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**GHOST IN THE MACHINE: ZUBULAKE REVISITED AND OTHER  
EMERGING E-DISCOVERY ISSUES UNDER THE  
AMENDED FEDERAL RULES**

By William P. Barnette\*

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“I am all for your using machines, but do not let them use you.”  
Winston Churchill<sup>1</sup>

**I. INTRODUCTION**

[1] We live in a digital age.<sup>2</sup> Electronically stored information (“ESI”) “is commonplace in our personal lives and in the operation of

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<sup>1</sup> MARTIN GILBERT, WINSTON S. CHURCHILL: NEVER DESPAIR, 1945-1965 at 210 (Vol. VIII 1988).

<sup>2</sup> MARK HELPRIN, DIGITAL BARBARISM 9 (2009) (“The history of the last hundred years has been, as much as anything else, the process of encoding information . . . . With binary coding, electrons as messengers, and the hard-fought mathematical adaptation necessary for control, we can now do almost everything in regard to information. We may, for example, look through billions of pages in an instant . . . .”); *see also* BARBARA J. ROTHSTEIN ET AL., MANAGING DISCOVERY OF ELECTRONIC INFORMATION: A POCKET

businesses, public entities, and private organizations.”<sup>3</sup> By now the numbers no longer shock: “more than 90% of all corporate information is electronic;<sup>4</sup> North American businesses exchange over 2.5 trillion e-mails per year;<sup>5</sup> today, less than 1% of all communication will ever appear in paper form; and, on average, a 1000-person corporation will generate nearly 2 million e-mails annually.”<sup>6</sup>

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GUIDE FOR JUDGES 1 (Federal Judicial Center 2007) [hereinafter *Pocket Guide*], available at [http://www.fjc.gov/public/pdf.nsf/lookup/eldscpkt.pdf/\\$file/eldscpkt.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/eldscpkt.pdf/$file/eldscpkt.pdf) (“It is a fact of modern life that an enormous volume of information is created, exchanged, and stored electronically.”).

<sup>3</sup> *Pocket Guide*, *supra* note 2, at 1. ESI “includes e-mails, webpages, word processing files, and databases stored in the memory of computers, magnetic disks (such as computer hard drives and floppy disks), optical disks (such as DVDs and CDs), and flash memory (such as ‘thumb’ or ‘flash’ drives).” *Id.* at 2.

<sup>4</sup> Indeed, as early as 2002, 92% of new information was stored on magnetic media, primarily hard disks. See Peter Lyman & Hal R. Varian, *How Much Information? 2003*, U. Cal. AT BERKELEY Sch. OF Inf. Mgmt. & Sys., <http://www2.sims.berkeley.edu/research/projects/how-much-info-2003/execsum.htm> (last visited Jan. 26, 2012).

<sup>5</sup> *Id.* E-mail creates “about 400,000 terabytes of new information each year worldwide.” *Id.* Meanwhile, instant messaging “generates 5 billion (750GB) messages a day, or 274 terabytes a year.” *Id.* It is estimated that in 2009 some 247 billion e-mails were sent per day. Stephen D. Brody et al., *Zealous Advocacy and the Discovery Process: Does the Duty to Cooperate Leave Room for Lawyering After National Day Laborer?*, 212 PLI/NY 271, 275-76 (2011).

<sup>6</sup> Dale M. Cendali et al., *Potential Ethical Pitfalls in Electronic Discovery*, SM090 ALI-ABA 1421, 1423 (2007) (citing Harvey L. Kaplan, *Electronic Discovery in the 21st Century: Is Help on the Way?*, 733 PLI/LIT 65, 67 (2005)); see also *Pocket Guide*, *supra* note 2, at 3 (citing Microsoft, *Survey Finds Workers Average Only Three Productive Days Per Week*, (Mar. 15, 2005), <http://www.microsoft.com/presspass/press/2005/mar05/0315ThreeProductiveDaysPr.mspx>) (“[The] average employee sends or receives about 50 messages per working day”).

[2] Not surprisingly, then, in the last several years discovery has increasingly focused on e-mail and other ESI.<sup>7</sup> Where electronic discovery was once present “only in large cases involving sophisticated entities, it is now seen in routine civil cases and in many criminal cases.”<sup>8</sup> Relatedly, the costs associated with e-discovery have continued to increase.<sup>9</sup> For instance, as of 2009 one leading e-discovery consultant estimated that overall industry costs would grow 20% over the previous year and exceed \$4 billion.<sup>10</sup>

[3] In an individual matter, the “effort and expense associated with electronic discovery [is] so excessive that, regardless of a case’s merits, settlement is often the most fiscally prudent course.”<sup>11</sup> Indeed, “[o]ne purpose of discovery—improper and rarely acknowledged but pervasive—is: ‘it makes one’s opponent spend money.’”<sup>12</sup> ESI exacerbates the

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<sup>7</sup> See *Pocket Guide*, *supra* note 2, at 1 (“In the past decade, discovery involving word-processed documents, spreadsheets, e-mail, and other [ESI] has become more routine. . .”).

<sup>8</sup> *Id.*

<sup>9</sup> John Bace, *Cost of E-Discovery Threatens to Skew Justice System*, GARTNER RES., Apr. 20, 2007, at 1, available at [http://www.akershaw.com/Documents/cost\\_of\\_ediscovery\\_threatens\\_148170.pdf](http://www.akershaw.com/Documents/cost_of_ediscovery_threatens_148170.pdf) (“The volumes and costs associated with meeting e-discovery requests are rising precipitously.”); see also The Sedona Conference, *The Sedona Conference Cooperation Proclamation*, 10 SEDONA CONF. J. 331 (Supp. 2009) [hereinafter *Cooperation Proclamation*] (“The costs associated with adversarial conduct in pre-trial discovery have become a serious burden to the American judicial system. This burden rises significantly in discovery of [ESI].”).

<sup>10</sup> Jason Krause, *EDD Providers Adapt to a Down Economy*, L. TECH. NEWS, Oct. 12, 2009 (citing George Socha, a producer of the Socha-Gelbmann industry survey in 2009).

<sup>11</sup> John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 550 (2010); see also *Cooperation Proclamation*, *supra* note 9, at 2 (“[Discovery costs] often overshadow efforts to resolve the matter itself.”).

<sup>12</sup> *Thorogood v. Sears, Roebuck & Co.*, 624 F.3d 842, 849 (7th Cir. 2010) (quoting BRIAN ANDERSON & ANDREW TRASK, *THE CLASS ACTION PLAYBOOK* § 4.5, 115-16 (2010)).

impact of this improper purpose.<sup>13</sup> Corporate defendants largely bear the expense of such abusive discovery tactics, particularly in complex litigation such as class actions in which their conduct is the “focus of the litigation.”<sup>14</sup>

[4] With the increasing prevalence and cost of e-discovery, there has been a corresponding rise in ESI-related disputes.<sup>15</sup> Such disputes and their inherent expense can lead to decisions based on “questions of process rather than merit.”<sup>16</sup> Indeed, “e-discovery has become more than merely a discovery process; it has become an alternate method of trying a lawsuit.”<sup>17</sup> Perhaps predictably, given that they more often respond to discovery requests, rather than initiate them, “[d]efendants are sanctioned for e-discovery violations nearly three times more often than plaintiffs.”<sup>18</sup> But, sanctions can be equal opportunity destroyers: while in aggregate

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<sup>13</sup> *Id.* at 849-50 (“[V]ast and ever-expanding volume of [e-mails] has made the cost of discovery soar.”).

<sup>14</sup> *Id.* (noting adverse “asymmetry . . . [that] there is far more evidence that plaintiffs may be able to discover in defendants’ records . . . than vice versa”).

<sup>15</sup> *Cooperation Proclamation*, *supra* note 9, at 1 (“In addition to rising monetary costs, courts have seen escalating motion practice, overreaching, obstruction, and extensive, but unproductive discovery disputes . . .”).

<sup>16</sup> *Bace*, *supra* note 9, at 1; *Cooperation Proclamation*, *supra* note 9, at 1 (explaining that discovery disputes may preclude “adjudication on the merits altogether”); Larry H. Kunin, *Appreciate the New Merits of E-Discovery*, DAILY REPORT, Jan. 26, 2009, at 1 (“[T]he quest for examination of all ESI and/or sanctions . . . is often leading to improper discovery requests and runaway litigation costs.”).

<sup>17</sup> Kunin, *supra* note 16, at 2; *see In re Ebay Seller Antitrust Litig.*, No. C 07-01882 JF (RS), 2007 U.S. Dist. LEXIS 75498, \*3 n.1 (N.D. Cal. Oct. 2, 2007) (noting motion for interim preservation order related “solely to ‘discovery about discovery’”).

<sup>18</sup> Dan H. Willoughby et al., *Sanctions for E-Discovery Violations: By the Numbers*, 60 DUKE L.J. 789, 803 (2010).

defendants have suffered more for ESI-related discovery abuses, a number of plaintiffs have also paid the price.<sup>19</sup>

[5] Effective December 1, 2006, Congress amended the Federal Rules of Civil Procedure in an attempt to “deal with the most basic problems associated with the discovery of [ESI].”<sup>20</sup> After five years of case law interpreting the amendments, some trends are evident<sup>21</sup>—unfortunately, these trends increasingly conflict with Rule 1’s mandate that the Federal Rules be “administered to secure the just, speedy, and inexpensive determination of every action . . . .”<sup>22</sup> This article will examine the impact of the amendments on the discovery of ESI and assess whether they have been effective in dealing with the “basic problems” of such discovery.<sup>23</sup>

[6] The article will begin with a discussion of significant pre-amendment decisions relating to the preservation and production of ESI.<sup>24</sup> It will then assess the recent amendments to the Federal Rules and how these have affected parties’ discovery obligations.<sup>25</sup> The article will focus on key issues that have arisen in the five years the amendments have been in effect, such as the duty to preserve ESI and when it arises, the scope of

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<sup>19</sup> See, e.g., *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Secs., LLC*, No. 05 Civ. 9016 (SAS), 2010 U.S. Dist. LEXIS 4546 (S.D.N.Y. Jan. 15, 2010). This phenomenon has led some commentators to divide the world into “data requesters versus data producers,” as opposed to plaintiffs or defendants. Symposium, *Managing Electronic Discovery: Views From the Judges*, 76 *FORDHAM L. REV.* 1, 4 (2007) (comments by Hon. Lee H. Rosenthal).

<sup>20</sup> Bace, *supra* note 9, at 2.

<sup>21</sup> See *infra* Section IV.

<sup>22</sup> FED. R. CIV. P. 1.

<sup>23</sup> Bace, *supra* note 9, at 2.

<sup>24</sup> See *infra* Section II.

<sup>25</sup> See *infra* Section III.

the preservation duty and the form of production, including privilege issues, and the sanctions that have been awarded based on the failure to preserve and produce relevant ESI.<sup>26</sup> Finally, the article will discuss a critical emerging issue related to the methodology for identifying and locating ESI, namely the sufficiency of keyword searches versus various other alternatives.<sup>27</sup> Given the need for expert involvement and the associated increase in cost, combined with the real world limitations on the ability of cooperation to control costs, the article concludes that it remains an open question whether the benefits of expanded e-discovery under the amended Federal Rules outweigh the burdens on the civil justice system.<sup>28</sup>

## II. KEY PRE-AMENDMENT DECISIONS REGARDING THE PRESERVATION AND PRODUCTION OF ESI

[7] While commentators have viewed the amendments to the Federal Rules as ushering in a sea change in discovery,<sup>29</sup> in reality, case law before 2006 increasingly recognized the discoverability of, and the corresponding duty to preserve, ESI.<sup>30</sup> Thus, a number of the significant

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<sup>26</sup> See *infra* Section IV.

<sup>27</sup> See *infra* Section IV.D.

<sup>28</sup> See *infra* Section V.

<sup>29</sup> E.g. Sharon Nelson & John Simek, *The New Federal Rules of Civil Procedure: An ESI Primer*, 32 NO. 8 LAW PRAC. 23, 25 (2006).

<sup>30</sup> See, e.g., *Antioch Co. v. Scrapbook Borders, Inc.*, 210 F.R.D. 645, 652 (D. Minn. 2002) (“It is a well accepted proposition that deleted computer files, whether they be e-mails or otherwise, are discoverable.”); *McPeck v. Ashcroft*, 202 F.R.D. 31, 32 (D.D.C. 2001) (“During discovery, the producing party has an obligation to search available electronic systems for the information demanded.”); *Simon Prop. Grp. L.P. v. mySimon, Inc.*, 194 F.R.D. 639, 640 (S.D. Ind. 2000) (noting “computer records, including records that have been ‘deleted,’ are documents discoverable under Fed. R. Civ. P. 34”); *Anti-Monopoly, Inc. v. Hasbro, Inc.*, No. Civ. A. No. 69-C-58-D, 1995 U.S. Dist. LEXIS 16355, \*1 (S.D.N.Y. Nov. 3, 1995) (“The law is clear that data in computerized form is discoverable even if paper ‘hard copies’ of the information have been produced, and that

issues that have arisen under the revised Federal Rules, such as the duty and scope of preservation, cost-shifting, and spoliation sanctions, originated in pre-amendment cases.<sup>31</sup>

### A. *Rowe*—Cost-Shifting Factors

[8] In one leading early e-discovery case, *Rowe Entertainment, Inc. v. The William Morris Agency, Inc.*, certain defendants sought a protective order against the production of e-mail stored on backup tapes.<sup>32</sup> Reasoning that “[e]lectronic documents are no less subject to disclosure than paper records,”<sup>33</sup> the court denied the requested protective order.<sup>34</sup>

[9] The court further recognized, however, that “discovery is not just about uncovering the truth, but also about how much of the truth the

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the producing party can be required to design a computer program to extract the data from its computerized business records, subject to the Court’s discretion as to the allocation of the costs of designing such a computer program.”); *Bills v. Kennecott Corp.*, 108 F.R.D. 459, 461 (D. Utah 1985) (“[N]ow axiomatic that [ESI] is discoverable,” if relevant); *Adams v. Dan River Mills, Inc.*, 54 F.R.D. 220, 222 (W.D. Va. 1972) (granting motion to compel payroll records in “the appropriate computerized form”).

<sup>31</sup> See *infra* Section II.A-III.

<sup>32</sup> *Rowe Entm’t, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 423 (S.D.N.Y. 2002). The plaintiffs were concert promoters who alleged defendants used discriminatory and anti-competitive practices to prevent plaintiffs from promoting certain events. *Id.*

<sup>33</sup> *Id.* at 428; see also *Playboy Enter., Inc. v. Welles*, 60 F. Supp. 2d 1050, 1053 (S.D. Cal. 1999); *Daewoo Elec. Co. v. United States*, 650 F. Supp. 1003, 1006 (Ct. Int’l Trade 1986).

<sup>34</sup> *Rowe*, 205 F.R.D. at 433. Defendants argued the e-mail was not likely to yield relevant information because any such significant communications would have been printed out and placed in appropriate files, which had already been provided to plaintiffs. *Id.* at 428. The court rejected this contention, noting studies that conclude one-third of all e-mail is never printed out. *Id.*



parties can afford to disinter.”<sup>35</sup> Thus, on the “more difficult issue”<sup>36</sup> of who should pay for the production, the court ordered that plaintiffs would bear the cost.<sup>37</sup> In reaching this conclusion, the court rejected the parties’ competing bright-line rules, which each suggested that the other should pay.<sup>38</sup>

[10] Plaintiffs contended the “responding party should bear the costs of producing electronic data since ‘if a party chooses an electronic storage method, the necessity for a retrieval program is an ordinary and foreseeable risk.’”<sup>39</sup> Noting the principle relied on by the plaintiffs did “not translate well into the realm of electronic data,” the court recognized that because storage costs for ESI “are virtually nil,” there could simply be “no compelling reason to discard it.”<sup>40</sup> Likewise, the court reasoned that

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<sup>35</sup> *Id.* at 423. According to the court, the case illustrated how “discovery expenses frequently escalate when information is stored in electronic form.” *Id.* In particular, the court recognized the “expense of locating and extracting [the] responsive e-mails is substantial . . . .” *Id.* at 428. Indeed, while disputed by plaintiffs, each defendant put on evidence that the production costs would range from the tens of thousands of dollars to almost \$9.75 million for a single defendant. *Id.* at 425-28.

<sup>36</sup> *Id.* at 428.

<sup>37</sup> *Id.* at 432-33. The court recognized that to prevent “undue burden or expense,” it could “[shift] some or all of the costs of the production to the requesting party.” *Id.* at 428. But traditionally, the “presumption is that the responding party must bear the expense of complying with discovery requests . . . .” *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978).

<sup>38</sup> *Id.* at 429.

<sup>39</sup> *Rowe*, 205 F.R.D. at 429 (citing *In re Brand Name Prescription Drugs Antitrust Litig.*, Nos. 94 C 897, MDL 997, 1995 U.S. Dist. LEXIS 8281, \*2 (N.D. Ill. June 15, 1995) and *Daewoo Elec. Ltd. v. United States*, 650 F. Supp. 1003, 1006 (Ct. Int’l Trade 1986) (“The normal and reasonable translation of electronic data into a form usable by the discovering party should be the ordinary and foreseeable burden of a respondent in the absence of a showing of extraordinary hardship.”)).

<sup>40</sup> *Id.*

even when subject data is retained for “limited [business] purposes, it is not necessarily amenable to discovery.”<sup>41</sup> In particular, according to the court, “[b]ack-up tapes . . . ‘are not archives from which documents may easily be retrieved. The data on a backup tape are not organized for retrieval of individual documents or files, but for wholesale, emergency uploading onto a computer system.’”<sup>42</sup>

[11] Similarly, the court rejected defendants’ argument that the requesting party should bear the expense.<sup>43</sup> Defendants contended that “when the costs of discovery are internalized, [the requesting] party can perform a cost-benefit analysis and decide whether the effort is justified,”<sup>44</sup> making cost-shifting appropriate. According to the court, this position failed for two reasons: (1) it conflicted with the “well-established legal principle . . . that the responding party will pay the expenses of production”; and (2) it could “result in the abandonment of meritorious claims by litigants too poor to pay for necessary discovery.”<sup>45</sup>

[12] In lieu of applying a bright-line rule, the court balanced eight different factors: (1) the specificity of the discovery requests; (2) the likelihood of discovering relevant information; (3) the availability of the information elsewhere; (4) the purposes for which the responding party maintains the subject data; (5) the relative benefit to the parties of obtaining the information; (6) the total cost of the production; (7) the relative ability and incentive of each party to control costs; and (8) each party’s resources.<sup>46</sup> Finding that the factors “tip[ped] heavily in favor of

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.* (quoting Kenneth J. Withers, *Computer-Based Discovery in Federal Civil Litigation*, SF97 ALI-ABA 1079, 1085 (2001)).

<sup>43</sup> *Id.*

<sup>44</sup> *Rowe*, 205 F.R.D. at 429.

<sup>45</sup> *Id.*; see *Oppenheimer Fund, Inc., v. Sanders*, 437 U.S. 340, 358 (1978).

<sup>46</sup> *Rowe*, 205 F.R.D. at 429.

shifting”<sup>47</sup> the production costs to plaintiffs, the court noted the requests were “extremely broad,”<sup>48</sup> the overall expense was “substantial by any definition,”<sup>49</sup> and plaintiffs were best situated to control the costs.<sup>50</sup>

[13] Further, the court reasoned that the concept of “marginal utility” favored shifting the costs to plaintiffs.<sup>51</sup> That is, while a broad search of the subject e-mails should not be precluded altogether, the court assessed there had “certainly been no showing that the e-mails [were] likely to be a gold mine.”<sup>52</sup> Thus, because the “marginal value of searching the e-mails [was] modest at best,” this factor supported shifting the cost to plaintiffs.<sup>53</sup> Likewise, the “absence of any benefit to the defendants” from the production justified cost-shifting.<sup>54</sup>

[14] In addition, the court noted there was no evidence defendants ever accessed “either their back-up tapes or their deleted e-mails in the normal

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<sup>47</sup> *Id.* at 432.

<sup>48</sup> *Id.* at 430. According to the court, “[w]here a party multiplies litigation costs by seeking expansive rather than targeted discovery, that party should bear the expense.” *Id.*

<sup>49</sup> *Id.* at 431. Where the “total cost of the requested discovery is not substantial, . . . there is no cause to deviate from the presumption that the responding party will bear the expense.” *Id.*

<sup>50</sup> *Id.* at 432 (recognizing it is “more efficient to place the burden on the party that will decide how expansive the discovery will be”).

<sup>51</sup> *Rowe*, 205 F.R.D. at 430.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*; see *McPeck v. Ashcroft*, 202 F.R.D. 31, 34 (D.D.C. 2001) (“[The] more likely it is that the backup tape contains information that is relevant to a claim or defense, the fairer it is that the [responding party] search at its own expense. The less likely it is, the more unjust it would be to make [the responding party] search at its own expense. The difference is ‘at the margin.’”).

<sup>54</sup> *Rowe*, 205 F.R.D. at 431 (“Where the responding party itself benefits from the production, there is less rationale for shifting costs to the requesting party”).

course of business . . . .”<sup>55</sup> Thus, as “a party would not be required to sort through its trash to resurrect discarded paper documents,” in the court’s view it likewise would “not be obligated to pay the cost of retrieving deleted e-mails.”<sup>56</sup>

[15] The court established a protocol for production, which the parties were free to modify by agreement.<sup>57</sup> Interestingly, the protocol contained essentially a clawback provision to deal with the inadvertent production of privileged documents, an issue which was later addressed in the amendments to the Federal Rules.<sup>58</sup>

### **B. *Zubulake I*—Cost-Shifting Factors Revised**

[16] On the heels of *Rowe*<sup>59</sup> came *Zubulake v. UBS Warburg LLC* (*Zubulake I*), which built upon and somewhat modified the *Rowe* principles, resulting in a series of landmark e-discovery rulings. In

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<sup>55</sup> *Id.* at 431.

<sup>56</sup> *Id.* *But see id.* at 430-32. The remaining factors were more of a mixed bag. For instance, the court concluded there was no showing the e-mails in question were “generally available other than by a search of the defendants’ hard drives or back-up tapes,” which supported defendants’ bearing the cost of the production. *Id.* at 430. The court further determined the relative resources of the parties to be neutral. *Id.* at 432.

<sup>57</sup> *Id.* at 433. Plaintiff’s counsel was required *id.* create a search procedure to identify responsive e-mails and notify “defendants’ counsel of the procedure chosen, including any specific word searches.” Defendants could object to any search proposed. *Id.*

<sup>58</sup> *Id.* at 433. The protocol anticipated that a privilege review of the e-mails would not occur until after plaintiffs ran the search and identified any documents they considered responsive. Any defendant that elected to review its database prior to production had to do so at its own cost. *See infra* notes 276-92 and accompanying text for further discussion of such “clawback” provisions.

<sup>59</sup> The *Rowe* ruling was issued by U.S. Magistrate Judge Francis. *Rowe*, 205 F.R.D. at 423. Plaintiffs objected to the ruling and moved to set aside the portion of the order shifting costs. Their motion was denied. *Rowe Entm’t, Inc. v. The William Morris Agency, Inc.*, No. 98 Civ. 8272 (RPP), 2002 U.S. Dist. LEXIS 8308, at \*3, \*32-33 (S.D.N.Y. May 8, 2002).

*Zubulake I*, plaintiff alleged various claims arising out of gender discrimination and retaliation.<sup>60</sup> She contended “key evidence” existed in e-mails contained only on backup tapes.<sup>61</sup> In opposition to plaintiff’s motion to compel production of the e-mails, defendants argued that restoring them would cost approximately \$175,000 and thus be unduly burdensome.<sup>62</sup>

[17] The court began by noting that like paper records, electronic documents are subject to discovery, including those “documents that may have been deleted and now reside only on backup disks.”<sup>63</sup> Thus, plaintiff was entitled to discovery of the subject e-mails as long as they were relevant, which the court found they clearly were.<sup>64</sup> Turning to the issue of cost-shifting, the court rejected the notion that “cost-shifting must be considered in every case involving the discovery of electronic data . . . .”<sup>65</sup>

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<sup>60</sup> *Zubulake v. UBS Warburg LLC (Zubulake I)*, 217 F.R.D. 309, 311 (S.D.N.Y. 2003). The court characterized plaintiff’s claims as “certainly not frivolous,” noting one “smoking gun” piece of evidence that had already been discovered: “an e-mail suggesting that she be fired ‘ASAP’ after her EEOC charge was filed, in part so that she would not be eligible for year-end bonuses.” *Id.* at 311, 312 n.8. Indeed, plaintiff ultimately won a verdict totaling \$9.1 million in compensatory damages, plus \$20.1 million in punitive damages. Edward Porter, *UBS Ordered to Pay \$29 Million in Sex Bias Lawsuit*, N.Y. TIMES, April 7, 2005, at C4.

<sup>61</sup> *Zubulake I*, 217 F.R.D. at 311-12. “[E]-mail was an important means of communication at [the defendant’s workplace] during the relevant time period,” with each salesperson receiving approximately 200 e-mails a day. *Id.* at 313-14. While defendant initially produced approximately 100 pages of e-mail messages, plaintiff herself produced approximately 450 pages. *Id.* at 313. The e-mails in dispute were stored on 94 backup tapes. *Id.* at 317.

<sup>62</sup> *Id.* at 312. While defendant claimed that its production was “complete,” it obviously had not searched for responsive e-mails on any of the backup tapes. *Id.* at 313, 317 (“[Defendant] cannot represent that it has produced all responsive e-mails.”).

<sup>63</sup> *Id.* at 317.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

Rather, according to the court, any “principled approach to electronic evidence must respect” the presumption that the responding party bears the expense of answering discovery requests.<sup>66</sup> The court admonished that “cost-shifting may effectively end discovery, especially when private parties are engaged in litigation with large corporations.”<sup>67</sup> Accordingly, the court concluded that “cost-shifting should be considered *only* when electronic discovery imposes an ‘undue burden or expense’ on the responding party.”<sup>68</sup> A burden or expense is undue when it “‘outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.’”<sup>69</sup>

[18] Continuing, the court reasoned that whether “production of documents is unduly burdensome or expensive turns primarily on whether it is kept in an *accessible or inaccessible* format (a distinction that corresponds closely to the expense of production).”<sup>70</sup> And the question of whether “electronic data is accessible or inaccessible turns largely on the media on which it is stored.”<sup>71</sup> To illustrate, the court discussed five categories of data and their storage: (1) active, online data;<sup>72</sup> (2) near-line

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<sup>66</sup> *Zubulake I*, 217 F.R.D. at 317; see *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978).

<sup>67</sup> *Zubulake I*, 217 F.R.D. at 317-18 (“[F]requent use of cost-shifting will have the effect of crippling discovery in discrimination and retaliation cases.”).

<sup>68</sup> *Id.* at 318. The court characterized the assumption that an “undue burden or expense may arise simply because electronic evidence is involved” as “mak[ing] no sense.” *Id.*

<sup>69</sup> *Id.* (quoting FED. R. CIV. P. 26(b)(2)(C)(iii)).

<sup>70</sup> *Id.* at 318.

<sup>71</sup> *Id.*

<sup>72</sup> *Zubulake I*, 217 F.R.D. at 318. The prototypical example of online data is information on hard drives. *Id.*

data;<sup>73</sup> (3) offline storage/archives;<sup>74</sup> (4) backup tapes;<sup>75</sup> and (5) erased, fragmented or damaged data.<sup>76</sup> According to the court, the “first three categories are typically identified as accessible, and the latter two as inaccessible.”<sup>77</sup> The distinction between the two categories “is easy to appreciate. Information deemed ‘accessible’ is stored in a readily usable format . . . . ‘Inaccessible’ data, on the other hand, is not readily usable.”<sup>78</sup>

[19] Applying these principles, the court concluded the e-mails on the ninety-four backup tapes were not “currently accessible.”<sup>79</sup> Because defendant would have to engage in a “costly and time-consuming process” to search the subject e-mails, the court found it “appropriate to *consider* cost-shifting.”<sup>80</sup> The court recognized that the *Rowe* eight factor test had “become the gold standard” for cost-shifting analysis.<sup>81</sup> Nonetheless, the

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<sup>73</sup> *Id.* at 318-19. Optical disks are good examples of near-line data storage devices. *Id.*

<sup>74</sup> *Id.* at 319. Offline data “lacks ‘the coordinated control of an intelligent disk subsystem,’” and is often referred to as “JBOD (‘Just a Bunch of Disks’).” *Id.*

<sup>75</sup> *Id.* at 319. Data on backup tapes “are not organized for retrieval of individual documents or files . . . .” *Id.*

<sup>76</sup> *Id.* Erased data “can only be accessed after significant processing.” *Id.*

<sup>77</sup> *Zubulake I*, 217 F.R.D. at 319-20.

<sup>78</sup> *Id.* at 320. The court noted the “accessible/inaccessible test employed” by it was “very similar” to the “active data” versus “residual data,” i.e., “deleted, shadowed, [or] fragmented” data, distinction drawn by the Sedona Conference. *Id.* at 320 n.61.

<sup>79</sup> *Id.* at 320.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

court found the *Rowe* test was “incomplete”<sup>82</sup> and, as a result, “generally favor[ed] cost-shifting.”<sup>83</sup>

[20] First, the court noted that Rule 26 “requires consideration ‘of the amount in controversy, the parties’ resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.’”<sup>84</sup> But *Rowe* made “no mention of either the amount in controversy or the importance of the issues at stake in the litigation.”<sup>85</sup> The court thus concluded these factors “should be added” to balance out the “*Rowe* factor that typically weighs most heavily in favor of cost-shifting, ‘the total cost associated with production.’”<sup>86</sup>

[21] Next, the court reasoned that the “absolute wealth of the parties is not the relevant factor.”<sup>87</sup> Thus, *Rowe*’s reference to the “resources available to each party” was immaterial, according to the court.<sup>88</sup> Instead,

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<sup>82</sup> *Zubulake I*, 217 F.R.D. at 320. In addition, the court was troubled by the fact that “courts have given equal weight to all of the [*Rowe*] factors, when certain factors should predominate.” *Id.*

<sup>83</sup> *Id.* As evidence, the court noted that “of the handful of reported opinions that apply *Rowe* or some modification thereof, *all of them* have ordered [cost-shifting].” *Id.*; *see, e.g.,* *Murphy Oil USA, Inc. v. Fluor Daniel, Inc.*, No. 99-3564 Section “T”(1), 2002 U.S. Dist. LEXIS 3196 (E.D. La. Feb. 19, 2002).

<sup>84</sup> *Zubulake I*, 217 F.R.D. at 321 (citing FED. R. CIV. P. 26(b)(2)(C)(iii)).

<sup>85</sup> *Id.* at 321.

<sup>86</sup> *Id.* As the court noted, while production costs are typically “objectively large” in any case where cost-shifting is an issue, that cost when compared to the “amount in controversy” may shed revealing light on the significance of the discovery in the context of the overall litigation. *Id.* For instance, a “response to a discovery request costing \$100,000 sounds (and is) costly, but in a case potentially worth millions of dollars, the cost of responding may not be unduly burdensome.” *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*



the “focus should be on the total cost of production *as compared to* the resources available to each party.”<sup>89</sup>

[22] Finally, the court considered the “‘importance of the issues at stake in the litigation’ . . . a critical consideration, even if rarely invoked.”<sup>90</sup> To illustrate, in the court’s view “if a case has the potential for broad public impact, then public policy weighs heavily in favor of permitting extensive discovery.”<sup>91</sup>

[23] The court furthered its modification of *Rowe* by eliminating two factors.<sup>92</sup> First, the court deleted *Rowe*’s reliance on “the specificity of the discovery request,” considering this to be essentially redundant of the relevance and cost factors.<sup>93</sup> Consequently, the court settled on a factor combining those elements, which would simply examine the “extent to

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<sup>89</sup> *Zubulake I*, 217 F.R.D. at 321 (emphasis added). In other words, “discovery that would be too expensive for one defendant to bear [may] be a drop in the bucket for another.” *Id.* (citing defendant’s net profits of \$716 million for the third quarter of 2002 alone).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* Of course, the question of who should bear the cost of such discovery is separate and apart from whether the discovery should be permitted in the first place. In any event, as examples of such “public impact” cases, the court cited “toxic tort class actions, environmental actions, . . . social reform litigation, cases involving criminal conduct, or cases implicating important legal or constitutional questions.” *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* In this regard, the court acknowledged that “[s]pecificity is surely the touchstone of any good discovery request, requiring a party to frame a request broadly enough to obtain relevant evidence, yet narrowly enough to control costs.” *Id.*; see WORKING GRP. ON ELEC. DOCUMENT RETENTION & PROD., THE SEDONA CONFERENCE, THE SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION at *ii* (Jonathan M. Redgrave et al. eds., 2d ed. 2007) (Principle 4: “Discovery requests should make as clear as possible what electronic documents and data are being asked for, while responses and objections to discovery should disclose the scope and limits of what is being produced.”).

which the request is specifically tailored to discover relevant information.”<sup>94</sup>

[24] In addition, the court found *Rowe*'s reliance on “the purposes for which the responding party maintains the requested data” to be “typically unimportant.”<sup>95</sup> On the contrary, according to the court, “[w]hether the data is kept for a business purpose or for disaster recovery does not affect its accessibility, which is the practical basis for calculating the cost of production.”<sup>96</sup> Thus, “[a]lthough a business purpose will often coincide with accessibility—data that is inaccessible is unlikely to be used or needed in the ordinary course of business—the concepts are not coterminous.”<sup>97</sup> Indeed, a “good deal of accessible, easily produced material may be kept for no apparent business purpose.”<sup>98</sup> But “[s]uch evidence is no less discoverable than paper documents that serve no current purpose and exist only because a party failed to discard them.”<sup>99</sup>

[25] After trimming and shaping the *Rowe* factors, the *Zubulake* court arrived at a new seven-factor test:

(1) the extent to which the request is specifically tailored to discover relevant information; (2) the availability of such information from other sources; (3) the total cost of the production, compared to the amount in controversy; (4) the

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<sup>94</sup> *Zubulake I*, 217 F.R.D. at 321.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 321-22.

<sup>98</sup> *Id.* at 322 n. 68.

<sup>99</sup> *Zubulake I*, 217 F.R.D. at 322 n. 68. For example, data that should “have been erased pursuant to a document retention/destruction policy may have been inadvertently retained. If so, the fact that it should have been erased in no way shields that data from discovery.” *Id.* at 322.

total cost of the production, compared to the resources available to each party; (5) the relative ability of each party to control costs and its incentive to do so; (6) the importance of the issues at stake in the litigation; and (7) the relative benefits to the parties of obtaining the information.<sup>100</sup>

[26] Significantly, the court determined the seven factors should not be weighed equally.<sup>101</sup> Rather, in the court’s view the “central question must be, does the request impose an ‘undue burden or expense’ on the responding party?”<sup>102</sup> The court resolved that “[w]eighting the factors in descending order of importance” may answer this question.<sup>103</sup> Thus, the court concluded that the first two factors—the extent to which the request is tailored to discover relevant information, and the availability of such information from other sources —“are the most important.”<sup>104</sup>

[27] The next most significant set of factors, numbers three through five, address “cost issues,” i.e., “‘How expensive will this production be?’ and, ‘Who can handle that expense?’”<sup>105</sup> Descending further in importance, the court came to factor six: the importance of the litigation itself.<sup>106</sup> Interestingly, while acknowledging that this factor “will only rarely come into play,” the court stated that it had “the potential to

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<sup>100</sup> *Id.* at 322.

<sup>101</sup> *Id.* at 322-23 (noting the “temptation to treat the factors as a check-list,” but recognizing that the “test cannot be mechanically applied at the risk of losing sight of its purpose”).

<sup>102</sup> *Id.* (“Put another way, ‘how important is the sought-after evidence in comparison to the cost of production?’”).

<sup>103</sup> *Id.* at 323.

<sup>104</sup> *Zubulake I*, 217 F.R.D. at 323.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

predominate over the others.”<sup>107</sup> Factor seven—the relative benefits to each party of the production—brought up the rear.<sup>108</sup> According to the court, this factor was “least important because it is fair to presume that the response to a discovery request generally benefits the requesting party.”<sup>109</sup>

[28] Having established the revised cost-shifting test and the relative weight to be accorded each of the seven factors, the court turned its attention to the evidence needed to analyze each factor.<sup>110</sup> The court criticized *Rowe*’s assumption that the requested e-mails were unlikely to be a “gold mine,”<sup>111</sup> reasoning that “such proof will rarely exist in advance of obtaining the requested discovery.”<sup>112</sup> Rather than speculating or making assumptions, the court determined that examining a small sample of backup tapes would “inform the cost-shifting analysis . . . .”<sup>113</sup> Such “tangible evidence” would reveal “what the backup tapes may have to offer,” as well as the “time and cost required to restore” them.<sup>114</sup> The court thus ordered defendant to “produce, at its expense, responsive e-mails from any *five* backup tapes selected” by plaintiff.<sup>115</sup> Defendant would then provide an affidavit detailing “the results of its search, as well

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<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Zubulake I*, 217 F.R.D. at 323. In the “unusual case where production will also provide a tangible or strategic benefit to the responding party, that fact may weigh *against* shifting costs.” *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* (citing *Rowe Entm’t, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 430).

<sup>112</sup> *Id.* In the court’s view, assumptions regarding the likelihood that relevant information would be found led *Rowe* and subsequent cases to favor cost-shifting “uniformly.” *Id.*

<sup>113</sup> *Id.* at 324.

<sup>114</sup> *Zubulake I*, 217 F.R.D. at 324.

<sup>115</sup> *Id.* The defendant was also ordered to produce at its expense all e-mails that existed on accessible sources, i.e., on its optical disks or its active servers. *Id.*

as the time and money spent.”<sup>116</sup> The court could then “conduct the appropriate cost-shifting analysis.”<sup>117</sup>

### C. *Zubulake III*—Cost-Shifting Applied

[29] A keyword search of the five backup tapes selected by plaintiff resulted in 1,075 responsive e-mails.<sup>118</sup> Defendant deemed 600 of these responsive to plaintiff’s document request and produced them.<sup>119</sup> Plaintiff presented the court with sixty-eight of the e-mails which she claimed were “highly relevant.”<sup>120</sup> In *Zubulake III*, the court used this “factual basis” to perform the cost-shifting analysis under the seven factors it had previously enunciated.<sup>121</sup> The court began by noting the party responding to the discovery at issue “has the burden of proof on a motion for cost-shifting.”<sup>122</sup> Looking at the first two factors, which make up the “marginal utility test,”<sup>123</sup> the court reasoned that plaintiff’s was “a

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<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Zubulake v. UBS Warburg LLC (Zubulake III)*, 216 F.R.D. 280, 282 (S.D.N.Y. 2003). “The total cost of restoring and producing responsive e-mails from the five backup tapes was \$19,003.43.” *Id.* at 283. Defendant estimated that the cost of further production from the backup tapes would be \$273,649.39, including \$165,954.67 “to restore and search the tapes and \$107,694.72 in attorney and paralegal review costs.” *Id.*

<sup>119</sup> *Id.* at 282.

<sup>120</sup> *Id.* at 285. The court presumed the sixty-eight e-mails were “reasonably representative” of those contained on the seventy-seven backup tapes. *Id.*

<sup>121</sup> *Id.* at 282, 284. The court “emphasiz[ed] again that cost-shifting is potentially appropriate only when *inaccessible* data is sought.” *Id.* at 284.

<sup>122</sup> *Id.* at 283.

<sup>123</sup> *Zubulake III*, 216 F.R.D. at 284. The marginal utility test examines whether the request is “specifically tailored to discover relevant information” and the “availability of such information from other sources.” *Id.* The court emphasized that these two factors “should be weighted the most heavily in the cost-shifting analysis.” *Id.*

relatively limited and targeted request,” which uncovered “relevant” and, indeed, “compelling” evidence.<sup>124</sup>

[30] On the second half of the test—the “availability of the relevant data from other sources”<sup>125</sup>—the court reached the “unavoidable conclusion that there are a significant number of responsive e-mails that now exist only on backup tapes.”<sup>126</sup> In so concluding, the court reasoned defendant had “previously produced only 100 pages of e-mails, but has now produced 853 pages (comprising the 600 responsive e-mails) from the five selected backup tapes alone.”<sup>127</sup> Thus, the court ruled the marginal utility of restoring the remaining backup tapes was “*potentially* high.”<sup>128</sup> Given that defendant bore the burden on the motion, the court concluded that “the marginal utility test tip[ped] slightly against cost-shifting.”<sup>129</sup>

[31] The court next looked at the “cost issues” in factors three through five—namely “How expensive will this production be?” and, “Who can handle that expense?”<sup>130</sup> The court noted the stakes were well beyond the realm of an ordinary dispute.<sup>131</sup> Rather, the court assumed the potential

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<sup>124</sup> *Id.* at 285. In the court’s view, the e-mails painted a picture of the “dysfunctional atmosphere surrounding” plaintiff’s workplace. *Id.* In particular, the court noted a “number of the e-mails complain[ed] of [plaintiff’s] behavior.” *Id.*

<sup>125</sup> *Id.* at 286.

<sup>126</sup> *Id.* at 287.

<sup>127</sup> *Id.* at 286-87.

<sup>128</sup> *Zubulake III*, 216 F.R.D. at 287. None of the e-mails provided direct evidence of discrimination. *Id.* at 286. Because the existence of such direct evidence remained “speculative,” the court termed the marginal utility only “potentially” high. *Id.* at 287.

<sup>129</sup> *Id.* at 287.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 288. In an ordinary case, a “responding party should not be required to pay for the restoration of inaccessible data if the cost . . . is significantly disproportionate to the

exposure to be in the “multi-million dollar” range.<sup>132</sup> Accordingly, the court determined the cost of the restoration was “surely not ‘significantly disproportionate’ to the projected value of [the] case,” and thus weighed against cost-shifting.<sup>133</sup>

[32] Comparing the total cost of the production to each party’s resources, the court recognized there was “no question that [defendant] has exponentially more resources available to it than [plaintiff].”<sup>134</sup> On the other hand, it was “not unheard of for plaintiff’s [sic] firms to front huge expenses when multi-million dollar recoveries are in sight.”<sup>135</sup> Thus, in the court’s view, the resources available to each party weighed against cost-shifting, but did “not rule it out.”<sup>136</sup>

[33] Regarding each party’s ability and incentive to control costs, the court concluded that plaintiff could do nothing more to “focus her discovery request or reduce its cost.”<sup>137</sup> Likewise, defendant had control over selecting which outside vendor to restore the tapes but, once that selection was made, “costs [were] not within the control of either party.”<sup>138</sup> Accordingly, the court characterized this factor as “neutral.”<sup>139</sup>

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value of the case.” *Id.* But, according to the court, “[w]hatever else might be said, this is not a nuisance value case, a small case or a frivolous case.” *Id.*

<sup>132</sup> *Id.* In fact, the court reasoned that if plaintiff prevailed, her “damages award undoubtedly [would] be higher than that of the vast majority of Title VII plaintiffs.” *Id.*

<sup>133</sup> *Zubulake III*, 216 F.R.D. at 288.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Zubulake III*, 216 F.R.D. at 288.

<sup>139</sup> *Id.*

[34] Similarly, the court considered factor six—the importance of the issues at stake in the case—to be “neutral” as well.<sup>140</sup> On the seventh and final factor, the relative benefits to the parties of obtaining the information, the court noted that plaintiff stood “to gain far more than [defendant], as will typically be the case.”<sup>141</sup> This factor “weigh[ed] in favor of cost-shifting.”<sup>142</sup>

[35] Tallying the factors, the court stressed that the outcome was “not merely a matter of counting and adding; [the factors are] only a guide.”<sup>143</sup> To illustrate, the court noted that “some of the factors cut against cost-shifting, but only *slightly* so . . . .”<sup>144</sup> Thus, the court concluded “some cost-shifting [was] appropriate . . . although [defendant] should pay the majority of the costs.”<sup>145</sup> Acknowledging that the “precise allocation of costs is a matter of judgment and fairness rather than a mathematical consequence of the seven factors,” the court nevertheless held that the factors informed its “exercise of discretion.”<sup>146</sup> Ultimately, the court assigned the “lion’s share” of the restoration costs, seventy-five percent, to

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<sup>140</sup> *Id.* at 289. The court recognized that while “discrimination in the workplace” is a “weighty issue,” it is “hardly unique.” *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Zubulake III*, 216 F.R.D. at 289. The court summarized that “[f]actors one through four tip against cost-shifting (although factor two only slightly so). Factors five and six are neutral, and factor seven favors cost-shifting.” *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* In support of this conclusion, the court recognized there was “plainly relevant evidence that [was] only available on [defendant’s] backup tapes.” *Id.* Plaintiff, however, had “not been able to show that there [was] indispensable evidence on those backup tapes . . . .” *Id.*

<sup>146</sup> *Id.*



defendant, while the remaining twenty-five percent were shifted to plaintiff.<sup>147</sup>

#### D. *Zubulake IV*—Spoliation Sanctions

[36] Subsequently, it came to light that certain of the backup tapes containing the requested e-mails had been destroyed.<sup>148</sup> In *Zubulake IV*, the court considered plaintiff's motion for sanctions<sup>149</sup> arising out of this spoliation.<sup>150</sup> According to the court, the questions presented involved “how to determine an appropriate penalty for the party that caused the loss [of evidence] and—the flip side—how to determine an appropriate remedy for the party injured by the loss.”<sup>151</sup> Thus, the court addressed “both the scope of a litigant's duty to preserve electronic documents and the

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<sup>147</sup> *Id.* The court further ruled that defendant would exclusively bear any and all costs beyond restoring the tapes. *Id.* at 291. According to the court, as “a general rule, where cost-shifting is appropriate, only the costs of restoration and searching should be shifted.” *Id.* at 290. That is, the “responding party should *always* bear the cost of reviewing and producing electronic data once it has been converted to an accessible form.” *Id.*

<sup>148</sup> *Zubulake v. UBS Warburg LLC (Zubulake IV)*, 220 F.R.D. 212, 215 (S.D.N.Y. 2003). Specifically, six tapes and part of a seventh were missing. *Id.* at 219.

<sup>149</sup> *Id.* at 215-16. Plaintiff requested three sanctions: “(a) an order requiring [defendant] to pay in full the costs of restoring the remainder of the monthly backup tapes; (b) an adverse inference instruction against [defendant] with respect to the backup tapes that [were] missing; and (c) an order directing [defendant] to bear the costs of re-depositing certain individuals” regarding recently produced e-mails. *Id.*

<sup>150</sup> *Id.* “Spoliation is ‘the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation.’” *Id.* at 216 (quoting *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999)). Spoliation of “evidence germane ‘to proof of an issue at trial can support an inference that the evidence would have been unfavorable to the party responsible for its destruction.’” *Id.* (quoting *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998)). The levying of an appropriate sanction for spoliation, however, is “confined to the sound discretion of the trial judge, and is assessed on a case-by-case basis.” *Id.* (quoting *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001)).

<sup>151</sup> *Zubulake IV*, 220 F.R.D. at 214.

consequences of a failure to preserve documents that fall within the scope of that duty.”<sup>152</sup>

[37] Before reaching the scope of the duty to preserve, the court recognized that “a party can only be sanctioned for destroying evidence if it had a duty to preserve it” in the first instance.<sup>153</sup> The court thus examined both “*when*” defendant’s duty to preserve attached and “*what*” evidence should have been preserved.<sup>154</sup> On the first question, the court noted the “obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation.”<sup>155</sup> Applying this principle, the court recognized that defendant’s duty to preserve arose no later than August 2001, when plaintiff filed her EEOC charge.<sup>156</sup> But the court went further, finding that the duty actually attached in April of 2001 when all of defendant’s “key players” anticipated litigation.<sup>157</sup>

[38] Turning to the scope of the preservation duty, the court rejected the notion that a party must maintain “every shred of paper, every e-mail or electronic document . . . .”<sup>158</sup> Consequently, as a general rule, “a party

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<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 216. Thus, if defendant “had no such duty, then [it] cannot be faulted.” *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*; see *Kronisch*, 150 F.3d at 126 (preservation duty arises “when a party should have known that the evidence may be relevant to future litigation”); cf. *Arthur Andersen LLP v. United States*, 544 U.S. 696, 704 (2005) (Ordinarily, it is “not wrongful for a manager to instruct his employees to comply with a valid document retention policy . . .”).

<sup>156</sup> *Zubulake IV*, 220 F.R.D. at 216.

<sup>157</sup> *Id.* at 217-18. Merely having one or two employees “contemplate the possibility” of litigation does not generally give rise to a preservation duty. *Id.* at 217. But here, the court reasoned that “almost everyone associated with [plaintiff] recognized the possibility that she might sue.” *Id.* Because the “relevant people . . . anticipated litigation in April 2001,” the duty to preserve attached then. *Id.*

need not preserve all backup tapes even when it reasonably anticipates litigation.”<sup>159</sup> Conversely, however, “anyone who anticipates being a party or is a party to a lawsuit must not destroy unique, relevant evidence that might be useful to an adversary.”<sup>160</sup> The duty to preserve accordingly “extends to those employees likely to have relevant information—the ‘key players’ in the case.”<sup>161</sup> Further, the scope of the duty encompasses “all relevant documents (but not multiple identical copies) in existence at the time the duty to preserve attaches, and any relevant documents created thereafter.”<sup>162</sup>

[39] To sum up, then, “[o]nce a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a ‘litigation hold’ to ensure the preservation of relevant documents.”<sup>163</sup> This hold “does not apply to inaccessible backup tapes (*e.g.*, those typically maintained solely for the purpose of disaster recovery), which may continue to be recycled on the schedule set forth in the company’s policy.”<sup>164</sup> But, “if backup tapes are accessible (*i.e.*, actively used for information retrieval), then such tapes *would* likely be subject to the litigation hold.”<sup>165</sup> The court did draw one significant

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<sup>158</sup> *Id.* at 217.

<sup>159</sup> *Id.* Notably, the court recognized that requiring otherwise could “cripple large corporations, like [defendant], that are almost always involved in litigation.” *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Zubulake IV*, 220 F.R.D. at 218. The court noted that all of the missing backup tapes belonged to key employees of defendant. *Id.*

<sup>162</sup> *Id.* The court left to each litigant’s discretion how this preservation is accomplished. *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

exception to the foregoing: “[i]f a company can identify where particular employee documents are stored on backup tapes, then the tapes storing the documents of ‘key players’ to the . . . litigation should be preserved . . . .”<sup>166</sup>

[40] Applying these principles, the court concluded defendant had breached its duty by failing to preserve the backup tapes in question.<sup>167</sup> In determining the appropriate remedy, the court rejected plaintiff’s request that it reconsider its earlier order on cost-shifting.<sup>168</sup>

[41] Similarly, the court declined plaintiff’s plea for an adverse inference instruction.<sup>169</sup> In doing so, the court reasoned that an adverse inference is appropriate only when the following three elements are satisfied: (1) the spoliator destroyed the evidence when under a duty to preserve it; (2) the evidence was destroyed with a “culpable state of mind”;<sup>170</sup> and (3) “the destroyed evidence was relevant,”<sup>171</sup> that is, it

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<sup>166</sup> *Zubulake IV*, 220 F.R.D. at 218.

<sup>167</sup> *Id.* at 219.

<sup>168</sup> *Id.* The court noted that in deciding the cost-shifting motion, it “was well aware that certain e-mails had not been retained and that certain backup tapes were missing.” *Id.*

<sup>169</sup> *Id.* The instruction would have directed the jury that it could “infer from the fact that [defendant] destroyed certain evidence that the evidence, if available, would have been favorable to [plaintiff] and harmful to [defendant].” *Id.* The court recognized the obvious “*in terrorem* effect” and “extreme sanction” of an adverse inference, which counseled that it “should not be given lightly.” *Id.* at 220.

<sup>170</sup> *Id.* at 220. Counterintuitively, “ordinary negligence” may suffice to show a “culpable state of mind.” *Id.* (quoting *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 108 (2d Cir. 2002)).

<sup>171</sup> *Zubulake IV*, 220 F.R.D. at 220. When evidence “is destroyed in bad faith (*i.e.*, intentionally or willfully), that fact alone is sufficient to demonstrate relevance.” *Id.* On the other hand, if the “destruction is negligent, relevance must be proven by the party seeking the sanctions.” *Id.*

would support a party's claim or defense.<sup>172</sup> While the court concluded defendant had a duty to preserve the backup tapes that were destroyed, and that the destruction was at a minimum negligent, it ruled that plaintiff failed to show the relevance of the destroyed tapes.<sup>173</sup> Thus, the court deemed the requested adverse inference "inappropriate."<sup>174</sup> The court did, however, order that defendant bear plaintiff's costs for re-deposing certain witnesses "for the limited purpose of inquiring into issues raised by the destruction of evidence and any newly discovered e-mails."<sup>175</sup>

### E. *Zubulake V*—Adverse Inference

[42] After conducting the additional depositions authorized in *Zubulake IV*, plaintiff discovered that certain of defendant's employees deleted relevant e-mails from their active accounts.<sup>176</sup> Defendant subsequently recovered some of those e-mails from backup tapes and produced them to plaintiff, although long after her initial document requests, while others were permanently lost.<sup>177</sup> Thus, in *Zubulake V* the court clarified the obligations of both the parties and their counsel with respect to the preservation, location, and production of ESI.<sup>178</sup>

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<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 220-21. Because defendant's spoliation was not willful, plaintiff had to "demonstrate that a reasonable trier of fact could find that the missing e-mails would support her claims." *Id.* at 221. But the court found "no reason to believe that the lost e-mails would" do so in those particular circumstances. *Id.*

<sup>174</sup> *Id.* at 222.

<sup>175</sup> *Id.*

<sup>176</sup> *Zubulake v. UBS Warburg LLC (Zubulake V)*, 229 F.R.D. 422, 426 (S.D.N.Y. 2004).

<sup>177</sup> *Id.* Plaintiff also presented evidence that some of defendant's employees did not produce documents until nearly two years after her requests. *Id.*

<sup>178</sup> *Id.* at 424. In the court's view, satisfying these obligations starts with the need for effective communication: "Lawyers and their clients need to communicate clearly and effectively with one another to ensure that litigation proceeds efficiently." *Id.*

[43] The court recognized that early in the litigation, prior to the destruction, defense “counsel—both in-house and outside—instructed [key] personnel to retain relevant electronic information.”<sup>179</sup> But the court noted that the issuance of a litigation hold is the beginning, not the end, of a party’s discovery obligations.<sup>180</sup> After the hold is issued, a party and its counsel must “make certain that all sources of potentially relevant information are identified” and retained.<sup>181</sup> Necessarily, then, counsel “must become fully familiar” with the “client’s document retention policies, as well as the client’s data retention architecture.”<sup>182</sup> In the court’s view, this will entail “speaking with [IT] personnel, who can explain system-wide backup procedures and the actual (as opposed to theoretical) implementation of the firm’s recycling policy.”<sup>183</sup>

[44] Further, counsel must communicate with “the ‘key players’ in the litigation, in order to understand how they stored information.”<sup>184</sup> In order to ensure that relevant information is preserved, the court instructed that the litigation hold “should be periodically re-issued so that new employees are aware of it, and so that it is fresh in the minds of all employees.”<sup>185</sup> Finally, it is not enough to just issue the hold—counsel also “should instruct all employees to produce electronic copies of their relevant active

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<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 432.

<sup>181</sup> *Zubulake V*, 229 F.R.D. at 432.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*; see *Pocket Guide*, *supra* note 2, at 4 (noting that counsel should inquire into “whether the information to be discovered has been deleted or is available only on backup tapes or legacy systems”).

<sup>184</sup> *Zubulake V*, 229 F.R.D. at 432. The court noted that “[u]nless counsel interviews each employee, it is impossible to determine whether all potential sources of information have been inspected.” *Id.*

<sup>185</sup> *Id.* at 433.

files,” as well as ensure that “all backup media which the party is required to retain is identified and stored in a safe place.”<sup>186</sup> While this last point seems obvious, the court noted a “primary reason[] that electronic data is lost is ineffective communication with [IT] personnel. By taking possession of . . . all potentially relevant backup tapes, counsel eliminates the possibility that such tapes will be inadvertently recycled.”<sup>187</sup>

[45] Applying these principles, the court recognized that while defendant’s counsel acted “reasonably” in issuing a litigation hold, they were nevertheless “not entirely blameless” in the failure to preserve relevant documents.<sup>188</sup> Primarily, the court faulted counsel for failing to “properly oversee” defendant’s response to the litigation hold, “both in terms of its duty to locate relevant information and its duty to preserve and timely produce that information.”<sup>189</sup> At the same time, however, the court recognized that “the duty to preserve and produce documents rests on the party.”<sup>190</sup> Thus, “[o]nce that duty is made clear . . . either by court order or by instructions from counsel, [a] party is on notice of its obligations and acts at its own peril.”<sup>191</sup> According to the court, defendant’s “employees—for unknown reasons—ignored many of the instructions that

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<sup>186</sup> *Id.* at 434. For an example of noncompliance, *see* *Kier v. UnumProvident Corp.*, No. 02 CIV. 8781 (DLC), 2003 U.S. Dist. LEXIS 14522 (S.D.N.Y. Aug. 22, 2003).

<sup>187</sup> *Zubulake V*, 229 F.R.D. at 434.

<sup>188</sup> *Id.* at 435. Specifically, the court noted that counsel “failed to communicate the litigation hold to all key players.” *Id.* at 436.

<sup>189</sup> *Id.* at 435. The court conceded that counsel are not required to “supervise every step of the document production process,” but nevertheless are “responsible for coordinating [a] client’s discovery efforts.” *Id.* Here, counsel failed to ensure that defendant’s employees complied with the preservation instructions given. *Id.*

<sup>190</sup> *Id.* at 436.

<sup>191</sup> *Id.*

counsel gave.”<sup>192</sup> Finding the resulting destruction of potentially relevant information to be willful,<sup>193</sup> the court ruled to issue an adverse inference instruction about the missing e-mails to the jury.<sup>194</sup>

#### **F. *Philip Morris*—Witnesses Precluded, Monetary Sanction**

[46] In *United States v. Philip Morris USA Inc.*, the court denied the government’s request for an adverse inference.<sup>195</sup> Eleven of defendant’s most senior employees failed to follow appropriate document retention procedures, resulting in the loss of a “significant number” of e-mails.<sup>196</sup> While terming it “astounding” that the employees did not preserve the documents in question, and concluding it had the “authority to impose [an adverse inference] for a discovery violation as serious and irremediable”<sup>197</sup>

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<sup>192</sup> *Zubulake V*, 229 F.R.D. at 436. Indeed, defendant deleted many e-mails “in defiance of explicit instructions not to.” *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 437. A number of other pre-amendment cases involved awards of sanctions based on destruction of electronic information. *See, e.g.*, *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 961 (9th Cir. 2006) (affirming sanction of dismissal and \$65,000 fine against plaintiff who intentionally destroyed computer files during litigation); *Krumwiede v. Brighton Assocs., LLC*, 2006 U.S. Dist. LEXIS 31669, at \*24-25, \*29-32 (N.D. Ill. May 8, 2006) (entering default judgment against plaintiff for intentionally destroying computer data); *Metropolitan Opera Assoc., Inc. v. Local 100*, 212 F.R.D. 178, 222 (S.D.N.Y. 2003) (granting default judgment as discovery sanction against defendant); *In re Prudential Ins. Co. Sales Practice Litig.*, 169 F.R.D. 598, 617 (D.N.J. 1997) (imposing a \$1 million sanction for failure to comply with preservation order); *Wm. T. Thompson Co. v. Gen. Nutrition Corp.*, 593 F. Supp. 1443, 1456 (C.D. Cal. 1984) (entering default judgment based on destruction of electronic information).

<sup>195</sup> *United States v. Philip Morris USA, Inc.*, 327 F. Supp. 2d 21, 25 (D.D.C. 2004). In *Philip Morris*, the federal government alleged defendants violated the RICO statute by allegedly deceiving the American public about the health effects of smoking. *See United States v. Philip Morris Inc.*, 116 F. Supp. 2d 131, 134 (D.D.C. 2000).

<sup>196</sup> *Philip Morris*, 327 F. Supp. 2d at 24. The employees’ actions violated both defendant’s own retention policies as well as a case management order entered by the court. *Id.* at 25.



as [defendant's] e-mail destruction," the court nevertheless found this "far-reaching sanction . . . simply inappropriate."<sup>198</sup> In particular, the court concluded that such a sanction would be disproportionate to the offense and thus "cast[] too wide a net."<sup>199</sup>

[47] The court did, however, preclude the employees who failed to follow the retention procedures from "testifying in any capacity at trial."<sup>200</sup> In addition, the court ordered that defendant pay a monetary sanction of \$2.75 million.<sup>201</sup> The court termed the fine "particularly appropriate" because it had "no way of knowing what, if any, value th[e] destroyed e-mails had to Plaintiff's case; because of that absence of knowledge, it was impossible to fashion a proportional evidentiary sanction that would accurately target the discovery violation."<sup>202</sup>

### G. *Phoenix Four*—Attorneys Sanctioned

[48] In *Phoenix Four, Inc. v. Strategic Resources Corp.*,<sup>203</sup> the court determined that the late production of certain electronic evidence did not

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<sup>197</sup> *Id.* at 25. The court noted that because it did not know what had been destroyed, it was "impossible to accurately assess" the damage done.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*; see also *Thompson v. United States*, 219 F.R.D. 93, 104 (D. Md. 1993) (precluding defendant from relying on e-mails that were not timely produced).

<sup>201</sup> *Philip Morris*, 327 F. Supp. 2d at 26. Elsewhere in the opinion, the court said that "each such individual" who failed to comply with the retention procedures "is being sanctioned in the amount of \$250,000." *Id.* at 26 n.1. But the court levied the fine against the defendant, not the individuals themselves. *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Phoenix Four, Inc. v. Strategic Res. Corp.*, No. 05 CIV. 4837 (HB), 2006 U.S. Dist. LEXIS 32211 (S.D.N.Y. May 22, 2006). Plaintiff sued its investment adviser and the adviser's principals alleging, *inter alia*, fraud and breach of fiduciary duty. *Id.* at \*1-2. Plaintiff was defendant's sole client. *Id.* at \*3.

justify an adverse inference instruction.<sup>204</sup> Shortly before the litigation commenced, defendants vacated their offices.<sup>205</sup> While defendants took about fifty boxes of documents and two servers and computer workstations, they left behind at least ten other workstations.<sup>206</sup> One of the defendants used one of the servers in his new business.<sup>207</sup>

[49] After suit was filed, defendants' counsel advised them of the need to gather and preserve both paper and electronic documents.<sup>208</sup> Defendants responded that they had not located any relevant electronic documents.<sup>209</sup> Subsequently, one of the servers taken from defendants' former offices malfunctioned, necessitating a service call.<sup>210</sup> The repairman discovered about 25 gigabytes of data stored in a portion of the server that was not viewable from a workstation.<sup>211</sup> After determining that much of the information was relevant, defendants' counsel produced it; the production came several months after defendants had represented they had produced all responsive documents.<sup>212</sup>

[50] Plaintiff moved for a number of sanctions based on defendants' failure to preserve and timely produce the relevant electronic

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<sup>204</sup> *Id.* at \*22.

<sup>205</sup> *Id.* at \*5.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at \*6.

<sup>208</sup> *Phoenix Four*, 2006 U.S. Dist. LEXIS 32211, at \*6.

<sup>209</sup> *Id.* Defendants did produce the roughly fifty boxes of documents taken from their old offices. *Id.* at \*7.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* The material was the equivalent of as much as 2,500 boxes of documents. *Id.*

<sup>212</sup> *Id.* at \*8-9.

information.<sup>213</sup> First, plaintiff sought an adverse inference due to defendants abandoning the computer workstations at their former offices.<sup>214</sup> While concluding that defendants were under a duty to preserve at the time of the abandonment, and thus were grossly negligent in leaving the computers behind,<sup>215</sup> the court nevertheless found an adverse inference inappropriate.<sup>216</sup> In particular, the court noted that plaintiff had not come forward with any proof the abandoned evidence would have supported its claim, as required for an adverse inference.<sup>217</sup>

[51] Plaintiff also sought an adverse inference based on defendants' late production of the documents found on the server.<sup>218</sup> Here, the court focused on defense counsel's role in the failure to timely produce the information.<sup>219</sup> Relying on *Zubulake V*, the court noted that counsel has a duty to "properly communicate with its client to ensure that 'all sources of relevant information [are] discovered.'"<sup>220</sup> The duty is not "confined to a request for documents," but rather encompasses a "search for *sources* of information."<sup>221</sup>

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<sup>213</sup> *Phoenix Four*, 2006 U.S. Dist. LEXIS 32211, at \*2.

<sup>214</sup> *Id.* at \*13-14.

<sup>215</sup> *Id.* at \*15. The court, however, concluded that the gross negligence alone did not support an inference that the discarded evidence was favorable to plaintiff, based in part on the "upheaval in the defendants' business." *Id.*

<sup>216</sup> *Id.* at \*15-16.

<sup>217</sup> *Id.* Indeed, plaintiff conceded that it would "never know whether there were favorable documents" that were destroyed. *Id.* at \*15.

<sup>218</sup> *Phoenix Four*, 2006 U.S. Dist. LEXIS 32211, at \*16.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.* (citation omitted).

<sup>221</sup> *Id.* at \*17.

[52] The court concluded that defense counsel “never undertook the more methodical survey of [defendants’] sources of information that Judge Scheindlin outlined in *Zubulake V.*”<sup>222</sup> Rather, according to the court, defense counsel “simply accepted the defendants’ representation that . . . there were no computers or electronic collections to search.”<sup>223</sup> Had defense counsel “been diligent, it might have asked—as it should have—what had happened to the computers [defendants] used at [their former office.] This question alone would have alerted [defense counsel] to the existence of the server that the defendants had taken with them from their former office.”<sup>224</sup> The court emphasized that counsel’s duty was not to “retrieve information from a difficult-to-access source, such as the server here, but rather to ascertain whether any information is stored there.”<sup>225</sup>

[53] Finding that defense counsel’s conduct amounted to gross negligence,<sup>226</sup> the court then concluded the delinquent produced evidence would support plaintiff’s claims.<sup>227</sup> Thus, plaintiff “established the elements necessary for an adverse inference instruction.”<sup>228</sup> The court,

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<sup>222</sup> *Id.*

<sup>223</sup> *Phoenix Four*, 2006 U.S. Dist. LEXIS 32211, at \*17.

<sup>224</sup> *Id.* at \*18.

<sup>225</sup> *Id.* (footnote omitted). The court’s analysis was “guided by the proposed amendments to Federal Rule of Civil Procedure 26,” which became effective several months after the ruling. *Id.* The court characterized the proposed amendments as “essentially codify[ing] the teaching of *Zubulake IV & V*, of which [defense counsel] should have been well aware.” *Id.* at \*19.

<sup>226</sup> *Id.* at \*19-20. Further, the court held defendants were “at the least negligent in carelessly representing to counsel that ‘there were no computers to search’ when they knew that they still possessed, and were actually using at least one of,” the old servers. *Id.* (alteration in original).

<sup>227</sup> *Id.* at \*20-21. Indeed, the court termed the documents “central” to plaintiffs’ claims. *Id.* at \*21.

<sup>228</sup> *Phoenix Four*, 2006 U.S. Dist. LEXIS 32211, at \*21.

however, declined to award “such a severe sanction,” reasoning that defendants had “come forward with the evidence, even if after the close of discovery.”<sup>229</sup>

[54] Similarly, the court denied plaintiff’s request for various sanctions pursuant to Federal Rule of Civil Procedure 37,<sup>230</sup> including that: (1) defendants be precluded from raising certain defenses; (2) defendants be precluded from relying on certain of the late produced documents; and (3) certain facts be deemed admitted against defendants.<sup>231</sup> Again, the court concluded that since the documents were produced, albeit late, any type of preclusion sanction was “not warranted.”<sup>232</sup>

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<sup>229</sup> *Id.* In stark contrast, in *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.*, 2005 WL 679071, at \*5 (Fla. Cir. Ct. Mar. 1, 2005), *rev’d on other grounds*, 955 So. 2d 1124 (Fla. Dist. Ct. App. 2007), *later proceeding at* 20 So. 3d 952 (Fla. Dist. Ct. App. 2009), defendant’s failure to preserve and search backup tapes led to a large number of relevant e-mails being irretrievably lost in a suit alleging fraud in a corporate acquisition. The failure to preserve evidence was exacerbated by defendant’s and “its counsel’s lack of candor [which] frustrated the court and opposing counsel’s ability to be fully and timely informed.” *Id.* The court ultimately found defendant had engaged in a “willful and gross abuse of its discovery obligations.” *Id.* In response, the court granted a number of severe sanctions, including rendering a partial default judgment, and ordering that (1) defendant would bear the burden of proving it lacked knowledge of the alleged fraud; and (2) allowing the jury to derive whatever inferences it chose from the facts related to defendant’s discovery failures. *Id.* at \*7-8. Not surprisingly, the jury ultimately returned a verdict in favor of plaintiff and awarded damages in the amount of approximately \$1.6 billion. See Susan Beck, *Morgan Stanley’s Recipe for Disaster*, CORPORATE COUNSEL (ALM), June 5, 2006.

<sup>230</sup> Rule 37 provided: “A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed.” *Phoenix Four*, 2006 U.S. Dist. LEXIS 32211, at \*23 (*quoting* FED. R. CIV. P. 37(c)(1) (2003)).

<sup>231</sup> *Phoenix Four*, 2006 U.S. Dist. LEXIS 32211, at \*25.

<sup>232</sup> *Id.* at \*26.

[55] The court then addressed plaintiff's request for monetary sanctions.<sup>233</sup> Noting that defendants' late production "severely disrupted the progress of th[e] litigation," the court concluded that "monetary sanctions w[ould] most appropriately serve the prophylactic, punitive, and remedial purposes of discovery sanctions."<sup>234</sup> Thus, the court ordered that defendants reimburse plaintiff for its costs and attorney's fees associated with bringing the motion.<sup>235</sup> Interestingly, this sanction was also levied against defense counsel; that is, the sanction was to "be borne by the [defendants] and [defense counsel] equally, and not by the [d]efendants' insurance carriers."<sup>236</sup>

### III. DECEMBER 2006 AMENDMENTS TO THE FEDERAL RULES

[56] With this background, it is now useful to examine the 2006 amendments to the Federal Rules of Civil Procedure dealing with e-discovery. As noted earlier, in recent years the increasing prevalence of electronic information has led to a corresponding increase in e-discovery disputes.<sup>237</sup> Enacted in 1970, however, the prior version of the Federal

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<sup>233</sup> *Id.* at \*27. In this regard, the court noted that even when it "denies other requested relief, it may still impose monetary sanctions for spoliation and other discovery misconduct." *Id.*

<sup>234</sup> *Id.* at \*28.

<sup>235</sup> *Id.* at \*28-29. The court also ordered that defendants and their counsel pay \$10,000 each for the re-depositions of three witnesses for "the limited purpose of inquiring into issues raised by the documents recovered from the server." *Id.* at \*29. Ultimately, the court awarded plaintiff \$45,161.82 in fees and costs. *Phoenix Four, Inc. v. Strategic Resources Corp.*, 2006 U.S. Dist. LEXIS 52402, at \*2 (S.D.N.Y. Aug. 1, 2006).

<sup>236</sup> *Phoenix Four*, 2006 U.S. Dist. LEXIS 32211, at \*29. The court did not identify the basis of its authority to sanction defense counsel in addition to defendants. *Id.* Notably, "Rule 37(c)(1) does not permit sanctions against counsel." *Grider v. Keystone Health Plan Central, Inc.*, 580 F.3d 119, 141 (3d Cir. 2009); *Maynard v. Nygren*, 332 F.3d 462, 470 (7th Cir. 2003); *Apex Oil Co. v. Belcher Co., Inc.*, 855 F.2d 1009, 1014 (2d Cir. 1988).

<sup>237</sup> See JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE (2005) at 23,

Rules did not contemplate the subsequent increasing importance of e-discovery.<sup>238</sup> Thus, prior to the amendments to the Federal Rules, courts tended to resolve disputes about such discovery on an ad hoc basis.<sup>239</sup> Correspondingly, various disparate state and local rules<sup>240</sup> were created to fill the “gap between existing discovery rules and practice . . . .”<sup>241</sup> Given the likelihood of inconsistency and confusion resulting from “a patchwork

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<http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2005.pdf>, [hereinafter STANDING COMMITTEE REPORT], (“[D]iscovery of [ESI] is becoming more time-consuming, burdensome, and costly.”); *supra* Section II.

<sup>238</sup> *Id.* Prior to the amendments, Federal Rules provided “inadequate guidance” on e-discovery. FED. R. CIV. P. 34 advisory committee’s notes (“[As] originally adopted, Rule 34 focused on discovery of ‘documents’ and ‘things.’ In 1970, Rule 34(a) was amended to include discovery of data compilations, anticipating that the use of computerized information would increase. [But] [s]ince then, the growth in [ESI] and in the variety of systems for creating and storing such information has been dramatic.”); Symposium, *Managing Electronic Discovery*, *supra* note 19, at \*5 (“It was time to bring the discovery rules more in line with the demands of modern practice.”).

<sup>239</sup> See STANDING COMMITTEE REPORT, *supra* note 237, at 23 (“Developing case law on discovery into [ESI] under the current rules is not consistent and is necessarily limited by the specific facts involved.”); FED. R. CIV. P. 34 advisory committee’s notes (Under the prior version of Rule 34, “[l]awyers and judges interpreted the term ‘documents’ to include [ESI] because it was obviously improper to allow a party to evade discovery obligations on the basis that the label had not kept pace with changes in information technology. But it has become increasingly difficult to say that all forms of [ESI], many dynamic in nature, fit within the traditional concept of a ‘document.’”); Myles V. Lynk, et al., *Panel Discussion: Judicial Conference Advisory Committee on the Federal Rules of Civil Procedure*, 73 *FORDHAM L. REV.* 119, 120 (Oct. 2004) (noting that prior to amendments to Federal Rules, there was “no national uniformity in [the] emerging area of electronic discovery”); *supra* Section II.

<sup>240</sup> See *Pocket Guide*, *supra* note 2, at 1 & n.1 (listing local rules addressing e-discovery); Thomas Y. Allman, *The Impact of the Proposed Federal E-Discovery Rules*, 12 *RICH. J.L. & TECH.* 13, ¶ 3 & nn.9-10 (2006).

<sup>241</sup> See STANDING COMMITTEE REPORT, *supra* note 237, at 23 (noting that a number of courts were considering adopting local rules prior to the amendments to the Federal Rules).

of rules and requirements,”<sup>242</sup> the amendments to the Federal Rules sought to bring uniformity by specifically providing processes for the discovery of ESI.<sup>243</sup>

[57] In sum, the amendments provide that like other relevant information, ESI is discoverable; parties must preserve and, if otherwise discoverable, produce ESI; counsel must understand ESI procedures; and courts will have the means to address difficulties, through cost-shifting and other means.<sup>244</sup> The specific amendments, which affected Rules 16(b), 26(a), 26(b)(2), 26(b)(5), 26(f), 33, 34(a), 34(b), 37(f), and 45, as well as Form 35, are briefly summarized *infra*.<sup>245</sup>

#### A. Early Attention to ESI—Rules 16(b) and 26(f)

[58] As amended, in connection with the initial planning session and subsequent scheduling order, Rules 16(b) and 26(f) require the parties to

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<sup>242</sup> *Id.* at 23-24 (recognizing the “costs of complying with unclear and at times vague discovery obligations, which vary from district to district in ways unwarranted by local variations in practice, are becoming increasingly problematic”).

<sup>243</sup> *See id.* at 23 (noting need for “national rules adequate to address the issues raised by electronic discovery”); Allman, *supra* note 240, at \*1 (explaining that the amendments resulted from a “conviction that e-discovery presents unique issues requiring uniform national rules”).

<sup>244</sup> *See* Craig Ball, *Hitting the High Points of the New E-Discovery Rules*, LAW PRACTICE TODAY, Oct. 2006, at 2 (“ESI is discoverable; Clients must preserve and produce ESI; Lawyers must understand how to request, protect, review and produce ESI; The courts have the tools to rectify abusive or obstructive electronic discovery”).

<sup>245</sup> Effective December 1, 2007, the Federal Rules were revised to reflect stylistic changes. *See* COMM. ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., PRELIMINARY DRAFT OF PROPOSED STYLE REVISION OF THE FEDERAL RULES OF CIVIL PROCEDURE at v, available at [http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Prelim\\_draft\\_proposed\\_pt1.pdf](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Prelim_draft_proposed_pt1.pdf). No substantive changes were intended by these amendments, as they were “intended to be primarily stylistic only.” *Id.* For clarity of reference, this article will discuss the versions of the Rules effective as of December 1, 2007.



confer early on regarding ESI.<sup>246</sup> New Rule 26(f) provides that the parties' discovery plan must address "any issues about disclosure or discovery of [ESI], including the form or forms in which it should be produced".<sup>247</sup> Thus, at their initial meet and confer the parties should discuss not only the basic question of whether there will be discovery of ESI and what types of such information each party has, but also "whether the information to be discovered has been deleted or is available only on backup tapes or legacy systems; the anticipated schedule for production and the format and media of that production; the difficulty and cost of producing the information and reallocation of costs, if appropriate; and the responsibilities of each party to preserve ESI."<sup>248</sup> As per *Zubulake*,<sup>249</sup> for the meet and confer to be effective "attorneys must be familiar with how their clients use computers on a daily basis and understand what

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<sup>246</sup> See STANDING COMMITTEE REPORT, *supra* note 237, at 26 (noting that under the new Rule 26(f), "the parties' conference is to include discussion of any issues relating to disclosure or discovery of [ESI]"); *Pocket Guide*, *supra* note 2, at 4 (noting parties "should address ESI in the earliest stages of the litigation, and judges should encourage them to do so"). Unless exempted from the initial disclosure requirements, the "parties must confer as soon as practicable—and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b)." FED. R. CIV. P. 26(f)(1).

<sup>247</sup> FED. R. CIV. P. 26(f)(3)(C). Rule 26(f) has been called the "most important e-discovery rule . . . because it gives the parties an opportunity to reach agreement on the 'contours' of the civil litigation in which they are engaged and, just as importantly, agree on what they disagree about and present their disputes for early judicial resolution . . ." Ronald J. Hedges, *The Most Important E-Discovery Rule*, L. TECH. NEWS, May 19, 2009.

<sup>248</sup> *Pocket Guide*, *supra* note 2, at 4-5; see STANDING COMMITTEE REPORT, *supra* note 237, at 26-27.

<sup>249</sup> *Zubulake V*, 229 F.R.D. 422, 432 (S.D.N.Y. 2004). In fact, the author of the *Zubulake* decisions, Judge Scheindlin, was on the drafting committee for the revised Federal Rules. Judge Shira Scheindlin, *Resume*, FORDHAM UNIVERSITY, <http://law.fordham.edu/faculty/shiraaschiendlin.htm> (last visited Feb. 2, 2012).

information is available, how routine computer operations may change it, and what is entailed in producing it.”<sup>250</sup>

[59] Under amended Rule 16(b), the resulting scheduling order will memorialize the parties’ obligations regarding the discovery of ESI.<sup>251</sup> In addition, as a companion piece to Rule 26’s so-called “clawback” provision, discussed *infra*,<sup>252</sup> the scheduling order will detail any agreements the parties reach regarding asserting privilege or work product claims after production of ESI.<sup>253</sup>

### B. Initial Disclosures of ESI—Rule 26(a)(1)

[60] Initial disclosure requirements under Rule 26 have likewise been modified in several ways. Most significantly, Rule 26(a)(1)(A)(ii) was amended to add ESI to the voluntary disclosure requirement.<sup>254</sup> Thus, without a discovery request, a party must “provide . . . a copy—or a description by category and location” of any ESI in its possession that it

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<sup>250</sup> See *Pocket Guide*, *supra* note 2, at 5. Indeed, for a “meaningful Rule 26(f) conference [to] take place,” the attorneys involved must be adequately informed about their clients’ IT systems. *Id.* at 4-5 (“Attorneys need to identify those persons who are most knowledgeable about the client’s computer system and meet with them.”). It may even be advisable to have IT personnel present at the meet and confer. See *Pocket Guide*, *supra* note 2, at 5; Symposium, *Managing Electronic Discovery*, *supra* note 19, at \*15 (“Judges may actually come to require more and more that lawyers bring their IT people to the meet-and-confer.”).

<sup>251</sup> FED. R. CIV. P. 16(b)(3)(B)(iii)-(iv). Form 35 has also been amended to “call for a report to the court about the results of” the meet and confer. FED. R. CIV. P. 16 advisory committee’s note.

<sup>252</sup> See *infra* notes 276-92 and accompanying text.

<sup>253</sup> See FED. R. CIV. P. 16(b)(3)(B)(iv); STANDING COMMITTEE REPORT, *supra* note 237, at 27 (“The parties are also directed to discuss whether they can agree on approaches to asserting claims of privilege or work-product protection after inadvertent production in discovery.”); *Pocket Guide*, *supra* note 2, at 5.

<sup>254</sup> FED. R. CIV. P. 26(a)(1)(A)(ii).

may use to support its claim or defense, unless the ESI would be used solely for impeachment.<sup>255</sup>

[61] This provision does not address whether or to what extent the inaccessibility of a particular piece of information impacts a party's duty to disclose.<sup>256</sup> The *Manual for Complex Litigation, Fourth*, which was published before the amended Federal Rules went into effect, provides that "parties have a duty to conduct a reasonable investigation pursuant to disclosure, particularly when a party possesses extensive computerized data, which may be subject to disclosure or later discovery."<sup>257</sup> Left unstated is whether this "reasonable investigation" should reach inaccessible information.<sup>258</sup> Other commentators, however, have suggested that while a party should "identify the nature of its computer system—including back-up system, network system, and e-mail system—as well as any software applications used to operate those systems," the party is not required to "attempt to search back-up systems or to retrieve deleted files in an exhaustive effort to locate all potentially relevant evidence as part of this initial disclosure obligation."<sup>259</sup>

### C. Scope of Discovery of ESI—Rules 26(b)(1) and 26(b)(2)

[62] Amended Rule 26(b) incorporates the concept of two-tiered discovery which had already existed under the Rules, and applies it to

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<sup>255</sup> *Id.*; see Ball, *supra* note 244, at 2. Initial disclosures must be made within 14 days of the parties' Rule 26(f) conference unless a different time is stipulated or ordered by the court. FED. R. CIV. P. 26(a)(1)(C).

<sup>256</sup> See FED. R. CIV. P. 26(a)(1)(A)(ii).

<sup>257</sup> MANUAL FOR COMPLEX LITIGATION (FOURTH) § 11.13 (2004).

<sup>258</sup> *Id.* The Manual does note, however, that actual production of initial disclosures is not required; rather, a party only has to identify relevant information and materials. *Id.*; see Fed. R. Civ. P. 26(a)(1)(A)(ii).

<sup>259</sup> *Pocket Guide, supra* note 2, at 6 (quoting 7 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 37A.20[2] (3d ed. 2005)).

ESI.<sup>260</sup> In particular, amended Rule 26(b)(2)(B) introduces the principle of “reasonable accessibility,”<sup>261</sup> establishing that a “party need not provide discovery of [ESI] from sources that the party identifies as not reasonably accessible because of undue burden or cost.”<sup>262</sup> On a motion either to compel or for protective order, the party refusing discovery bears the burden of showing the information sought is not reasonably accessible.<sup>263</sup> The party seeking the ESI “may need discovery to test the assertion that the information is not reasonably accessible.”<sup>264</sup> This discovery might include sampling information contained on the sources identified as not reasonably accessible, inspecting those sources, or taking depositions of persons with knowledge of the supposedly inaccessible sources.<sup>265</sup>

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<sup>260</sup> Symposium, *Managing Electronic Discovery*, *supra* note 19, at \*9. The first tier is “party-managed discovery,” which requires no court order and encompasses information that is relevant, not privileged, and—in the case of ESI—“reasonably accessible.” *Id.*; *see* FED. R. CIV. P. 26(b)(2)(B); FED. R. CIV. P. 26 advisory committee’s notes. The second tier is “court-supervised discovery,” meaning that “[c]ourt approval is required before the information can be obtained.” Symposium, *Managing Electronic Discovery*, *supra* note 19, at \*9. ESI that is not “reasonably accessible” is now included in the second tier. *Id.*; *see* FED. R. CIV. P. 26(b)(2)(B).

<sup>261</sup> *See* FED. R. CIV. P. 26(b)(2)(B). The “responding party must . . . identify, by category or type, the sources containing potentially responsive information that it is neither searching nor producing.” Fed. R. Civ. P. 26 advisory committee’s notes.

<sup>262</sup> FED. R. CIV. P. 26(b)(2)(B); *see* FED. R. CIV. P. 26 advisory committee’s notes (recognizing that “some sources of [ESI] can be accessed only with substantial burden and cost. In a particular case, these burdens and costs may make the information on such sources not reasonably accessible.”).

<sup>263</sup> FED. R. CIV. P. 26(b)(2)(B); *see* Ball, *supra* note 244, at 3 (“[I]f an opponent objects, your client must prove inaccessibility in court.”); FED. R. CIV. P. 26 advisory committee’s notes (“[T]he responding party must show that the identified sources of information are not reasonably accessible because of undue burden or cost.”).

<sup>264</sup> *Pocket Guide*, *supra* note 2, at 8.

<sup>265</sup> *See* Symposium, *Managing Electronic Discovery*, *supra* note 19, at \*11 (“Courts are using methods like sampling, for example, ordering parties to restore a small portion of a back-up tape, or one of several back-up tapes, in order to see both how hard it is to get to the information—what is the nature and extent of the forensic or other kind of work

[63] Even if inaccessibility is demonstrated, the court may still order discovery if the requesting party establishes “good cause.”<sup>266</sup> In assessing good cause, the following factors are relevant:

(1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources;<sup>267</sup> (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties’ resources.<sup>268</sup>

The good cause determination is subject to the proportionality test found in Rule 26(b)(2)(C), which essentially limits discovery where the cost and burden outweighs the potential benefit.<sup>269</sup>

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necessary to make this information accessible—and how valuable the information really is.”).

<sup>266</sup> FED. R. CIV. P. 26(b)(2)(B). The burden of showing good cause is on the party seeking discovery. *Id.*

<sup>267</sup> Indeed, it has been suggested that parties should “first sort through the information that can be provided from easily accessed sources and then determine whether it is necessary to search the less-accessible sources.” *Pocket Guide, supra* note 2, at 8.

<sup>268</sup> FED. R. CIV. P. 26 advisory committee’s notes.

<sup>269</sup> FED. R. CIV. P. 26(b)(2)(C). In theory, this is the case, but some commentators have noted that proportionality limits “have not proven effective.” *See, e.g.,* Symposium, *Managing Electronic Discovery, supra* note 19, at \*10. Thus, the amendments also seek to “make those proportionality limits more effective in this new area where they are the most important.” *Id.*

[64] While good cause and proportionality is established on a case by case basis,<sup>270</sup> whether discovery of challenged ESI will be allowed “often turns on the type of computer data being sought.”<sup>271</sup> Thus, the production of “active data, available to the responding party in the ordinary course of business, is most likely to satisfy the proportionality test.”<sup>272</sup> Conversely, systems data, such as “when people logged on and off a computer or network, the applications and passwords they used, and what websites they visited,” can be more costly to produce, and consequently less likely to satisfy the proportionality test.<sup>273</sup> If good cause is established, the court “may specify conditions for the discovery,”<sup>274</sup> such as cost-shifting.<sup>275</sup>

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<sup>270</sup> See FED. R. CIV. P. 26 advisory committee’s notes (“circumstances of the case” must be considered in determining whether good cause is shown); Symposium, *Managing Electronic Discovery*, *supra* note 19, at \*10 (good cause determination is “case by case”).

<sup>271</sup> *Pocket Guide*, *supra* note 2, at 7.

<sup>272</sup> *Id.* “Active electronic records are generally those currently being created, received, or processed, or that need to be accessed frequently and quickly.” *Id.* Of course, active data is generally considered accessible. *Zubulake I*, 217 F.R.D. 309, 318-19 (S.D.N.Y. 2003).

<sup>273</sup> *Pocket Guide*, *supra* note 2, at 7. Other types of data may be even more removed from the ordinary course of business and therefore expensive to retrieve and review, i.e., inaccessible. These include “offline archival media, backup tapes designed for restoring computer systems in the event of a disaster, deleted files, and legacy data, which were created on now-obsolete computer systems with obsolete operating and computer software.” *Id.* at 7–8.

<sup>274</sup> FED. R. CIV. P. 26(b)(2)(B).

<sup>275</sup> FED. R. CIV. P. 26 advisory committee’s notes (“The conditions may . . . include payment by the requesting party of part or all of the reasonable costs of obtaining information from sources that are not reasonably accessible.”). In addition, the “conditions may take the form of limits on the amount, type, or sources of information required to be accessed and produced.” *Id.*; see Ball, *supra* note 244, at 3 (after good cause is shown, party’s “recourse is to ask the court to tailor the production order to minimize” burden).

#### D. Clawback Provision—Rule 26(b)(5)(B)

[65] The typical volume of ESI in a given case frequently increases the time, effort, and expense required to perform a privilege review prior to production.<sup>276</sup> Indeed, given the universe of responsive information, it can be difficult to ensure that all ESI is reviewed for privilege before production.<sup>277</sup> Amended Rule 26(b)(5)(B) recognizes this increased risk of waiver and establishes a procedure for parties to attempt to assert attorney-client or work product privilege after ESI has been produced.<sup>278</sup>

[66] Under this so-called “clawback” or “sneak-peek” procedure, if information produced in discovery is subject to a claim of privilege or work product protection, the party asserting the privilege may “notify any party that received the information of the claim and the basis for it.”<sup>279</sup> After receiving notice, the opposing party must “promptly return, sequester, or destroy the specified information and any copies it has . . . .”<sup>280</sup> Further, the receiving party “must not use or disclose the information until the claim is resolved [and] must take reasonable steps to retrieve the information if the party disclosed it before being notified” of the privilege

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<sup>276</sup> See FED. R. CIV. P. 26 advisory committee’s notes (“[T]he burdens and costs of accessing and retrieving the information”).

<sup>277</sup> See Symposium, *Managing Electronic Discovery*, *supra* note 19, at \*7 (“The likelihood of inadvertent production of privileged information is greater with electronic information than it was with paper, for [a number of reasons]: its volume, its dynamic nature, the way in which it is stored, and the way it appears when viewed on a screen or printed out.”); Ball, *supra* note 244, at 4 (parties are “fast losing the ability to review individual items, and it’s increasingly common for privileged and non-privileged content to insidiously mix”).

<sup>278</sup> See generally FED. R. CIV. P. 26(b)(5)(B).

<sup>279</sup> *Id.* The notice should be in writing unless circumstances dictate otherwise, such as asserting the claim during a deposition. FED. R. CIV. P. 26 advisory committee’s notes. In addition, the “notice should be as specific as possible in identifying the information and stating the basis for the claim.” *Id.*

<sup>280</sup> FED. R. CIV. P. 26(b)(5)(B).

claim.<sup>281</sup> The receiving party may present the information to the court under seal for a determination of whether the privilege applies.<sup>282</sup> It is incumbent on the producing party to preserve the information until the claim is decided.<sup>283</sup>

[67] By its nature, the “clawback” procedure does not address the substantive question of whether a privilege that is not asserted until after production is waived.<sup>284</sup> Rather, courts “should rely on developed principles to determine whether, and under what circumstances, waiver results from inadvertent production.”<sup>285</sup> Thus, for example, “unreasonable delay in seeking the return of privileged information may give rise to a waiver.”<sup>286</sup>

[68] Significantly, any agreement reached by the parties under Rules 26(f) and 16(b) regarding post-production assertions of privilege will “ordinarily control” over contrary procedures set forth in Rule 26(b)(5).<sup>287</sup> The substantive law of privilege is beyond the scope of the Federal Rules of Civil Procedure, however.<sup>288</sup> Thus, while any such agreement may bind the parties, in the absence of substantive law it may not be effective

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<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

<sup>284</sup> See FED. R. CIV. P. 26 advisory committee’s notes (“In most circumstances, a party who receives information under such an arrangement cannot assert that production of the information waived a claim of privilege or of protection as trial-preparation material.”).

<sup>285</sup> *Pocket Guide, supra* note 2, at 16.

<sup>286</sup> *Id.*

<sup>287</sup> FED. R. CIV. P. 26 advisory committee’s notes; see *Pocket Guide, supra* note 2, at 16. It should be noted that the court is not authorized to “require the parties to enter into such an arrangement, absent their agreement.” *Id.* at 15.

<sup>288</sup> *Pocket Guide, supra* note 2, at 15.



against third parties in subsequent litigation.<sup>289</sup> Fortunately, such substantive law has recently been enacted in the form of Federal Rule of Evidence 502.<sup>290</sup> Pursuant to Rule 502, a “Federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other Federal or State proceeding.”<sup>291</sup> The Rule also codifies the effect in later litigation of agreements among the parties regarding disclosure of privileged information: unless incorporated into a court order, such agreements only bind the parties to the agreement.<sup>292</sup>

### E. Form of Production—Rules 33 and 34

[69] Amendments to Rule 33(d) make clear that the option to produce business records in response to an interrogatory includes ESI.<sup>293</sup> Notably, the option to produce business records applies only where “the burden of

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<sup>289</sup> See *Hopson v. Mayor and City Council of Baltimore*, 232 F.R.D. 228, 235 (D. Md. 2005) (“[E]ven if [such agreements] are enforceable as between the parties that enter into them, it is questionable whether they are effective against third parties.”).

<sup>290</sup> President Bush signed the law enacting Rule 502 on September 19, 2008. See Pub. L. No. 110-322, § 1(a), 122 Stat. 3537 (2008). It applies in all cases commenced after that date and, “insofar as is just and practicable,” in all cases pending on that date. See Pub. L. No. 110-322, § 1(c), 122 Stat. 3538 (2008). The enactment of Rule 502 has been hailed as the “biggest event of 2008 . . . .” Cecil Lynn III, et al., *E-Discovery Rulings: 2008 in Review*, LAW TECHNOLOGY NEWS, Jan. 9, 2009, at 1.

<sup>291</sup> FED. R. EVID. 502(d); see, e.g., *Rhoads Indus. v. Building Materials Corp.*, 254 F.R.D. 216 (E.D. Pa. 2008); *Relion, Inc. v. Hydra Fuel Cell Corp.*, 2008 U.S. Dist. LEXIS 98400 (D. Or. Dec. 4, 2008). One key emerging and often outcome-determinative issue in Rule 502 cases has been which party bears the burden of establishing waiver. Compare *Rhoads*, 254 F.R.D. at 223, 227 (burden on party claiming waiver), with *Relion*, 2008 U.S. Dist. LEXIS 98400, at \*5 (burden on party asserting privilege).

<sup>292</sup> FED. R. EVID. 502(e).

<sup>293</sup> FED. R. CIV. P. 33(d) (“If the answer to an interrogatory may be determined by examining, auditing, compiling, abstracting, or summarizing a party’s business records (including [ESI]),” the responding party may produce the relevant records in responding to the interrogatory).

deriving or ascertaining the answer will be substantially the same for either party . . . .”<sup>294</sup> In addition, the responding party must ensure that its opponent “can locate and identify [the business records] ‘as readily as can the party served,’” and “must give the interrogating party a ‘reasonable opportunity to examine, audit, or inspect’ the information.”<sup>295</sup> Thus, depending on the circumstances, the responding party may be required to “provide some combination of technical support, information on application software, or other assistance.”<sup>296</sup> Indeed, it is conceivable that the responding party may have to “provide direct access to its electronic information system, but only if that is necessary to afford the requesting party an adequate opportunity to derive or ascertain the answer to the interrogatory.”<sup>297</sup>

[70] Rule 34(a) now specifically provides that ESI is subject to production.<sup>298</sup> The amended Rule does not provide a precise definition of ESI.<sup>299</sup> Rather, the Rule is “expansive and includes any type of

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<sup>294</sup> *Id.*

<sup>295</sup> FED. R. CIV. P. 33 advisory committee’s notes.

<sup>296</sup> *Id.*

<sup>297</sup> *Id.* Significantly, however, the amendments are not meant to “create a routine right of direct access to a party’s electronic information system, although such access might be justified in some circumstances.” FED. R. CIV. P. 34 advisory committee’s notes.

<sup>298</sup> FED. R. CIV. P. 34 (a)(1)(A). In so amending the Rule, the drafting Committee confirmed that consistent with prior case law “discovery of [ESI] stands on equal footing with discovery of paper documents.” FED. R. CIV. P. 34 advisory committee’s notes; *see, e.g., Zubulake I*, 217 F.R.D. 309, 317 (S.D.N.Y. 2003); *Rowe Entm’t, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 428 (S.D.N.Y. 2002).

<sup>299</sup> FED. R. CIV. P. 34; FED. R. CIV. P. 34 advisory committee’s notes. Recognizing that the “rapidity of technological change” counseled “against a limiting or precise definition of [ESI],” the amendment is “intended to be broad enough to cover all current types of computer-based information . . . .” *Id.* Moreover, the “same broad meaning” found in Rule 34 likewise applies to references to ESI in Rules 26(a)(1), 26(b)(2), 26(b)(5)(B), 26(f), 34(b), 37(f), and 45. *Id.*

information that is stored electronically.”<sup>300</sup> The Rule now applies to information “stored in any medium,” in an attempt to capture “future developments in computer technology.”<sup>301</sup>

[71] The requesting party “may specify the form or forms in which [ESI] is to be produced.”<sup>302</sup> The responding party may object to the requested form; if it does so—“or if no form was specified in the request—the party must state the form or forms it intends to use.”<sup>303</sup> If a request “does not specify a form for producing [ESI], a party must produce it in a form . . . in which it is ordinarily maintained or in a reasonably usable form . . . .”<sup>304</sup> The option to produce in a reasonably usable form, however, “does not mean that a responding party is free to convert [ESI] from the form in which it is ordinarily maintained to a

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<sup>300</sup> FED. R. CIV. P. 34 advisory committee’s notes; see Ball, *supra* note 244, at 1 (ESI encompasses any “potentially relevant data that’s stored on computers, disks, tape, gadgets, and the Internet.”).

<sup>301</sup> FED. R. CIV. P. 34 advisory committee’s notes. As noted previously, case law since the last amendment to Rule 34 in 1970 had frequently tried to stretch the definition of “document” to fit ESI. See *supra* notes 238 & 239 and accompanying text.

<sup>302</sup> FED. R. CIV. P. 34(b)(1)(C). The requesting party is not required to specify the form of production. FED. R. CIV. P. 34 advisory committee’s notes. Indeed, the rule recognizes that the “requesting party may not have a preference.” *Id.*

<sup>303</sup> FED. R. CIV. P. 34(b)(2)(D). Failure to specify the form to be used prior to production “runs a risk that the requesting party can show that the produced form is not reasonably usable and that it is entitled to production of some or all of the information in an additional form.” FED. R. CIV. P. 34 advisory committee’s notes; see *Miller v. IBM*, No. C 02-2118 MJJ (MEJ), 2006 U.S. Dist. LEXIS 22506, \*19 (N.D. Cal. Apr. 14, 2006) (requiring plaintiff to produce e-mail with attachments physically attached or provide specific references to enable defendant to identify which attachments belonged to which e-mails).

<sup>304</sup> FED. R. CIV. P. 34(b)(2)(E)(ii). If the parties cannot agree on the form for production, they must meet and confer under Rule 37(a)(2)(B) and attempt to resolve the issue. FED. R. CIV. P. 34 advisory committee’s notes. In the event of a motion to compel, the court has wide discretion in picking a form of production, i.e., it “is not limited to the forms initially chosen by the requesting party, stated by the responding party, or specified in this rule for situations in which there is no court order or party agreement.” *Id.*

different form that makes it more difficult or burdensome for the requesting party to use the information efficiently in the litigation.”<sup>305</sup> Thus, similarly to amended Rule 33,<sup>306</sup> under new Rule 34(a) a responding party may be required to “provide some reasonable amount of technical support, information on application software, or other reasonable assistance to enable the requesting party to use the information.”<sup>307</sup> In any event, a party is not required to produce the same ESI “in more than one form.”<sup>308</sup>

#### F. A Safe Harbor? Rule 37

[72] Rule 37(e) has been amended to address sanctions for the failure to produce ESI.<sup>309</sup> The rule now provides that “[a]bsent exceptional circumstances,” a court may not impose sanctions based on the failure to provide ESI “lost as a result of the routine, good faith operation of an electronic information system.”<sup>310</sup> As has been borne out by the relevant case law,<sup>311</sup> however, the protection provided by this supposed “safe

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<sup>305</sup> FED. R. CIV. P. 34 advisory committee’s notes. For example, if “the responding party ordinarily maintains the information it is producing in a way that makes it searchable by electronic means, the information should not be produced in a form that removes or significantly degrades this feature.” *Id.*

<sup>306</sup> *See supra* note 296 and accompanying text.

<sup>307</sup> FED. R. CIV. P. 34 advisory committee’s notes.

<sup>308</sup> FED. R. CIV. P. 34(b)(2)(E)(iii).

<sup>309</sup> FED. R. CIV. P. 37(e).

<sup>310</sup> *Id.* The amendment thus recognizes that the “‘routine operation’ of computer systems includes the alteration and overwriting of information, often without the operator’s specific direction or awareness, a feature with no direct counterpart in hard-copy documents.” FED. R. CIV. P. 37 advisory committee’s notes.

<sup>311</sup> *See infra* Section IV.A.

harbor”<sup>312</sup> is far from absolute.<sup>313</sup> In particular, a party is protected from sanctions only if it acted in “good faith”, which likely will turn on the timely issuance of a litigation hold.<sup>314</sup> That is, the good faith requirement “means that a party is not permitted to exploit the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve.”<sup>315</sup>

### G. Third-Party Discovery—Rule 45

[73] Amendments to Rule 45 apply the changes regarding ESI made throughout the Federal Rules to subpoenas as well. Specifically, ESI may now be subject to subpoena;<sup>316</sup> ESI not reasonably accessible need not be

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<sup>312</sup> See Symposium, *Panel Discussion: Judicial Conference Advisory Committee on the Federal Rules of Civil Procedure*, 73 *FORDHAM L. REV.* 71, 72 (2004) (comments by Andrew M. Scherffius) (“[S]afe harbor is in a very general way considered to be provisions that will protect a defendant—or a plaintiff for that matter—who has destroyed or lost e-discovery under circumstances where they can show that their conduct was reasonable.”).

<sup>313</sup> See Gwendolyn Mariano, *EDD Rules: The Great Debate*, *L. TECH. NEWS*, Apr. 18, 2005, at 2 (quoting Magistrate Ronald J. Hedges that amendments “will give minimal protection, at best, to attorneys and parties. Indeed, the amendments constitute traps for the unwary.”).

<sup>314</sup> FED. R. CIV. P. 37 advisory committee’s notes (“[Good faith] may involve a party’s intervention to modify or suspend certain features of [system’s] routine operation to prevent the loss of information, if that information is subject to a preservation obligation.”).

<sup>315</sup> *Id.*

<sup>316</sup> FED. R. CIV. P. 45(a)(1)(A)(iii). Similarly to documents or other tangible things, a subpoena for the production of ESI requires the responding party to “permit inspection, copying, testing, or sampling of the materials.” FED. R. CIV. P. 45(a)(1)(D).

produced, unless the requesting party can show good cause;<sup>317</sup> if the subpoena does not specify a form for the production, ESI shall be produced as it is ordinarily maintained or in a reasonably usable form;<sup>318</sup> and, finally, if privileged ESI is inadvertently produced in response to a subpoena, clawback provisions similar to those provided in Rule 26(b)(5) are available.<sup>319</sup>

#### IV. KEY POST-AMENDMENT DECISIONS REGARDING THE PRESERVATION AND PRODUCTION OF ESI

##### A. Duty of Preservation—Litigation Holds

###### 1. *Cache La Poudre*

[74] One of the critical early issues under the amended Federal Rules was the duty of preservation and when it arose.<sup>320</sup> In one leading case, *Cache La Poudre Feeds, LLC v. Land O’Lakes, Inc.*, plaintiff accused defendant of spoliation based on the latter’s failure, after being put on notice of potential litigation, to “discontinue its practice . . . of routinely eliminating e-mail and overwriting backup electronic media.”<sup>321</sup> Preliminary to its analysis, the court acknowledged the “challenge of overseeing discovery at a time when potential access to [ESI] is virtually

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<sup>317</sup> FED. R. CIV. P. 45(d)(1)(D). If good cause is shown, the court may “specify conditions for the discovery,” i.e., allow the discovery “on terms that protect a nonparty against significant expense.” *Id.*; Fed. R. Civ. P. 45 advisory committee’s notes.

<sup>318</sup> FED. R. CIV. P. 45(d)(1)(B). If a particular form is requested, the responding party can object to that form. Fed. R. Civ. 45(c)(2)(B).

<sup>319</sup> See FED. R. CIV. P. 45(d)(2)(B) (“If information produced in response to a subpoena is subject to a claim of privilege . . . the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information . . .”).

<sup>320</sup> See *infra* Section IV.A.

<sup>321</sup> *Cache La Poudre Feeds, LLC v. Land O’Lakes, Inc.*, 244 F.R.D. 614, 620 (D. Colo. 2007).

limitless, and when the costs and burdens associated with full discovery could be more outcome-determinative, as a practical matter, than the facts and substantive law.”<sup>322</sup> Turning to the motion, the court “first determine[d] whether the missing documents or materials [were] relevant to an issue at trial.”<sup>323</sup> Finding they “self-evident[ly]” were, the court then looked to whether defendant had a duty to preserve the materials when they were destroyed.<sup>324</sup>

[75] While noting the duty to preserve evidence is typically “triggered by the filing of a lawsuit,” the court recognized the obligation may “arise even earlier if a party has notice that future litigation is likely.”<sup>325</sup> Here, plaintiff argued that a phone call and letter it sent defendant almost two years before filing suit triggered the latter’s duty to preserve.<sup>326</sup> The court, however, concluded that rather than threatening litigation, the letter implied that plaintiff “was willing to explore a negotiated resolution.”<sup>327</sup> Thus, the court ruled “[u]nder the particular facts of th[e] case,” defendant’s preservation duty did not arise until suit was filed.<sup>328</sup> Thus,

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<sup>322</sup> *Id.* at 620. In this regard, the court noted the “right to conduct discovery is not absolute.” *Id.* at 619. Rather, the Federal Rules recognize several limitations on “a party’s right to obtain discovery,” most notably when the “burden or expense of the proposed discovery outweighs its likely benefit, given the needs of the case, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.” *Id.* at 620 (citing FED. R. CIV. P. 26(b)(2)(C)).

<sup>323</sup> *Id.* at 621. The ESI in question related to a trademark dispute between the parties. *Id.*

<sup>324</sup> *Id.*

<sup>325</sup> *Id.* Given that “litigation ‘is an ever-present possibility’ in our society,” a mere chance of a lawsuit is insufficient to trigger the duty to preserve. *Id.* (citation omitted); see *Hynix Semiconductor, Inc. v. Rambus Inc.*, 591 F. Supp. 2d 1038, 1061 (N.D. Cal. 2006) (“[L]itigation must be more than a possibility” to trigger preservation duty). The conclusion as to whether a duty to preserve exists “must be guided by the facts of each case.” *Cache La Poudre*, 244 F.R.D. at 621.

<sup>326</sup> See *id.* at 621-22 (detailing the parties’ interactions over two years).

<sup>327</sup> *Id.* at 622.

the court denied plaintiff's request for spoliation sanctions prior to that date.<sup>329</sup>

[76] Plaintiff also sought sanctions based on alleged discovery abuses after the preservation duty had unquestionably arisen.<sup>330</sup> Although defendant had issued a litigation hold within days after service of the suit, plaintiff contended that certain relevant documents had not been preserved.<sup>331</sup> In particular, plaintiff argued that defendant should have contacted former employees to inquire whether they possessed relevant documents, which defendant did not do.<sup>332</sup> The court declined to award sanctions on this basis, noting that plaintiff had deposed one ex-employee, and had not inquired into whether the person possessed any relevant documents.<sup>333</sup>

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<sup>328</sup> *Id.* at 624. "As of that date, Defendants clearly had an obligation to preserve relevant evidence." *Id.* at 622.

<sup>329</sup> *Id.* In contrast, in Phillip M. Adams & Assocs., LLC v. Winbond Elecs. Corp., No. 1:05-CV-64 TS, 2010 U.S. Dist. LEXIS 97305, \*15 (D. Utah Sept. 16, 2010), the court held that a class action settlement in 1999 put "the entire computer and component manufacturers industry . . . on notice of a potential for litigation regarding defective floppy disc components . . ." This fact, combined with a letter defendant received from one of its customers—not the plaintiff—in 2000, led the court to conclude the preservation duty had been triggered years before the 2005 filing of suit. *Id.* at \*21. Given that certain documents had not been preserved, the court granted plaintiff an instruction allowing but not requiring the jury to "draw assumptions from the fact that [defendant] did not preserve and has not produced evidence." *Id.* at \*26-27; *see also* Connor v. Sun Trust Bank, 546 F. Supp. 2d 1360, 1376-77 (N.D. Ga. 2008) (granting sanction "instruct[ing] the jury as to the appropriate inference to draw from the absence of evidence" where defendant's employee failed to produce e-mail sent 10 days prior to receiving retention instructions from counsel).

<sup>330</sup> *Cache La Poudre*, 244 F.R.D. at 624.

<sup>331</sup> *Id.* at 625. Plaintiff based its argument on the preservation duties set forth by Judge Scheindlin in *Zubulake V.* *Id.* (citation omitted).

<sup>332</sup> *Id.* at 626.



[77] The court also rejected plaintiff's argument that defendant's preservation duty encompassed conducting "systemwide [sic] keyword searches."<sup>334</sup> While Judge Scheindlin suggested in *Zubulake V* that keyword searches were one way to identify responsive material, the court did not read her suggestion as an "immutable 'obligation.'"<sup>335</sup> Rather, the court recognized that in the "typical case, '[r]esponding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronic data and documents."<sup>336</sup>

[78] Ultimately, the court concluded defendant failed to satisfy its discovery obligations, primarily by failing to take independent action to verify the completeness of its document production, and by continuing its routine practice of erasing the hard drives of departed employees.<sup>337</sup> Consequently, the court awarded relatively minor sanctions in the amount of \$5,000 plus deposition costs, and ordered that defendant provide certain additional discovery.<sup>338</sup> In so doing, the court rejected plaintiff's request for an adverse finding at trial.<sup>339</sup>

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<sup>333</sup> *Id.* at 627. The court also was "not inclined to penalize a party for failing to approach former employees in an effort to respond to 'catch-all' or nearly indecipherable requests for production." *Id.*

<sup>334</sup> *Id.*

<sup>335</sup> *Cache La Poudre*, 244 F.R.D. at 627–28 (*Zubulake V* should not be "interpreted so inflexibly").

<sup>336</sup> *Id.* at 628 (citing THE SEDONA PRINCIPLES, *supra* note 93, at 31). The court likewise held that defendant acted reasonably in refusing to search inaccessible backup tapes for responsive information. *Id.* at 628, 632.

<sup>337</sup> *Id.* at 630.

<sup>338</sup> *Id.* at 638.

<sup>339</sup> *Id.* at 635. The court noted that unlike the Second Circuit, the Tenth requires a showing of bad faith, not mere negligence, to support an adverse inference. *Id.*; *cf.* *Aramburu v. Boeing Co.*, 112 F.3d 1398, 1407 (10th Cir. 1997) ("Mere negligence in losing or destroying records is not enough because it does not support an inference of

## 2. *Oxford House*

[79] In *Oxford House, Inc. v. City of Topeka*, plaintiff moved to compel production of certain e-mails.<sup>340</sup> Defendant argued the e-mails in question had been deleted and were not available.<sup>341</sup> Defendant further put on evidence that the e-mails were not recoverable because its backup tapes were overwritten every six weeks.<sup>342</sup> Noting the destruction occurred in June 2005 and defendant had not been put on notice of potential litigation until later that August, the court concluded defendant had no duty to preserve the e-mails.<sup>343</sup> In other words, the destruction occurred before defendant's duty to preserve arose.<sup>344</sup>

[80] The court also rejected plaintiff's argument that defendant should search for the deleted e-mails on the backup tapes.<sup>345</sup> Initially, the court cited *Zubulake IV* for the proposition that even if the "backup tapes were conclusively shown to possess the deleted e-mail communications, 'as a general rule, a party need not preserve all backup tapes even when it

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consciousness of a weak case."); *Residential Funding Corp. v. DeGeorge Fin. Grp.*, 306 F.3d 99, 108 ("The sanction of an adverse inference may be appropriate in some cases involving the negligent destruction of evidence because each party should bear the risk of its own negligence.").

<sup>340</sup> *Oxford House, Inc. v. City of Topeka*, 2007 U.S. Dist. LEXIS 31731, at \*2, 7 (D. Kan. Apr. 27, 2007).

<sup>341</sup> *Id.* at \*8.

<sup>342</sup> *Id.* at \*11. In addition, defendant submitted an affidavit from one of its representatives establishing that he had not received any relevant e-mails, although two other persons apparently had. *Id.* at \*9.

<sup>343</sup> *Id.* at \*11.

<sup>344</sup> *Id.* at \*11.

<sup>345</sup> *Oxford House*, 2007 U.S. Dist. LEXIS 31731, at \*13-14 (noting the "small likelihood that such efforts would be successful").

reasonably anticipates litigation.”<sup>346</sup> Rather, inaccessible backup tapes, such as those used for disaster recovery, generally are not subject to a litigation hold.<sup>347</sup> The court concluded the backup tapes at issue were used for disaster recovery purposes and thus were not subject to a preservation duty.<sup>348</sup> In any event, the court also recognized there was no evidence the tapes would have contained the e-mails when defendant’s duty to preserve arose.<sup>349</sup>

[81] Relatedly, the court agreed with defendant that searching the backup tapes would be unduly burdensome under the circumstances.<sup>350</sup> In reaching this conclusion, the court relied on the marginal utility analysis, assessing the likelihood the search would “produce information that is relevant to a claim or defense. The greater the likelihood that it will, the fairer it is to require the producing party to bear the expense.”<sup>351</sup> Here, the court recognized the costs of searching the backup tapes would be high,<sup>352</sup> while the chances of discovering relevant information were low given

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<sup>346</sup> *Id.* at \*12 (citation omitted).

<sup>347</sup> *Id.* at \*12; *see also* *Forest Labs, Inc. v. Caraco Pharm. Labs, Ltd.*, No. 06-4004-RDR, 2009 U.S. Dist. LEXIS 31555, \*11-12, \*23 (E.D. Mich. Apr. 14, 2009) (ordering hearing to assess accessibility of backup tapes destroyed after trigger of preservation duty; if tapes were inaccessible, then no duty to preserve existed).

<sup>348</sup> *Oxford House*, 2007 U.S. Dist. LEXIS 31731, at \*12.

<sup>349</sup> *Id.* at \*11.

<sup>350</sup> *Id.* at \*14.

<sup>351</sup> *Id.* at \*14.

<sup>352</sup> *Id.* at \*15. Defendant argued that an initial review of the tapes would cost at least \$100,000. *Id.*

defendant's policy of continually writing over data on the tapes.<sup>353</sup> Thus, the court upheld defendant's unduly burdensome objection.<sup>354</sup>

### 3. *Doe*

[82] In *Doe v. Norwalk Community College*, the court "strongly disagree[d]" with defendants' contention that their duty to preserve did not arise until "well after [plaintiff] filed her lawsuit in November 2004 . . . ."<sup>355</sup> Rather, and in contrast to *Cache La Poudre*, the court concluded the "duty to preserve certainly arose no later than September 2004, when [plaintiff's] counsel sent the defendants a demand letter . . . ."<sup>356</sup> In fact, the court surmised the duty to preserve had initially arisen as early as February 2004, when a number of one of the defendant's employees met to discuss certain of the allegations plaintiff ultimately raised in her suit.<sup>357</sup> By that time, "even if [plaintiff] had not yet filed her lawsuit, the defendants should have known that any documents, including e-mails and hard drives, related to [a certain defendant] could potentially be relevant to future litigation."<sup>358</sup>

[83] Defendants tried to rely on Rule 37(e)'s so-called "safe harbor" provision to excuse their destruction of electronic data after the duty to preserve arose, arguing that any such destruction resulted from "a neutral

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<sup>353</sup> *Oxford House*, 2007 U.S. Dist. LEXIS 31731, at \*15.

<sup>354</sup> *Id.* at \*16. *Contra* Disability Rights Council v. Washington Metro., 242 F.R.D. 139, 148 (D.D.C. 2007) (ordering defendant to search backup tapes for deleted e-mails; safe harbor provision of Rule 37(e) did not apply where defendant failed to implement a litigation hold until over two years after suit was filed, leading to the deletion of responsive e-mails).

<sup>355</sup> *Doe v. Norwalk Community College*, 248 F.R.D. 372, 377 (D. Conn. 2007).

<sup>356</sup> *Id.*

<sup>357</sup> *Id.*

<sup>358</sup> *Id.*

retention system with limited resources.”<sup>359</sup> The court, however, noted there was “no evidence that the defendants did anything to stop the routine destruction of the backup tapes after [their] obligation to preserve arose.”<sup>360</sup> According to the court, to avail itself of Rule 37’s good faith exception, a “party needs to act affirmatively to prevent” the destruction of data, such as by implementing a litigation hold.<sup>361</sup> Given that defendants had not done so, the court ruled they were not entitled to the protections afforded by Rule 37.<sup>362</sup> Indeed, the court found “defendants’ failure to place a litigation hold and to preserve e-mails and hard drives relevant to [plaintiff’s] allegations . . . to be at least grossly negligent, if not reckless,” entitling plaintiff to an adverse inference instruction.<sup>363</sup>

#### 4. *Treppel*

[84] Likewise, in *Treppel v. Biovail Corp.*, the court concluded defendants’ “efforts to preserve ESI were clearly inadequate.”<sup>364</sup> Plaintiff filed suit in April 2003, leading the corporate defendant’s general counsel in May to orally instruct key executives to preserve relevant information.<sup>365</sup> The general counsel repeated the instructions in

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<sup>359</sup> *Id.*

<sup>360</sup> *Doe*, 248 F.R.D. at 380.

<sup>361</sup> *Id.* at 378.

<sup>362</sup> *Id.* (citation omitted).

<sup>363</sup> *Id.* at 379, 381.

<sup>364</sup> *Treppel v. Biovail Corp.*, 249 F.R.D. 111, 118 (S.D.N.Y. 2008).

<sup>365</sup> *Id.* at 115. The executives, however, could not remember when they began to preserve information. *Id.* at 121; *see also* *Acorn v. Cnty. of Nassau*, No. CV 05-2301 (JFB) (WDW), 2009 U.S. Dist. LEXIS 19459, at \*7-8 (E.D.N.Y. Mar. 9, 2009). Defendant argued that it issued a “verbal hold” upon receiving service of the complaint in June 2005. But the court noted defendant had not provided an affidavit “indicating the timing of [the attorney’s] ‘verbal hold’ or to whom she relayed it.” *Id.* at \*8. Further, defendant had not provided any evidence that the attorney “or anyone else . . . conducted any

December, following a letter from plaintiff's counsel demanding that all relevant ESI be preserved.<sup>366</sup> The preservation instructions were not issued in writing, nor did the general counsel follow up with the executives as to what steps they took to preserve information.<sup>367</sup> Defendants failed to preserve backup tapes that existed in December 2003, some seven months after the preservation duty attached.<sup>368</sup> The court termed defendants' preservation efforts "clearly inadequate," relying on *Zubulake V* for the proposition that "[c]ounsel must take affirmative steps to monitor compliance" with a litigation hold, which failed to occur.<sup>369</sup>

[85] On the question of remedy,<sup>370</sup> the court found defendants' discovery failures "negligent but not willful," meaning plaintiff had to

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follow-up to ensure that her instructions were being followed." *Id.* Thus, the court concluded that defendant breached its duty to preserve until September 2006, when it issued a formal litigation hold. *Id.* at \*10.

<sup>366</sup> *Treppel*, 249 F.R.D. at 115.

<sup>367</sup> *Id.* The general counsel also did not take any steps to ensure that employees other than the executives preserved relevant information. *Id.* at 118.

<sup>368</sup> *Id.* at 119. While the court recognized *Zubulake IV*'s general rule that backup tapes are not required to be preserved, it went on to conclude the tapes in question should have been saved because they "were quite likely to contain files that were later deleted." *Id.* In doing so, the court did not address the accessibility of the backup tapes, nor did it discuss whether the defendants could "identify where particular employee documents [were] stored on the backup tapes," and thus seemed to go beyond the *Zubulake IV* principles. *Id.*; see *Zubulake IV*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003); cf. *Oxford House, Inc. v. City of Topeka*, No. 06-4004-RDR, 2007 U.S. Dist. LEXIS 31731, at \*12 (D. Kan. Apr. 27, 2007) (noting the inaccessibility of backup tapes and finding the litigation hold did not apply).

<sup>369</sup> *Treppel*, 249 F.R.D. at 118 (citation omitted).

<sup>370</sup> Generally, a "court 'must determine the appropriate sanction based on the relative fault of the party against whom sanctions are sought and the prejudice suffered by the party seeking sanctions.' Moreover, '[t]rial judges should have the leeway to tailor sanctions to insure that spoliator[s] do not benefit from their wrongdoing—a remedial purpose that is best adjusted according to the facts and evidentiary posture of each case.'" *Id.* at 123-24 (citations omitted).

establish the missing evidence's relevance in order to justify an adverse inference.<sup>371</sup> Recognizing that plaintiff failed to do so, the court denied the request for an adverse inference.<sup>372</sup> The court did, however, allow plaintiff to conduct a forensic search of one of defendants' laptop computers, and ordered defendants to restore and conduct additional searches on various backup tapes.<sup>373</sup>

## 5. *Keithley*

[86] One of the more striking decisions awarding sanctions for the failure to institute a proper litigation hold is *Keithley v. The Home Store.Com, Inc.*<sup>374</sup> In *Keithley*, plaintiffs argued that defendants spoliated “three types of evidence: (1) source code; (2) early architectural, design and implementation documents; and (3) reports.”<sup>375</sup> Generally speaking,

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<sup>371</sup> *Id.* at 122. While positing that in certain circumstances a finding of gross negligence in destroying evidence can support an adverse inference, the court concluded “defendants’ conduct ‘[did] not rise to the egregious level seen in cases where relevance is determined as a matter of law.’” *Id.* at 121-22 (citations omitted).

<sup>372</sup> *Id.* at 122-23. Indeed, the court noted there was “little extrinsic evidence demonstrating that any pertinent documents at all were destroyed, let alone documents favorable to the plaintiff.” *Id.* at 122.

<sup>373</sup> *Id.* at 124.

<sup>374</sup> *Keithley v. The Home Store.Com, Inc.*, No. C-03-04447 SI (EDL), 2008 U.S. Dist. LEXIS 61741 (N.D. Cal. Aug. 12, 2008). Preliminary to its analysis, the court noted that it would “prefer to see [its] resources . . . directed to addressing the substantive issues of the case . . . rather than the collateral issue of sanctions for discovery abuse . . . .” *Id.* at \*3-4. But the court concluded this was “the unusual case in which [d]efendants’ conduct warrant[ed] stiff monetary, as well as evidentiary, sanctions.” *Id.* at \*4. Indeed, the court termed the discovery misconduct by defendants “among the most egregious” it had seen. *Id.* at \*3. According to the court, defendants made misrepresentations to both plaintiffs and the court, as well as engaged in spoliation of information. *Id.*

<sup>375</sup> *Id.* at \*12. Plaintiffs contended the spoliation prejudiced their ability to prove patent infringement related to a computerized system for tracking real estate information. *See id.* at \*11.

the court recognized the duty to preserve “extends to what the party knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery, and/or is the subject of a pending discovery request.”<sup>376</sup> The “threshold question” in assessing spoliation allegations, however, is “when the duty to preserve . . . arose.”<sup>377</sup> Here, the court recited that a litigant must preserve evidence it knows or should know is relevant to imminent litigation, or “probable” future litigation.<sup>378</sup>

[87] Plaintiffs contended a July 1998 letter put defendants on notice of the alleged infringement.<sup>379</sup> The court rejected this contention, as the letter did “not threaten litigation or even mention infringement.”<sup>380</sup> The court concluded, however, that the duty to preserve existed by August 2001, when plaintiffs sent defendants an unambiguous demand letter.<sup>381</sup> Defendants, therefore, “had a duty to preserve documents well before” the lawsuit was filed in October 2003.<sup>382</sup> But according to the court, whether the duty existed before the filing of the lawsuit was “largely academic,” because defendants did not implement a litigation hold “even after th[e] lawsuit was filed and [they] recklessly allowed the destruction of some relevant source code as late as 2004.”<sup>383</sup>

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<sup>376</sup> *Id.* at \*13 (citations omitted).

<sup>377</sup> *Id.* at \*15.

<sup>378</sup> *Id.* By “probable,” the court meant “‘more than a possibility.’” *Id.* (citation omitted).

<sup>379</sup> *Keithley*, 2008 U.S. Dist. LEXIS 61741, at \*16.

<sup>380</sup> *Id.*; *cf.* *Cache La Poudre Feeds, LLC v. Land O’Lakes, Inc.*, 244 F.R.D. 614, 622 (D. Colo. 2007) (involving a letter from counsel which “implied that her client . . . was willing to explore a negotiated resolution”).

<sup>381</sup> *See Keithley*, 2008 U.S. Dist. LEXIS 61741, at \*16. Indeed, the court noted the duty “probably arose” by June 2001 based on another letter plaintiffs sent. *Id.* at \*16-17.

<sup>382</sup> *Id.* at \*17.

<sup>383</sup> *Id.*



[88] In addition, the court stressed defendants' concession "that there was no written litigation hold policy in place during any of the relevant time periods. . . . Nor was there any evidence, other than oral testimony, of what employees were told with respect to preservation of documents . . . ."<sup>384</sup> According to the court, the lack of a written "litigation hold policy and procedures for its implementation, including timely reminders or even a single e-mail notice to relevant employees, exemplifie[d] [d]efendants' lackadaisical attitude with respect to discovery . . . ."<sup>385</sup>

[89] Coupled with the lack of a litigation hold was the defendants' "egregious failure to diligently search for responsive documents," which, in the court's view, "compounded" the harm.<sup>386</sup> For example, defendants "produced 480,000 files containing reports two weeks after they" represented to the court "that *no* reports existed, and approximately sixteen months after the [c]ourt ordered production of reports."<sup>387</sup> Likewise, defendants produced an archive CD of some of the source code in April 2008, after having been ordered to do so in December 2006.<sup>388</sup> Even worse for defendants, they apparently had not previously asked the custodian of the CD to search for data responsive to the source code requests.<sup>389</sup> Thus, the court concluded defendants "failed to adequately

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<sup>384</sup> *Id.* at \*18.

<sup>385</sup> *Id.*; *see also In re NTL, Inc. Secs. Litig.*, 244 F.R.D. 179, 198-99 (S.D.N.Y. 2007) (failing to implement adequate litigation holds and issuing timely reminders was at least grossly negligent).

<sup>386</sup> *Keithley*, 2008 U.S. Dist. LEXIS 61741, at \*19.

<sup>387</sup> *Id.* at \*30. The court had previously granted plaintiffs' motion to compel, which encompassed many of the allegedly spoliated documents. *See id.* at \*19-22.

<sup>388</sup> *Id.* at \*41. Unfortunately, "evidence of prior versions of source code was destroyed." *Id.* at \*34.

<sup>389</sup> *See id.* at \*41-42. The court was "frankly shocked" and could "fathom" no explanation for "why the CD was not found and produced earlier." *Id.*

search for and produce” relevant documents, including reports and source code.<sup>390</sup>

[90] On the issue of remedy, the court recognized the

policies underlying the spoliation sanctions are many: ‘to punish the spoliator, so as to ensure that it does not benefit from its misdeeds; to deter future misconduct; to remedy, or at least minimize, the evidentiary or financial damages caused by the spoliation; and last, but not least, to preserve the integrity of the judicial process and its truth-seeking function.’<sup>391</sup>

Cataloguing defendants’ sins—they had not issued a litigation hold, had not adequately preserved evidence, had made material misrepresentations to the plaintiffs and the court, and had produced an “avalanche” of responsive information much later than when required—the court characterized their behavior as “reckless and egregious discovery misconduct.”<sup>392</sup> Nevertheless, the court declined to enter a terminating sanction, reasoning there was “no evidence that [d]efendants engaged in deliberate spoliation, and dismissal is the most extreme sanction and would go beyond what is necessary to cure the prejudice to [p]laintiffs . . . .”<sup>393</sup> The court did, however, order that an adverse inference instruction

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<sup>390</sup> *Id.* at \*22. In contrast, the court declined to impose sanctions related to discovery of the design and architectural documents. *Id.* at \*47.

<sup>391</sup> *Keithley*, 2008 U.S. Dist. LEXIS 61741, at \*6 (citations omitted). Under its inherent authority, the court concluded sanctions were available “if ‘preceded by a finding of bad faith, or conduct tantamount to bad faith,’ such as recklessness ‘combined with an additional factor such as frivolousness, harassment, or an improper purpose.’” *Id.* at \*7 (citing *Fink v. Gomez*, 239 F.3d 989, 994 (9th Cir. 2001)). Rule 37 sanctions, on the other hand, could be triggered by mere “negligent conduct.” *Keithley*, 2008 U.S. Dist. LEXIS 61741, at \*7.

<sup>392</sup> *Keithley*, 2008 U.S. Dist. LEXIS 61741, at \*47-48.

<sup>393</sup> *Id.* at \*50.

be given regarding spoliation of the source code data.<sup>394</sup> In addition, the court awarded plaintiffs a “sizeable monetary sanction.”<sup>395</sup>

## 6. *Innis Arden*

[91] In *Innis Arden Golf Club v. Pitney Bowes, Inc.*, plaintiff failed to preserve soil samples and associated electronic data.<sup>396</sup> Indeed, neither plaintiff nor its consultant, who gathered the samples, ever instituted a litigation hold.<sup>397</sup> As a result, “all e-mail messages and draft documents and reports were deleted after thirty days.”<sup>398</sup> Given there was no dispute

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<sup>394</sup> *Id.* at \*50-51. The *Keithley* opinion was authored by U.S. Magistrate Judge Laporte. *Id.* at \*2. Defendants objected to the report. See *Keithley v. The Homestore.com, Inc.*, 629 F. Supp. 2d 972 (N.D. Cal. 2008). The court denied the objections, with the exception of the adverse inference, which had been rendered moot by the grant of summary judgment in defendants’ favor on noninfringement and invalidity. *Id.* at 974, 978.

<sup>395</sup> *Keithley*, 2008 U.S. Dist. LEXIS 61741, at \*54. Later, defendants moved for sanctions based on alleged spoliation by plaintiffs. *Keithley v. Homestore.com, Inc.*, No. C-03-04447 SI (EDL), 2008 U.S. Dist. LEXIS 92822, at \*2 (N.D. Cal. Nov. 6, 2008). While concluding that plaintiffs had engaged in misconduct, the court concluded that the “harsh remedy” of an adverse inference, much less terminating sanctions, would be “disproportionate” given the facts presented. *Id.* at \*20-21, \*26, \*28. Specifically, the court noted there had been “no showing that [p]laintiffs engaged in widespread, reckless or intentional spoliation.” *Id.* at \*28. Consequently, the court granted defendants fees and costs and certain additional discovery, but denied the request for terminating sanctions or an adverse inference. *Id.* at \*29-30.

<sup>396</sup> *Innis Arden Golf Club v. Pitney Bowes, Inc.*, 257 F.R.D. 334, 335, 338 (D. Conn. 2009). Plaintiff brought suit under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), seeking to recover costs related to removing PCBs found on its property. *Id.* at 335. The samples in question were taken in anticipation of seeking reimbursement of remediation costs from neighboring landowners who allegedly were responsible for the contamination. See *id.* at 336.

<sup>397</sup> *Id.* at 338.

<sup>398</sup> *Id.* Likewise, “much of the original electronically stored data from the PCB analyses was not preserved.” *Id.*

the soil samples and related data had not been preserved, the court looked to (1) whether plaintiff had a duty to preserve the materials when they were destroyed and, if so; (2) whether sanctions were warranted by the destruction and what type were justified.<sup>399</sup>

[92] According to the court, plaintiff knew the soil samples were a “critical part of possible cost-recovery litigation, and the duty to preserve this evidence attached at the latest by mid-2005 . . . .”<sup>400</sup> Interestingly, the court found the preservation duty arose even before the suit was filed.<sup>401</sup> Further, the court concluded plaintiff was responsible for the spoliation even though its consultant had actually destroyed the data.<sup>402</sup>

[93] Turning to the appropriate remedy, the court noted the “applicable sanction should be molded to serve the prophylactic, punitive, and remedial rationales underlying the spoliation doctrine.”<sup>403</sup> In finding “no basis on which to conclude that [plaintiff] purposefully destroyed evidence,” the court likewise recognized “no reason [had been] offered why it was not feasible, either logistically or economically . . . to store the soil samples . . . .”<sup>404</sup> In addition, plaintiff failed to issue any litigation hold “despite contemporaneously recognizing the potential negative

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<sup>399</sup> *Id.* at 339.

<sup>400</sup> *Id.* at 340. In support of this finding, the court relied on plaintiff’s own documents, including the engagement letter with its consultant, showing that “litigation was reasonably anticipated from the very beginning of the investigation and remediation process.” *Id.*

<sup>401</sup> *Innis Arden*, 257 F.R.D. at 339 (“[D]uty . . . attach[es] [when] ‘a party should have known that the evidence may be relevant to *future* litigation.’” (quoting *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998))).

<sup>402</sup> *See id.* at 341 (“Courts have found that an expert’s destruction of evidence can be attributed to its client . . . .”).

<sup>403</sup> *Id.* (citation omitted) (internal quotation marks omitted).

<sup>404</sup> *Id.* at 342-43.

consequences of evidence destruction.”<sup>405</sup> Thus, according to the court, a “severe sanction” was “necessary.”<sup>406</sup> While concluding that dismissal was unwarranted, the court likewise reasoned an adverse inference would be insufficient.<sup>407</sup> Given that the “key raw ‘fingerprint’ evidence . . . simply no longer exists, but the party that is responsible for its destruction seeks to benefit from its use,” the court ruled the appropriate sanction would be to preclude any evidence based on the samples that plaintiff’s consultant had destroyed.<sup>408</sup>

## 7. Oracle

[94] Plaintiffs in *Nursing Home Pension Fund v. Oracle Corp.*<sup>409</sup> contended that defendants “improperly focused” their preservation efforts by only sending hold notices to roughly 30 of 40,000 employees.<sup>410</sup> The court rejected this contention, noting “plaintiffs ha[d] not identified any

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<sup>405</sup> *Id.* at 342.

<sup>406</sup> *Innis Arden*, 257 F.R.D. at 342. In particular, the court noted the prejudice defendant suffered, since it could not run its own tests and analysis on samples and data that no longer existed. *See id.*

<sup>407</sup> *Id.* at 342-43. The proceeding was a bench trial which, in the court’s view, rendered an adverse inference “somewhat awkward.” *Id.* at 343.

<sup>408</sup> *Id.*; *cf.* *Pinstripe, Inc. v. Manpower, Inc.*, No. 07-CV-620-GKF-PJC, 2009 U.S. Dist. LEXIS 66422, at \*8-9, \*11-12 (N.D. Okla. July 28, 2009) (awarding only small monetary sanction and additional discovery, despite finding that defendant failed to issue litigation hold and failed to monitor compliance with oral retention instructions, and concluding that defendant’s conduct was not intentional).

<sup>409</sup> *Nursing Home Pension Fund v. Oracle Corp.*, 254 F.R.D. 559 (N.D. Cal. 2008). Plaintiffs alleged a number of securities fraud claims on behalf of a class of purchasers of Oracle stock. *See id.* at 561.

<sup>410</sup> *Id.* It is unclear precisely how many employees plaintiffs contended should have received the hold notice. *See id.* In any event, plaintiffs did not explain how discovery could feasibly be conducted on thousands of employees, assuming that was their goal.

particular documents that were not preserved as a result of defendants' preservation efforts . . . ."<sup>411</sup>

[95] Plaintiffs also argued the preservation process was inadequate because Oracle's CEO, Larry Ellison, did not produce a significant number of e-mails from his files, nor notes or transcripts of interviews he conducted with an author on a book project.<sup>412</sup> Here, the court found sanctions appropriate.<sup>413</sup> On the e-mail issue, the court noted defendants only produced 15 e-mails sent or received by Mr. Ellison from his own files, while over 1,650 of such e-mails were produced from the files of other Oracle employees.<sup>414</sup> The court disagreed with defendants' contention that plaintiffs were not entitled to receive multiple copies of the e-mails, reasoning it "could have been helpful . . . to demonstrate that certain e-mails were discovered in Ellison's files; otherwise . . . Ellison could argue that he never actually read or received an e-mail that was sent to him, and thus had no knowledge of its contents."<sup>415</sup>

[96] Further, the court faulted Mr. Ellison's production related to the interviews for his book.<sup>416</sup> While certain transcript pages were produced,

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<sup>411</sup> *Id.* at 565. The production overall was massive, totaling some 2.1 million documents. *In re Oracle Corp. Secs. Litig.*, 627 F.3d 376, 386 (9th Cir. 2010).

<sup>412</sup> *Oracle*, 254 F.R.D. at 561-62. Mr. Ellison received the hold notice. *Id.* at 561.

<sup>413</sup> *Id.* at 565.

<sup>414</sup> *Id.*

<sup>415</sup> *Id.* This proposition seems dubious. Whether a particular e-mail is produced from the alleged recipient's files or somewhere else, the recipient could always argue that he did not read the e-mail in question. In any event, requiring production of every recipient's copy of a particular e-mail contravenes the direction of *Zubulake IV* that a party need not maintain "multiple identical copies" of relevant documents or "every shred of paper, every e-mail or electronic document . . ." *Zubulake IV*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003).

<sup>416</sup> *Oracle*, 254 F.R.D. at 566.

many others were not, apparently because the author destroyed the materials in question.<sup>417</sup> The court rejected Mr. Ellison’s argument that he did not have possession or custody of the interview materials, noting he had a contractual right to exercise “authority over the materials and the ability to preserve them . . . .”<sup>418</sup> Given that Mr. Ellison “knew of the litigation at the time most interviews were conducted, and failed to take any efforts to preserve the materials despite his obligation to do so,” the court ruled sanctions were warranted.<sup>419</sup> Accordingly, the court granted plaintiffs an adverse inference regarding Mr. Ellison’s e-mails and the interview materials related to the book.<sup>420</sup>

## 8. *Green*

[97] In *Green v. Blitz U.S.A., Inc.*, plaintiff sought spoliation sanctions several years after losing a jury trial.<sup>421</sup> Defendant had a single employee who was responsible for searching for and gathering documents relevant

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<sup>417</sup> *Id.*

<sup>418</sup> *Id.* at 566-67.

<sup>419</sup> *Id.* at 566.

<sup>420</sup> *Id.* at 567. Specifically, the court ruled plaintiffs “would be entitled to an inference that the spoliated evidence would demonstrate Ellison’s knowledge of any material facts that [p]laintiffs could otherwise establish.” *In re Oracle Corp. Secs. Litig.*, 627 F.3d 376, 385 (9th Cir. 2010). Ultimately, the court nevertheless granted summary judgment in defendants’ favor. *Id.* at 395. On appeal, the Ninth Circuit affirmed, rejecting plaintiff’s contention that the adverse inferences should have been applied to “defeat a challenge to the insufficiency of their *prima facie* case.” *Id.* at 386.

<sup>421</sup> *Green v. Blitz U.S.A., Inc.*, No. 2:07-CV-372 (TJW), 2011 U.S. Dist. LEXIS 20353, at \*4 (E.D. Tex. Mar. 1, 2011). Plaintiff’s suit involved a product liability claim alleging that a gas can manufactured by defendant caused the death of plaintiff’s relative. *Id.* Plaintiff claimed the gas tank should have contained a flame arrester; defendant contended it did not because flame arresters are ineffective. *Id.* Discovery in a related case revealed documents which plaintiff contended related to this issue and should have been produced in her case, leading to the spoliation motion. *Id.* at \*4-5.

to the litigation.<sup>422</sup> The employee, however, did “not institute a litigation-hold of documents, do any electronic word searches for e-mails, or talk with the IT department regarding how to search for electronic documents.”<sup>423</sup> Consequently, plaintiff “identifie[d] numerous documents not produced in [her] case that [were] extremely relevant and material.”<sup>424</sup>

[98] The court found that “any competent electronic discovery effort would have located” the documents in question.<sup>425</sup> Moreover, defendant’s IT department had the “ability to do electronic word searches for e-mails, [yet] no word search was ever done.”<sup>426</sup> In fact, the employee in charge of defendant’s discovery efforts “readily admit[ted] that ‘I am about as computer . . . illiterate as they [sic] get.’”<sup>427</sup> Thus, the court concluded that defendant “made little, if any, effort to discharge its electronic discovery obligations . . . [and] also failed to preserve its electronic documents.”<sup>428</sup> Even more damning, the court found defendant “actually asked its employees to routinely delete electronic documents,” at a time when it was defending multiple product liability lawsuits and had a preservation duty.<sup>429</sup>

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<sup>422</sup> *Id.* at \*11.

<sup>423</sup> *Id.* at \*14; *see also In re A&M Fla. Props. II, No. 09-15173 (AJG), 2010 Bankr. LEXIS 1217, at \*20, \*21 (S.D.N.Y. Apr. 7, 2010)* (granting monetary sanction against plaintiff and counsel where ESI was produced late due to failure to timely identify all sources of information).

<sup>424</sup> *Green, 2011 U.S. Dist. LEXIS 20353, at \*14.* For instance, plaintiff identified numerous documents including e-mails from discovery in another case that related to the flame arrester issue. *See id.* at \*14-18.

<sup>425</sup> *Id.* at \*20.

<sup>426</sup> *Id.* at \*21.

<sup>427</sup> *Id.* at \*20-21. As the court noted, “[t]hat [defendant] put someone in charge of its discovery who knows nothing about computers does not help [its] effort to show that it was reasonable in its discovery obligations.” *Id.* at \*21 n.5.

<sup>428</sup> *Id.* at \*26.



[99] Based on the foregoing, the court issued a harsh—and creative—sanction: (1) it ordered defendant to pay \$250,000 to compensate plaintiff for losses caused by defendant’s serial discovery violations; (2) it also gave defendant thirty days to provide a copy of the court’s order to every plaintiff in every lawsuit pending against it and that had been pending against it in the previous two years; (3) the court ordered an additional \$500,000 fine that would extinguish upon the defendant’s certification of compliance with the foregoing provision; and (3) the court ordered that for the five subsequent years, for every new lawsuit that defendant would be a party to (whether plaintiff or defendant), it must file a copy of the court’s order with its initial pleading or filing.<sup>430</sup>

## **B. Scope of Preservation—Reasonable Accessibility and Proportionality**

### **1. *Café Asia***

[100] In *Smith v. Café Asia*, defendant moved to compel production of certain images stored on plaintiff’s cell phone.<sup>431</sup> Defendant argued the images would rebut plaintiff’s claim that he was subjected to a hostile work environment due to his sexual orientation.<sup>432</sup> While recognizing the broad scope of discovery, the court nevertheless noted that “relevancy

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<sup>429</sup> *Green*, 2011 U.S. Dist. LEXIS 20353, at \*26-27. Defendant also recycled its backup tapes every two weeks, meaning the deleted e-mails were permanently lost. *Id.* at \*29. Thus, the court concluded “it [would] never be known how much prejudice against the plaintiff was actually caused by [defendant’s] failure to preserve documents.” *Id.*

<sup>430</sup> *Id.* at \*33-36.

<sup>431</sup> *Smith v. Café Asia*, 246 F.R.D. 19, 19 (D.D.C. 2007).

<sup>432</sup> *Id.* at 20. Plaintiff conceded that “his cell phone contain[ed] ‘intimate, highly personal’ and ‘unclothed images’ . . . but denie[d] having willingly shared the images with his co-workers.” *Id.* Defendant, on the other hand, argued that the “images [were] relevant to whether plaintiff invited a hostile work environment and whether he was subjectively offended by defendant’s alleged conduct.” *Id.*

alone does not entitle a requesting party to *carte blanche* in discovery.”<sup>433</sup> Rather, according to the court, “[o]ne important constraint is the admissibility of the discovery being sought.”<sup>434</sup> Thus, even though information ultimately held inadmissible at trial may still be discoverable, this “holds true . . . only if the [information] ‘appear[s] reasonably calculated to lead to the discovery of admissible evidence.’”<sup>435</sup>

[101] Accordingly, the court determined that “the question of discoverability is inseparable from admissibility,” and thus it had to examine whether the information’s probative value was substantially outweighed by its unfair prejudice.<sup>436</sup> The court therefore ordered that the images be preserved pending a ruling on their admissibility by the trial judge.<sup>437</sup> In addition, the court ordered that plaintiff permit one attorney designated by defendant to inspect the images so defendant could make an informed argument regarding their admissibility.<sup>438</sup>

## 2. *Columbia Pictures*

[102] In *Columbia Pictures, Inc. v. Bunnell*, the court addressed the “following question of first impression: is the information held in a computer’s random access memory (RAM) ‘electronically stored information’ under Federal Rule of Civil Procedure 34?”<sup>439</sup> Defendants

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<sup>433</sup> *Id.*

<sup>434</sup> *Id.* In this regard, the court noted “[a]s with most things in life, Rule 26 is not an all-or-nothing proposition.” *Id.*

<sup>435</sup> *Id.* at 20 (quoting FED. R. CIV. P. 26(b)(1)).

<sup>436</sup> *Café Asia*, 246 F.R.D. at 20. For an extensive discussion of the admissibility of ESI, see generally *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 537-38 (D. Md. 2007).

<sup>437</sup> *Café Asia*, 246 F.R.D. at 20-21.

<sup>438</sup> *Id.* at 21.

<sup>439</sup> *Columbia Pictures, Inc. v. Bunnell*, 245 F.R.D. 443, 446 (C.D. Cal. 2007). In *Columbia Pictures*, plaintiffs were “motion picture studios that own[ed] copyrights or

argued that ESI “cannot include information held in RAM because the period of storage, which may be as much as six hours, is too temporary.”<sup>440</sup> The court disagreed, finding it undisputed that

RAM is computer memory and that information held in RAM is held there for later use by the computer (e.g., to be used in tasks performed by software or written to a hard drive, flash drive, DVD, or other more permanent medium) or disposal (e.g., to be erased when the computer is turned off or when the data is overwritten with new information as part of the regular computing process).<sup>441</sup>

Further, the court noted that RAM “itself is *defined* as a storage unit . . . and . . . is typically used as the computer’s primary storage . . . .”<sup>442</sup> Thus, according to the court, “information held in RAM is ‘stored’ under the plain meaning of the unambiguous language of Rule 34.”<sup>443</sup>

[103] Leaving aside the plain language of Rule 34, the court further noted the definition of ESI was meant to “be read expansively to include all current and future electronic storage mediums . . . .”<sup>444</sup> Since Rule 34’s

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exclusive reproduction and distribution rights to numerous movies and television programs.” *Id.* at 445. Plaintiffs claimed that defendants operated a website that allegedly permitted “Internet users to locate and download, view, store, and distribute unauthorized copies of Plaintiffs’ works. *Id.* Plaintiffs sought discovery of server log data, which included, *inter alia*, “the anonymous (masked or encrypted) Internet Protocol (IP) address of users of Defendants’ website . . . .” *Id.* at 447 n.3. The server log data could be copied from defendants’ computers and produced to plaintiffs. *Id.* at 447.

<sup>440</sup> *Id.* at 446.

<sup>441</sup> *Id.*

<sup>442</sup> *Id.* at 447.

<sup>443</sup> *Id.*; see FED. R. CIV. P. 34(a)(1)(A) (allowing discovery of any “electronically stored information . . . stored in a medium from which information can be obtained . . .”).

scope was meant to be as “broad as possible,” the court saw “no room to interpret the Rule to categorically exclude information written in a particular medium simply because that medium stores information only temporarily.”<sup>445</sup> Accordingly, the court ordered discovery of the RAM in question.<sup>446</sup>

### 3. *Parkdale America*

[104] Competing motions to compel and for a protective order related to the discovery of ESI were at issue in *Parkdale America, LLC v. Travelers Casualty & Surety Co.*<sup>447</sup> Specifically, defendant sought discovery of “internal e-mails, memoranda and files relating to [plaintiffs’] claims for insurance coverage . . . .”<sup>448</sup> Plaintiffs objected, arguing the e-mails were not reasonably accessible and producing them would constitute an undue burden and expense, particularly to review for privilege.<sup>449</sup> The court disagreed, noting the “disputed e-mails are presently in LotusNotes format, rather than in a less accessible backup media.”<sup>450</sup> Further,

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<sup>444</sup> *Columbia Pictures*, 245 F.R.D. at 447 (citing FED. R. CIV. P. 34 advisory committee’s notes).

<sup>445</sup> *Id.* at 447. On the contrary, “Rule 34 requires no greater degree of permanency from a medium than that which makes obtaining the data possible.” *Id.*

<sup>446</sup> *Id.*

<sup>447</sup> See *Parkdale Am., LLC v. Travelers Cas. & Sur. Co.*, No. 3:06CV78-R, 2007 U.S. Dist. LEXIS 88820, at \*1 (W.D.N.C. Nov. 19, 2007). The primary claim in the suit sought a declaratory judgment that, pursuant to an insurance contract, defendant owed a defense and indemnity obligation to plaintiffs for ten underlying antitrust lawsuits. *Id.* at \*2.

<sup>448</sup> *Id.* at \*11. The plaintiffs had previously produced the e-mails of one of their alleged officers. *Id.* at \*5, \*24-25. The parties had shared the cost of this production. *Id.* at \*25. Defendants then sought e-mails from certain other of plaintiffs’ officers or employees. *Id.*

<sup>449</sup> *Id.* at \*34.

<sup>450</sup> *Id.* at \*35.

considering the “amount in controversy[,] . . . the parties’ apparent resources, and the importance of the proposed discovery in resolving critical factual issues,” the court concluded plaintiffs had “not articulated a sufficient basis to relieve them of the obligation to produce [the] e-mails.”<sup>451</sup> The court went on to order that plaintiffs should make a good faith effort to apportion costs of the production with defendant and, failing that, could move for an order allocating costs pursuant to *Zubulake I*.<sup>452</sup>

#### 4. *Heartland Surgical*

[105] The court in *Heartland Surgical Specialty Hospital v. Midwest Division, Inc.* resolved a dispute over the burdensomeness of searching personal e-mail accounts subject to a subpoena.<sup>453</sup> The respondents to the

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<sup>451</sup> *Id.*; see FED. R. CIV. P. 26(b)(2)(C)(iii). Notably, plaintiffs had not offered a specific cost estimate for producing the relevant e-mails. See *Parkdale Am.*, 2007 U.S. Dist. LEXIS 88820, at \*35.

<sup>452</sup> *Parkdale Am.*, 2007 U.S. Dist. LEXIS 88820, at \*40. In leaving open the possibility of cost-shifting, the court appeared to go beyond the strictures of FED. R. CIV. P. 26(b)(2)(B), which permits conditions on discovery after a showing of inaccessibility (and after good cause is shown). See, e.g., *Dahl v. Bain Capital Partners, LLC*, 655 F. Supp. 2d 146, 149 (D. Mass. 2009) (defendants failed to identify “which documents [were] inaccessible or the nature of that inaccessibility” and thus “fail[ed] to provide any grounds for shifting costs . . . .”); *Pipefitters Local No. 636 Pension Fund v. Mercer Human Res. Consulting, Inc.*, No. 05-CV-74326, 2007 U.S. Dist. LEXIS 52169, at \*4-5 (E.D. Mich. July 19, 2007) (granting motion to strike order that plaintiffs would bear cost of restoring electronic data, as it was not clear that magistrate “engaged in the proper analysis before shifting the cost of discovery to plaintiffs”). Here, again, the court concluded that the subject e-mails were not reasonably inaccessible, and ordinarily a party bears its own costs in responding to discovery requests. See *Parkdale Am., LLC*, 2007 U.S. Dist. LEXIS 88820, at \*35; *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978).

<sup>453</sup> *Heartland Surgical Specialty Hosp. v. Midwest Div., Inc.*, No. 05-2164-MLB-DWB, 2007 U.S. Dist. LEXIS 53217 (D. Kan. July 20, 2007). The subpoena at issue concerned certain physicians who were founders of a hospital. *Id.* at \*5. The founders were not parties to the antitrust and tortious interference suit filed by the hospital, although they had a financial interest in the outcome. See *id.* at \*6, \*18.

subpoena argued that searching their personal e-mail accounts would be unduly burdensome, given that the plaintiff had already produced all e-mails found on business accounts maintained by the respondents.<sup>454</sup> Defendant, on the other hand, contended that respondents may have destroyed some ESI, based on testimony that certain respondents had never seen the subpoena, searched for the requested documents, nor directed anyone else to conduct such a search.<sup>455</sup> The court, however, reasoned that the respondents were “undoubtedly busy physicians who [were] engaged in daily activities that require[d] their full attention,” and thus concluded that “they may have not recalled or remembered specifically what was done about the subject subpoenas.”<sup>456</sup> The court therefore ruled the respondents had not “intentionally failed to comply” with the subpoenas, nor “acted in a grossly negligent manner.”<sup>457</sup> [106] On the discoverability of information from the personal e-mail accounts, it was “bothersome to the [c]ourt that no attempt at all was made by some of the [respondents] to search, even on a random basis, their personal or office e-mails.”<sup>458</sup> Nevertheless, the court recognized that many of the remaining documents in dispute were not the type that “could reasonably be expected to be found through an e-mail search.”<sup>459</sup> Applying Rule 26(b)(2)(C)’s proportionality analysis, the court reasoned that searching the personal e-mail accounts was not likely to discover any

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<sup>454</sup> *See id.* at \*22.

<sup>455</sup> *See id.* at \*42-43.

<sup>456</sup> *Id.* at \*43.

<sup>457</sup> *Id.*

<sup>458</sup> *Heartland Surgical*, 2007 U.S. Dist. LEXIS 53217, at \*45. On the other hand, the court noted that respondents had already produced all e-mails sent to their business addresses. *Id.*

<sup>459</sup> *Id.* at \*46.

documents that had not already been produced.<sup>460</sup> Thus, the court ruled it would not require searches of the personal e-mail accounts.<sup>461</sup>

## 5. *Oracle*

[107] The court in *Oracle Corp. v. SAP AG* analyzed Rule 26(b)(2)(C)'s proportionality standard.<sup>462</sup> Defendants proposed that discrete document searches be limited to no more than 115 custodians.<sup>463</sup> Plaintiffs, conversely, argued for searches involving up to 165 custodians.<sup>464</sup> Defendants argued that the burden and expense would outweigh any potential benefit, noting the requested additional searches would cost approximately \$16.5 million.<sup>465</sup> In response, plaintiffs contended the additional searches were justified by the stakes of the case, which amounted to potentially hundreds of millions if not a billion dollars.<sup>466</sup> At the same time, however, plaintiffs "did not propose shifting any part of these enormous costs to them[selves]."<sup>467</sup>

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<sup>460</sup> See *id.* at \*44-45, \*47; see also FED. R. CIV. P. 26(b)(2)(C)(iii).

<sup>461</sup> *Heartland Surgical*, 2007 U.S. Dist. LEXIS 53217, at \*47.

<sup>462</sup> *Oracle Corp. v. SAP AG*, No. C-07-01658 PJH (EDL), 2008 U.S. Dist. LEXIS 88319 (N.D. Cal. July 3, 2008). Plaintiffs alleged that defendants "engaged in serious intellectual property violations through extensive illegal downloads," leading to the theft of "'many hundreds' of customers . . . ." *Id.* at \*4.

<sup>463</sup> *Id.* at \*3. Searches would also be run against centralized repositories. *Id.* at \*2.

<sup>464</sup> *Id.* at \*3.

<sup>465</sup> *Id.*; see FED. R. CIV. P. 26(b)(2)(C)(iii). Defendants also argued that because of the volume of information the additional searches could impact the discovery deadline as well as the trial date. *Oracle*, 2008 U.S. Dist. LEXIS 88319, at \*5.

<sup>466</sup> *Oracle*, 2008 U.S. Dist. LEXIS 88319, at \*4.

<sup>467</sup> *Id.* at \*5.

[108] In assessing proportionality, the court recognized that cost “is only one consideration among many . . . .”<sup>468</sup> But the court would “not condone forcing [d]efendants to expend \$16.5 million on custodial searches for just one aspect of what [would] undoubtedly be extensive discovery in” the case.<sup>469</sup> More fundamentally, the court recognized that it had to apply the discovery rules “in accordance with the wise mandate of *Rule 1*: ‘the just, speedy, and inexpensive determination of every action and proceeding.’”<sup>470</sup> The mere fact that the case, like many federal cases, involved significant public policy issues, and that defendants possessed significant resources, did not dissuade the court.<sup>471</sup> Rather, according to the court, requiring parties to

expend many millions of dollars on discovery in each lawsuit that fits this profile because of the explosion in the amount and types of [ESI] . . . [would lead to businesses being] mired in exorbitantly costly litigation where the process of discovery becomes so onerous and prohibitively expensive that it no longer facilitates resolution on the merits as a means to an end, but dominates and derails the litigation process.<sup>472</sup>

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<sup>468</sup> *Id.* at \*6.

<sup>469</sup> *Id.*

<sup>470</sup> *Id.*

<sup>471</sup> *See Oracle*, 2008 U.S. Dist. LEXIS 88319, at \*6-7.

<sup>472</sup> *Id.* at \*7. Indeed, there has been much study and commentary on this “vanishing trial” phenomenon, which is no doubt related at least in part to the increasing costs of litigation, specifically discovery. *See* Patricia Lee Refo, *The Vanishing Trial*, 30 LITIG. ONLINE 2, 3 (2004), available at [http://www.americanbar.org/content/dam/aba/publishing/litigation\\_journal/04winter\\_openingstatement.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/litigation_journal/04winter_openingstatement.authcheckdam.pdf) (“Discovery is too broad, takes too much time, and costs the parties too much money.”). These expenses are exacerbated by the increasing emphasis on e-discovery. *See Thorogood v. Sears, Roebuck & Co.*, 624 F.3d 842, 849-50 (7th Cir. 2010).



As evidence, the court noted that not only would the discovery sought “run afoul of the deadlines set by the trial judge,” it would also likely “produce an avalanche of information that could not be presented to a jury in a manner and time frame that it could digest.”<sup>473</sup> Thus, the court concluded that discovery would be limited to 120 custodians.<sup>474</sup>

## 6. *Mancia*

[109] In *Mancia v. Mayflower Textile Services Co.*, Magistrate Judge Grimm wrestled with the concepts of cooperation and proportionality as mandated by Rule 26.<sup>475</sup> While prosecuting a collective action seeking allegedly unpaid overtime and other wages, plaintiffs propounded a number of broad discovery requests.<sup>476</sup> Defendants’ objections triggered a motion to compel.<sup>477</sup> The court began its analysis with “[o]ne of the most important, but apparently least understood or followed, of the discovery rules . . . Fed. R. Civ. P. 26(g),” which requires that “every discovery disclosure, request, response or objection must be signed by at least one attorney of record, or the client, if unrepresented.”<sup>478</sup> This signature “certifies that to the best of the person’s knowledge, information, and belief *formed after a reasonable inquiry*,’ the disclosure is complete and correct, and that the discovery request, response or objection is,” *inter alia*, “not interposed for any improper purpose (such as to harass, cause

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<sup>473</sup> *Oracle*, 2008 U.S. Dist. LEXIS 88319, at \*7.

<sup>474</sup> *Id.*

<sup>475</sup> *See Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 356-57 (D. Md. 2008).

<sup>476</sup> *See id.* at 355-56. The requests sought relevant e-mails and other documents. *Id.* at 364.

<sup>477</sup> *See id.* at 355-56. As a preliminary matter, the court noted an “obvious violation” of FED. R. OF CIV. PROC. 33(b)(4) in that defendants’ objections were not stated “with specificity.” *Id.* at 356.

<sup>478</sup> *Id.* at 357 (citing FED. R. CIV. P. 26(g)(1)).

unnecessary delay, or needlessly increase the cost of litigation) . . . .”<sup>479</sup>  
Further, the signer certifies that the requests, etc. are “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).”<sup>480</sup>

[110] The court noted a number of “important ‘take away points’ [from Rule 26(g)] that ought to, but unfortunately do not, regulate the way discovery is conducted.”<sup>481</sup> First, according to the court,

the rule is intended to impose an ‘affirmative duty’ on counsel to behave responsibly during discovery, and to ensure that it is conducted in a way that is consistent ‘with the spirit and purposes’ of the discovery rules, which . . . requires cooperation by counsel to identify and fulfill legitimate discovery needs, yet avoid seeking discovery the cost and burden of which is disproportionately large to what is at stake in the litigation.<sup>482</sup>

Second, the “rule is intended to curb discovery abuse by requiring the court to impose sanctions if it is violated, absent ‘substantial justification,’ and those sanctions are intended both to penalize the noncompliant lawyer or unrepresented client, and to deter others from noncompliance.”<sup>483</sup>  
Third, the “rule aspires to eliminate one of the most prevalent of all

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<sup>479</sup> *Id.* (citing FED. R. CIV. P. 26(g)(1)(A), (B)(i)-(ii)).

<sup>480</sup> *Mancia*, 253 F.R.D. at 357 (citing FED. R. CIV. P. 26(g)(1)(B)(iii)).

<sup>481</sup> *Id.*

<sup>482</sup> *Id.* at 357-58.

<sup>483</sup> *Id.* at 358.

discovery abuses: kneejerk discovery requests served without consideration of cost or burden to the responding party.”<sup>484</sup>

[111] Working in tandem is Rule 26(b)(2)(C)’s proportionality test, under which a court has an obligation, *sua sponte*, to limit discovery where the burden or expense outweighs its likely benefit, “considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.”<sup>485</sup> The court recognized the reality, however, that with “certain discovery, principally interrogatories and document production requests, lawyers customarily serve requests that are far broader, more redundant and burdensome than necessary . . . .”<sup>486</sup> This “failure to engage in discovery as required by Rule 26(g) is one reason why the cost of discovery is so widely criticized as being excessive—to the point of pricing litigants out of court.”<sup>487</sup> As a result, “[d]eserving cases are not brought because the cost of pursuing them fails a rational cost-benefit test, while meritless cases, especially smaller cases, are being settled rather than being tried because it costs too much to litigate them.”<sup>488</sup> E-discovery, of course, exacerbates the problem of discovery

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<sup>484</sup> *Id.* The court also noted that Rule 26(g) was meant to end the “equally abusive practice of objecting to discovery requests reflexively—but not reflectively—and without a factual basis.” *Id.* Specifically, the court recognized that “boilerplate objections that a request for discovery is ‘overbroad and unduly burdensome, and not reasonably calculated to lead to the discovery of material admissible in evidence,’ persist despite a litany of decisions from courts, including this one, that such objections are improper unless based on particularized facts.” *Id.* (citations omitted). In fact, according to the court, “the very act of making such boilerplate objections is *prima facie* evidence of a Rule 26(g) violation . . . .” *Id.* at 359.

<sup>485</sup> *Mancia*, 253 F.R.D. at 364 (quoting FED. R. CIV. P. 26(b)(2)(C)).

<sup>486</sup> *Id.* at 358.

<sup>487</sup> *Id.* at 359.

<sup>488</sup> *Id.* (quoting AM. COLL. OF TRIAL LAWYERS & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., INTERIM REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 3 (2008)).

costs, and “is partly responsible for making federal litigation ‘procedurally more complex, risky to prosecute, and very expensive . . . .’”<sup>489</sup>

[112] The court disputed the notion there is anything inherent in our adversary system “that precludes cooperation between the parties and their attorneys during the litigation process to achieve orderly and cost effective discovery . . . .”<sup>490</sup> In this regard, the court may have overlooked the incentives for plaintiffs’ counsel, in class or other complex litigation, to run up their opponent’s discovery costs in hopes of extracting a settlement, whatever the merits of the case.<sup>491</sup> Thus, while a “lawyer who seeks excessive discovery given what is at stake in the litigation, . . . or pursues discovery in order to make the cost for his or her adversary so great that the case settles to avoid the transaction costs” may well be “hindering the adjudication process,” the court ignored that to such lawyers this is a feature of the system—not a bug.<sup>492</sup>

[113] The court concluded that a number of defendants’ objections were “boilerplate” and “non-particularized,” and thus violated Rule 33.<sup>493</sup> At the same time, the court noted that much of the discovery propounded by

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<sup>489</sup> *Id.* at 359 (quoting Gregory P. Joseph, *Trial Balloon: Federal Litigation—Where Did It Go off Track?*, 34 LITIG. 5, 62 (2008) (quotation marks omitted)).

<sup>490</sup> *Mancia*, 253 F.R.D. at 360-61 (noting further that “[t]he apparent ineffectiveness of Rule 26(g) in changing the way discovery is in fact practiced often is excused by arguing that the cooperation that judges expect during discovery is unrealistic because it is at odds with the demands of the adversary system . . . . But this is just not so.”).

<sup>491</sup> *See, e.g.*, *Thorogood v. Sears, Roebuck & Co.*, 624 F.3d 842, 849-50 (7th Cir. 2010) (recognizing that corporate defendants typically have “much more extensive” records than class action plaintiffs, and noting propensity of the latter to “want to rummage in quest for smoking guns”).

<sup>492</sup> *Mancia*, 253 F.R.D. at 362; *see Thorogood*, 624 F.3d at 850, 855-56 (noting that although merit of case was “slight,” pressure to settle would “mount up if class counsel’s ambitious program of discovery is allowed to continue”).

<sup>493</sup> *Mancia*, 253 F.R.D. at 363-64. The court explained that defendants’ failure to make timely, specific objections waived any legitimate objection that existed. *See id.* at 364.

plaintiffs “might be excessive or overly burdensome, given the nature of [the] case, the few number of named Plaintiffs and the relatively modest amounts of wages claimed for each.”<sup>494</sup> Thus, the court ordered the parties to meet and confer and “attempt to identify a foreseeable range of damages” in an effort to determine the value of the case, which would then inform a “workable ‘discovery budget’ that is proportional to what is at issue in the case.”<sup>495</sup> The parties were then to

discuss the amount and type of discovery already provided, and . . . the additional discovery still sought by Plaintiffs, in order to evaluate the Rule 26(b)(2)(C) factors, to determine whether Plaintiffs’ legitimate additional discovery needs could be fulfilled from non-duplicative, more convenient, less burdensome, or less expensive sources than those currently sought . . . .<sup>496</sup>

If the parties were unable to reach agreement on the additional requested discovery, the court would then rule based on the factors discussed previously.<sup>497</sup>

### C. Search Methodology—No Routine Access to Opponent’s Systems

#### 1. *Scotts*

[114] In *The Scotts Company v. Liberty Mutual Insurance Co.*,<sup>498</sup> plaintiff moved to compel an order that “would require defendant to allow

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<sup>494</sup> *Id.*

<sup>495</sup> *Id.* This admittedly “rough estimate” would also include plaintiffs’ attorneys’ fees assuming they prevailed. *Id.*

<sup>496</sup> *Id.*

<sup>497</sup> *Id.* at 365.

a forensic expert to search defendant's computer systems, network servers and databases and would require defendant to provide backup tapes of certain information systems to include data for the last nine years."<sup>499</sup> The court, however, denied the motion, reasoning the amendments to Rule 34 "simply clarif[ied] 'that discovery of [ESI] stands on equal footing with discovery of paper documents.'"<sup>500</sup> Thus, "without a qualifying reason, plaintiff is no more entitled to access to defendant's electronic information storage systems than to defendant's warehouses storing paper documents."<sup>501</sup> As to whether plaintiff had a sufficient reason for the motion, the court concluded not—the motion was based on "mere suspicion," and "speculation [was], in the view of this court, entirely insufficient."<sup>502</sup>

## 2. *Ferron*

[115] In *Ferron v. Search Cactus, L.L.C.*,<sup>503</sup> the court found "qualifying reasons sufficient to permit [d]efendants access to [p]laintiff's computer

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<sup>498</sup> *Scotts Co. LLC v. Liberty Mut. Ins. Co.*, No. 2:06-CV-899, 2007 U.S. Dist. LEXIS 43005 (S.D. Ohio June 12, 2007).

<sup>499</sup> *Id.* at \*4. Plaintiff contended that the 2006 amendments to Rule 34 of the Federal Rules of Civil Procedure supported its motion. *Id.*

<sup>500</sup> *Id.* (citing FED. R. CIV. P. 34 advisory committee's notes).

<sup>501</sup> *Id.* at \*5; *see also* FED. R. CIV. P. 34 advisory committee's notes ("[Revised Rule 34] is not meant to create a routine right of direct access to a party's electronic information system.").

<sup>502</sup> *Scotts*, 2007 U.S. Dist. LEXIS 43005, at \*6; *see also* *Williams v. Massachusetts Mut. Life Ins. Co.*, 226 F.R.D. 144, 146 (D. Mass. 2005) (denying motion to appoint computer forensic expert where movant failed to show "that Defendants are unwilling to produce computer-generated documents"); *Bethea v. Comcast*, 218 F.R.D. 328, 329-30 (D.D.C. 2003) (denying motion to compel because "inspection or seizure [of ESI] is not permitted unless the moving party can 'demonstrate that the documents they seek to compel do, in fact, exist and are being unlawfully withheld'" (citation omitted)).

<sup>503</sup> *John W. Ferron v. Search Cactus LLC*, No. 2:06-cv-327, 2008 U.S. Dist. LEXIS 34599 (S.D. Ohio Apr. 28, 2008).

systems” that had been absent in *Scotts*.<sup>504</sup> Specifically, the court concluded plaintiff had not properly implemented a litigation hold.<sup>505</sup> In addition, the court noted that plaintiff had not produced the requested information and his computers “contain[ed] the only available documentary evidence of his visits to the websites in issue . . . .”<sup>506</sup> Given plaintiff had not previously produced the information, the court distinguished *Scotts* on the basis that defendants did not seek the reproduction of ESI but rather sought information that plaintiff should already have preserved and produced.<sup>507</sup> Accordingly, the court ordered that plaintiff allow defendants’ forensic computer expert to image his hard drives.<sup>508</sup>

### 3. *Adams*

[116] In *Phillip M. Adams & Assocs., L.L.C. v. Fujitsu Ltd.*, the court applied the general rule that the 2006 amendments did not create a routine right of access to an opponent’s systems, but did find sampling

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<sup>504</sup> *Id.* at \*8; *see supra* note 501 and accompanying text.

<sup>505</sup> *Ferron*, 2008 U.S. Dist. LEXIS 34599, at \*8-9. Defendants sought discovery of e-mails received and websites visited by plaintiff, which formed the basis of his consumer fraud claim. *Id.* at \*2.

<sup>506</sup> *Id.* at \*8.

<sup>507</sup> *Id.*; *see also* Diepenhorst v. City of Battle Creek, No. 1:05-cv-734, 2006 U.S. Dist. LEXIS 48551, \*10-11 (W.D. Mich. June 30, 2006).

<sup>508</sup> *Ferron*, 2008 U.S. Dist. LEXIS 34599, at \*13-14. Other courts have allowed access to a party’s computer systems where some type of discovery misconduct can be shown. *See, e.g.*, *Playboy Enters. v. Welles*, 60 F. Supp. 2d at 1054 (allowing access to party’s computer system based on showing of systemic deletion of relevant emails); *Ameriwood Indus., Inc. v. Liberman*, 2006 U.S. Dist. LEXIS 93380, \*6 (E.D. Mo. Dec. 27, 2006) (granting motion to compel imaging of defendant’s hard drive where court had “cause to question whether defendants have produced all responsive documents”); *cf. In re Ford Motor Co.*, 345 F.3d 1315, 1317 (11th Cir. 2003) (“[w]hile some kind of direct access [to systems] might be permissible in certain cases,” a necessary prerequisite would be “a factual finding of some non-compliance with discovery rules”).

appropriate.<sup>509</sup> Defendant contended that relevant data was located on old computers that plaintiffs had not previously searched.<sup>510</sup> Plaintiff, in response, claimed that it would take hundreds of hours to search all the computers at issue and, in any event, he had used those computers to produce archives from which his production came.<sup>511</sup>

[117] Noting the parties “dr[ew] opposite conclusions” on the sufficiency of plaintiff’s initial search, the court was “unable to determine” whether the burden of making plaintiff conduct additional searches on the old computers would outweigh the likely benefit.<sup>512</sup> To inform this analysis, the court ordered plaintiff to produce an inventory of his old computers.<sup>513</sup> Defendant could then select one computer from the list and require plaintiff to produce the directories and file structure for that computer.<sup>514</sup> If this sampling revealed “something significant,” defendant could move for further discovery.<sup>515</sup>

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<sup>509</sup> See Phillip M. Adams & Assocs., L.L.C. v. Fujitsu Ltd., No. 1:05-CV-64, 2010 U.S. Dist. LEXIS 45576, at \*24-25 (D. Utah May 10, 2010). In *Adams*, defendant sought an order compelling disclosure of ESI in native format, including metadata and file trees found on plaintiff’s computers. See *id.* at \*16.

<sup>510</sup> *Id.* at \*22.

<sup>511</sup> *Id.*

<sup>512</sup> *Id.* at \*23

<sup>513</sup> *Id.* at \*24. The inventory included the “computer make and model; serial number; storage devices and capacity of the storage devices associated with the computer; dates the computer was in service; by whom it was used; a general description of the uses of the computer; any archive or backup related to the computer; a summary of the type of data on the computer; and the current location and custodian of the computer.” *Id.*

<sup>514</sup> *Adams*, 2010 U.S. Dist. LEXIS 45576, at \*25. If plaintiff identified ten or more computers, then defendant would be entitled to select two computers for further examination. *Id.*

<sup>515</sup> *Id.*



#### 4. *Ford*

[118] Pointing to a “noticeable absence” of relevant documents in its opponent’s production, defendant in *Ford Motor Co. v. Edgewood Properties, Inc.* requested access to plaintiff’s systems to run “narrowly tailored key word search[es] . . . .”<sup>516</sup> Plaintiff’s production was based on a “manual document collection process,” rather than electronic searches, which the court recognized was “not necessarily contemplated under the Sedona Principles . . . .”<sup>517</sup> At the same time, however, the court noted the responding party is presumed to be “in the best position to choose an appropriate method of searching and culling data.”<sup>518</sup> Rejecting defendant’s “conclusory allegation” that it had “not received all of the documents to which it is entitled,”<sup>519</sup> the court ruled that “reinventing the wheel,” i.e., allowing access for electronic searches to test the efficacy of the prior manual searches, would be unduly burdensome to plaintiff.<sup>520</sup> Given that defendant had not made a “colorable showing” that plaintiff had either intentionally or negligently withheld documents, and that a subjective belief that “documents must exist simply is not enough” to require further discovery, the court denied the motion to compel.<sup>521</sup>

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<sup>516</sup> *Ford Motor Co. v. Edgewood Props., Inc.*, 257 F.R.D. 418, 427 (D.N.J. 2009).

<sup>517</sup> *Id.*; see The Sedona Conference Working Grp. on Best Practices for Document Retention and Prod., *The Sedona Conference Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery*, 8 SEDONA CONF. J. 189, 195 (2007) [hereinafter *Sedona Best Practices Commentary*].

<sup>518</sup> *Ford*, 257 F.R.D. at 427 (quoting *Sedona Best Practices Commentary*, *supra* note 517, at 195) (internal quotation marks omitted).

<sup>519</sup> *Id.* at 427. Indeed, the court noted that such “nefarious speculation has not moved several courts, nor will it move this one, to grant burdensome discovery requests late in the game.” *Id.*

<sup>520</sup> *Id.*

<sup>521</sup> *Id.* at 428. The court did note that if subsequent depositions revealed the existence of unproduced documents defendant could then move for appropriate relief. *Id.*

## 5. *Bank of Mongolia*

[119] In *Bank of Mongolia v. M&P Global Financial Services, Inc.*, defendants failed to timely respond to document requests or produce responsive documents.<sup>522</sup> Plaintiff then sought “access to [d]efendants’ electronic records and computer hardware” to conduct searches.<sup>523</sup> At the hearing on plaintiff’s motion, defendants conceded they had not yet searched their electronic data and requested additional time for their expert to do so.<sup>524</sup> The court, however, denied this request, “in view of the . . . [d]efendants’ past lack of response to [p]laintiff’s request for information . . . .”<sup>525</sup> Instead, the court concluded that “an independent expert should be appointed to retrieve any deleted responsive files from [d]efendants’ computers.”<sup>526</sup> In denying plaintiff’s request for direct access to defendants’ systems, the court reasoned that the “failure to adequately respond to [p]laintiff’s request for documents is not sufficient grounds to give [p]laintiff unfettered access to [d]efendants’ computer system.”<sup>527</sup>

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<sup>522</sup> *Bank of Mongolia v. M&P Global Financial Servs., Inc.*, 258 F.R.D. 514, 516 (S.D. Fla. 2009).

<sup>523</sup> *Id.* at 517.

<sup>524</sup> *Id.*

<sup>525</sup> *Id.* at 520.

<sup>526</sup> *Id.* The independent expert would create a mirror image of defendants’ systems. *Id.* The expert would then use terms agreed to by the parties (with the court resolving any disputes) to search the mirror image results. *Id.* at 521. Plaintiff was ordered to pay the cost of employing the expert, although the court agreed to revisit the issue if evidence of spoliation by the defendants turned up. *Id.* The court also ordered that defendants pay plaintiff’s attorney’s fees associated with bringing the motion, a total of \$3,400. *Id.* at 522.

<sup>527</sup> *Bank of Mongolia*, 258 F.R.D. at 521; *see also In re Ford Motor Co.*, 345 F.3d 1315, 1316 (11th Cir. 2003) (“Rule 34(a) does not grant unrestricted, direct access to a respondent’s database compilations.”).

## D. Search Methodology—Keywords Challenged

### 1. *O’Keefe*

[120] Defendants attempted to challenge the suitability of certain search terms in *United States v. O’Keefe*.<sup>528</sup> The court reasoned that “[w]hether search terms or ‘keywords’ will yield the information sought is a complicated question involving the interplay, at least, of the sciences of computer technology, statistics and linguistics.”<sup>529</sup> As a result, according to the court, “for lawyers and judges to dare opine that a certain search term or terms would be more likely to produce the information than the terms that were used is truly to go where angels fear to tread.”<sup>530</sup> Because the suitability of particular keywords is “clearly beyond the ken of a layman,” the court concluded “that any such conclusion [would have to] be based on evidence that . . . meets the criteria of Rule 702 of the Federal Rules of Evidence.”<sup>531</sup> Accordingly, the court directed that if defendants

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<sup>528</sup> See *United States v. O’Keefe*, 537 F. Supp. 2d 14, 18 (D.D.C. 2008). *O’Keefe* involved criminal charges alleging one defendant, a former State Department employee, expedited visa requests in exchange for gifts and other improper benefits. *Id.* at 15-16. Though the proceeding was criminal, the court applied the Federal Rules of Civil Procedure, noting the criminal rules did not address the document production issues presented. See *id.* at 18-19. In the court’s view, it would have been “foolish” to ignore the Rules “merely because this is a criminal case.” Rather, it was “far better to use these rules than to reinvent the wheel when the production of documents in criminal and civil cases raises the same problems.” *Id.* at 19.

<sup>529</sup> *Id.* at 24.

<sup>530</sup> *Id.*; cf. *Dunkin’ Donuts Franchised Rests. LLC v. Grand Cent. Donuts, Inc.*, No. CV 2007-4027 (ENV)(MDG), 2009 U.S. Dist. LEXIS 52261, at \*15 (E.D.N.Y. June 19, 2009) (directing defendants to provide their opponent with “a list of the employees or former employees whose e-mails they want searched and the specific search terms to be used for each individual”).

<sup>531</sup> *O’Keefe*, 537 F. Supp. 2d at 24. Rule 702 provides that a “witness who is qualified as an expert by knowledge, skill, experience, training, or education, may testify in the form of an opinion . . . if the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue . . . .” FED. R. EVID. 702.

wanted to challenge the search terms used, they must file a motion to compel “based on evidence that meets the requirements of Rule 702 . . . .”<sup>532</sup>

## 2. *Equity Analytics*

[121] Similarly, in *Equity Analytics, LLC v. Lundin*, decided by the same Magistrate Judge as *O’Keefe*,<sup>533</sup> in considering a dispute as to the efficacy of search terms the court ordered the challenger’s expert to submit an affidavit detailing his concerns with the terms proposed.<sup>534</sup> In doing so, the court again emphasized that “determining whether a particular search methodology, such as keywords, will or will not be effective certainly requires knowledge beyond the ken of a lay person (and a lay lawyer) and requires expert testimony that meets the requirements of Rule 702 . . . .”<sup>535</sup>

## 3. *Victor Stanley I*

[122] In *Victor Stanley, Inc. v. Creative Pipe, Inc.* (*Victor Stanley I*), plaintiff argued that 165 electronic documents produced by defendants “occurred under circumstances that waived any privilege or protected status.”<sup>536</sup> In concluding that any privilege had indeed been waived, Magistrate Judge Grimm delved into the search methodologies employed

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<sup>532</sup> *O’Keefe*, 537 F. Supp. 2d at 24.

<sup>533</sup> United States Magistrate Judge Facciola. See *O’Keefe*, 537 F. Supp. 2d at 14; *Equity Analytics, LLC v. Lundin*, 248 F.R.D. 331 (D.D.C. 2008).

<sup>534</sup> *Equity Analytics*, 248 F.R.D. at 333.

<sup>535</sup> *Id.* The court conceded the efficacy of the “contemplated forensic search . . . [was] beyond any experience or knowledge I can claim.” *Id.*; see also *Asarco, Inc. v. U.S. EPA*, No. 08-1332 (EGS/JMF), 2009 U.S. Dist. LEXIS 37182, at \*7 (D.D.C. Apr. 28, 2009) (noting that “keyword searches are no longer the favored methodology” and ordering that party conduct another search using additional keywords).

<sup>536</sup> *Victor Stanley, Inc. v. Creative Pipe, Inc.* (*Victor Stanley I*), 250 F.R.D. 251, 253 (D. Md. 2008).

by defendants in their privilege review.<sup>537</sup> The review used seventy keywords which were selected by one of the defendants and his attorneys.<sup>538</sup> According to the court, defendants were “regrettably vague” in describing how the keywords were developed, “how the search was conducted, and what quality controls were employed to assess their reliability and accuracy.”<sup>539</sup> In particular, the court noted “nothing [was] known . . . regarding [defendant’s and his attorneys’] qualifications for designing a search and information retrieval strategy that could be expected to produce an effective and reliable privilege review.”<sup>540</sup>

[123] The court further criticized defendants for not conducting any sampling to “see if the search results were reliable.”<sup>541</sup> According to the court, the “only prudent way to test the reliability of the keyword search is to perform some appropriate sampling of the documents determined to be privileged and those determined not to be in order to arrive at a comfort level that the categories are neither over-inclusive nor under-inclusive.”<sup>542</sup>

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<sup>537</sup> See *id.* at 253-54, 256.

<sup>538</sup> *Id.* at 256.

<sup>539</sup> *Id.*

<sup>540</sup> *Id.*

<sup>541</sup> *Victor Stanley I*, 250 F.R.D. at 257. Instead, defendants apparently simply produced all documents identified by the keyword search as non-privileged. *Id.*

<sup>542</sup> *Id.* According to the court, “[c]ommon sense suggests that even a properly designed and executed keyword search may prove to be over-inclusive or under-inclusive, resulting in the identification of documents as privileged which are not, and non-privileged which, in fact, are.” *Id.* In *CBT Flint Partners, LLC v. Return Path, Inc.*, No. 1:07-CV-1822-TWT, 2008 U.S. Dist. LEXIS 84189, at \*8 (N.D. Ga. Aug. 7, 2008), 102 search terms resulted in 1.4 million responsive documents. 500,000 of the documents were “potentially privileged.” *Id.* at \*10. After determining that plaintiff bore responsibility for selecting the search terms, the court ordered cost-shifting of \$300,000 to pay defendant’s costs in conducting the privilege review. *Id.* at \*8, \*10. In addition, the court awarded defendant attorney’s fees of \$86,786.95 related to the motion to compel. *Id.* at \*12.

This failure to sample provided further support for the conclusion that defendants' search efforts were not adequate.<sup>543</sup>

[124] Discussing search protocols generally, the court acknowledged that while "keyword searches are useful tools for search and retrieval of ESI, all keyword searches are not created equal . . . ."<sup>544</sup> Instead, "there is a growing body of literature that highlights the risks associated with conducting an unreliable or inadequate keyword search or relying exclusively on such searches for privilege review."<sup>545</sup> Citing *O'Keefe* and *Equity Analytics*, the court reasoned that "proper selection and implementation [of search terms] obviously involves technical, if not

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<sup>543</sup> See *Victor Stanley I*, 250 F.R.D. at 262.

<sup>544</sup> *Id.* at 256-57. Indeed, the court noted "[k]eyword searching may be accomplished in many ways," ranging from simple use of "individual keywords . . . . [to] more advanced search techniques, such as Boolean proximity operators . . . ." *Id.* at 261 n.9. Boolean operators combine a keyword with phrases such as "or," "and," or "not" to locate responsive documents. *Id.* Beyond keywords are more advanced methods such as:

probabilistic search models, including 'Bayesian classifiers' (which searches by creating a formula based on values assigned to particular words based on their interrelationships, proximity, and frequency to establish a relevancy ranking that is applied to each document searched); 'Fuzzy Search Models' (which attempt to refine a search beyond specific words, recognizing that words can have multiple forms. By identifying the 'core' for a word the fuzzy search can retrieve documents containing all forms of the target word); 'Clustering' searches (searches of documents by grouping them by similarity of content, for example, the presence of a series of same or similar words that are found in multiple documents); and 'Concept and Categorization Tools' (search systems that rely on a thesaurus to capture documents which use alternative ways to express the same thought).

*Id.*

<sup>545</sup> *Id.* at 257.

scientific knowledge.”<sup>546</sup> While acknowledging that those opinions had “raised the eyebrows of some commentators” who feared that the use of experts would multiply already exorbitant e-discovery costs, the court stated that a “careful reading of *O’Keefe* and *Equity Analytics* . . . should allay these concerns.”<sup>547</sup>

[125] According to the court,

It cannot credibly be denied that resolving contested issues of whether a particular search and information retrieval method was appropriate . . . involves scientific, technical or specialized information. If so, then, the trial judge must decide a method’s appropriateness with the benefit of information from some reliable source—whether an affidavit from a qualified expert, a learned treatise, or, if appropriate, from information judicially noticed.<sup>548</sup>

Indeed, the court termed it “risky for a trial judge to attempt to resolve issues involving technical areas without the aid of expert assistance.”<sup>549</sup> Thus, in the court’s view,

all that *O’Keefe* and *Equity Analytics* required was that the parties be prepared to back up their positions with respect to a dispute involving the appropriateness of ESI search and information retrieval methodology—obviously an area of science or technology—with reliable information from

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<sup>546</sup> *Id.* at 260; *see also In re Seroquel Prods. Liab. Litig.*, 244 F.R.D. 650, 660 n.6, 662 (M.D. Fla. 2007) (criticizing defendant’s use of keyword search methodology); *Sedona Best Practices Commentary*, *supra* note 517, at 201 (“[S]imple keyword searching alone is inadequate in at least some discovery contexts.”).

<sup>547</sup> *Victor Stanley I*, 250 F.R.D. at 261 n.10.

<sup>548</sup> *Id.*

<sup>549</sup> *Id.*

someone with the qualifications to provide helpful opinions, not conclusory argument by counsel.<sup>550</sup>

[126] Attempting to address the cost concerns mentioned previously, the court simply

repeat[ed] that the cost-benefit balancing factors of . . . Rule 26(b)(2)(C) apply to all aspects of discovery, and parties worried about the cost of employing properly designed search and information retrieval methods have an incentive to keep the costs of this phase of discovery as low as possible, including attempting to confer with their opposing party in an effort to identify a mutually agreeable search and retrieval method.<sup>551</sup>

Such an agreement would minimize “cost because if the method is approved, there will be no dispute resolving its sufficiency, and doing it right the first time is always cheaper than doing it over if ordered to do so by the court.”<sup>552</sup> Needless to say, this discussion does nothing to “allay” the cost concerns occasioned by the *O’Keefe* and *Equity Analytics* decisions.<sup>553</sup> On the contrary, it appears to cement those concerns. The court’s reference to an “incentive” to keep discovery costs low fails to recognize that quite often there is only one party with such an incentive—its opponent wants the opposite.<sup>554</sup> Whether requiring agreement to

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<sup>550</sup> *Id.*

<sup>551</sup> *Id.*

<sup>552</sup> *Victor Stanley I*, 250 F.R.D. at 261 n.10.

<sup>553</sup> *See id.*

<sup>554</sup> *See* *Thorogood v. Sears, Roebuck & Co.*, 624 F.3d 842, 848-49 (7th Cir. 2010). Likewise, courts and commentators considered the proportionality analysis commended by this court to be ineffective under the pre-amendment version of the Rules. *See supra* note 269, and accompanying text. It is far from clear that the amended Rule 26(b)(2)(C)’s cost-benefit test is any more effective than the previous version. *See Duke:*



overly broad search terms the opponent wants, or hiring an expert to justify more constrained terms, this line of cases, if followed, simply adds yet another layer of costs to the e-discovery process.<sup>555</sup>

#### 4. *William A. Gross*

[127] In *William A. Gross Construction Associates, Inc. v. American Manufacturers Mutual Insurance Co.*, the court issued a “wake-up call to the Bar . . . about the need for careful thought, quality control, testing, and cooperation with opposing counsel in designing search terms or ‘keywords’ to be used to produce e-mails or other [ESI].”<sup>556</sup> The dispute centered on the production of e-mails from a non-party to the suit.<sup>557</sup> The parties could not agree on keywords, with each side proposing terms the other party considered either too narrow or too broad.<sup>558</sup> As a result, the court was “left . . . in the uncomfortable position of having to craft a keyword search methodology for the parties, without adequate information . . . .”<sup>559</sup> Concluding that the case was just the latest example of lawyers designing keyword searches in the dark, the court joined the *O’Keefe* line of cases in requiring that search methodology be supported by “something

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*Providing Tools to Cope with E-Discovery Issues*, THE METROPOLITAN CORP. COUNS., June 2, 2010, at 12 (noting consensus that proportionality standard “is not used very often, if at all”).

<sup>555</sup> See, e.g., *Thorogood*, 624 F.3d at 849-50.

<sup>556</sup> *William A. Gross Constr. Assocs., Inc. v. Am. Mfrs. Mut. Ins. Co.*, 256 F.R.D. 134 (S.D.N.Y. 2009).

<sup>557</sup> *Id.*

<sup>558</sup> *Id.* at 135. The court noted the “problem would have been avoided . . . if [the non-party] used a standard ‘Re’ line in its . . . e-mails to distinguish [the relevant] project from its other work. It did not do so, however.” *Id.* It may bear mentioning that businesses use e-mail to conduct business, not prepare for discovery obligations in some future, unanticipated litigation years hence.

<sup>559</sup> *Id.*

other than a lawyer's guesses . . . without any quality control testing to see if the search terms produce reasonably all the responsive ESI and limited 'false positives.'"<sup>560</sup> Summing up, the court endorsed "cooperation among counsel" as the "best solution in the entire area of electronic discovery . . . ." <sup>561</sup> Again, whether this is a realistic solution is far from clear.

## 5. *Fannie Mae*

[128] *In re Fannie Mae Securities Litigation* illustrates the potential pitfalls of cooperation: a third party responding to a subpoena spent millions of dollars for failing to conduct timely searches on overly broad but agreed-to key words, and the court still held the party in contempt.<sup>562</sup> The third party's initial response to the subpoena did not include searching backup tapes.<sup>563</sup> When the requesting parties objected and moved to hold the third party in contempt, the third party agreed to search its backup tapes; the parties memorialized this agreement in a stipulated order.<sup>564</sup> Pursuant to this agreement, the requesting parties submitted over 400 search terms which implicated approximately 660,000 documents.<sup>565</sup> The

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<sup>560</sup> *Id.* at 136 n.3. Surprisingly, the court held that it "need not now decide whether expert testimony is required" to validate a search. *Id.*

<sup>561</sup> *William A. Gross*, 256 F.R.D. at 136 n.3; *see also* *Capitol Records, Inc. v. MP3Tunes, LLC*, 261 F.R.D. 44, 48-49 (S.D.N.Y. 2009) (involving an agreement between parties on nine search terms, but requiring court to resolve dispute as to other thirty).

<sup>562</sup> *In re Fannie Mae Secs. Litig.*, 552 F.3d 814, 817-18 (D.C. Cir. 2009). The third party, the Office of Federal Housing Enterprise Oversight ("OFHEO"), regulates the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac"). *Id.* at 816. During litigation over alleged accounting irregularities by Fannie Mae, several of its senior executives issued subpoenas to OFHEO. *Id.*

<sup>563</sup> *Id.* at 817.

<sup>564</sup> *Id.*

<sup>565</sup> *Id.*

third party objected, claiming that under the agreement the requesting parties were limited to providing “appropriate search terms.”<sup>566</sup> The district court disagreed, however, ruling that the agreement<sup>567</sup> “gave the [requesting parties] sole discretion to specify search terms and imposed no limits on permissible terms.”<sup>568</sup> The third party then took “extensive efforts to comply” with its production obligations under the agreement, “hiring fifty contract attorneys solely for that purpose” and spending “over \$6 million, more than 9 percent of the agency’s entire annual budget.”<sup>569</sup> Nevertheless, the third party was not able to comply in a timely manner with its production deadlines, leading the district court to hold it in contempt.<sup>570</sup>

[129] On appeal, the D.C. Circuit affirmed, agreeing with the lower court that the agreement obligated the third party to use whatever search terms the requesting parties specified.<sup>571</sup> The appellate court likewise rejected the argument that “the district court violated Rule 45 by compelling compliance without considering cost-shifting, narrowing the scope of the requests, or finding that [the requesting parties] demonstrated good cause for forcing [the third party] to retrieve its inaccessible data.”<sup>572</sup> According to the court, “[w]hatever the merits of these claims, [the third party]

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<sup>566</sup> *Id.*

<sup>567</sup> The specific terms at issue provided that “OFHEO will work with the [requesting parties] to provide the necessary information (without individual document review) to develop appropriate search terms. By October 19, 2007, the [requesting parties] will specify the search terms to be used.” *In re Fannie Mae Sec. Litig.*, 552 F.3d at 817.

<sup>568</sup> *Id.*

<sup>569</sup> *Id.*

<sup>570</sup> *Id.* at 818. As a sanction, the district court ordered production of all documents withheld on the sole basis of the qualified deliberative process privilege and not logged by a certain deadline. *Id.*

<sup>571</sup> *Id.* at 819.

<sup>572</sup> *In re Fannie Mae Sec. Litig.*, 552 F.3d at 821 (internal quotation marks omitted).

abandoned them by entering into the stipulated order.”<sup>573</sup> Thus, in the court’s view the third party could “hardly complain now about being held to its agreement.”<sup>574</sup>

## E. Form of Production—Metadata, etc.

### 1. *Scotts*

[130] In *Scotts Co. LLC v. Liberty Mutual Insurance Co.*, plaintiff sought an order requiring defendant to reproduce certain electronic data, including metadata, “in the form in which it was maintained by defendant instead of in the hard copy form in which it ha[d] been produced . . . .”<sup>575</sup>

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<sup>573</sup> *Id.* at 821-22.

<sup>574</sup> *Id.* at 822. Of course, the major point in dispute was whether the third party agreed to the undeniably overbroad and unduly burdensome search terms. Thus, under these circumstances it is not particularly persuasive to conclude that the third party had no grounds to complain about the scope of the subpoena because it agreed to it. This is especially so given that Rule 45 mandates that a “party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty . . . .” FED. R. CIV. P. 45(c)(1). Indeed, as Magistrate Grimm explained in *Mancia v. Mayflower Textile Services Co.*, the court has a *sua sponte* obligation to limit discovery where the burden or expense outweighs the likely benefit. 253 F.R.D. 354, 364 (D. Md. 2008); *see also* FED. R. CIV. P. 26(b)(2)(C); FED. R. CIV. P. 45(c)(1); *supra* text accompanying notes 485-97. Spending \$6 million and over 9 percent of an annual budget responding to a subpoena would certainly seem to be an undue burden and expense, no matter the alleged terms of agreement. Thus, if anything, *In re Fannie Mae* provides yet another example of the difficulty of relying on the proportionality concepts of the Federal Rules to effectively limit the scope or expense of e-discovery.

<sup>575</sup> *Scotts Co. LLC v. Liberty Mut. Ins. Co.*, No. 2:06-CV-899, 2007 U.S. Dist. LEXIS 43005, at \*10 (S.D. Ohio June 12, 2007). The court examined several sources to define “metadata,” and settled on a few. *Id.* It is “commonly described as ‘data about data,’ is defined as a ‘set of data that describes and gives information about other data.’” *Id.* at \*11 n.2 (quoting OXFORD ENGLISH DICTIONARY). The Sedona Conference defines metadata as “information about a particular data set which describes how, when and by whom it was collected, created, accessed, or modified and how it is formatted (including data demographics such as size, location, storage requirements and media information).” *Scotts*, 2007 U.S. Dist. LEXIS 43005, at \*11 n.2 (quoting THE SEDONA GUIDELINES:

Plaintiff argued that “as a ‘matter of law, a party’s discovery obligations are not satisfied by the production of computerized information in a hard copy format.’”<sup>576</sup>

[131] Citing Rule 34, however, the court concluded this “assertion is simply an incorrect statement of the law.”<sup>577</sup> Rather, the court noted that under Rule 34 both parties play a role in the form of production.<sup>578</sup> That is, a party may specify the form in which it wants the ESI produced; plaintiff, however, had failed to do so in its requests.<sup>579</sup> Likewise, in its responses defendant had not specified the form it intended to use for its production, as required under Rule 34 when the propounding party does not specify the form.<sup>580</sup> Relying on the Advisory Committee Notes to the 2006 amendments, the court recognized that if “the responding party ordinarily maintains the information it is producing in a way that makes it searchable by electronic means, the information should not be produced in

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BEST PRACTICE GUIDELINES & COMMENTARY FOR MANAGING INFORMATION AND RECORDS IN THE ELECTRONIC AGE, at Appendix F (Charles R. Ragan et. al eds., 2005), available at [http://www.thesedonaconference.org/content/miscFiles/TSG9\\_05.pdf](http://www.thesedonaconference.org/content/miscFiles/TSG9_05.pdf)). Common examples of metadata include: “a file’s name, a file’s location (*e.g.*, directory structure or pathname), file format or file type, file size, file dates (*e.g.*, creation date, date of last data modification, date of last data access, and date of last metadata modification), and file permissions (*e.g.*, who can read the data, who can write to it, who can run it).” *Scotts*, 2007 U.S. Dist. LEXIS 43005, at \*11 n.2. File dates and size can often be seen by users, but “other metadata can be hidden or embedded and unavailable to computer users who are not technically adept.” *Id.*; see *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 547 (D. Md. 2007) (quoting *Williams v. Sprint/United Mgmt. Co.*, 230 F.R.D. 640, 646 (D. Kan. 2005)).

<sup>576</sup> *Scotts*, 2007 U.S. Dist. LEXIS 43005, at \*13.

<sup>577</sup> *Id.*

<sup>578</sup> *Id.*

<sup>579</sup> *Id.* at \*12.

<sup>580</sup> *Id.*

a form that removes or significantly degrades this feature.”<sup>581</sup> While plaintiff argued the hard copy production impaired its ability to use the information by not permitting searches for metadata, the court concluded the parties should meet and confer on this issue.<sup>582</sup>

## 2. *Ford*

[132] In *Ford Motor Co. v. Edgewood Properties, Inc.*, the defendant requested that plaintiff “produce documents in native format.”<sup>583</sup> In response, the plaintiff produced documents in “Tagged Image File Format (‘TIFF’) with accompanying searchable text.”<sup>584</sup> After plaintiff essentially completed the production, defendant objected to the form.<sup>585</sup>

[133] According to the court, the “producing party ordinarily must take into account the need for metadata to make otherwise unintelligible documents understandable.”<sup>586</sup> But, “crucially” in the court’s view, defendant did not object to the production “within a reasonable period of time. . . .”<sup>587</sup> While the court did not “dictat[e] a rigid formulation as to when a party must object to a document production,” it simply held that waiting until after the production was “virtually complete” was

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<sup>581</sup> *Scotts*, 2007 U.S. Dist. LEXIS 43005, at \*14.

<sup>582</sup> *Id.* at \*14-15.

<sup>583</sup> *Ford Motor Co. v. Edgewood Props., Inc.*, 257 F.R.D. 418, 424 (D.N.J. 2009).

<sup>584</sup> *Id.*

<sup>585</sup> *Id.* at 425-26.

<sup>586</sup> *Id.* at 425; *see also* *Aguilar v. Immigration & Customs Enforcement Div. of the United States Dept. of Homeland Sec.*, 255 F.R.D. 350, 357 (S.D.N.Y. 2008) (stating that metadata is generally ordered produced when “it is sought in the initial document request and the producing party has not yet produced the documents in any form”); THE SEDONA PRINCIPLES, *supra* note 93, at ii (see Principle 12).

<sup>587</sup> *Ford*, 257 F.R.D. at 425.

unreasonable.<sup>588</sup> Because defendant had waived its objection, and it “without question [would be] unduly burdensome to a party months after production to require that party to reconstitute their *entire* production to appease a late objection,” the court denied the motion to compel.<sup>589</sup>

### 3. *Covad*

[134] In *Covad Communications Co. v. Revonet, Inc.*, the defendant refused to produce e-mails in their native format, instead proposing to make them available in hard copy or TIFF files.<sup>590</sup> That is, defendant “claim[ed] the right to convert the e-mails from their native format to other formats even though those are not as easily searchable by electronic means as the e-mails in their native format would be.”<sup>591</sup> Defendant’s justification for doing so was that plaintiff had not specified the format for the production of the e-mails.<sup>592</sup>

[135] Pursuant to Rule 34, the court noted “the requesting party may [specify] the form in which [ESI] should be produced and,” failing that, the production should be in the “form in which [the information] is ordinarily maintained, or in a reasonably usable form.”<sup>593</sup> The parties had

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<sup>588</sup> *Id.* at 426. The court commended “[r]easonableness [a]s the touchstone principle, as it is with most discovery obligations.” *Id.*

<sup>589</sup> *Id.* The court noted the “entire problem could have been avoided had there been an *explicit* agreement between the parties as to production, but . . . that ship ha[d] sailed . . .” *Id.*

<sup>590</sup> *Covad Commc’ns. Co. v. Revonet, Inc.*, 254 F.R.D. 147, 148 (D.D.C. 2008).

<sup>591</sup> *Id.*

<sup>592</sup> *See id.* at 148-49.

<sup>593</sup> *Id.* at 149; *see also* *MGP Ingredients, Inc. v. Mars, Inc.*, No. 06-2318-JWL-DJW, 2007 U.S. Dist. LEXIS 76853, at \*9-10 (D. Kan. Oct. 15, 2007) (noting that “the producing party must either produce the documents as they are kept in the usual course of business or organize and label them to correspond with the categories in the request” and that “[i]f

not discussed what form the production would take, but instead appeared to “mak[e] assumptions based on each others’ behavior: [plaintiff] expect[ed] its documents in electronic form because [defendant] hired a company to collect [ESI], and [defendant] assum[ed] that they should produce 35,000 pages of e-mails in hard copy because [plaintiff] produced its documents in that format.”<sup>594</sup> While recognizing that plaintiff’s instructions in the document requests were “hopelessly imprecise and [defendant] could colorably argue that [they] should be interpreted to include several different formats,” the court concluded that “no reasonable person can honestly believe that hard copy is one of them.”<sup>595</sup> Indeed, according to the court, while it was unclear what plaintiff asked for, it was clear what they had *not* asked for, “and that is what they got.”<sup>596</sup> Thus, the court ordered that defendant “produce the e-mails . . . in their native format.”<sup>597</sup>

[136] The court went on to conclude that the parties should share the cost of removing any privileged e-mails from the production up to \$4,000, i.e., \$2,000 per party.<sup>598</sup> While ordinarily defendant would bear this cost

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the producing party produces documents [in order] . . . the Rule imposes no duty to organize and label the documents . . .”).

<sup>594</sup> *Covad*, 254 F.R.D. at 149.

<sup>595</sup> *Id.* at 150.

<sup>596</sup> *Id.*

<sup>597</sup> *Id.* at 151. In doing so, the court noted there was authority from “at least 2000 that indicated that a party could be required to produce data in an electronic format even though it had already produced it in hard copy.” *Id.* at 150-51 (citing Shira A. Scheindlin & Jeffrey Rabkin, *Electronic Discovery in Federal Civil Litigation: Is Rule 34 up to the Task?*, 41 B.C. L. Rev. 327, 355 (2000)). Thus, according to the court, defendant “played with fire” by producing the e-mails only in hard copy. *Id.* at 151. But the court did not mention Rule 34(b)(2)(E)(iii)’s provision that a “party need not produce the same [ESI] in more than one form.” *See generally* FED. R. CIV. P. 34(b)(2)(E)(iii).

<sup>598</sup> *Covad*, 254 F.R.D. at 151.



alone, the court recognized that plaintiff had “play[ed] with the same fire” by likewise producing its documents in hard copy.<sup>599</sup> Thus, characterizing the dispute as “both parties [going] through the same stop sign,” the court concluded “that they both should pay for the crash.”<sup>600</sup> Indeed, the court hoped its decision would “have a didactic purpose” by emphasizing the need for parties to confer with each other “on such a fundamental question as the format of their productions of [ESI].”<sup>601</sup>

#### 4. *Dahl*

[137] In *Dahl v. Bain Capital Partners, LLC*, plaintiffs sought production of all the “metadata associated with e-mails and word documents produced” by defendants.<sup>602</sup> The court, however, rejected this request, noting that “case law shows wariness about metadata’s value in litigation.”<sup>603</sup> Indeed, according to the court, “Rule 34 militates against the broad, open disclosure of metadata that” plaintiffs sought.<sup>604</sup> Instead, the court explained that discovery requests should be narrowly tailored “so only necessary data is produced.”<sup>605</sup> Applying this principle, the court

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<sup>599</sup> *Id.*; see also *Peskoff v. Faber*, 251 F.R.D. 59, 60-61 (D.D.C. 2008) (examining cost-shifting when the information sought could only be obtained through a costly forensic examination).

<sup>600</sup> *Covad*, 254 F.R.D. at 151.

<sup>601</sup> *Id.*

<sup>602</sup> *Dahl v. Bain Capital Partners, LLC*, 655 F. Supp. 2d 146, 149 (D. Mass. 2009).

<sup>603</sup> *Id.*; see, e.g., *Kentucky Speedway, LLC v. NASCAR, Inc.*, No. 05-138-WOB, 2006 U.S. Dist. LEXIS 92028, at \*24 (E.D. Ky. Dec. 18, 2006) (“In most cases and for most documents, metadata does not provide relevant information”); *Wyeth v. Impax Labs., Inc.*, 248 F.R.D. 169, 171 (D. Del. 2006) (“Most metadata is of limited evidentiary value, and reviewing it can waste litigation resources”).

<sup>604</sup> *Dahl*, 655 F. Supp. 2d at 149.

<sup>605</sup> *Id.* at 150.

concluded that “[r]ather than a sweeping request for metadata, [plaintiffs] should tailor their requests to specific word documents, specific e-mails or specific sets of e-mail . . . .”<sup>606</sup> The court hoped this “more focused approach [would] . . . reduce the parties’ costs and work.”<sup>607</sup>

## F. Significant Recent Sanctions Cases

### 1. *Zubulake Revisited—Pension Committee*

[138] In *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC*, Judge Scheindlin revisited the preservation principles she initially set forth in the *Zubulake* series of opinions six years earlier.<sup>608</sup> Certain defendants moved for sanctions, arguing “plaintiff[s] failed to preserve . . . [relevant] documents” and then

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<sup>606</sup> *Id.*; see also *Ojeda-Sanchez v. Bland Farms, LLC*, No. CV608-096, 2009 U.S. Dist. LEXIS 66238, at \*11 (S.D. Ga. July 31, 2009) (ordering production of metadata where plaintiffs showed “particularized need for the information”); cf. *Bray & Gillespie Mgmt. LLC v. Lexington Ins. Co.*, 259 F.R.D. 568, 582-83, 590-91 (M.D. Fla. 2009) (sanctioning plaintiff and counsel for falsely telling opposing counsel that plaintiff “had caused all of its ESI to be printed and scanned to support the position that [plaintiff] could not produce metadata or text searchable documents”); *Williams v. Sprint/United Mgmt. Co.*, 230 F.R.D. 640, 651 (D. Kan. 2005) (clarifying that order to produce ESI “in the form in which it is regularly maintained, i.e., in its native format or as an active file, . . . must include all metadata unless . . . party timely objects to production of the metadata, the parties agree that the metadata should not be produced, or the producing party requests a protective order.”).

<sup>607</sup> *Dahl*, 655 F. Supp. 2d at 150. The court did require that certain excel spreadsheets be produced in their native format, drawing a distinction with metadata “because of [their] different functions . . . .” *Id.* at n.1. According to the court, “[m]aintaining spreadsheets in their native format is necessary to assure the integral elements of a spreadsheet remain undisturbed. In contrast, the court [was] not convinced that metadata is an integral element of a given e-mail or word document.” *Id.*

<sup>608</sup> *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Secs., LLC*, 685 F. Supp. 2d 456, 462 (S.D.N.Y. 2010) (“Once again, I have been compelled to closely review the discovery efforts of parties in a litigation, and once again have found that those efforts were flawed.”).

“submitted false and misleading declarations regarding their” discovery efforts.<sup>609</sup> While acknowledging that “[c]ourts cannot and do not expect that any party can meet a standard of perfection,” the court explained that it has “a right to expect that litigants and counsel will take the necessary steps to ensure that relevant records are preserved when litigation is reasonably anticipated, and that such records are collected, reviewed, and produced to the opposing party.”<sup>610</sup> Further, according to the court, “[e]ach case will turn on its own facts and the varieties of efforts and failures is [sic] infinite.”<sup>611</sup>

[139] Informing the court’s analysis were the principles of negligence, gross negligence, and willfulness.<sup>612</sup> Finding “no clear definition of these terms” applicable to spoliation allegations, the court concluded they “simply describe a continuum. Conduct is either acceptable or unacceptable. Once it is unacceptable the only question is how bad is the conduct.”<sup>613</sup> The court reasoned that after July 2004, when *Zubulake V* was issued, the “failure to issue a *written* litigation hold constitutes gross negligence because that failure is likely to result in the destruction of relevant information.”<sup>614</sup>

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<sup>609</sup> *Id.* at 463. Plaintiffs were ninety-six investors seeking to recover \$550 million lost when two hedge funds were liquidated. *Id.* at 462 n.3. The retention efforts of thirteen of the plaintiffs were at issue in the motion. *Id.*

<sup>610</sup> *Id.* at 461.

<sup>611</sup> *Id.* at 465.

<sup>612</sup> *Id.* at 463.

<sup>613</sup> *Pension Comm.*, 685 F. Supp. 2d at 463.

<sup>614</sup> *Id.* at 464; *cf.* Haynes v. Dart, No. 08-C-4834, 2010 U.S. Dist. LEXIS 1901, at \*11 (N.D. Ill. Jan. 11, 2010) (“The failure to institute a document retention policy, in the form of a litigation hold, is relevant to the court’s consideration, but it is not *per se* evidence of sanctionable conduct.”).

[140] Turning to the next step of collection and review, the court noted that “depending on the extent of the failure to collect evidence, or the sloppiness of the review, the resulting loss or destruction of evidence is surely negligent, and, depending on the circumstances may be grossly negligent or willful.”<sup>615</sup> Thus, for example, the “failure to collect records—either paper or electronic—from key players constitutes gross negligence or willfulness as does the destruction of e-mail or certain backup tapes after the duty to preserve has attached.”<sup>616</sup> On the other hand, the “failure to obtain records from all those employees who had any involvement with the issues raised in the litigation . . . , as opposed to just the key players, could constitute negligence.”<sup>617</sup>

[141] Whether alleged misconduct constitutes negligence versus gross negligence or worse is significant because the answer impacts how the party seeking sanctions goes about proving the relevance of the missing evidence.<sup>618</sup> Significantly, according to the court, “[r]elevance and prejudice may be presumed when the spoliating party acted in bad faith or

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<sup>615</sup> *Pension Comm.*, 685 F. Supp. 2d at 465.

<sup>616</sup> *Id.* The court later clarified that by mentioning “certain backup tapes” it was not “requiring that *all* backup tapes must be preserved. Rather, if such tapes are the sole source of relevant information (e.g., the active files of key players are no longer available), then such backup tapes should be segregated and preserved. When accessible data satisfies the requirement to search for and produce relevant information, there is no need to save or search backup tapes.” *Id.* at 479 n.99. This limitation comports with the court’s earlier guidance in *Zubulake IV* and the holdings of other cases. See *Oxford House, Inc. v. Topeka*, No. 06-4004-RDR, 2007 U.S. Dist. LEXIS 31731, at \*12 (D. Kan. Apr. 27, 2007); *Zubulake IV*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003) (“As a general rule, then, a party need not preserve all backup tapes even when it reasonably anticipates litigation.”).

<sup>617</sup> *Pension Comm.*, 685 F. Supp. 2d at 465.

<sup>618</sup> See *id.* at 467. To win sanctions, the movant must establish that the alleged spoliator: “(1) had control over the evidence and an obligation to preserve it at the time of destruction or loss; (2) acted with a culpable state of mind upon destroying or losing the evidence; and that (3) the missing evidence is relevant to the innocent party’s claim or defense.” *Id.*

in a grossly negligent manner.”<sup>619</sup> On the contrary, “when the spoliating party was merely negligent, the innocent party must prove both relevance and prejudice in order to justify the imposition of a severe sanction.”<sup>620</sup> Relevance in this regard “means something *more than sufficiently probative to satisfy Rule 401 of the Federal Rules of Evidence.*”<sup>621</sup> Thus, the “innocent party must . . . show that the evidence would have been helpful in proving its claims or defenses — i.e., that the innocent party is prejudiced without that evidence.”<sup>622</sup> Significantly, “[p]roof of relevance does not necessarily equal proof of prejudice.”<sup>623</sup>

[142] Applying these principles, the court rejected the defendant’s request for a dismissal, “the most extreme sanction.”<sup>624</sup> The court did,

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<sup>619</sup> *Id.* But “application of the presumption is not required.” *Id.* Further, “[n]o matter what level of culpability is found, any presumption is rebuttable and the spoliating party should have the opportunity to demonstrate that the innocent party has not been prejudiced by the absence of the missing information.” *Id.* at 468. Indeed, the “party seeking relief has some obligation to make a showing of relevance and eventually prejudice, lest litigation become a ‘gotcha’ game rather than a full and fair opportunity to air the merits of a dispute.” *Id.*

<sup>620</sup> *Id.* at 467-68.

<sup>621</sup> *Id.* at 467 (citation omitted).

<sup>622</sup> *Pension Comm.*, 685 F. Supp. 2d at 467. This, of course, can be a difficult burden because it is “often impossible to know what lost documents would have contained.” *Id.* at 466. Thus, “[c]ourts must take care not to ‘hold[] the prejudiced party to too strict a standard of proof regarding the likely contents of the destroyed [or unavailable] evidence,’ because doing so ‘would . . . allow parties who have . . . destroyed evidence to profit from that destruction.’” *Id.* at 468 (alteration in original). Nevertheless, the innocent party “must present extrinsic evidence tending to show that the destroyed [ESI] would have been favorable to [its] case.” *Id.*

<sup>623</sup> *Id.* at 467.

<sup>624</sup> *Id.* at 469. As the court noted, a “terminating sanction is justified in only the most egregious cases, such as where a party has engaged in perjury, tampering with evidence, or intentionally destroying evidence by burning, shredding, or wiping out computer hard drives.” *Id.* at 469-70; *see, e.g.*, *Gutman v. Klein*, No. 03 Civ. 1570 (BMC), 2008 U.S. Dist. LEXIS 97707, at \*1-2 (E.D.N.Y. Dec. 1, 2008) (granting default judgment where

however, conclude that plaintiffs failed to issue an appropriate litigation hold when their duty to preserve arose.<sup>625</sup> While acknowledging that counsel had “telephoned and e-mailed plaintiffs [regarding preserving and collecting documents] and distributed memoranda instructing plaintiffs to be over, rather than under, inclusive,” the court noted the purported hold did “not direct employees to *preserve* all relevant records—both paper and electronic—nor [did] it create a mechanism for *collecting* the preserved records so that they [could] be searched by someone other than the employee.”<sup>626</sup> Rather, according to the court, the “directive place[d] total reliance on the employee to search and select what that employee believed to be responsive records without any supervision from [c]ounsel.”<sup>627</sup>

[143] The court concluded that none of the plaintiffs “engaged in willful misconduct.”<sup>628</sup> But,—separate and apart from failing to issue an appropriate litigation hold—the court found numerous other instances of either gross negligence or simple negligence by plaintiffs.<sup>629</sup> Specifically, certain plaintiffs “failed to execute a comprehensive search for documents and/or failed to sufficiently supervise or monitor their employees’

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defendants intentionally deleted computer files after duty to preserve arose). The court found “no evidence of such misconduct in this case.” *Pension Comm.*, 685 F. Supp. 2d at 470.

<sup>625</sup> *Pension Comm.*, 685 F. Supp. 2d at 473. Indeed, plaintiffs admitted that they did not issue written litigation holds until 2007, whereas their duty to preserve arose in 2003. *Id.* at 475-76.

<sup>626</sup> *Id.* at 473.

<sup>627</sup> *Id.* In the court’s view, “not every employee will require hands-on supervision from an attorney. However, attorney oversight of the [preservation] process, including the ability to review, sample, or spot-check the collection efforts is important.” *Id.* n.68. Again, the court noted “each search must be evaluated on a case by case basis.” *Id.*

<sup>628</sup> *Id.* at 478.

<sup>629</sup> *Id.* at 477.

document collection.”<sup>630</sup> Other plaintiffs “failed to collect and preserve documents of key players.”<sup>631</sup> At least one plaintiff “admitted that it destroyed backup data in 2004, after the duty to preserve at least some backup tapes was well-established.”<sup>632</sup> Finally, the court noted that “almost every plaintiff submitted a declaration [detailing their preservation efforts] that—at best—lacked attention to detail, or—at worst—was intentionally vague in an attempt to mislead . . . [d]efendants and the [c]ourt.”<sup>633</sup>

[144] On the issue of remedy, the court found that for those plaintiffs who were grossly negligent, defendants had “‘adduced enough evidence’ that plaintiffs ha[d] failed to produce relevant documents and that the . . . [d]efendants ha[d] been prejudiced as a result.”<sup>634</sup> Accordingly, the court agreed to instruct the jury that it could presume “both the relevance of the missing documents and resulting prejudice to the . . . [d]efendants, subject to the plaintiffs’ ability to rebut the presumption . . . .”<sup>635</sup>

[145] For the remaining plaintiffs, who were merely negligent in carrying out their discovery obligations, the court concluded that defendants “carried their limited burden of demonstrating that the lost

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<sup>630</sup> *Pension Comm.*, 685 F. Supp. 2d at 477.

<sup>631</sup> *Id.*

<sup>632</sup> *Id.*

<sup>633</sup> *Id.* at 477. In addition, the court concluded several plaintiffs violated their duty to present knowledgeable witnesses regarding “[w]hich files were searched, how the search was conducted, who was asked to search, what they were told, and the extent of any supervision . . . .” *Id.*

<sup>634</sup> *Id.* at 478.

<sup>635</sup> *Pension Comm.*, 658 F. Supp. 2d at 478.

documents would have been relevant.”<sup>636</sup> However, the court determined prejudice to be “another matter,” recognizing that defendants had “gathered an enormous amount of discovery—both from documents and witnesses.”<sup>637</sup> Thus, the court found that a sanction less than an adverse inference would suffice for the negligent plaintiffs “[u]nless [defendants] [could] show through extrinsic evidence that the loss of the documents has prejudiced their ability to defend the case.”<sup>638</sup> The court therefore ruled the negligent plaintiffs were subject only to monetary sanctions, including the defendant’s reasonable costs and attorney’s fees incurred in prosecuting the motion.<sup>639</sup> The grossly negligent plaintiffs were subject to this monetary sanction in addition to the adverse inference charge.<sup>640</sup>

## 2. *Rimkus*

[146] In contrast to *Pension Committee*, the court in *Rimkus Consulting Group, Inc. v. Cammarata* addressed allegations of intentional, rather than negligent, destruction of evidence,<sup>641</sup> in the context of a dispute regarding covenants not to compete.<sup>642</sup> Defendants acknowledged they had deleted

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<sup>636</sup> *Id.* at 479. Here, the court reasoned that “[t]he documents that no longer exist were created during the critical time period. Key players must have engaged in correspondence regarding the relevant transactions.” *Id.*

<sup>637</sup> *Id.*

<sup>638</sup> *Id.*

<sup>639</sup> *Id.* at 497.

<sup>640</sup> *Pension Comm.*, 685 F. Supp. 2d at 496 n.251, 497.

<sup>641</sup> *Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598, 607 (S.D. Tex. 2010) (“[A]llegations of willful misconduct: the intentional destruction of e-mails and other electronic information at a time when they were known to be relevant to anticipated or pending litigation.”).

<sup>642</sup> Plaintiff alleged that defendants—its former employees—breached noncompetition and nonsolicitation agreements and misappropriated trade secrets in launching a new competing business. *Id.* at 608.



“some arguably relevant” e-mails, but contended plaintiff could not “show prejudice because the missing e-mails ‘would be merely cumulative of the evidence already produced.’”<sup>643</sup>

[147] In discussing the applicable legal principles, the court noted that “[w]hether preservation or discovery conduct is acceptable in a case depends on what is *reasonable*, and that in turn depends on whether what was done—or not done—was *proportional* to that case and consistent with clearly established applicable standards.”<sup>644</sup> As the *Pension Committee* court recognized, this “analysis depends heavily on the facts and circumstances of each case and cannot be reduced to a generalized checklist.”<sup>645</sup> This is because in assessing sanctions a court must “consider both the spoliating party’s culpability and the level of prejudice to the party seeking the discovery,” both of which “can range along a continuum.”<sup>646</sup> Thus, a “court’s response to the loss of evidence depends on both the degree of culpability and the extent of prejudice.”<sup>647</sup> So, for example, “[e]ven if there is intentional destruction of potentially relevant evidence, if there is no prejudice to the opposing party, that influences the sanctions” ruling.<sup>648</sup>

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<sup>643</sup> *Id.* at 609. Indeed, the record “include[d] evidence that the defendants intentionally deleted some e-mails and attachments after there was a duty to preserve them . . . [and engaged in] efforts to conceal or delay revealing that e-mails and attachments had been deleted.” *Id.* at 607.

<sup>644</sup> *Id.* at 613.

<sup>645</sup> *Id.* (citing *Pension Comm.*, 685 F. Supp. 2d at 464-65). Likewise, according to the *Rimkus* court, “[a]pplying a categorical approach to sanctions issues is also difficult.” *Id.*

<sup>646</sup> *Rimkus*, 688 F. Supp. 2d at 613.

<sup>647</sup> *Id.*

<sup>648</sup> *Id.* Similarly, “if there is an inadvertent loss of evidence but severe prejudice to the opposing party, that . . . will influence the appropriate response, recognizing that sanctions (as opposed to other remedial steps) require some degree of culpability.” *Id.*

[148] Applying Fifth Circuit law, the court noted that “severe sanctions,” such as “granting default judgment, striking pleadings, or giving adverse inference instructions may not be imposed unless there is evidence of ‘bad faith.’”<sup>649</sup> That is, “[m]ere negligence is not enough’ to warrant an instruction on spoliation.”<sup>650</sup> Consequently, unlike in the Second Circuit, “negligent as opposed to intentional, ‘bad faith’ destruction of evidence is not sufficient to give an adverse inference instruction and may not relieve the party seeking discovery of the need to show that missing documents are relevant and their loss prejudicial.”<sup>651</sup> According to the court, the Fifth Circuit’s emphasis on the “level of culpability necessary for an adverse inference instruction limit[ed] the applicability of the *Pension Committee* approach[.]” where Judge Scheindlin “imposed a form of adverse inference instruction based on a finding of gross negligence. . . .”<sup>652</sup>

[149] Requiring a “showing that the lost information is relevant and prejudicial is an important check on spoliation allegations and sanctions motions.”<sup>653</sup> Thus, “[c]ourts have held that speculative or generalized assertions that the missing evidence would have been favorable to the party seeking sanctions are insufficient.”<sup>654</sup> Here, the court distinguished *Pension Committee*’s reasoning that because the evidence no longer exists

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<sup>649</sup> *Id.* at 614 (citations omitted).

<sup>650</sup> *Id.* (citations omitted).

<sup>651</sup> *Rimkus*, 688 F. Supp. 2d at 615. The court noted “[o]ther circuits have also held negligence insufficient for an adverse inference instruction.” *Id.* at 614 (citations omitted) (listing Seventh, Eighth, Tenth, Eleventh, and D.C. Circuits as requiring bad faith for adverse inference, while the First, Third, Fourth, and Ninth Circuits do not).

<sup>652</sup> *Id.* at 615.

<sup>653</sup> *Id.* at 616. The court recognized that “[s]poliation of evidence—particularly of [ESI]—has assumed a level of importance in litigation that raises grave concerns. Spoliation allegations and sanctions motions distract from the merits of a case, add costs to discovery, and delay resolution.” *Id.* at 607.

<sup>654</sup> *Id.* at 616 (citations omitted).

it may be difficult for “an innocent party . . . to show that information lost through spoliation is relevant and prejudicial[.]”<sup>655</sup> and *Pension Committee*’s conclusion allowing for the presumption of relevance and prejudice “when the spoliating party acts in a grossly negligent [rather than intentional] manner.”<sup>656</sup> On the contrary, the *Rimkus* court recognized that “in many cases . . . there are sources from which at least some of the allegedly spoliated evidence can be obtained.”<sup>657</sup> In addition, often the “party seeking discovery can also obtain extrinsic evidence of the content of at least some of the deleted information from other documents, deposition testimony, or circumstantial evidence.”<sup>658</sup> In fact, that is what occurred in the case before the court, where evidence developed by the plaintiff “included some recovered deleted e-mails and circumstantial evidence and deposition testimony relating to the unrecovered records.”<sup>659</sup> As a result, the court concluded there was

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<sup>655</sup> *Id.*

<sup>656</sup> *Rimkus*, 688 F. Supp. 2d at 617 (citation omitted). One obvious conceptual problem with the *Pension Committee* approach is that typically a negligence analysis requires proof of harm, i.e., damages will not be presumed. *See, e.g.*, *Holmes v. Wack*, 464 F.2d 86, 89 n.5 (10th Cir. 1972) (“Actual damage is, of course, an essential element in a negligence action. Here damages are not presumed.”); *Catasauqua Area Sch. Dist. v. Eagle-Picher Indus., Inc.*, No. 85-3743, 1988 U.S. Dist. LEXIS 11316, at \*3 (E.D. Pa. Sept. 28, 1988). But, although phrased in the guise of a traditional negligence framework, *Pension Committee* dispenses with the need to show harm by assuming relevance and prejudice if the spoliation resulted from gross negligence. *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456, 467 (S.D.N.Y. 2010). And even with ordinary negligence, where *Pension Committee* would require proof of relevance and prejudice, the court took pains to stress that the burden of proof should not be “too strict.” *Id.* at 468. Again, this concept is not found in traditional negligence analysis. *See generally* RESTATEMENT (SECOND) OF TORTS § 328A (1965) (stating that the plaintiff has the burden of proving he “has in fact suffered harm of a kind legally compensable by damages.”).

<sup>657</sup> *Rimkus*, 688 F. Supp. 2d at 616.

<sup>658</sup> *Id.*

<sup>659</sup> *Id.* at 617-18.

“neither a factual nor legal basis . . . to rely on a presumption of relevance or prejudice.”<sup>660</sup>

[150] Because the court determined that plaintiffs had made the necessary preliminary showing of willful misconduct, it concluded that it would present an adverse inference instruction to the jury.<sup>661</sup> The instruction would “ask the jury to decide whether the defendants intentionally deleted [ESI] to prevent [its] use in litigation” and, assuming such misconduct, “whether . . . the lost information would have been unfavorable to the defendants.”<sup>662</sup> In addition, the court awarded plaintiff reasonable costs and fees incurred in investigating the spoliation and prosecuting the motion.<sup>663</sup>

### 3. *Victor Stanley II*

[151] In *Victor Stanley, Inc. v. Creative Pipe, Inc. (Victor Stanley II)*, Magistrate Judge Grimm addressed a request for default judgment and other sanctions based on one defendant’s serial spoliation of ESI.<sup>664</sup> Defendants acquiesced in a partial default judgment, which the court granted.<sup>665</sup> More notably, the court ordered that the spoliating defendant be imprisoned for no more than two years, “unless and until” he paid plaintiff’s attorney’s fees and costs awarded in connection with the motion.<sup>666</sup> While acknowledging this was an “extreme sanction,” the

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<sup>660</sup> *Id.* at 618.

<sup>661</sup> *Id.* at 620.

<sup>662</sup> *Rimkus*, 688 F. Supp. 2d at 620.

<sup>663</sup> *Id.* at 679.

<sup>664</sup> See *Victor Stanley, Inc. v. Creative Pipe, Inc. (Victor Stanley II)*, 269 F.R.D. 497, 500 (D. Md. 2010) (the party “deleted, destroyed, and otherwise failed to preserve evidence; and repeatedly misrepresented the completeness of their discovery production . . .”).

<sup>665</sup> *Id.*

<sup>666</sup> *Id.*

court reasoned this was an “extreme case,”<sup>667</sup> calling the prejudice to plaintiff from the destruction “unquestionable.”<sup>668</sup> Strikingly, the court termed it the “single most egregious example of spoliation that [it had] encountered. . . .”<sup>669</sup>

[152] *Victor Stanley II* is instructive for its thorough exposition of the state of the law regarding e-discovery and spoliation.<sup>670</sup> Initially, the court noted that resolving spoliation motions had “proven to be one of the most challenging tasks for judges,” particularly because of the

lack of a uniform national standard governing when the duty to preserve potentially relevant evidence commences, the level of culpability required to justify sanctions, the nature and severity of appropriate sanctions, and the scope of the duty to preserve evidence and whether it is tempered by the same principles of proportionality that Fed. R. Civ. P. 26(b)(2)(C) applies to all discovery in civil cases.<sup>671</sup>

Further, the court recognized the concern that

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<sup>667</sup> *Id.* at 500 n.3. Indeed, defendant not only failed to implement a litigation hold, he also actively deleted a large amount of relevant ESI. *Id.* at 501, 504, 506.

<sup>668</sup> *Id.* at 508.

<sup>669</sup> *Victor Stanley II*, 269 F.R.D. at 515. According to the court, the record “demonstrate[d] intentional misconduct done with the purpose of concealing or destroying evidence.” *Id.* Further, the court concluded that this “grave misconduct . . . was undertaken for the purpose of thwarting [p]laintiff’s ability to prove its case and for the express purpose of hamstringing this Court’s ability to effect a just, speedy, and inexpensive resolution of a serious commercial tort” and that “[t]he prejudice to [p]laintiff [was] clear.” *Id.*

<sup>670</sup> *See generally id.* at 497. Judge Grimm even noted, “I will attempt to synthesize not only the law of this District and Circuit, but also to put it within the context of the state of the law in other circuits as well . . . .” *Id.* at 517.

<sup>671</sup> *Id.* at 516.

in some instances, [courts] imposed standards approaching strict liability for loss of evidence, without adequately taking into account the difficulty—if not impossibility—of preserving all ESI that may be relevant to a lawsuit, the reasonableness of the measures that were taken to try to preserve relevant ESI, or whether the costs that would be incurred by more complete preservation would be disproportionately great when compared to what is at issue in the case.<sup>672</sup>

As a result, according to the court, it was not an “exaggeration to say that many lawyers . . . view preservation obligations as one of the greatest contributors to the cost of litigation being disproportionately expensive in cases where ESI will play an evidentiary role.”<sup>673</sup>

[153] Addressing the obligation to preserve evidence, the court noted that this duty “is neither absolute, nor intended to cripple organizations” and thus “should not be analyzed in absolute terms; it requires nuance, because the duty ‘cannot be defined with precision.’”<sup>674</sup> According to the court, “[p]roper analysis requires . . . determin[ing] reasonableness under the circumstances—‘reasonable and good faith efforts to retain information that may be relevant to pending or threatened litigation.’”<sup>675</sup> Thus, “‘the scope of preservation should somehow be proportional to the amount in controversy and the costs and burdens of preservation.’”<sup>676</sup> This duty, of course, is further limited in that it “pertains only to relevant

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<sup>672</sup> *Id.*

<sup>673</sup> *Id.*

<sup>674</sup> *Victor Stanley II*, 269 F.R.D. at 522 (citations omitted).

<sup>675</sup> *Id.* (citations omitted).

<sup>676</sup> *Id.* at 522 (citations omitted).

documents.”<sup>677</sup> In sum, “assessment of reasonableness and proportionality should be at the forefront of all inquiries into whether a party has fulfilled its duty to preserve relevant evidence.”<sup>678</sup>

[154] But “[u]nfortunately,” according to the court, “in terms of what a party must do to preserve potentially relevant evidence, case law is not consistent across the circuits, or even within individual districts.”<sup>679</sup> This inconsistency concerns many litigants,

particularly . . . institutional clients such as corporations, businesses or governments, because their activities—and vulnerability to being sued—often extend to multiple jurisdictions, yet they cannot look to any single standard to measure the appropriateness of their preservation activities, or their potential liability for failure to fulfill their preservation duties.<sup>680</sup>

Reasonableness and proportionality thus should play a role here as well; that is, like the scope of the obligation to preserve, “[b]reach of the preservation duty . . . is [also] premised on reasonableness: A party

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<sup>677</sup> *Id.* (citing *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456, 464 (S.D.N.Y. 2010)).

<sup>678</sup> *Id.* at 523. *But see* *Orbit One Commc’ns, Inc. v. Numerex Corp.*, 271 F.R.D. 429, 436 (S.D.N.Y. 2010) (noting that the reasonableness and proportionality standard “may prove too amorphous to provide much comfort to a party deciding what files it may delete or backup tapes it may recycle”). Thus, “[u]ntil a more precise definition is created by rule, a party is well-advised to ‘retain all relevant documents (but not multiple identical copies) in existence at the time the duty to preserve attaches.’” *Id.* (quoting *Zubulake IV*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003)). Significantly, “relevance” here “means relevance for purposes of discovery, which is ‘an extremely broad concept.’” *Id.* at 436-37 (quoting *Condit v. Dunne*, 225 F.R.D. 100, 105 (S.D.N.Y. 2004)).

<sup>679</sup> *Victor Stanley II*, 269 F.R.D. at 523.

<sup>680</sup> *Id.*

breaches its duty to preserve relevant evidence if it fails to act reasonably by taking ‘positive action to preserve material evidence.’”<sup>681</sup>

[155] Interestingly, the court identified the source of the preservation duty as being “owed to the *court*, not to a party’s adversary.”<sup>682</sup> The court termed this “a subtle, but consequential”—indeed, some would say controversial—“distinction.”<sup>683</sup> The court further noted a “proper appreciation of the distinction informs the . . . decision regarding appropriate spoliation sanctions.”<sup>684</sup> For example,

[w]here intentionally egregious conduct leads to spoliation of evidence but causes no prejudice because the evidence destroyed was not relevant, or was merely cumulative to readily available evidence, or because the same evidence could be obtained from other sources, then the integrity of the judicial system has been injured far less than if simple negligence results in the total loss of evidence essential for an adversary to prosecute or defend against a claim.<sup>685</sup>

[156] From the premise that the parties owe the preservation duty to the court, the court noted “another, less widely discussed, injury to the civil

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<sup>681</sup> *Id.* at 525 (quoting *Jones v. Bremen High Sch. Dist.* 228, No. 08-C-3548, 2010 WL 2106640, at \*6 (N.D. Ill. May 25, 2010)).

<sup>682</sup> *Id.* This contention presents a couple of obvious conceptual problems. First, left unexplained is how the adversary has standing to pursue sanctions for alleged spoliation if the duty to preserve is not actually owed to it. Likewise, if the party truly owes a duty to the court—not the adversary—then resolving a spoliation motion would seem to put the court in an adversarial posture towards the party accused of spoliation, rather than functioning as an impartial decision maker.

<sup>683</sup> *Id.* at 526; *see supra* note 682.

<sup>684</sup> *Victor Stanley II*, 269 F.R.D. at 526.

<sup>685</sup> *Id.*



justice system.”<sup>686</sup> Specifically, “[w]hen spoliation issues are litigated, more attention is focused on e-discovery than on the merits, with a motion for sanctions an increasingly common filing.”<sup>687</sup> As a result, “[a]llegations of spoliation and the motions practice that ensues interfere with the court’s administration of justice in general by crowding its docket and delaying the resolution of cases.”<sup>688</sup>

## V. CONCLUSION

[157] Some five years after the amendments to the Federal Rules governing e-discovery, it is clear that they have not met the goals of promoting uniformity and achieving cost reduction.<sup>689</sup> While the relevant Federal Rules are now uniform, their application varies widely, from when the duty of preservation attaches<sup>690</sup> to what the duty encompasses,<sup>691</sup>

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<sup>686</sup> *Id.*

<sup>687</sup> *Id.* (citations omitted) (internal quotation marks omitted).

<sup>688</sup> *Id.*

<sup>689</sup> See FED. R. CIV. P. 1 (stating that the rules are meant to “secure the just, speedy, and inexpensive determination of every action”); *Cooperation Proclamation*, *supra* note 9, at 1.

<sup>690</sup> Compare *Cache La Poudre Feeds, LLC v. Land O’Lakes, Inc.*, 244 F.R.D. 614, 622 (D. Colo. 2007) (finding that preservation duty arose when suit was filed), with *Phillip M. Adams & Assocs., LLC v. Winbond Elecs. Corp.*, No. 1:05-CV-64, 2010 U.S. Dist. LEXIS 97305, at \*21 (D. Utah Sept. 16, 2010) (finding that preservation duty arose years before suit was filed).

<sup>691</sup> Compare *Victor Stanley II*, 269 F.R.D. at 522 (holding that reasonableness and proportionality should govern scope of preservation), with *Orbit One Commc’ns, Inc. v. Numerex Corp.*, 271 F.R.D. 429, 436 (S.D.N.Y. 2010) (holding that reasonableness and proportionality may be too “amorphous” to rely upon, thus party should preserve all relevant documents). Compare *Dahl v. Bain Capital Partners, LLC*, 655 F. Supp. 2d 146, 149 (D. Mass. 2009) (rejecting demand for metadata), with *Williams v. Sprint/United Mgmt. Co.*, 230 F.R.D. 640, 651 (D. Kan. 2005) (finding that production must include all relevant metadata unless parties agree otherwise).

including what actions the parties must take<sup>692</sup> and the basis for any sanctions resulting from a failure to act.<sup>693</sup> This lack of a national governing standard and the corresponding need for a case by case analysis leads parties to employ a lowest common denominator approach of essentially preserving everything, which obviously increases the costs of discovery.<sup>694</sup> Thus, the most critical shortcoming of the amended Rules is their failure to restrain the exploding costs of e-discovery,<sup>695</sup> despite recognition in the Rules themselves,<sup>696</sup> and by some—but not enough—courts, of the need to limit the inherent expense of such discovery.<sup>697</sup> The results are predictable: parties simply do not bring cases because they fail a rational cost-benefit analysis or, the flip side, parties settle unmeritorious cases because it makes economic sense to do so rather

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<sup>692</sup> Compare *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456, 465 (S.D.N.Y. 2010) (finding that a failure to issue a written litigation hold constitutes gross negligence), with *Haynes v. Dart*, No. 08-C-4834, 2010 U.S. Dist. LEXIS 1901, at \*11 (N.D. Ill. Jan. 11, 2010) (finding that a failure to issue litigation hold is not *per se* evidence of sanctionable conduct).

<sup>693</sup> Compare *Pension Comm.*, 685 F. Supp. 2d at 467 (allowing for adverse inference based on gross negligence), with *Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598, 614 (S.D. Tex. 2010) (concluding that mere negligence, as opposed to intentional destruction, not sufficient to warrant adverse inference).

<sup>694</sup> See *Orbit One*, 271 F.R.D. at 436 (“Until a more precise definition is created by rule, a party is well-advised to ‘retain all relevant documents (but not multiple identical copies) in existence at the time the duty to preserve attaches.’” (quoting *Zubulake IV*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003))).

<sup>695</sup> See, e.g., *Thorogood v. Sears, Roebuck & Co.*, 624 F.3d 842, 849-50 (7th Cir. 2010) (noting “soar[ing]” costs related to e-discovery).

<sup>696</sup> See FED. R. CIV. P. 26(b)(2)(B) (allowing for cost-shifting); FED. R. CIV. P. 26(b)(2)(C)(iii) (proportionality standard).

<sup>697</sup> See *supra* note 554 and accompanying text. Compare *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 364 (D. Md. 2008) (noting court’s *sua sponte* duty to limit discovery where burden or expense outweighs likely benefit), with *In re Fannie Mae Sec. Litig.*, 552 F.3d 814, 821-22 (D.C. Cir. 2009) (upholding sanction related to overly broad search terms without reference to proportionality analysis).

than fight on,<sup>698</sup> all of which contributes to the “vanishing trial” phenomenon.<sup>699</sup> These cost issues are only likely to get worse if the increased use of experts to validate search methodologies envisioned by the *O’Keefe* and *Equity Analytics* line of cases takes hold.<sup>700</sup>

[158] Even with the default mode favoring over-preservation, the simple fact is that spoliation motions are now weapons. Whatever is not preserved serves as the basis for a sanctions motion, regardless of relevance, prejudice, etc., and again increases litigation costs and slows dispute resolution.<sup>701</sup> Given this reality, it seems clear that cooperation, whatever its general merits, is not likely to be a viable solution to the problems of e-discovery, particularly when the incentives—namely to run up costs in order to force a settlement—do not favor cooperation.<sup>702</sup>

[159] Numerous groups have recognized the problems with e-discovery as it exists today, although solutions have been lacking.<sup>703</sup> But until more

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<sup>698</sup> See *Mancia*, 253 F.R.D. at 364.

<sup>699</sup> See *supra* note 472 and accompanying text; see also *Bace*, *supra* note 9, at 2-3 (quoting Justice Breyer that costs of e-discovery will “drive out of the litigation system a lot of people who ought to be there”).

<sup>700</sup> See *supra* notes 528-561 and accompanying text.

<sup>701</sup> See, e.g., *Victor Stanley II*, 269 F.R.D. 487, 526 (D. Md. 2010); *Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598, 607 (S.D. Tex. 2010).

<sup>702</sup> See *supra* notes 491-92 and accompanying text; see also *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557-58 (2007) (noting “*in terrorem*” increase in settlement value after surviving motion to dismiss due to discovery costs).

<sup>703</sup> See, e.g. AM. COLL. OF TRIAL LAWYERS & THE INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 2 (2009), available at <http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=4008> (“Electronic discovery . . . needs a serious overhaul.”); SEVENTH CIRCUIT ELEC. DISCOVERY PILOT PROGRAM, PHASE ONE OCTOBER 1, 2009 - MAY 1, 2010, STATEMENT OF PURPOSE AND PREPARATION OF PRINCIPLES 7

consistency and uniformity is brought to the application of the Rules (whether through further amendments or otherwise), unrestrained e-discovery will continue to be a drag on the civil justice system.

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(2009), available at <http://www.ilcd.uscourts.gov/Statement%20-%20Phase%20One.pdf>; *Duke Law Hosts Conference on Litigation in Federal Courts, May 10-11*, DUKE LAW NEWS, May 5, 2010, <http://www.law.duke.edu/news/story?id=4933&u=11>.