintiff and plaintiff's consultant's expenses for a hampered inspection for failure to comply with an inspection order without special circumstances to justify non-compliance. Court also ordered electronic records to be inspected and further non-compliance would warrant a default judgment); *In re Sept. 11th*

The courts have not been hesitant to enter a default judgment for violations of discovery. In a 2007 California district court case, the court applied a five factor test for determining if default judgment should be granted for defendants' spoliation of evidence.⁹⁸ The test consisted of the following criteria: 1) expeditious resolution of litigation; 2) court's docket management; 3) risk of prejudice; 4) public policy in deciding cases on their merits; and 5) the availability of lesser sanctions. The court granted a default judgment on the basis that the defendant had engaged in efforts to destroy evidence and provide false testimony under oath. In addition, the court had previously sanctioned the defendant with monetary sanctions of \$30,000 for prior violations.⁹⁹

The consequences of sanctions for spoliation and other violations can be disastrous. A California case involving several court sanctions resulted in jury awards of more than \$604 million in compensatory damages and \$850 million in punitive damages.¹⁰⁰ The court imposed sanctions for spoliation, failure to produce documents, and failure to disclose obligations. The sanctions included an adverse jury instruction for certification violations and sluggish discovery and production. They also included a default judgment instruction where the liability allegations of the complaint were read to the jury who was instructed that those allegations were considered admitted for purpose of trial.¹⁰¹ Fortunately for the defendants, those damages were overturned by the appellate court on other grounds.¹⁰² The appellate court did not reach the issue of whether the sanctions enforced were an abuse of discretion. Therefore, this case serves as a reminder of the potential consequences of flaunting the requirements of e-discovery.

The courts have also dismissed cases when a plaintiff fails to comply with e-discovery rules and orders. A Mississippi court dismissed a case when plaintiff failed to comply with two

Liab. Ins. Coverage Cases, 243 F.R.D. 114 (S.D.N.Y. 2007) (Court ordered insurer to pay \$1.25 million in sanctions under FED.R.CIV.P. 11 and 37 for deleting essential electronic documents and failing to produce a paper version of the same documents for over three years).

⁹⁴ See *Connor v. Sun Trust Bank*, 546 F.Supp.2d. 1360 (N.D. Ga. 2008) (Despite defendant's assertion of a 30-day email destruction policy which destroyed relevant emails, Court granted plaintiff's motion for sanctions and issued an adverse jury instruction because plaintiff provided evidence of some of the relevant emails using other means).

⁹⁵ See *Google Inc., v. Am. Blind & Wallpaper Factory, Inc.*, 2007 WL 1848665 (N.D. Cal. June 27, 2007) (Court ordered evidentiary sanctions including acknowledgment of several judicially determined facts and monetary sanctions of \$15,000 for defendant's failure to preserve, collect, and produce evidence).

⁹⁶ See *United Med. Supply Co., Inc., v. United States*, 2007 WL 1952680 (Fed. Cl. June 27, 2007) (Despite argument by defendant that it acted in good faith, but negligently, Court ordered spoliation sanctions that defendant was prohibited from cross-examining plaintiff's expert on gaps in the record and was ordered to reimburse plaintiff for additional discovery costs arising out of defendant's failure to produce. For 4 years, the defendant had failed to contact the proper custodians about the litigation and preservation requirements. Court held no requirement for bad faith to enforce spoliation sanctions).

⁹⁷ See *Grange Mut. Cas. Co. V. Mack*, 270 Fed.Appx. 372, 2008 WL 744723 (6th Cir. 2008) (Court affirmed default judgment order where defendant's bad faith of purposely delaying discovery, ignoring court discovery deadlines and orders to compel, and instructing employees to ignore court orders caused prejudice to plaintiff).

⁹⁸ *Columbia Pictures v. Bunnell*, 2007 WL 4877701 (C.D. Cal. Dec. 13, 2007).

⁹⁹ *Id.*

¹⁰⁰ *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co.*, 2005 WL 679071 (Fla.Cir.Ct. Mar. 1, 2005) and 2005 WL 4947328 (Fla.Cir.Ct. March 1, 2005).

¹⁰¹ *Coleman (Parent) Holdings, Inc., v. Morgan Stanley & Co.*, 2005 WL 674885 (Fla.Cir.Ct. Mar. 23, 2005) and 2005 WL 5569257 (Fla.Cir.Ct. November 10, 2005).

¹⁰² *Morgan Stanley & Co., Inc., v. Coleman (Parent) Holdings, Inc.*, 955 So.2d 1124 (Fla. App. 4th Dist. 2007).

discovery orders requiring production and did not respond to the defendant's attempt to resolve the discovery issues pursuant to FED.R.CIV.P. 37.¹⁰³ Although sanctions as severe as those described above are uncommon, sanctions for noncompliance with rules and orders are quite prevalent.

B. What Constitutes Sanctions

Besides the court's inherent authority to issue sanctions for discovery violations, the courts have authority under Rule 37(e) to issue sanctions specifically for violations of electronic discovery.

The best example of the potential damages one can suffer for failure to comply with the electronic discovery rules and court orders is a California case where the plaintiffs were required to pay over \$8.5 million in attorney's fees.¹⁰⁴ The court found that the plaintiffs failed to produce thousands (nearly 46,000 very important emails out of 1.2 million pages) of documents requested during discovery. In addition, the court required nearly twenty of plaintiffs' attorneys to show cause as to why they should not be personally sanctioned. The court also ordered six of plaintiffs' attorneys to be reviewed for further disciplinary action by the California State Bar. However, the court issued an order permitting the six attorneys who filed objections to the sanctions to be permitted to present a self-defense based on attorney-client privileged information against the allegations.¹⁰⁵

In addition to monetary sanctions, the courts have also prevented parties from utilizing ESI at trial. In another California case, the defendant produced ESI after the discovery deadline.¹⁰⁶ The defendant argued it was an "honest mistake." The court held under FED.R.CIV.P. 26(g) and FED.R.CIV.P. 37(c) that an "honest mistake" is not substantial justification for an incorrect certification and that defendant failed to timely supplement initial disclosures without substantial justification. On this basis, the court ordered monetary sanctions and precluded the ESI produced beyond the discovery deadline.¹⁰⁷

With respect to the issue of timely production of documents, the courts have provided differing results. In a Florida case, the court imposed sanctions on the defendant's for a

¹⁰³ *Gaddis v. Smith & Nephew, Inc.*, 2008 WL 2415183 (S.D. Miss. June 11, 2008).

¹⁰⁴ *Qualcomm Inc., v. Broadcom Corp.*, 2008 WL 66932 (S.D. Cal. Jan. 7, 2008), *See also Qualcomm Inc., v. Broadcom Corp.*, 2007 WL 2900537 (S.D. Cal. September 28, 2007); *Qualcomm Inc., v. Broadcom Corp.*, 2007 WL 2261799 (S.D. Cal. August 6, 2007); *Qualcomm Inc., v. Broadcom Corp.*, 2007 WL 2296441 (S.D. Cal. August 6, 2007); *Qualcomm Inc., v. Broadcom Corp.*, 2007 WL 1031373 (S.D. Cal. March 21, 2007).

¹⁰⁵ *Qualcomm Inc. v. Broadcom Corp.* 2008 WL 638108 (S.D. Cal. March 5, 2008). *See also Wingnut Films, Ltd. V. Katja Motion Pictures Corp.*, 2007 WL 2758571 (C.D. Cal. Sept. 18, 2007) (Court ordered a third party vendor to conduct keyword searches when defendant failed to produce any discovery after failing to comply with court orders to produce. Court imposed monetary sanctions on defendant of \$125,000.00); *Claredi Corp. v. SeeBeyond Tech. Corp.*, 2007 WL 735018 (E.D. Mo. Mar. 8, 2007) (Court ordered defendant to produce documents on its archived databases after plaintiff filed a motion for sanctions based on emails it obtained from third party competitors showing email communications between parties that defendant had previously denied ever existed. Court found emails relevant and ordered defendant to pay \$54,000 for costs associated with plaintiff bringing motion and \$20,000 as a sanction for dilatory discovery production and failure to conduct responsive search for past two years).

¹⁰⁶ *R&R Sails, Inc. v. Ins. Co. of Pa.*, 2008 WL 2232640 (S.D. Cal. April 18, 2008).

¹⁰⁷ *Id.*

purposefully sluggish production of discovery.¹⁰⁸ The defendants failed to produce documents in accessible or useful formats, missed deadlines, refused to consult with plaintiff about keyword searches, failed to produce single document TIFF files, and omitted attachments and relevant emails.¹⁰⁹

In addition, the courts have been careful to only grant default judgment for electronic discovery violations when the violations are truly in bad faith. In a 2007 Florida ruling, the court issued monetary sanctions and granted default judgment against defendants for withholding “smoking gun” evidence.¹¹⁰ The defendants argued that they failed to produce a critically dispositive email and attachments because the email was deleted as part of the defendants’ ongoing business practices.¹¹¹

However, even when bad faith is present, the courts are not inclined to grant default judgment. In a 2007 Illinois ruling, the court found that the defendant acted in bad faith by discarding his computer after receiving notice of the complaint.¹¹² The plaintiff moved for default judgment, sanctions, and attorney’s fees. The court declined to award default judgment, but ordered the plaintiff to pay for a third-party’s discovery due to the computer’s destruction and retention of a computer expert.¹¹³ The court also awarded nearly \$100,000 in attorney’s fees.¹¹⁴

In some cases it is difficult to discern whether the courts are issuing sanctions under their inherent authority to manage discovery or if they are specifically referencing FED.R.CIV.P. 37(e). Regardless, as the courts move further away from the enactment of the amended rules and into the future of electronic discovery, they are holding parties more accountable for electronic discovery violations. As counsel’s knowledge and competency of electronic discovery expand, the court’s expectations rise.

V. Tackling the E-Discovery Issue

E-Discovery is quickly becoming a major issue for those industries that often are involved in litigation. Recent studies have found that 17.5% of companies are “not ready to handle complex discovery requests.”¹¹⁵ Almost twelve percent of the companies had not established a policy regarding e-discovery.¹¹⁶ These policies are critical especially when faced with litigation in federal court. Attorneys are expected to be familiar with their client’s policies on electronically stored information early in the litigation process.¹¹⁷ Written policies allow the court to see the efforts the company has made in following the requirements of litigation.

¹⁰⁸ *In re Seroquel Prod. Liab. Litig.* 244 F.R.D. 650 (M.D. Fla. 2007).

¹⁰⁹ *Id.*

¹¹⁰ *Quantum Comm. Corp. v. Star Broad. Inc.*, 473 F.Supp.2d 1249 (S.D. Fla. 2007).

¹¹¹ *Id.*

¹¹² *APC Filtration, Inc. v. Becker*, 2007 WL 3046233 (N.D. Ill. Oct. 12, 2007).

¹¹³ *Id.*

¹¹⁴ *APC Filtration, Inc. v. Becker*, 2007 WL 4569721 (N.D. Ill. Oct. 12, 2007).

¹¹⁵ Sara Stephanini, *Execs Feeling Weary About E-Discovery: Study*, LAW360, available at http://productliability.law360.com/print_article/64735.

¹¹⁶ *Id.*

¹¹⁷ *See* FED. R. CIV. P. 16.

Although the policies may not completely protect against sanctions, the policies may demonstrate that “good faith” was exercised by the party. Further, developing and enacting company-wide policies may save a corporation during litigation when it is estimated that the electronic discovery process may account for as much as 20% of all litigation costs.¹¹⁸ Established policies allow for the efficient collection of documents and may prevent expensive sanctions.

As e-discovery becomes more prevalent, there are a variety of solutions available to handle these demands. Companies may internalize the process and create a team responsible for handling the requests. Software companies are developing programs that may automate the process. Finally, third-parties are available to outsource the task. Regardless of how companies handle electronic discovery, failing to consider how to manage electronically stored information “can cost companies thousands if not millions of dollars in unnecessary expenses, fines, and judgments.”¹¹⁹

A. The E-Discovery Team

The E-Discovery Team is an integral part of a company’s effective and timely response to e-discovery. Companies need to “create a core response team” that is “equipped to respond to e-discovery requirements quickly.”¹²⁰ Included on this team should be representatives from the IT, human resources, and legal departments.¹²¹ These departments are critical to the team. The “protracted timelines and unpredictability” of litigation requires HR to be an integral part of the E-Discovery Team.¹²² This team will be responsible for “managing e-discovery issues and updating the company’s record-retention policy.”¹²³ ¹²⁴Updating this policy is critical. Mergers, out-dated software, upgrades and changes in technology all require the policy to be flexible and adapt with today’s business world.¹²⁵

1. I Speak Geek

When preparing an E-Discovery team, it will be important to include an individual or two who can effectively communicate with counsel, judges, and juries about the data retention processes in layman’s terms. This will be especially true when dealing with sanctions under Rule 37(e) for routine deletions of information. Companies will need a person on their E-discovery Team that is fluent in “Geek”. This critical member of the team should be able to understand the technological side of how a company is retaining its data, storing system, and the programs controlling routine deletions. This person must then be able to relay and explain the processes in laymen’s term for attorneys, judges and possibly juries. If a judge cannot

¹¹⁸ Harmon, *supra*, n. 1.

¹¹⁹ Kevin F. Brady and Chad Breckinridge, *Avoiding the Preservation Predicament*, 17-OCT BUS. L. TODAY 21 (Oct. 2007).

¹²⁰ Stephanini, *supra*, n. 116.

¹²¹ *Id.*

¹²² *Id.*

¹²³ Brady, *supra*, n. 120

¹²⁴

¹²⁵ *Id.*

understand a company's witness, the judge cannot rule in the company's favor and could possibly award sanctions for data lost through routine, good faith operations of a program.

The geek-speaker will also be the link between legal counsel and the IT department. Because attorneys are expected to be familiar with the document retention policies of his or her client, the geek-speaker will be able to effectively explain the policies in place to counsel.¹²⁶ Having a contact person for counsel will allow counsel to identify where potential electronically stored information may be found during the Rule 26(f) conference.¹²⁷ Providing this information allows the discovery process to flow more efficiently and potentially cut discovery costs. If counsel specifies where particular information may be located, the company may avoid the unnecessary costs of retrieving irrelevant data because opposing counsel limited ESI discovery requests to only relevant information.

2. "Always be prepared"

The need for an E-discovery team is reflected in the rules requiring a proactive approach to data retention.¹²⁸ Courts imposed considerable sanctions prior to the new federal rules—it is not any stretch of the imagination to believe that these fines may dramatically increase now that companies are officially on notice.¹²⁹ Preparation will also benefit companies in the long run. If a company has a data retention plan in place and is actively attempting to comply with discovery requests, courts may compel production but will probably not order sanctions. These good faith efforts may protect those cases which are defensible from becoming disastrous jury verdicts or default judgments.

B. Software

Software companies are coming to the aid of corporations involved in litigation by creating programs to assist in the collection of electronically stored information. The software automatically sorts email and other documents based on set parameters. Software may be extremely useful in "de-duplicating" the discovery to be produced.¹³⁰ Memos and emails may have multiple versions and were received by multiple people.¹³¹ The software can also sort the discovery into clusters based on sender, recipient, or subject.¹³² Thus, the software may cut discovery cost since emails directed or sent by any of the company's attorneys may be clustered and set aside initially as privileged, allowing the privilege review to focus on other documents that may not be obviously privileged.

C. Third Party Vendors

¹²⁶ James K. Lehman, John D. Martin, and Daniel R. D'Alberto, *Electronic Discovery and the Rule 26(f) Conference*, DRI, Jan. 2008, p. 60.

¹²⁷ *Id.*

¹²⁸ Brady, *supra*, n. 120.

¹²⁹ *Id.*

¹³⁰ Harmon, *supra*, n. 1.

¹³¹ *Id.*

¹³² *Id.*

Some companies may wish to outsource their e-discovery team. The benefit of using third-party vendors is that they will be computer experts. Companies that may not focus on technology or where it would be too costly to hire an e-discovery team should consider this alternative. Third-party vendors may be found throughout the country and with the network capabilities, companies are not required to choose a local vendor. Companies may search the country to find a vendor that satisfies their needs and budget constraints.

VI. What the Future Holds for Electronic Discovery

As *Zubulake* ushered in the era of electronic discovery prior to the enactment of the amended rules, new cases are helping to shape the future of electronic discovery within the context of the amended rules. Currently, a New York case that is very similar to *Zubulake* is being considered by the court regarding sanctions for defendant's failure to preserve evidence.¹³³ The court employed a three-part test to determine if plaintiff's motion for sanctions is warranted. The court is considering the following factors: 1) the defendant's obligation to preserve the information; 2) destruction with a culpable state of mind (which includes ordinary negligence); and 3) relevancy.¹³⁴ At this time, the court has yet to rule on the motion because it has allowed the defendant to search its email servers and backup servers to establish whether any evidence is present and whether it is relevant. The case has the potential to redefine how the amended rules are applied in light of the *Zubulake* cases and all of the above case law that has only recently molded the emerging world of electronic discovery.

Electronic discovery continues to explode and litter the battlegrounds of litigation with new issues and questions to grapple. The time is coming when practitioners will have to educate themselves about electronic discovery in order to continue to provide competent assistance. Clients will also have to adapt their methods to the ever-changing world of electronic discovery.

¹³³ *Treppel v. Biovail Corp.*, 249 F.R.D. 111 (S.D.N.Y. 2008).

¹³⁴ *Id.* at 120.