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FOUR YEARS LATER: HOW THE 2006 AMENDMENTS TO THE FEDERAL RULES HAVE RESHAPED THE E-DISCOVERY LANDSCAPE AND ARE REVITALIZING THE CIVIL JUSTICE SYSTEM

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I. INTRODUCTION

[1] The 2006 amendments to the Federal Rules of Civil Procedure, which were enacted to address the potentially immense burden involved in the discovery of electronically-stored information ("ESI"),[1] set in motion a process that is revitalizing the primary purpose of the Federal Rules of Civil Procedure adopted nearly seventy years earlier: "to secure the just, speedy, and inexpensive determination of every action and proceeding."[2] One of the principal means through which the Federal Rules of Civil Procedure achieve this purpose is by allowing for the discovery of "any nonprivileged matter that is relevant to any party's claim or defense."[3] The reasoning behind these liberal discovery rules is that once parties know, ostensibly through discovery, their respective positions in a dispute, they will reach a resolution more quickly and efficiently.[4]

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[1] *See* COMM. ON RULES OF PRACTICE AND PROCEDURE, JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE JUDICIAL CONFERENCE 22-24 (2005), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2005.pdf [hereinafter 2005 COMM. REPORT]; Letter from David F. Levi, Chair, Comm. on Rules of Practice & Procedure of the Judicial Conf. of the U.S., to John G. Roberts, Chief Justice, Supreme Court of the U.S. (Sept. 30, 2005), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/supct1105/Summary_Proposed_Amendments.pdf [hereinafter Summary of Proposed Amendments]; *see also* Damian Vargas, Note, *Electronic Discovery: 2006 Amendments to the Federal Rules of Civil Procedure*, 34 RUTGERS COMPUTER & TECH. L.J. 396, 396 (2008).

[2] FED. R. CIV. P. 1. Although Rule 1 has changed since its enactment in 1938, it has continuously embraced the same core principles. *See* FED. R. CIV. P. 1 advisory committee's note.

[3] FED. R. CIV. P. 26(b)(1).

[4] *See* FED. R. CIV. P. 1; *see also* O'Meara-Sterling v. Mitchell, 299 F.2d 401, 404 (5th Cir. 1962) ("The spirit and purpose of the Federal Rules is to secure just, speedy and inexpensive determination of actions and they look to the admission of matters about which there is no dispute."); Des Isles v. Evans, 225 F.2d 235, 236 (5th Cir. 1955) ("The rules have for their primary purpose the securing of speedy and inexpensive justice in a uniform and well ordered manner.").

[2] However, unbounded liberal discovery in the modern information age can carry immense burdens.[5] Increasing ubiquitous use of computers through the later half of the twentieth century, and the consequent digitization of information, has created an unfathomable volume of information, and will continue to do so at an exponential rate.[6] These technological advancements allow us to store as much information on a single server as is contained in every item in the Library of Congress[7] (147,093,357 at last count).[8]

[3] The creation of more information means there is more available, and potentially relevant, information to a party's claim or defense, and thus more information subject to discovery.[9] Moreover, the discovery norms that developed during the paper era are unsuited to the new paradigm of e-mail, backup tapes, and server farms.[10] As such, a broadly worded discovery request that would have resulted in the production of several thousand pages of paper documents in the late-1980s could easily result in the production of several million pages of ESI today, with a

[5] *See* 2005 COMM. REPORT, *supra* note 1; *see also* Bernadette Starzee, *Law's Double-Edged Sword of Technology,* LONG ISLAND BUS. NEWS, Jan. 12, 2011, *available at* 2011 WLNR 1175529.

[6] *See* George L. Paul & Jason R. Baron, *Information Inflation: Can the Legal System Adapt?*, 13 RICH. J.L. & TECH. 10, ¶¶ 10-13 (2007), http://jolt.richmond.edu/v13i3/article10.pdf; Bennett B. Borden, *E-Discovery Alert, The Demise of Linear Review*, CLEARWELL SYSTEMS, 1 (Oct. 2010), http://www.clearwellsystems.com/e-discovery-blog/wp-content/uploads/2010/12/E-Discovery_10-05-2010_Linear-Review_1.pdf; *see also* Jason R. Baron & Ralph C. Losey, *e-Discovery: Did You Know?*, YOUTUBE (Feb. 11, 2010), http://www.youtube.com/watch?v=bWbJWcsPp1M&feature=player_embedded.

[7] *See Data, Data Everywhere: A Special Report on Managing Information*, ECONOMIST, Feb. 27, 2010, at 1, *available at* http://www.unitysystems.biz/downloads/TooMuchInformation_Laserfiche.pdf.

[8] *About the Library*, LIBR. CONGRESS, http://www.loc.gov/about/generalinfo.html#2007_at_a_glance (last visited Feb. 19, 2011).

[9] *See* 2005 COMM. REPORT, *supra* note 1, at 22-23; *see also* Baron & Losey, *supra* note 6.

[10] *See* 2005 COMM. REPORT, *supra* note 1, at 22-23.

corresponding increase in the cost of conducting such discovery.[11] The immense volume of potentially relevant evidence has driven the cost of finding, reviewing, and producing that information to unprecedented heights, threatening the very purposes of our civil justice system.[12]

[4] The volume of information responsive to an "all documents concerning (anything)" request may be utterly impossible to manage, forcing litigants to develop more artful and articulate discovery strategies.[13] The 2006 Amendments to the Federal Rules of Civil Procedure (the "2006 Amendments" or "Amendments"), have provided the legal framework for developing these new strategies, and an analysis of court opinions issued since the Amendments reveals that both the bench and the bar are getting better at doing so.[14] Although seemingly modest in

[11] *See* John H. Beisner, *Discovering A Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 564-70 (2010) (discussing how electronic discovery has increased the costs and volume of material associated with discovery).

[12] *See* John Bace, *Cost of E-Discovery Threatens to Skew Justice System*, A KERSHAW, 1-3 (Apr. 20, 2007), http://www.akershaw.com/Documents/cost_of_ediscovery_threatens_148170.pdf.

[13] *See* Bradley C. Nahrstadt, *A Primer on Electronic Discovery: What You Don't Know Can Really Hurt You*, TRIAL ADVOC. Q., Fall 2008, at 17, 26-27 (discussing the difficulty associated with electronically stored information requests, which can result in the requestor receiving too little or too much, information); Kenneth R. Berman & David A. Brown, *Practical Issues in Framing and Responding to Discovery Requests for Electronic Information*, *in* AM. BAR ASS'N CTR. FOR CONTINUING LEGAL EDUC., NAT'L INST., REPRESENTING HIGH TECHNOLOGY COMPANIES: BUSINESS LAW, LITIGATION, TORT AND INSURANCE PRACTICE 1-2 (1998) ("Broad discovery requests for electronic information can . . . generate objections and expensive discovery disputes, which might be avoided by more thoughtful, narrowly tailored requests for electronic information . . . . [T]he sheer mass of information potentially available, and the cost of reviewing, organizing, and interpreting such information counsel in favor of specificity in discovery requests for electronic information.").

[14] *See, e.g.*, Edelen v. Campbell Soup Co., 265 F.R.D. 676, 680, 684-85 (N.D. Ga. 2010) (noting the Magistrate Judge's role in developing a discovery protocol and finding she appropriately narrowed the plaintiff's electronic discovery requests); *see also* Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC, 685 F. Supp. 2d 456, 463-72 (S.D.N.Y. 2010) (identifying spoliation and sanction issues stemming from electronic discovery); Fifty-Six Hope Road Music, Ltd. v. Mayah Collections, Inc., No. 2:05-cv-01059-KJD-GWF, 2007 WL 1726558, *6-11 (D. Nev. June 11, 2007) (limiting the scope of discovery requests).

scope, these Amendments set the stage for a paradigmatic shift in the ways both courts and litigants approach the electronic discovery ("e-discovery") process in particular, and the litigation process in general. By requiring parties to gain an understanding of their own information, engage each other about ESI early in the litigation process, and involve the courts to help balance the parties' rights and burdens with respect to such discovery, the 2006 Amendments have fostered a more cooperative, just, and efficient approach to discovery that has begun to revitalize the guiding principle in Federal Rule of Civil Procedure 1.[15]

[5] This Article examines how the landscape of electronic discovery has changed in the four years since the adoption of the 2006 Amendments. It first describes the substance, structure, and purpose of the 2006 Amendments. Next, the Article examines how the 2006 Amendments have influenced, affected, and changed the way we go about conducting electronic discovery by fostering greater cooperation between adversaries and more efficient methods of requesting, searching for, and producing information. This Article then looks to the technological changes on the horizon that will require our legal system to further adapt, including the growing prevalence of social media and the changing nature of privacy in our information age.

II. THE 2006 ELECTRONIC DISCOVERY AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

[6] On December 1, 2006, amendments to Federal Rules of Civil Procedure 16, 26, 33, 34, 37, and 45 went into effect to address, largely for the first time, the issue of discovery of ESI.[16] The Advisory Committee began considering the Amendments in the late 1990s as ESI became a more frequent subject of discovery disputes.[17] The Advisory Committee

[15] *See, e.g.*, Thomas Y. Allman, *Conducting E-Discovery After the Amendments: The Second Wave*, 10 SEDONA CONF. J., 215, 216-18 (2009).

[16] Supreme Court of the United States, Order Adopting Amendments to the Federal Rules of Civil Procedure ¶ 3, Apr. 12, 2006, *available at* http://www.supremecourt.gov/orders/courtorders/frcv06p.pdf; *see also* W.E. Aubuchon Co. v. BeneFirst, LLC, 245 F.R.D. 38, 41 (D. Mass. 2007).

[17] 2005 COMM. REPORT, *supra* note 1, at 22.

solicited extensive input from "bar organizations, attorneys, computer specialists, and members of the public" in the early-2000s and, in 2005, introduced the proposals that eventually became the 2006 Amendments.[18] Pursuant to the Rules Enabling Act, the United States Supreme Court provided final approval for the Amendments in April 2006 and, following no further action from Congress, the changes went into effect.[19]

[7] By the time the Advisory Committee first introduced the proposals that would result in the 2006 Amendments, the legal community was struggling with the pitfalls and complexities of e-discovery.[20] In fact, nearly five years earlier, a previous iteration of the Advisory Committee had explicitly recognized the need to address the growing issue of electronic discovery through amendments to the discovery rules.[21] Before the Amendments, courts were dealing with the complexities and burdens of e-discovery through the use of local rules and case law, which led to inconsistencies across jurisdictions and a confusing and debilitating federal civil judicial system.[22] For example, in 2002 the Southern District

[18] *Id.*

[19] Letter from John G. Roberts, Jr., Chief Justice, Supreme Court of the U.S., to Dick Cheney, President, U.S. Senate (Apr. 12, 2006), *available at* http://www.supremecourt.gov/orders/courtorders/frcv06p.pdf; Letter from John G. Roberts, Jr., Chief Justice, Supreme Court of the U.S., to J. Dennis Hastert, Speaker, House of Representatives (Apr. 12, 2006), *available at* http://www.supremecourt.gov/orders/courtorders/frcv06p.pdf; *see* 28 U.S.C. § 2072(a) (2006) ("The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.").

[20] *See* 2005 COMM. REPORT, *supra* note 1, at 22-24; *see also* Tom Olzak, *eDiscovery Challenges*, INFOSECWRITERS (Feb. 2006), http://www.infosecwriters.com/text_resources/pdf/eDiscovery_TOlzak.pdf.

[21] Memorandum from Paul V. Niemeyer, Chair, Advisory Comm. on Civil Rules, to Anthony J. Scirica, Chair, Comm. on Rules of Practice and Procedure (May 11, 1999), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/repcivil.pdf ("The Committee recognized that it will be faced with the task of devising mechanisms for providing full disclosure in a context where potential access to information is virtually unlimited and in which full discovery could involve burdens far beyond anything justified by the interests of the parties to the litigation.").

[22] 2005 COMM. REPORT, *supra* note 1, at 24.

of New York, in *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*, adopted a test to determine whether to shift the costs of e-discovery between the parties,[23] only to modify and replace that test less than eighteen months later in the seminal *Zubulake I* opinion.[24]

[8] Against this backdrop, the Advisory Committee first proposed the Amendments "to reduce the costs of [electronic] discovery, to increase its efficiency, to increase uniformity of practice, and to encourage the judiciary to participate more actively in case management."[25] The Amendments made the following substantive changes to the discovery rules:

- Rule 16(b) was amended to allow the district court to include in a scheduling order "provisions for disclosure or discovery of electronically stored information" and "any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after production;"[26]

[23] Rowe Ent., Inc. v. William Morris Agency, Inc., 205 F.R.D. 421, 429 (S.D.N.Y. 2002) (adopting a multi-factor test to determine cost-shifting in e-discovery).

[24] Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 320-22 (S.D.N.Y. 2003) (identifying *Rowe* as "the gold standard for courts resolving electronic discovery disputes" but modifying the *Rowe* test by eliminating two factors and adopting a new seven-factor test to govern cost-shifting for electronic discovery).

[25] Letter from Lee H. Rosenthal, Chair, Advisory Comm. on the Fed. Rules of Civil Procedure, to David F. Levi, Chair, Standing Comm. on Rules of Practice & Procedure (May 27, 2005), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV5-2005.pdf [hereinafter Report of the Civil Rules Advisory Comm].

[26] FED. R. CIV. P. 16(b) (2006); *see* Report of the Civil Rules Advisory Comm., *supra* note 25, at 26-27, 29. The language, but not the substance, of Rule 16 has since been amended to read, "*provide* for disclosure or discovery of electronically stored information;" and "any agreements the parties reach for asserting claims of privilege or protection as trial-preparation material after *information is produced*." FED. R. CIV. P. 16(b) (emphasis added).

- Rule 26(a)(1)(B) – now Rule 26(a)(1)(A)(ii) – was amended to include ESI in the list of information that parties must include in their initial disclosures;[27]

- Rule 26(b)(2)(B) was amended to allow a party to withhold discoverable material stored in a manner that is "not reasonably accessible because of undue burden or cost," subject to the opposing party's right to file a motion to compel the disclosure of such material;[28]

- Rule 26(b)(5)(B) was amended to require a party, upon receiving notice that information produced in discovery is privileged, to "promptly return, sequester, or destroy the specified information and any copies it has;"[29]

- Rule 26(f) was amended to identify three additional items for parties to discuss when meeting to formulate a discovery plan: (1) preservation of discoverable information, (2) issues related to the disclosure or discovery of ESI, and (3) agreements regarding the handling of claims that information requested or disclosed in discovery is privileged or subject to work product protection;[30]

- Rule 33(d) was amended to allow a party to produce ESI in lieu of a written response to an interrogatory if the burden

[27] FED. R. CIV. P. 26(a)(1)(A)(ii); *see* FED. R. CIV. P. 26(a)(1)(B) (2006); Report of the Civil Rules Advisory Comm., *supra* note 25, at 30.

[28] FED. R. CIV. P. 26(b)(2)(B); *see* FED. R. CIV. P. 26(b)(2)(B) (2006); Report of the Civil Rules Advisory Comm., *supra* note 25, at 46, 52.

[29] FED. R. CIV. P. 26(b)(5)(B); *see* FED. R. CIV. P. 26(b)(5)(B) (2006); Report of the Civil Rules Advisory Comm., *supra* note 25, at 56-58, 61-62.

[30] FED. R. CIV. P. 26(f); *see* FED. R. CIV. P. 26(f) (2006); Report of the Civil Rules Advisory Comm., *supra* note 25, at 31-33, 38-39.

in deriving the answer to the interrogatory from the ESI would be substantially the same for both parties;[31]

- Rule 34(a) was amended to include ESI within the information a party can seek in discovery under this rule, and provides a party the ability to sample or test ESI;[32]

- Rule 34(b) was amended to allow a requesting party to specify the form in which it seeks production of information requested in discovery;[33]

- Rule 37(f) was amended to create a safe-harbor from sanctions for a party who deletes information as part of a routine information management system;[34]

- Rule 45 was amended to contain language to conform to the changes made to the rules listed above for discovery from third parties.[35]

[9] Taken together, these changes established a general framework for parties to use when a case involves the discovery of ESI, and there are very few cases that do not.[36] Fundamentally, the Amendments require a

[31] FED. R. CIV. P. 33(d); *see* FED. R. CIV. P. 33(d) (2006); Report of the Civil Rules Advisory Comm., *supra* note 25, at 68-69.

[32] FED. R. CIV. P. 34(a); *see* FED. R. CIV. P. 34(a) (2006); Report of the Civil Rules Advisory Comm., *supra* note 25, at 70-73, 80-82.

[33] FED. R. CIV. P. 34(b); *see* FED. R. CIV. P. 34(b) (2006); Report of the Civil Rules Advisory Comm., *supra* note 25, at 71-72, 80-81.

[34] FED. R. CIV. P. 37(f) (2006); *see* FED. R. CIV. P. 37(e); Report of the Civil Rules Advisory Comm., *supra* note 25, at 86, 89-90.

[35] FED. R. CIV. P. 45; *see* FED. R. CIV. P. 45 (2006); Report of the Civil Rules Advisory Comm., *supra* note 25, at 92-102, 106-09.

[36] *See* Mia Mazza et al., *In Pursuit of FRCP 1: Creative Approaches to Cutting and Shifting the Costs of Discovery of Electronically Stored Information*, 13 RICH. J.L. & TECH. 11, ¶ 2 (2007), http://jolt.richmond.edu/v13i3/article11.pdf; Todd Mayo, *Helpful Tips for Electronic Document Management in Construction Litigation*, CONSTRUCTION

party to consider and discuss relevant ESI much earlier in a case than before.[37] Prior to the Amendments, parties often did not think about discovery until after the filing of a complaint, followed by an answer and a motion to dismiss.[38] The Amendments changed the timing of when parties need to consider ESI by requiring the disclosure of ESI in initial disclosures under Rule 26.[39] These disclosures must occur within 14 days of a Rule 26(f) conference,[40] at which the parties are to discuss a discovery plan, the scope of preservation, the form of production, protective orders, and privilege protections.[41] In fact, if the parties *do not* cooperatively participate in forming a discovery plan, the court may sanction them under Rule 37(f).[42] Furthermore, the Rule 26(f) conference must occur before the Rule 16(b) scheduling order,[43] which generally takes place within 120

UPDATE (PinnacleOne, Arnhem, Neth.), Aug. 2007, *available at* http://www.lorman.com/newsletter/article.php?article_id=795&newsletter_id=174&category_id=3&topic=CN ("Electronic documents have become so prevalent that they are now recognized as a standard part of the discovery process. This, along with the fact that parties are increasingly turning their paper documents into electronic form, demonstrates that the love for paper in litigation is slowly fading. We may never be paperless, but we will surely find ourselves more frequently in situations where we must decide how to efficiently manage electronic documents.").

[37] *See* FED. R. CIV. P. 26(f) advisory committee's note (requiring parties to discuss e-discovery at their discovery-planning conference and explaining that doing so can help avoid later difficulties); *see also* Steven S. Gensler, *Some Thoughts on the Lawyer's E-Volving Duties in Discovery*, 36 N. KY. L. REV. 521, 532 (2009) ("The belief that lawyers should, if not must, significantly increase their early efforts in order to properly address the demands of e-discovery seems nearly universal.").

[38] *Cf.* Gensler, *supra* note 37, at 524 ("Despite the centrality of discovery to the Federal Rules system, the 1938 Rules contained virtually nothing about discovery management, either by the parties through planning discussions or by the court.").

[39] FED. R. CIV. P. 26(a)(1)(A)(ii); *see also* FED. R. CIV. P. 26(a)(1)(B) (2006).

[40] FED. R. CIV. P. 26(a)(1)(C).

[41] FED. R. CIV. P. 26(f).

[42] FED. R. CIV. P. 37(f).

[43] FED. R. CIV. P. 26(f)(1).

days from the filing of the complaint.[44] The scheduling order contemplates the inclusion of a discovery protocol, which, when used to its full advantage, should include specific agreements by the parties concerning the scope, format, and timing of the production of ESI.[45] For the scheduling order to include all of these aspects, the parties must undertake sufficient efforts to understand their own sources of ESI, and what ESI they need from the opposing party.[46]

[10] The real genius behind the Amendments is that, when properly used, the responsibility rests upon the parties to consider the evidence they need, where it is located, and how to acquire it in a way that is fair and proportional to the needs of the case.[47] A party cannot disclose sources of ESI until it identifies those sources.[48] Therefore, a party must undertake some analysis of its ESI soon after the initiation of a case.[49] A party cannot meet and confer regarding the proper scope of discovery unless it has some idea of where relevant information resides and the burden required to retrieve it.[50] The fundamental solution to conducting civil discovery in a world awash in information is to seek only the information

[44] FED. R. CIV. P. 16(b)(2).

[45] FED. R. CIV. P. 16(b)(3)(B).

[46] *See* FED. R. CIV. P. 26(f) advisory committee's note (noting that it might be beneficial for parties and counsel to discuss their computer information systems when developing a discovery plan); *see also* Gensler, *supra* note 37, at 532 (discussing the importance of knowing both your client's and opponent's information system before litigation).

[47] *See* Gensler, *supra* note 37, at 532.

[48] *See* FED. R. CIV. P. 26(a)(1)(A)(ii).

[49] *Cf.* FED. R. CIV. P. 26(f) advisory committee's note (discussing the importance of counsel familiarizing itself with computer and other information systems that potentially store ESI).

[50] *Cf.* Mazza et al., *supra* note 36, ¶ 139 (explaining that a party who knows the location of ESI, why the party needs the ESI, and how much it will cost to access, is "in the best position to persuade a court to shift some or all discovery costs).

that is necessary for the resolution of the case.[51] To do this, litigants must openly and transparently discuss sources of information, how to address them, and the associated level of difficulty.[52] The Amendments provide the tools to allow such dialogue to occur.

[11] An examination of e-discovery opinions issued since the Amendments reveals that the bench and bar are increasingly adept at using the tools the Amendments provide to craft discovery protocols that are reasonable, iterative, and proportional to the needs of the case.[53] This newfound proficiency is finally helping achieve the primary goal of civil litigation: "the just, speedy, and inexpensive determination of every action and proceeding."[54]

III. HOW THE 2006 AMENDMENTS HAVE CHANGED THE DISCOVERY PROCESS

[12] From a textual perspective, the 2006 Amendments made relatively modest changes to the discovery rules aimed at modernizing the process to accommodate the explosion of ESI.[55] From the addition of "electronically stored information" to Rule 34(a), to the requirement that parties discuss e-discovery when formulating a discovery plan under Rule 26(f), to the direction for courts to consider e-discovery when entering a scheduling

[51] *See* Scott E. Randolph & A. Dean Bennett, *Using the Mandatory Rule 26(f) Discovery Conference to Manage ESI Pays Dividends Throughout Litigation*, IDAHO EMP. L. BLOG (Feb. 7, 2011, 10:19 AM), http://www.idahoemploymentlawblog.com/2011/02/using-the-mandatory-rule-26f-discovery-conference-to-manage-esi-pays-dividends-throughout-litigation.html.

[52] *See* Gensler, *supra* note 37, at 532.

[53] *See* Bennett B. Borden et al., *Alert: Sanctions Down; Cooperation Up; Preservation, Privacy and Social Media Remain Challenging*, WILLIAMS MULLEN (Dec. 17, 2010), http://www.williamsmullen.com/sanctions-down-cooperation-up-preservation-privacy-and-social-media-remain-challenging-12-17-2010/.

[54] FED. R. CIV. P. 1.

[55] *See* 2005 COMM. REPORT, *supra* note 1, at 22-23 (noting the differences between conventional discovery and ESI discovery and concluding: "These and other difference are causing problems in discovery that rule amendments can helpfully address.").

order under Rule 16(b), the 2006 Amendments largely consisted of seemingly small changes to the discovery rules that made the e-discovery process more uniform and certain.[56]

[13] However, the modesty of the textual changes the Amendments effected belies the breadth of the impact they have had since adoption, especially considering how many courts have subsequently enforced the Amendments.[57] At their most fundamental, the Amendments have created the opportunity, indeed the requirement when properly enforced, for litigants to consciously consider the evidentiary needs of their case, understand how those needs can be satisfied by ESI, communicate those needs to opposing counsel and the court, and negotiate and implement reasonable and proportional strategies to identify and produce ESI.[58] When carefully considered and consciously undertaken, artful e-discovery strategies can significantly decrease the burden of e-discovery and lead to the speedy, just, and inexpensive resolution of civil litigation.[59]

[14] In fact, this is where "information inflation" is a good thing. By 2002, the amount of data maintained on computers reached 5 exabytes (5 billion gigabytes), which is roughly the equivalent of every word spoken by human kind.[60] By 2009, "there were about 988 exabytes of data," an amount of data that, if printed, would reach from the sun to Pluto and back.[61] This volume of information is so immense that it is

[56] *See id.*, *supra* note 1, at 26, 28.

[57] *See, e.g.*, In re Subpoena to Witzel, 531 F.3d 113, 118 (1st Cir. Mass. 2008); Bd. of Regents v. BASF Corp., No. 4:04CV3356, 2007 U.S. Dist. LEXIS 82492, at *17-18 (D. Neb. Nov. 5, 2007); Gipson v. Sw. Bell Tel. Co., No. 08-2017-EFM-DJW, 2009 WL 790203, at *11 (D. Kan. Mar. 24, 2009).

[58] *See* Paul & Baron, *supra* note 6, ¶ 35.

[59] *See* Kenneth W. Brothers, *Six Key Lessons from Living with the E-Discovery Rules*, *in* PRACTISING LAW INSTITUTE, PATENTS, COPYRIGHTS, TRADEMARKS, AND LITERARY PROPERTY COURSE HANDBOOK SERIES, PLI Order No. 18979, at 331-34 (March, 2009).

[60] Baron & Losey, *supra* note 6; Borden, *supra* note 6, at 1.

[61] Borden, *supra* note 6, at 1; Baron & Losey, *supra* note 6.

incomprehensible. However, even more astounding than the mere volume of information is the uses to which we put it. The information age has fundamentally affected virtually every aspect of our society, and has ushered in "a new phase of civilization."[62] So, why is this a good thing for the resolution of litigation?

[15] The typical person goes about her day creating a great deal of information, a digital contrail, if you will. Much of that information is electronically created and stored.[63] Between e-mail, instant messages, texts, posts, tweets, blogs, phone call records, voicemail, pictures, GPS-interactive application data, logins, downloads, server logs, records of security "key card" swipes, ATM cards, credit cards, and automatic toll booth payment systems, the volume and variety of data the typical person creates every day is astounding.[64] Perhaps more importantly, this digital contrail is evidence of where a person was at a particular point in time, what they did there, and very often, why they did it.[65] The typical litigation matter, at its most fundamental, seeks to answer those very questions: "What happened, and why?" In our modern information age, the answers to these questions are contained largely, and increasingly, within ESI.

[16] Simply knowing that the answers to the questions "what happened and why" may lie somewhere within a vast repository of ESI does not prove particularly helpful to litigants. Litigants must specifically target the ESI that is legally significant to the outcome of the matter.[66] The 2006

[62] Paul & Baron, *supra* note 6, ¶ 9.

[63] *See* Baron & Losey, *supra* note 6 ("98% of all information is created electronically.").

[64] *See* Paul & Baron, *supra* note 6, ¶ 21.

[65] *See* Apu Kapadia et al., *Virtual Walls: Protecting Digital Privacy in Pervasive Environments*, 4480 LECTURE NOTES IN COMPUTER SCIENCE 162 (2007), *available at:* http://www.springerlink.com/content/a651245g33k62p72/fulltext.pdf. (advocating employment of "virtual walls" in the computer science field to prevent release of "digital footprint" information, because third parties may be able to extrapolate unintended data via "context-aware applications").

[66] *See* FED. R. CIV. P. 26(b)(1); *see also In re* Subpoena to Michael Witzel, 531 F.3d 113, 118 (1st Cir. 2008) ("Rule 26(b)(1) allows discovery of 'any nonprivileged matter that is

Amendments have helped litigants focus on these key questions by establishing a framework through which they can consciously consider and disclose sources of potentially relevant ESI, and work with opposing counsel to target reasonably and proportionally those sources to develop legally significant facts.[67] This cooperative approach to discovery is what the Amendments (and especially the case law interpreting them) are largely about.[68]

A. Cooperation

[17] The complexities and costs associated with electronic discovery require that parties cooperate to prevent the process from devolving into mutually assured destruction.[69] Much of the consternation surrounding electronic discovery has resulted from the fact that parties adopting bare-knuckled approaches to discovery in the age of ESI have driven the cost of litigation beyond all reasonable bounds.[70] Parties who approach electronic discovery in this fashion often find themselves facing legal discovery bills that exceed the underlying amount in controversy and come to dominate

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relevant to any party's claim or defense.' A party seeking broader discovery 'of any matter relevant to the subject matter involved in the action,' is required to show good cause to support the request.") (emphasis omitted) (quoting Fed. R. Civ. P. 26(b)(1)).

[67] *See* FED. R. CIV. P. 26; FED R. CIV. P. 34(a); *see also* FED. R. CIV. P. 26(b)(2) advisory committee's note; *cf.* FED. R. CIV. P. 34(a) advisory committee's note (describing "electronically stored information" as a flexible and broad term).

[68] *See, e.g.*, Mancia v. Mayflower Textile Servs. Co, 253 F.R.D. 354, 362 (D. Md. 2008) ("However central the adversary system is to our way of formal dispute resolution, there is nothing inherent in it that precludes cooperation between the parties and their attorneys during the litigation process to achieve orderly and cost effective discovery of the competing facts on which the system depends.").

[69] *See* Daniel C. Girard & Todd I. Espinosa, *Limiting Evasive Discovery: A Proposal for Three Cost-Saving Amendments to the Federal Rules*, 87 DENV. U. L. REV. 473, 474 (2010).

[70] *See id.*; *see also* Gipson v. Sw. Bell Tel. Co., No. 08-2017-EFM-DJW, 2009 WL 790203, at *21 (D. Kan. Mar. 24, 2009).

the litigation.[71] However, when parties approach e-discovery in a more cooperative fashion with regard to issues such as the scope of the duty to preserve,[72] the search protocols the parties will use for ESI,[73] and the form in which the parties will produce ESI,[74] can reduce the transaction costs associated with the mechanics of the process and prevent discovery from consuming the litigation.[75] It is not e-discovery *per se* that drives litigation costs, it is e-discovery conducted incompetently.[76]

[18] The critical structural changes made by the 2006 Amendments to Federal Rule of Civil Procedure 26 have fostered greater cooperation between litigants involved in e-discovery.[77] These changes do not mandate cooperation where the rules previously required none, but rather

[71] *See* Network Computing Servs. Corp. v. Cisco Sys., Inc., 223 F.R.D. 392, 395 (D.S.C. 2004) ("[D]espite the best efforts of Congress, the Advisory Committee on Civil Rules and other similar bodies, litigation expenses continue to rise, often due to ever-increasing discovery demands and ensuing discovery disputes.").

[72] *See* Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 217 (S.D.N.Y. 2003) (discussing the scope of the duty to preserve).

[73] *See* Balboa Threadworks, Inc. v. Stucky, No. 05-1157-JTM-DWB, 2006 WL 763668, at *5 (D. Kan. Mar. 24, 2006) (advising parties to meet and confer on the use of a search protocol, including keywords); The Sedona Conference, *The Sedona Conference Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery*, 8 SEDONA CONF. J. 189, 200-01 (2007).

[74] *See* Aguilar v. Immigration & Customs Enforcement Div. of U.S. Dep't of Homeland Sec., 255 F.R.D. 350, 358 (S.D.N.Y. 2008) ("[C]ourts have emphasized the need for the parties to confer and reach agreements regarding the form of electronic document production before seeking to involve the court."); *Sedona Conference Best Practices Commentary*, *supra* note 73.

[75] *Cf.* Mancia v. Mayflower Textile Servs. Co, 253 F.R.D. 354, 360 (D. Md. 2008).

[76] *See id.* at 359.

[77] *See* Emery G. Lee III & Kenneth J. Withers, *Survey of United States Magistrate Judges on the Effectiveness of the 2006 Amendments to the Federal Rules of Civil Procedure*, 11 SEDONA CONF. J., 201, 207 (2010) (finding that 70.5% of surveyed magistrate judges thought the 2006 amendment to Rule 26(f) was "at least somewhat effective in encouraging [cooperation]").

set the stage for cooperation to occur.[78] For instance, by designating electronic discovery as a topic for parties to address when formulating a discovery plan, Rule 26(f)(3)(C) now requires the parties to begin discussing e-discovery issues at an early stage of the litigation.[79] The rule does not compel the parties to reach agreement on any issue they discuss, or even to discuss any particular issue.[80] Rather, Rule 26(f)(3)(C) simply requires the parties *to talk* to one another about e-discovery before discovery begins.[81]

[19] The disputes that had become common were a driving force behind the Advisory Committee's desire to have parties pursue this goal.[82] For example, before the 2006 Amendments took effect, parties routinely

[78] *See* FED. R. CIV. P. 26.

[79] *See* FED. R. CIV. P. 26(f)(3)(C).

[80] *See id.*

[81] *See id.* The Advisory Committee's Note to Rule 26(f) provides:

> The particular issues regarding electronically stored information that deserve attention during the discovery planning stage depend on the specifics of the given case. For example, the parties may specify the topics for such discovery and the time period for which discovery will be sought. They may identify the various sources of such information within a party's control that should be searched for electronically stored information. They may discuss whether the information is reasonably accessible to the party that has it, including the burden or cost of retrieving and reviewing the information. Rule 26(f)(3) explicitly directs the parties to discuss the form or forms in which electronically stored information might be produced. The parties may be able to reach agreement on the forms of production, making discovery more efficient.

FED. R. CIV. P. 26(f) advisory committee's note (citations omitted).

[82] *See, e.g.*, DE Techs., Inc. v. Dell Inc., 238 F.R.D. 561, 565-66 (W.D. Va. 2006); N. Natural Gas Co. v. Teksystems Global Applications, Outsourcing, L.L.C., No. 8:05 CV 316, 2006 U.S. Dist. LEXIS 64149, *7-10 (D. Neb. Sept. 6, 2006); *In re* Priceline.com Inc., Sec. Litig., 233 F.R.D. 88, 89 (D. Conn. 2005); Williams v. Sprint/United Mgmt. Co., 230 F.R.D. 640, 649 (D. Kan. 2005); *In re* Verisign, Inc. Sec. Litig., No. C 02-02270 JW, 2004 U.S. Dist. LEXIS 22467, *7-8 (N.D. Cal. Mar. 10, 2004).

fought over the form in which to produce ESI, particularly with respect to the production of metadata.[83] As a result, the Advisory Committee specifically identified the form of production as an issue that parties should discuss during the meet-and-confer in order to identify disputes early and "avoid the expense and delay of searches or productions using inappropriate forms."[84]

[20] This new focus on fostering engagement and cooperation between parties appears throughout the changes to Rule 26.[85] For example, Rule 26(b)(2) was designed as a protective measure "to address issues raised by difficulties in locating, retrieving, and providing discovery of some electronically stored information."[86] On its face, the rule does not appear to require any type of cooperative engagement between parties and, instead, actually empowers a party responding to discovery to withhold discoverable information by unilaterally designating it as "not reasonably accessible."[87] This rule would actually appear to encourage mischief by empowering parties to resist discovery on nothing more than a self-serving determination that specific information is "not reasonably accessible."[88]

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[83] *See DE Techs.*, 238 F.R.D. at 565-66 (discussing the form in which electronic data would be produced); *N. Natural Gas Co*., 2006 U.S. Dist. LEXIS 64149, at *7-10 (requiring the plaintiffs to produce the software at issue in a form the defendant could use); *In re Priceline.com*, 233 F.R.D. at 89 (discussing the defendants' objection to the manner in which electronic information should be produced); *Williams*, 230 F.R.D. at 649 (discussing the limited guidance provided by Rule 34 with respect to the form in which electronic documents must be produced); *In re Verisign*, 2004 U.S. Dist. LEXIS 22467, at *7-8 (addressing the defendants' objections to the production of documents in electronic form).

[84] FED. R. CIV. P. 26(f) advisory committee's note.

[85] *See generally* FED. R. CIV. P. 26.

[86] FED. R. CIV. P. 26(b)(2) advisory committee's note.

[87] *See* FED. R. CIV. P. 26(b)(2)(B).

[88] *Cf.* FED. R. CIV. P. 26(b)(2)(B); Ameriwood Indus., Inc. v. Liberman, No. 4:06CV524-DJS, 2007 WL 496716, at *2 (E.D. Mo. Feb. 13, 2007) (finding the information subject to a discovery request "not reasonably accessible" and thereby denying defendants' motion to compel).

[21] However, the Advisory Committee balanced this new power of potential obstruction by imposing upon the responding party the burden of demonstrating that the information is not reasonably accessible, and authorizing the court to order production even if the responding party is able to meet its burden.[89] Therefore, Rule 26(b)(2)(B) created more of a "qualified privilege" than an absolute safe-harbor.[90] Furthermore, by using the threat of a motion to compel to limit the power of the responding party to resist discovery,[91] the Advisory Committee created a scenario under which parties must engage one another and seek a remedy to the dispute before seeking judicial resolution.[92] This is significant given that Rule 37(a) requires that a party make a good faith effort to resolve a discovery dispute before filing a motion to compel.[93] Indeed, commentary on the rule makes clear both that a party resisting discovery under the rule must provide sufficient facts about the information it is withholding, for the requesting party to evaluate its claims, and that the parties should discuss the burden or cost of retrieving and reviewing the information before proceeding further.[94]

[22] Since the 2006 Amendments took effect, the underlying concept of cooperation has taken firm hold within the judiciary.[95] Courts have come

[89] FED. R. CIV. P. 26(b)(2)(B) ("On motion to compel discovery . . . the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause . . . ."); *see also* Tangent, *eDiscovery Amendments to the Federal Rules of Civil Procedure and Instant Message Archiving,* DATACOVE, 3, http://www.datacove.net/docs/frcp_26_dc_im.pdf (last visited Feb. 16, 2011).

[90] *See* Jeffrey W. Stempel & David F. Herr, *Applying Amended Rule 26(B)(1) in Litigation: The New Scope of Discovery*, 199 F.R.D. 396, 419 (2001); Tangent, *supra* note 89 at 4.

[91] *See* FED. R. CIV. P. 26(b)(2)(B).

[92] *See* FED. R. CIV. P. 37(a) advisory committee's note.

[93] FED. R. CIV. P. 37(a)(3)(A); *see* FED. R. CIV. P. 37(a)(2)(A) (2006).

[94] *See* FED. R. CIV. P. 26(b)(2) advisory committee's note.

[95] *See* Gensler, *supra* note 37, at 538-40.

to view the e-discovery process as "a cooperative undertaking, not part of the adversarial give and take,"[96] and they routinely order parties to cooperate when conducting discovery of ESI.[97] In fact, courts have held that attorneys now have *an affirmative duty* to cooperate in discovery and confer with one another to resolve any disputes that may arise,[98] and have explicitly ordered parties to cooperate on forming a search protocol to govern electronic discovery.[99] Due to this increased emphasis on cooperation, courts are paying closer attention to parties' efforts to resolve e-discovery disputes before seeking judicial relief.[100] Courts routinely decline to rule on discovery disputes where, in the opinion of the respective court, the parties have not put forth sufficient effort to resolve their differences prior to seeking resolution from the court.[101]

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[96] *In re* Seroquel Prods. Liab. Litig., 244 F.R.D. 650, 660 (M.D. Fla. 2007).

[97] *See* Burt Hill, Inc. v. Hassan, No. Civ.A. 09-1285, 2010 WL 419433, at *10 (W.D. Pa. Jan. 29, 2010) (ordering parties to meet and confer about search terms); *see also* Ross v. Abercrombie & Fitch Co., No. 2:05-cv-0819, 2010 WL 1957802, at *4 (S.D. Ohio May 14, 2010) (ordering parties to meet and confer, and devise search protocol).

[98] *See* Mezu v. Morgan State Univ., 269 F.R.D. 565, 571 (D. Md. 2010); Mancia v. Mayflower Textile Servs. Co., 253 F.R.D. 354, 357–58 (D. Md. 2008); Bd. of Regents v. BASF Corp., No. 4:04CV3356, 2007 U.S. Dist. LEXIS 82492, at *17-18 (D. Neb. Nov. 5, 2007) (holding that the 2006 Amendments "placed--on counsel--the affirmative duties to work with clients to . . . cooperatively plan discovery with opposing counsel . . . and confer with opposing counsel to resolve disputes . . . .").

[99] *See* Dunkin' Donuts Franchised Rests. LLC v. Grand Cent. Donuts, Inc., No. CV 2007-4027(ENV)(MDG), 2009 WL 1750348, at *4-5 (E.D.N.Y. June 19, 2009).

[100] *Cf.* Gensler, *supra* note 37, at 566.

[101] *See, e.g.*, Aguilar v. Immigration & Customs Enforcement Div. of U.S. Dep't of Homeland Sec., 255 F.R.D. 350, 358 (S.D.N.Y. 2008) (holding that, under amended Rule 26(f)(3)(C), "at the outset of any litigation, the parties should discuss whether the production of metadata is appropriate and attempt to resolve the issue without court intervention"); Scotts Co. LLC v. Liberty Mut. Ins. Co., No. 2:06-CV-899, 2007 WL 1723509, at *4 (S.D. Ohio June 12, 2007) (deferring ruling on a motion to compel production of metadata until after the parties conducted meet and confer because "[i]t [was] unclear to th[e] Court whether the parties ha[d] fully exhausted extra-judicial efforts to resolve th[e] dispute").

[23] In large part, parties have responded positively to these developments.[102] Since 2006, cases involving e-discovery have revealed a variety of different areas in which parties have used cooperative agreements to avoid many of the burdens and costs associated with ESI.[103] Parties now routinely reach agreements on such issues as the form in which ESI will be produced, which search terms will be used, which groups of custodians will have their ESI searched, what ESI will be sampled before broader searches are conducted, and various other aspects of search protocols.[104] In recent years, parties have also begun to negotiate agreements to define each party's duty to preserve ESI, thereby reducing the uncertainty that often surrounds the question of what a party needs to preserve once litigation arises or is anticipated.[105]

[24] One striking example of the extent to which this new cooperative ethos has been adopted is a series of cases in which parties of vastly different resource levels entered cooperative agreements on e-discovery.[106] From a purely adversarial perspective, an imbalance in litigation resources of this type weighs strongly against cooperation for the party with the greater resources.[107] Indeed, historically, many parties have viewed resource imbalances of this type as a key strategic weapon to force the opposition to drop their case or enter into an unfavorable settlement.[108]

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[102] *See, e.g.*, *Burt Hill*, 2010 WL 419433, at *8 (providing an example of defendants using Rule 37 to compel a plaintiff to provide documents and the plaintiff complying).

[103] *See, e.g.,* Widevine Techs., Inc. v. Verimatrix, Inc., No. 2-07-cv-321, 2009 WL 4884397 (E.D. Tex. Dec. 10, 2009); Capitol Recs., Inc. v. MP3tunes, LLC, 261 F.R.D. 44 (S.D.N.Y. 2009); Ford Motor Co. v. Edgewood Props., Inc., 257 F.R.D. 418 (D.N.J. 2009); Newman v. Borders, Inc., 257 F.R.D. 1 (D.D.C. 2009).

[104] *See, e.g.*, *Widevine Techs*., 2009 WL 4884397, at *1.

[105] *See, e.g.*, Arista Records LLC v. Usenet.com, Inc., 608 F. Supp. 2d 409, 417 (S.D.N.Y. 2009).

[106] *See, e.g.*, cases cited *supra* note 103.

[107] *See* Beisner, *supra* note 11, at 563 (explaining how one party can force settlement by driving up its opponent's discovery costs).

[108] *See id.* at 551.

However, when the party with the greater resources is a corporation, it also tends to have more information that is electronic and discoverable, and thus it potentially faces greater expense in the discovery process. This has done much to balance the respective resources of the parties in asymmetric litigation and is one of the factors driving the extent to which the 2006 Amendments have taken hold.[109]

[25] But, it would be naïve to suggest that this cooperative approach to e-discovery is universally accepted or applied.[110] In a number of recent decisions, courts have denied motions to compel because the information sought was outside of an agreement reached between the parties.[111] Moreover, one of the only reasons that courts continue to stress the need for cooperation is that the parties involved in those lawsuits were displaying sufficient levels of uncooperative behavior to merit a response from the court.[112] However, since the enactment of the 2006 Amendments, the clear trend has been toward greater levels of cooperation between parties.[113]

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[109] *Cf.* Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 321 (S.D.N.Y. 2003) ("More important than comparing the relative ability of a party to pay for discovery, the focus should be on the total cost of production as compared to the resources available to each party. Thus, discovery that would be too expensive for one defendant to bear would be a drop in the bucket for another.").

[110] *See, e.g.*, Widevine Techs., Inc. v. Verimatrix, Inc., No. 2-07-cv-321, 2009 WL 4884397, at *1 (E.D. Tex. Dec. 10, 2009) (denying a motion to compel the production of documents outside of the date range agreed by the parties even though the documents might be responsive).

[111] *See id.*; *see also In re* Classicstar Mare Lease Litig., No. 5:07-cv-353-JMH, 2009 WL 260954, at *1, 4 (E.D. Ky. Feb 2, 2009) (denying a motion to compel the production of documents in a format different from the one agreed to by the parties).

[112] *See generally* cases cited *supra* note 103.

[113] *Cf.* Thomas Y. Allman, *Managing E-Discovery After the 2006 and 2008 Amendments: The Second Wave*, *in* 804 PRACTISING LAW INST., LITIG. & ADMIN. PRACTICE COURSE HANDBOOK SERIES, LITIG., ELECTRONIC DISCOVERY GUIDANCE 2009: WHAT CORPORATE AND OUTSIDE COUNSEL NEED TO KNOW 129, 134 (2009) ("Some courts explicitly require both cooperation *and* civility.") (emphasis in original).

[26] One example of this trend is the 2008 *The Sedona Conference Cooperation Proclamation*.[114] Building on the cooperative mandate of the 2006 Amendments, the *Cooperation Proclamation* reflects an effort by The Sedona Conference to promote "a culture of cooperation in the discovery process," and encourage "a national drive to promote open and forthright information sharing, dialogue (internal and external), training, and the development of practical tools to facilitate cooperative, collaborative, transparent discovery."[115] Only three pages in length, the *Cooperation Proclamation* sets forth general principles designed to achieve these goals and guide the manner in which parties approach discovery.[116] The cooperative approach to e-discovery advocated in the *Cooperation Proclamation* has enjoyed overwhelming acceptance.[117]

[27] Since 2008, courts have repeatedly looked to, relied on, and encouraged parties to act consistently with the *Cooperation Proclamation* when addressing e-discovery issues.[118] For example, after becoming exasperated with a series of discovery disputes over issues as petty as whether a party could file a reply brief, Magistrate Judge Craig Shaffer of the District of Colorado ordered the parties "to work together consistent

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[114] *See generally* The Sedona Conference, *The Sedona Conference Cooperation Proclamation*, 10 SEDONA CONF. J. 331 (Supp. 2009).

[115] *Id.* at 331.

[116] *See generally id* at 331-33.

[117] *Id.* at 334-38 (listing all of the judges who support the *Cooperation Proclamation*).

[118] *See*, *e.g.*, Tamburo v. Dworkin, No. 04 C 3317, 2010 U.S. Dist. LEXIS 121510, at *10 (N.D. Ill. Nov. 17, 2010) (citing Cartel Asset Mgmt. v. Ocwen Fin. Corp., No. 01-cv-01644-REB-CBS, 2010 WL 502721, at *13-14 (D. Colo. Feb. 8, 2010) (ordering the parties "to actively engage in cooperative discussions to facilitate a logical discovery flow."); Home Design Servs., Inc. v. Trumble, No. 09-cv-00964-WYD-CBS, 2010 WL 1435382, at *5 (D. Colo. Apr. 9, 2010) (quoting *Cooperation Proclamation*, *supra* note 112, at 331) (stating that counsel "'bear a professional obligation to conduct discovery in a diligent and candid manner'"); SEC v. Collins & Aikman Corp., 256 F.R.D. 403, 415 (S.D.N.Y. 2009) (directing "the parties' attention to the recently issued Sedona Conference Cooperation Proclamation" and its recognition "that courts see the discovery rules 'as a mandate for counsel to act cooperatively'") (citation omitted).

with . . . the principles underlying *The Cooperation Proclamation*."[119] Some courts have gone significantly further than simply citing the *Cooperation Proclamation* and have substantively relied on it to resolve discovery disputes.[120]

[28] Although the *Cooperation Proclamation* is most closely associated with the field of e-discovery, its impact has extended beyond such narrow confines.[121] In *JSR Micro, Inc. v. QBE Insurance Corp.*, the court cited the *Cooperation Proclamation* when resolving the plaintiff's motion to address the defendant's violation of Federal Rule of Civil Procedure 30(b)(6).[122] In response to the plaintiff's request to depose a corporate representative under Rule 30(b)(6), the defendant contended that it was unable to identify an appropriate representative for two of the designated topics because the language the plaintiff used was "too ambiguous."[123] The court found this assertion unpersuasive and, citing the *Cooperation Proclamation*, stated that the defendant "should have met and conferred with Plaintiff to clarify the meaning" of the language in question, rather than "unilaterally assum[ing] a narrow interpretation" thereof.[124]

[29] The 2006 Amendments created the framework through which parties can discuss openly and cooperatively the evidentiary needs of a case and how fairly and reasonably to satisfy them.[125] Litigants are increasingly taking advantage of this framework, and when they do not,

[119] *Cartel Asset Mgmt.*, 2010 U.S. Dist. LEXIS 17857, at *41.

[120] *See, e.g.*, Mancia v. Mayflower Textile Servs. Co., 253 F.R.D. 354, 363-64 (D. Md. 2008).

[121] *See, e.g.*, JSR Micro, Inc. v. QBE Ins. Corp., No. C-09-03044 PJH (EDL), 2010 U.S. Dist. LEXIS 40185, at *9-11 (N.D. Cal. Apr. 5, 2010).

[122] *Id*. at *10.

[123] *Id.*

[124] *Id.*

[125] *See* Allman, *supra* note 111, at 133 ("The 2006 Amendments were designed . . . to promote open and forthright sharing of information to expedite case progress, minimize burden and expense and remove contentiousness as much as possible.").

courts often step in to see that they do.[126] This cooperative approach to e-discovery is perhaps the single most important impact the 2006 Amendments have had on the discovery process.

B. Proportionality

[30] Closely related to the idea of cooperation, is the idea of proportionality.[127] The 2006 Amendments not only encourage parties to cooperate so they understand the sources and contents of ESI, but the Amendments also established an explicit mechanism to confine the discovery of ESI to that which is most useful to the resolution of the controversy.[128] The Amendments acknowledge that in our modern age we are deluged with information, but not all information relevant to a case is necessary for that case's speedy, just, and inexpensive resolution.[129] Instead, the Amendments contemplate that the information subject to discovery should be the information that is reasonably accessible, taking

[126] *See, e.g.*, Degeer v. Gillis, No. 09 C 6974, 2010 WL 5096563, at *14 (N.D. Ill. Dec. 8, 2010) (ordering a non-party to meet and confer with the defendants to determine search terms that would lead to responsive documents); Romero v. Allstate Ins. Co., 271 F.R.D. 96, 109 (E.D. Pa. 2010) ("Thus, counsel are generally directed to meet and confer to work in a cooperative, rather than an adversarial manner, to resolve discovery issues."); Capitol Records, Inc. v. MP3tunes, LLC, 261 F.R.D. 44, 48 n. 3 (S.D.N.Y. 2009) ("As I indicated during a conference with counsel . . . if such disputes persist, I will 'require that all meet and confers be in person and that they be videotaped.'"); s*ee also* Thomas Y. Allman, *The Impact of the Proposed Federal E-Discovery Rules*, 12 RICH. J.L. & TECH. 13, ¶ 1 (2006), http://jolt.richmond.edu/v12i4/article13.pdf ("[The Amendments to the Federal Rules of Civil Procedure] also establish a new paradigm of mandatory early discussion of contentious issues, including preservation of potentially discoverable information.").

[127] *See* Tamburo v. Dworkin, No. 04 C 3317, 2010 U.S. Dist. LEXIS 121510, at *7 (N.D. Ill. Nov. 17, 2010) ("Nevertheless, the *Rule 26* proportionality test allows the Court to 'limit discovery if it determines that the burden of the discovery outweighs its benefit.'") (citation omitted).

[128] *See* Theodore C. Hirt, *The Two-Tier Discovery Provision of Rule 26(b)(2)(B) - A Reasonable Measure for Controlling Electronic Discovery?*, 13 RICH. J.L. & TECH. 12, ¶ 1 (2007), http://jolt.richmond.edu/ v13i3/article12.pdf.

[129] *See generally* FED. R. CIV. P. 26(b)(2) advisory committee's note.

into account the needs of the case.[130] Rule 26 plays a large part in effectuating such a limitation.[131]

[31] The text of Rule 26(b)(2)(B) is straightforward and authorizes a party to withhold production of ESI that is "not reasonably accessible," subject to the requesting party's right to compel production of the withheld data.[132] The Advisory Committee adopted factors similar to the proportionality test identified in *Zubulake I* to provide guidance to courts when determining whether to compel production of ESI withheld under Rule 26(b)(2)(B).[133] Specifically, a requesting party can only compel production of ESI that is "not reasonably accessible" if it can justify the need for such ESI under the circumstances of the case and the specific nature of the discovery request.[134] However, the most significant aspects of the Advisory Committee's commentary on Rule 26(b)(2) are found in the following directives:

> In [some] cases, the parties may need some focused discovery, which may include sampling of the sources, to learn more about what burdens and costs are involved in accessing the information, what the information consists of, and how valuable it is for the litigation in light of information that can be obtained by exhausting other opportunities for discovery.

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[130] *See id*.

[131] *See generally id.* (outlining the ways in which parties can work together and with courts under Rule 26 to ensure that e-discovery is generally limited to materials that are reasonably accessible and relevant to the litigation).

[132] FED. R. CIV. P. 26(b)(2)(B).

[133] *Compare* Zubulake v. UBS Warburg, LLC, 217 F.R.D. 309, 322 (S.D.N.Y. 2003) (creating a "New Seven-Factor Test" to be used when considering cost-shifting of discovery costs between parties), *with* FED. R. CIV. P. 26(b)(2)(c) advisory committee's note (incorporating the "New Seven-Factor Test" from *Zubulake* into the 2006 Amendments).

[134] *See* FED. R. CIV. P. 26(b)(2) advisory committee's note.

> The good-cause inquiry and consideration of the Rule 26(b)(2)(C) limitations are coupled with the authority to set conditions for discovery. The conditions may take the form of limits on the amount, type, or sources of information required to be accessed and produced.[135]

[32] These two directives, in conjunction with the text of Rule 26(b)(2)(B), have given parties and courts an explicit legal basis to employ proportional approaches to electronic discovery.[136] Although there is no single definition that captures the number of possible permutations of such proportional approaches, the basic goal is to find ways to take an undifferentiated mass of ESI and determine whether and to what extent it contains information relevant to the litigation, and/or what retrieval methods will work best to obtain that information.[137] Such approaches take greater levels of forethought and planning, but have the ability to reduce dramatically the scope and costs of e-discovery.[138]

[33] In fact, Rule 26(g)(1) explicitly requires lawyers to undertake this level of foresight and planning.[139] Rule 26(g)(1) requires that a lawyer sign every discovery request, and by doing so, attest that the request is "neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action."[140]

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[135] *Id.*

[136] *See generally* FED. R. CIV. P. 26(b)(2)(B); FED. R. CIV. P. 26(b)(2) advisory committee's note.

[137] *See* FED. R. CIV. P. 26(b)(2) advisory committee's note.

[138] *See generally id.* (discussing the primary purposes of the 2006 Amendment, which requires parties to plan their discovery carefully and consider costs of discovery before engaging in e-discovery).

[139] *See generally* FED. R. CIV. P. 26(g)(1).

[140] FED. R. CIV. P. 26(g)(1)(B)(iii).

[34] Courts increasingly rely on Rule 26 to confine discovery to that which is proportional to the needs of the case. In some cases, courts have simply denied a party's request for e-discovery where the burden clearly outweighed the potential benefit of the information sought.[141] In other cases, courts have narrowed the scope of e-discovery to that which is justified by the facts of the case.[142] For example, in *Calixto v. Watson Bowman Acme Corp.*, the court confronted the plaintiff's motion to compel the defendant to restore all of its backup tapes to a searchable format and then search each for relevant ESI.[143] The court, however, found such a request too burdensome for the benefit it would yield and instead ordered the defendant to restore and search a single backup tape.[144]

[35] Further, courts have increasingly imposed limits on the scope of ESI search protocols parties propose.[145] For example, in *Barrera v. Boughton*, the court rejected the plaintiff's request for production of ESI from forty custodians over a six-year period and instead ordered production of ESI from only three custodians over a three-year period.[146] Similarly, in *Edelen v. Campbell Soup Co.*, the court rejected a requesting party's proposal for an ESI search spanning fifty-five custodians over a three-year period using fifty search terms and instead allowed the producing party to use the narrower search protocol it proposed.[147]

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[141] *See, e.g.*, Rodriguez-Torres v. Gov't Dev. Bank of P.R., 265 F.R.D. 40, 44 (D.P.R. 2010) (denying a motion to compel production of three years worth of e-mails on grounds that "the ESI requested [was] not reasonably accessible because of the undue burden and cost").

[142] *See, e.g.*, Calixto v. Watson Bowman Acme Corp., No. 07-60077-CIV-ZLOCH/ROSENBAUM, 2009 U.S. Dist. LEXIS 111659, at *30-35 (S.D. Fla. Nov. 16, 2009).

[143] *Id.* at *31.

[144] *Id.* at *35-36.

[145] *See, e.g.*, Barrera v. Boughton, No. 3:07cv1436(RNC), 2010 U.S. Dist. LEXIS 103491, at *12 (D. Conn. Sept. 30, 2010); Edelen v. Campbell Soup Co., 265 F.R.D. 676, 684-85 (N.D. Ga. 2009).

[146] *See Barrera*, 2010 U.S. Dist. LEXIS 103491, at *12.

[147] *See Edelen*, 265 F.R.D. at 684-85.

[36] Courts are also becoming increasingly facile with the use of iterative search techniques and sampling to identify the most effective and proportional search protocol for ESI.[148] In *Barrera*, the court ordered a phased approach to e-discovery under which the defendant would sample the ESI from the three custodians over the three-year period and, depending on the results, the plaintiff would then have the opportunity to request additional searches.[149] Although not ruling under the Federal Rules of Civil Procedure, in *Makrakis v. DeMelis*, the court allowed a party seeking ESI from thirteen custodians over a twenty-two year period to obtain an initial sampling of ESI from backup tapes and determine whether a broader search was justified.[150] Recent improvements in advanced search technologies, sampling, and computer-assisted review (or predictive coding) have made this type of phased approach a viable option for many litigants.[151]

[37] Following closely on the heels of its *Cooperation Proclamation*, The Sedona Conference issued *The Sedona Conference Commentary on Proportionality in Electronic Discovery* (the "*Commentary on Proportionality*") in October 2010.[152] The *Commentary on Proportionality* adopted six broad principles to govern the process of electronic discovery:

> 1. The burdens and costs of preservation of potentially relevant information should be weighed against the potential value and uniqueness of the information when determining the appropriate scope of preservation.

[148] *See, e.g.*, *Barrera*, 2010 U.S. Dist. LEXIS 103491, at *12; Makrakis v. DeMelis, No. 09-706-C, 2010 Mass. Super. LEXIS 223, at *6-7 (Super. Ct. July 13, 2010).

[149] *See Barrera*, 2010 U.S. Dist. LEXIS 103491 at *12.

[150] *Makrakis*, 2010 Mass. Super. LEXIS 223, at *7.

[151] *See, e.g.*, *Barrera*, 2010 U.S. Dist. LEXIS 103491, at *12; *Makrakis*, 2010 Mass. Super. LEXIS 223, at *7.

[152] The Sedona Conference, *Commentary on Proportionality in Electronic Discovery*, 11 SEDONA CONF. J. 289 (2010) [hereinafter *Commentary on Proportionality*].

2. Discovery should generally be obtained from the most convenient, least burdensome, and least expensive sources.

3. Undue burden, expense, or delay resulting from a party's action or inaction should be weighed against that party.

4. Extrinsic information and sampling may assist in the analysis of whether requested discovery is sufficiently important to warrant the potential burden or expense of its production.

5. Nonmonetary factors should be considered when evaluating the burdens and benefits of discovery.

6. Technologies to reduce cost and burden should be considered in the proportionality analysis.[153]

[38] The Sedona Conference designed the *Commentary on Proportionality* to function as a guide for practitioners and courts when confronting specific electronic discovery issues.[154] The *Commentary on Proportionality* identified the specific legal rules and doctrines that provide the basis for proportionality in e-discovery, and provided direct guidance for best practices under each principle.[155] Although The Sedona Conference published the *Commentary on Proportionality* less than four months before the composition of this Article, two courts have already cited the document favorably when addressing e-discovery issues.[156]

[153] *Id*. at 291.

[154] *See id.* at 290 ("We hope our efforts will assist lawyers, judges, and others involved in the legal system work with the concept of proportionality in discovery.").

[155] *See generally id*.

[156] *See* FTC v. Church & Dwight Co., No. 10-149 (EGS/JMF), 2010 U.S. Dist. LEXIS 115205, at *11 (D.D.C. Oct. 29, 2010); *see also* Tamburo v. Dworkin, No. 04 C 3317, 2010 U.S. Dist. LEXIS 121510, at *7 (N.D. Ill. Nov. 17, 2010).

[39] The twin principles of cooperation and proportionality codified in the 2006 Amendments and increasingly enforced by the courts are immensely powerful tools for decreasing the burden of e-discovery in the information age.[157] Moreover, as can be seen through the e-discovery opinions issued since the 2006 Amendments, these principles are starting to have an effect on the conduct of civil litigation.[158] This effect can be seen best through an examination of e-discovery sanctions cases.

C. Sanctions

[40] Although drawing a substantial amount of attention in the legal press, the issue of sanctions did not figure prominently in the 2006 Amendments.[159] The only change that the Advisory Committee made in the area of sanctions was the addition of the so-called "safe harbor" provision under what was then Rule 37(f).[160] Under this new rule, "absent exceptional circumstances, sanctions cannot be imposed for loss of electronically stored information resulting from the routine, good-faith operation of an electronic information system."[161]

[41] The scope and effect of this safe harbor provision is limited.[162] The need for the rule grew out of the Advisory Committee's recognition that "[m]any steps essential to computer operation may alter or destroy information, for reasons that have nothing to do with how that information

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[157] Indeed, the Advisory Committee expected and intended this trend. *See* FED. R. CIV. P. 26 advisory committee's note ("The information explosion of recent decades has greatly increased both the potential cost of wide-ranging discovery and the potential for discovery to be used as an instrument for delay or oppression.").

[158] *See e.g., Tamburo*, 2010 U.S. Dist. LEXIS 121510, at *7; *FTC*, 2010 U.S. Dist. LEXIS 115205, at *11.

[159] *See* FED. R. CIV. P. 37(f) advisory committee's note.

[160] Under the current version of the Code, the safe harbor provision is found under Rule 37(e). FED. R. CIV. P. 37(e).

[161] FED. R. CIV. P. 37(f) advisory committee's note.

[162] *See id*.

might relate to litigation."[163] However, this safe harbor provision does not override a party's duty to preserve evidence once litigation begins or is reasonably anticipated.[164] As a result, Rule 37(f)–now Rule 37(e)–has not fundamentally changed the availability or scope of sanctions in the e-discovery context.[165]

[42] Although the 2006 Amendments in general and the safe harbor provision in particular had little direct effect on the issue of e-discovery sanctions, the framework for e-discovery the Amendments created, as well as the experience that both parties and courts have gained with e-discovery, have had a significant impact on the number and types of sanctions awarded by courts, as well as the circumstances in which sanctions are awarded.[166] The number of e-discovery cases where a party requested and the court granted sanctions increased each year after 2006, reaching their peak in 2009.[167]

[43] However, the relative number of cases where courts awarded sanctions decreased in 2010 for the first time since the 2006 Amendments.[168] Courts issued 280 e-discovery opinions[169] in 2010.[170] Of

[163] *Id.*

[164] *See id*.

[165] *See id*.

[166] *See 2009 Year-End Electronic Discovery and Information Law Update*, GIBSON DUNN (Jan. 15, 2010), http://www.gibsondunn.com/publications/Pages/2009YearEndElectronicDiscoveryUpdate.aspx.

[167] *See id*.

[168] *See* Borden et al., *supra* note 53.

[169] Deciding whether an opinion is an "e-discovery opinion" is a subjective determination. Opinions from criminal cases are not e-discovery opinions because they are not subject to the Federal Rules of Civil Procedure. Similarly, opinions involving general discovery matters, though they incidentally involve the discovery of ESI, are not e-discovery opinions.

[170] *Cf.* Borden et al., *supra* note 53 (identifying and discussing trends in the 209 e-discovery opinions published as of December 1, 2010).

those opinions, 79 involved cases where a party sought sanctions (38%) and the court awarded sanctions in 49 of those cases (62% of the cases where a party sought sanctions and 23% of all 2010 e-discovery cases).[171] This is a significant decrease from 2009, when a party pursued sanctions in 42% of e-discovery cases, and the court awarded sanctions in 70% of those cases (30% of all e-discovery cases).[172] There was also a corresponding relative decline in every type of sanction awarded, including fees and costs (twenty-nine cases), adverse inferences (seven cases), terminating sanctions (seven cases), preclusion of evidence (three cases), and additional discovery ordered (six cases).[173]

[44] To a large extent, the decline in sanctions can be explained by the growing sophistication of parties and courts in dealing with e-discovery issues.[174] As previously discussed, the 2006 Amendments provided a framework for the conduct of e-discovery and guidance on the relevant issues for parties and courts to address.[175] Parties and their attorneys have also developed much greater familiarity and experience with electronic discovery.[176]

[45] Indeed, as reflected by developments such as preservation orders and the growing reliance on proportional approaches to e-discovery, parties and courts are actively working to prevent the circumstances that generate sanctionable conduct.[177] As a result, we see fewer cases in which the court sanctions a party, particularly a sophisticated party, for failing to

[171] *Id.*

[172] *Id.*

[173] *Id.*

[174] *See id.*

[175] *See supra* notes 67, 125-26 and accompanying text.

[176] *See supra* note 166 and accompanying text.

[177] *See, e.g.*, *Tamburo* 2010 U.S. Dist. LEXIS 121510 at *7 (N.D. Ill. Nov. 17, 2010) (citing The Sedona Conference, *Commentary on Proportionality in Electronic Discovery*, 11 SEDONA CONF. J. 289, 294 (2010)).

preserve relevant evidence,[178] failing to conduct a proper search of ESI,[179] actively destroying ESI during litigation,[180] or withholding ESI from production without justification.[181] Although such sanctionable conduct certainly continues to occur, its prevalence has diminished.

IV. CHALLENGES THAT REMAIN TO BE RESOLVED

A. Preservation Obligations

[46] Violation of the duty to preserve discoverable evidence remains one of the most difficult problems litigants face and the most fertile area for sanctions.[182] This is caused by two main challenges. The first challenge concerns the ability of a litigant to know where its information is located and how to preserve it.[183] This is fundamentally an information governance problem.[184] Our ability to create information, coupled with

[178] *Cf.* Zubulake v. UBS Warburg LLC, 229 F.R.D. 422, 424 (S.D.N.Y. 2004).

[179] *Cf.* Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., No. CA 03-5045 AI, 2005 Extra LEXIS 94, at *1, 30 (Cir. Ct. Palm Beach Cnty., Fla. Mar. 23, 2005).

[180] *Cf. In re* Napster, Inc. Copyright Litig., 462 F. Supp. 2d 1060, 1077 (N.D. Cal. 2006).

[181] *Cf.* Wachtel v. Health Net, Inc., 239 F.R.D. 81, 113 (D.N.J. 2006).

[182] *See* Maria Perez Crist, *Preserving the Duty to Preserve: The Increasing Vulnerability of Electronic Information*, 58 S.C. L. REV. 7, 15 (2006) ("While the case law has developed general guidelines as to when the duty exists and the scope of the duty, these guidelines are more difficult to follow when electronic information is involved."); *see also* Dan H. Willoughby, Jr. et al., *Sanctions for E-Discovery Violations: By the Numbers*, 60 DUKE L.J. 789, 803 (2010) ("In the 230 cases in which sanctions were awarded, the most common misconduct was failure to preserve ESI, which was the sole basis for sanctions in ninety cases.") (footnote omitted).

[183] *See* Ronald J. Hedges, *Discovery of Digital Information*, 747 PRACTISING L. INST./LITIG. 41, 56 (2006) ("Any discovery plan must address issues relating to [digital or electronic] information, including the search for it and its location, retrieval, form of production, inspection, preservation, and use at trial.").

[184] *See* Barry Murphy, *What is Information Governance?*, EDISCOVERY J. (Mar. 22, 2010, 7:00 AM), http://ediscoveryjournal.com/2010/03/what-is-information-governance/ ("For those of us in eDiscovery, information governance is about putting in place the right people, processes, and tools to be able to efficiently respond to requests for

the ease and inexpensive nature of storing it, has led to vast repositories of data.[185] However, our ability to know what is in that information has not kept up with our ability to create it.[186] This is compounded by the separation of the legal function of a company, which is responsible for preserving information, and the IT function, which is responsible for managing information and implementing the technological processes that effect its preservation.[187] To solve this problem, a company must have a comprehensive information governance plan so that it knows what information it creates, where the information is located, and what the information contains.[188] Although beyond the scope of this Article, the single most important thing a company can do to lower the burden associated with e-discovery is to implement an effective information governance plan that includes a litigation response protocol.[189] This protocol should implement steps through which a company recognizes the triggering of the duty to preserve, evaluates the scope of the duty, and the proper manner in which to preserve the information.[190]

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information."). Mr. Murphy's posting also provides an excellent graphical depiction of what constitutes information governance. *See id.*

[185] *See* Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC, No. 05 Civ. 9016 (SAS), 2010 U.S. Dist. LEXIS 4546, at *1 (S.D.N.Y. Jan. 15, 2010) (stating that this is "an era where vast amounts of electronic information is [sic] available"); Crist, *supra* note 182, at 9 (stating that "improvements in technology make information storage easier and cheaper in an electronic form").

[186] *Cf.* Victor Stanley, Inc. v. Creative Pipe, Inc., 250 F.R.D. 251, 259 n.5 (D. Md. 2008) (referring to "the extra challenges . . . posed by handling voluminous production of ESI").

[187] *See* Harry Pugh, *Information Governance: A Practical Approach for the Dodd-Frank Era*, WALL ST. & TECH. (Feb. 16, 2011), http://wallstreetandtech.com/articles/229216570 ("many companies lack any systematic linkage and transparency between IT and the people who determine the legal obligations and business value.").

[188] *Cf. id.* (discussing information governance in the context of the Dodd-Frank Act and noting the importance of companies "knowing what information they have and where it is").

[189] *See* Maureen E. O'Neill et al., *New E-Discovery Rules: How Companies Should Prepare*, 19 INTELL. PROP. & TECH. L.J. 13, 15-16 (2007).

[190] *See id*

[47] The second challenge is recognizing the circumstances that trigger the duty to preserve. The general rule is that a duty to preserve is triggered once litigation becomes reasonably likely.[191] For a defendant, this is usually, but certainly not always, when it is served with a complaint.[192] For a plaintiff, it is at some point prior to filing its complaint, because it made the decision to undertake litigation before drafting the complaint.[193] However, determining when the duty is triggered is increasingly tricky, as the 2010 cases reveal.[194] The challenge for companies is to establish clear lines of communication between business units and the legal department so they can timely recognize triggering events and readily respond.[195]

[48] Even with an effective information governance plan and protocols in place to recognize a triggering event, the preservation burden can be substantial.[196] This is because there is very little guidance in the case law

[191] *See, e.g.*, Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497, 521 (D. Md. 2010) [hereinafter *Victor Stanley II*]; Rimkus Consulting Grp. v. Cammarata, 688 F. Supp. 2d. 598, 612 (S.D. Tex. 2010); Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC, 05 Civ. 9016 (SAS), 2010 U.S. Dist. LEXIS 4546, at *14-15 (S.D.N.Y. Jan. 15, 2010).

[192] *See* Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc., 244 F.R.D. 614, 621 (D. Colo. 2007); Krumwiede v. Brighton Assocs., L.L.C., No. 05 C 3003, 2006 WL 1308629, at *8 (N.D. Ill. May 8, 2006).

[193] *Pension Comm.*, 685 F. Supp. 2d at 466 ("A plaintiff's duty is more often triggered before litigation commences, in large part because plaintiffs control the timing of litigation.").

[194] *See Victor Stanley II*, 269 F.R.D. at 516; *Rimkus Consulting*, 688 F. Supp. 2d at 613; *see also* Crist, *supra* note 182, at 18 ("Courts are not in agreement as to when a party should be charged with sufficient notice of a claim to trigger the preservation obligation.").

[195] *See* Murphy, *supra* note 184 ("Because eDiscovery initiatives are really part of information governance, they are closely related to records management, compliance, privacy, and security programs. The challenge many organizations face is connecting these programs under one umbrella and correctly assigning ownership–sometimes to legal, sometimes to IT, and sometimes to compliance.").

[196] *Cf. Victor Stanley II*, 269 F.R.D. at 523 (noting that the only "safe" preservation policy is "one that complies with the most demanding requirements of the toughest court

and nothing in the Federal Rules of Civil Procedure to help define the proper scope of preservation.[197] In an insightful article entitled *Proportionality in the Post-Hoc Analysis of Pre-Litigation Preservation Decisions*, Magistrate Judge Paul Grimm and his co-authors discussed the difficulty in dealing with the duty to preserve, which is largely a common law duty, when litigation is reasonably likely.[198] When the filing of a complaint triggers the duty to preserve, opposing counsel can be engaged to negotiate the proper scope of preservation, and the court can be involved as needed.[199] In fact, the 2010 e-discovery cases show an increased use of preservation agreements negotiated by litigants.[200] Yet, when a triggering event occurs before the filing of a complaint, a company is on its own to determine the proper scope of preservation, and mistakes in this determination can be costly, even outcome determinative.[201]

[49] However, courts recognize the difficulty involved in preserving all potentially relevant evidence and often issue sanctions more on the basis of the prejudice suffered by the injured party and less on the culpability of

to have spoken on the issue, despite the fact that the highest standard may impose burdens and expenses that are far greater than what is required in most other jurisdictions").

[197] *See* Allman, *supra* note 111, at 140 (stating that "[t]he Rules 'do not specifically address' preservation obligations" and "case law is not a model of clarity, especially in regard to its onset or 'trigger' of the duty [to preserve]") (quoting Texas v. City of Frisco, No. 4:07cv383, 2008 WL 828055, *4 (E.D. Tex. Nev. Mar. 27, 2008)).

[198] *See generally* Paul W. Grimm et al., *Proportionality in the Post-Hoc Analysis of Pre-Litigation Preservation Decisions*, 37 U. BALT. L. REV. 381 (2008).

[199] *See id.* at 393-99; *cf.* Crist, *supra* note 182, at 54-55 (discussing proactive steps a party can take to ensure the proper preservation of ESI).

[200] *See, e.g.*, United States v. La. Generating LLC, No. 09-100-RET-CN, 2010 U.S. Dist. LEXIS 20207 (M.D. La. 2010).

[201] *See* Grimm et al., *supra* note 198, at 383; *see also* Wm. T. Thompson Co. v. Gen. Nutrition Corp., 593 F. Supp. 1443, 1453 (C.D. Cal. 1984) (issuing monetary sanctions and entering a default judgment because the defendant destroyed records).

the spoliator.[202] Reflecting this more pragmatic approach to sanctions, in recent years courts typically have chosen sanctions more remedial than punitive in nature.[203] For example, one court entered an adverse inference sanction against a party that destroyed a relevant surveillance tape, even though the court found no evidence that the party did so intentionally.[204] Another court entered a similar sanction against a party that destroyed evidence because it was not aware of its duty to preserve.[205] Although courts are increasingly focusing on the prejudice caused by sanctionable conduct, few courts hesitate to award substantial sanctions where a party's conduct is indisputably egregious.[206] One court entered sanctions of $100,000 against a defendant that fabricated critical e-mails.[207] Another court dismissed a plaintiff's case with prejudice for repeated and flagrant violations of the court's discovery orders.[208]

[50] The preservation obligation remains one of the most significant challenges in e-discovery. In the coming years, courts likely will address this issue through the development of case law on the preservation obligation, the use of preservation agreements, and perhaps even further

[202] *See, e.g.*, Silvestri v. Gen. Motors Corp., 271 F.3d 583, 593 (4th Cir. 2001) ("But even when conduct is less culpable, dismissal may be necessary if the prejudice to the defendant is extraordinary, denying it the ability to adequately defend its case.").

[203] *See, e.g.*, Kwon v. Costco Wholesale Corp., No. 08-00360 JMS/BMK, 2010 U.S. Dist. LEXIS 13614, at *10 (D. Haw. Feb. 17, 2010) (issuing an adverse inference sanction even though the party destroying evidence "was on notice of [the] claim" but "took no steps to preserve the [evidence]"); Melendres v. Arpaio, No. CV-07-2513-PHX-GMS, 2010 U.S. Dist. LEXIS 20311, at *19-24 (D. Ariz. Feb. 11, 2010);

[204] *See Kwon*, 2010 U.S. Dist. LEXIS 13614, at *8-10.

[205] *See Melendres*, 2010 U.S. Dist. LEXIS 20311, at *19–20 (holding that bad faith is not necessary to determine whether sanctions are appropriate).

[206] *See, e.g.*, Aliki Foods, LLC v. Otter Valley Foods, Inc., 726 F. Supp. 2d 159, 182 (D. Conn. 2010) (dismissing the plaintiff's claim because it had "intentionally and deliberately" destroyed ESI it had been ordered to produce).

[207] *See* Amerisource Corp. v. RX USA Int'l Inc., No. 02-CV-2514 (JMA), 2010 U.S. Dist. LEXIS 67108, at *17, *22–23 (E.D.N.Y. July 6, 2010).

[208] *See Aliki Foods*, 726 F. Supp. 2d at 182.

amendments to the Federal Rules of Civil Procedure that better define the obligation and provide protections for good faith efforts to comply.

B. Privacy, Social Media, and the Outdated Stored Communications Act

[51] The decrease in cases where courts awarded sanctions in 2010, despite the increase in the number of e-discovery cases, reflects maturation on the part of the bench and the bar in dealing with the significant challenges of our information age.[209] However, there remain new challenges that courts are just beginning to address. These challenges relate to information created and used in ways entirely new to the information age, where there is very little law, and where analogies to the old ways of using information do not quite fit.

[52] Although privacy issues have long vexed courts, litigants, and commentators in areas unrelated to e-discovery,[210] 2010 saw the issuance of a number of opinions that exemplify the uncertainty and inconsistency that surrounds the privacy of electronic communications.[211] Many of these cases involved a situation where an employer used its control over the means by which an employee sent or received electronic communications to gain access to those communications.[212]

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[209] *See 2010 Year-End Electronic Discovery and Information Law Update*, GIBSON DUNN (Jan. 13, 2011), http://www.gibsondunn.com/publications/pages/2010YearEndE-Discovery-InformationLawUpdate.aspx [hereinafter *2010 Year-End Update*] ("In perhaps the most important development in the sanctions area, the overall frequency of courts granting sanctions declined substantially compared to 2009 . . . .").

[210] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 578 (2003) (finding a statute that makes it a crime for two persons of the same sex to engage in intimate sexual conduct in violation of the right to privacy); Bowers v. Hardwick, 478 U.S. 186, 193-95 (1986) (holding a state sodomy statute did not violate the rights of homosexuals), *overruled by Lawrence*, 539 U.S. 558; Eisenstadt v. Baird, 405 U.S. 438, 453-55 (1972) (holding a statute that permitted married persons to obtain contraceptives but prohibited distribution of contraceptives to single persons violated the Equal Protection Clause); Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (ruling a law that forbade the use of contraceptives was an unconstitutional intrusion on the right of marital privacy).

[211] *See, e.g.*, Stengart v. Loving Care Agency, Inc., 990 A.2d 650, 663 (N.J. 2010); People v. Klapper, 902 N.Y.S.2d 305, 311-12 (Crim. Ct. 2010).

[212] *See Stengart*, 990 A.2d at 307; *Klapper*, 902 N.Y.S.2d at 308.

[53] In *People v. Klapper*, a New York state court held that an employee had no inherent right of privacy in a personal e-mail account accessed through his employer's computers.[213] The employer used software that recorded all of the keystrokes made on a computer to obtain the login information for an employee's personal e-mail account.[214] The employer subsequently used information obtained through that software to access the employee's personal e-mail account and obtain copies of her e-mails.[215] The court dismissed the charges against the employer and held that the employee had no personal right to privacy to personal e-mail stored on a computer owned by his employer because there was no unauthorized access.[216] In so holding, the court suggested that once an employee types information into a computer, any expectation of privacy in such information is lost.[217]

[54] In contrast with the *Klapper* decision, the Supreme Court of New Jersey, in *Stengart v. Living Care Agency, Inc.*, held that an employee had a protectable privacy interest in communications sent through a personal e-mail account using her employer's computer.[218] In *Stengart*, the employee used her work computer to access a password-protected web-based e-mail account and send e-mails to an attorney about the conditions at her workplace.[219] After the employee resigned, the employer hired experts to analyze the computer, and these experts were able to retrieve some of the e-mails the employee sent to her attorney.[220] Even though the

[213] *See Klapper*, 902 N.Y.S.2d at 311.

[214] *Id.* at 308.

[215] *Id.*

[216] *Id*. at 311.

[217] *See id*. at 307 ("It is today's reality that a reasonable expectation of internet privacy is lost, upon your affirmative keystroke.").

[218] Stengart v. Loving Care Agency, Inc., 990 A.2d 650, 665 (N.J. 2010).

[219] *Id*. at 656.

[220] *Id*.

employer had a written policy that all communications sent through its computer systems were subject to review,[221] the court held that the employee had a right to privacy in her personal e-mail account, which trumped the company's policy.[222]

[55] Together, *Klapper* and *Stengart* exemplify the uncertainty surrounding the extent to which the law considers electronic communications private.[223] Unfortunately, the United States Supreme Court recently passed up an opportunity to provide some much-needed direction in this area.[224] In *City of Ontario v. Quon*, the Court granted cert to review a decision by the Ninth Circuit that the City of Ontario, California violated the Fourth Amendment by obtaining copies of text messages a City employee sent and received on a City issued electronic pager.[225] However, the Court avoided the question of whether the employee had a reasonable expectation of privacy in the text messages,[226] and instead, held that regardless of the employee's expectation of privacy, the City's conduct was reasonable under the Fourth Amendment.[227] The Court stated:

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[221] *Id*. at 657.

[222] *See id*. at 663.

[223] *See* People v. Klapper, 902 N.Y.S.2d 305, 307 (Crim. Ct. 2010) ("In this day of wide dissemination of thoughts and messages through transmissions which are vulnerable to interception and readable by unintended parties . . . the concept of Internet privacy is a fallacy upon which no one should rely."); *see also Stengart*, 990 A.2d at 654-55 (noting that, as businesses and private citizens increasingly embrace "the use of computers, electronic communication devices, the Internet, and e-mail . . . the line separating business from personal activities can easily blur.").

[224] *See* City of Ontario v. Quon, 130 S. Ct. 2619 (2010); *see also* Mark Whitney, *Client Alert: The Impact of Emerging Technologies on Employee Privacy*, MORGAN, BROWN & JOY, LLP, 2 (Nov. 19, 2010), http://www.morganbrown.com/docs/privacy-technology%2011-2010.pdf.

[225] *Quon*, 130 S. Ct. at 2625–27.

[226] *See* Whitney, *supra* note 224, at 3. *See generally Quon*, 130 S. Ct. 2619.

[227] *Quon*, 130 S. Ct. at 2633 ("Because the search was reasonable, petitioners did not violate respondents' Fourth Amendment rights . . . ").

> The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear. In *Katz*, the Court relied on its own knowledge and experience to conclude that there is a reasonable expectation of privacy in a telephone booth. It is not so clear that courts at present are on so sure a ground. Prudence counsels caution before the facts in the instant case are used to establish far-reaching premises that define the existence, and extent, of privacy expectations enjoyed by employees when using employer-provided communication devices.
>
> Rapid changes in the dynamics of communication and information transmission are evident not just in the technology itself but in what society accepts as proper behavior. . . . At present, it is uncertain how workplace norms, and the law's treatment of them, will evolve.[228]

[56] It is unfortunate that the Court did not take this opportunity to provide clearer guidance regarding the proper scope of privacy expectations in personal communications at work. Without such guidance, employers will continue to face conflicting law in different jurisdictions, and will struggle with establishing policies regarding employee communications.

[57] Another area of developing, and thus conflicting law, regards the use of social media.[229] The need for greater clarity and consistency in this area is manifest given the rising prominence of social media websites as hubs of our electronic communications. Mark Zuckerberg, the founder of Facebook, recently acknowledged that, "350 million users make use of

[228] *Id*. at 2629-30 (citations omitted).

[229] *See, e.g.*, Michael Schmidt, *A Final Update On The NLRB's Facebook Firing Case*, SOC. MEDIA EMP. L. BLOG (Feb. 9, 2011), http://www.socialmediaemployment lawblog.com/ ("As the law continues to develop, there is no doubt that the intersection of social media and employment-related decisions will be crossed again soon in court or an administrative agency.").

Facebook messages, sending 4 billion a day."[230] Additionally, an estimated 25 billion "tweets" were sent on Twitter in 2010.[231] Despite the vast amount of information these websites handle, there is no clear consensus on the extent to which an individual's communications are protected from disclosure.[232] Some courts have allowed discovery of the content contained on individuals' social media pages,[233] while others have prohibited such disclosure.[234]

[58] Further complicating matters is the fact that the primary legal framework in this area is the Stored Communication Act ("SCA") Congress passed in 1986, when the Internet was still in the earliest stages of infancy.[235] Given the state of technology at the time Congress drafted the SCA, the statute has often proved unfit for the challenges posed by the technology of today.[236] In *Crispin v. Christian Audigier, Inc*., the court's analysis of whether Facebook and Myspace could resist disclosure of user

[230] Brenna Ehrlich, *Facebook Messages by the Numbers*, MASHABLE (Nov. 15, 2010), http://mashable.com/2010/11/15/facebook-messages-numbers/.

[231] *Internet 2010 in Numbers*, PINGDOM (Jan. 12, 2011), http://royal.pingdom.com/2011/01/12/internet-2010-in-numbers/.

[232] *Compare* EEOC v. Simply Storage Mgmt., LLC, 270 F.R.D. 430, 436 (S.D. Ind. 2010), *with* Barnes v. CUS Nashville, LLC, No. 3:09-0764, 2010 U.S. Dist. LEXIS 52263 (M.D. Tenn. May 27, 2010).

[233] *E.g.*, *Simply Storage Mgmt.*, 270 F.R.D. at 437 (requiring the plaintiff to produce content from the individuals' Facebook pages that was relevant to the lawsuit and limited to a specific time period).

[234] *E.g.*, *Barnes*, 2010 U.S. Dist. LEXIS 52263, at *2 (holding that the SCA prohibited the disclosure of a non-party witness' Facebook information).

[235] Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848 (codified as amended at 18 U.S.C. §§ 2701-12); Mark S. Sidoti et al., *How Private Is Facebook Under the SCA?,* L. TECH. NEWS (Oct. 5, 2010), http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202472886599&slreturn=1&hbxlogin=1.

[236] Konop v. Hawaiian Airlines, Inc., 302 F.3d 868, 874 (9th Cir. 2002) ("[T]he [SCA] was written prior to the advent of the Internet and the World Wide Web. As a result, the existing statutory framework is ill-suited to address modern forms of communication.").

content based on the SCA is instructive.[237] After engaging in an analysis that commentators have described as "legal acrobatics,"[238] the court concluded that private communications through social media sites were protected from disclosure under the SCA, but left open the question of whether other information shared through the sites were subject to similar protection.[239] As the proliferation of the use of social media continues to grow, its discovery, and any limitations thereto, will increasingly become an issue for litigants.[240] To better prepare for the uncertainties surrounding the disclosure of content from social networking sites, parties should formulate and negotiate ESI discovery protocols in a way that addresses how to manage such information at the outset of litigation.[241]

V. CONCLUSION

[59] We live in a truly unprecedented era, where information is created and distributed in ways that would seem miraculous to prior generations.[242] This age of information is bringing drastic changes to all aspects of our society, and we are only experiencing the very earliest stages of those changes.[243] With greater information flow, people and

[237] *See generally* Crispin v. Christian Audigier, Inc., 717 F. Supp. 2d 965, 991 (C.D. Cal. 2010).

[238] Sidoti et al., *supra* note 235.

[239] *See Crispin*, 717 F. Supp. 2d at 991.

[240] *See* Evan North, *Facebook Isn't Your Space Anymore: Discovery of Social Networking Websites*, 58 U. KAN. L. REV. 1279, 1285-88 (2010).

[241] Borden et al., *supra* note 53.

[242] *See A Special Report on Managing Information: Data, Data Everywhere*, ECONOMIST (Feb. 25, 2010), *available at* http://www.economist.com/node/15557443/print (stating that digital information is expanding exponentially which "makes it possible to do many things that previously could not be done").

[243] *See id*.; Richard L. Marcus, *E-Discovery & Beyond: Toward Brave New World or 1984?,* 25 REV. LITIG. 633, 635–66 (2010) (explaining how technology has had widespread effects on society as a whole, and e-discovery in particular).

businesses interact more frequently and in a greater variety of forms.[244] The law, at its most fundamental, organizes and prioritizes these interactions, and deems certain conduct reasonable and other conduct unreasonable.[245] The law also determines what information is necessary for the proper resolution of disputes.[246]

[60] The authors of this Article see this process developing in the area of e-discovery. The deluge of data threatens to overwhelm our civil justice system, driving the cost of resolving conflicts through that system beyond the benefit of doing so.[247] The 2006 Amendments were intended to help reduce this cost by establishing a framework whereby litigants are required to think about what information they have; what information they need; openly and transparently discuss those needs with the opposing party; and agree on reasonable, iterative, and proportional discovery protocols.[248] Courts are using the framework of the Amendments to reward reasonable conduct and sanction unreasonable conduct, and litigants are learning how to work within this new framework.[249] By doing so, information sufficient to determine the outcome of a matter is being discovered and exchanged, while information marginal to that determination is more often being excluded.[250] This can most effectively

[244] *Cf.* Paul & Baron, *supra* note 6, at ¶ 9 (listing the variety of mediums that have become available in recent years, and how they have led to increased communication).

[245] *See* FED. R. CIV. P. 26 (defining reasonableness in terms of accessibility without "undue burden or cost").

[246] *Id.* (placing various limits on the scope of discovery).

[247] *Cf.* FED. R. CIV. P. 26 advisory committee's note (citing FED. R. CIV. P. 1) (explaining that the overwhelming amount of data that exists "impose[s] costs on an already overburdened system and impede[s] the fundamental goal of the 'just, speedy, and inexpensive determination of every action'").

[248] *See* FED. R. CIV. P. 26(b)(2) advisory committee's note.

[249] *See, e.g.*, *In re* Seroquel Prods. Liab. Litig., 244 F.R.D. 650, 655, 665 (M.D. Fla. 2007) (applying Rules 26 and 37 of the Federal Rules of Civil Procedure and sanctioning a defendant for "fail[ing] to produce 'usable' or 'reasonably accessible' documents").

[250] *See supra* Part III.B.

be accomplished when an entity establishes a comprehensive information governance program that allows it to know the location and content of its information. Once this is known, an entity can more quickly and easily determine what happened and why: the fundamental questions of litigation.[251] This allows parties to lower the cost and expense of civil litigation and encourages a revitalization of the primary purpose of our civil justice system: "the just, speedy, and inexpensive determination of every action and proceeding."[252]

[251] *See supra*, ¶ 15. This is where the explosion of information is actually helpful, not harmful, to the modern litigation process. The very technology that created the information age and the consequent challenges it presents in e-discovery is also the key to its solution. That reality is the next chapter of this story.

[252] FED. R. CIV. P. 1.