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## A SEARCH FOR BALANCE IN THE DISCOVERY OF ESI SINCE DECEMBER 1, 2006

By: Douglas L. Rogers\*

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### I. INTRODUCTION

[1] An explosion in the amount and discovery of electronically stored information (ESI) threatens to clog the federal court system and make judicial determination of the substantive merits of disputes an endangered species.<sup>1</sup> It is interesting that this information discovery explosion has

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<sup>1</sup> Ross Chaffin, *The Growth of Cost-Shifting in Response to the Rising Cost and Importance of Computerized Data in Litigation*, 59 OKLA. L. REV. 115, 154 (2006) ("Often, a court's decision regarding the allocation of costs in this very expensive discovery will induce settlement, and thus determine the outcome of the litigation itself."); Mia Mazza, Emmalena K. Quesada & Ashley L. Sternberg, *In pursuit of FRCP 1: Creative Approaches to Cutting and Shifting Costs of Discovery of Electronically Stored Information*, 13 RICH. J.L. & TECH. 11, ¶ 3 (2007) (stating "the explosive growth of ESI has changed the very nature of discovery, with new electronic complexities making the preservation and production of evidence far more challenging."); George L. Paul & Jason R. Baron, *Information Inflation: Can the Legal System Adapt?*, 13 RICH. J.L. TECH. 10, ¶ 2 (2007) (stating "it is no exaggeration to say that litigation, as we have known it, is threatened by information's new hyper-flow."); Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 DUKE L.J. 561, 605 (2001) (stating "it is clear that the existing discovery structure threatens core values of the litigation matrix."); Lee H. Rosenthal, *A Few Thoughts on Electronic Discovery After December 1, 2006*, 116

skipped over Rule 1 of the Federal Rules of Civil Procedure, which provides in part that the federal rules “shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.”<sup>2</sup>

[2] Clients know, or after first becoming involved in litigation learn, that federal court litigation is rarely speedy or inexpensive. However, the amended Federal Rules of Civil Procedure specifically addressing this explosion in the discovery of ESI (the “ESI Rules”) became effective on December 1, 2006.<sup>3</sup> Do the ESI Rules help?

[3] This article addresses that question by reviewing many of the federal court decisions on the ESI Rules<sup>4</sup> and proposing general principles to help make the discovery aspect of litigation more manageable, without harming the due process rights of the litigants.<sup>5</sup> Specifically, this article analyzes issues chronologically from the view of an attorney or client facing litigation:

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YALE L.J. POCKET PART 167, 191 (Nov. 30, 2006) (Lawyers and judges are collectively wringing their hands over the continuing decline in the number of trials, especially jury trials. The factors that contribute to this are many and varied, but there is a consensus that the costs and delays of civil litigation - largely due to discovery - play a significant role.)

<sup>2</sup> FED. R. CIV. P. 1 (2007). *See also* Mazza, *supra* note 1, at 176 ([L]itigants should be aggressive in invoking FRCP 1 as a basis for the innovative use of search strategies and cost-shifting to increase efficiency and reduce costs across the board in discovery. It is only in this way that the mandate of a just, speedy, and inexpensive determination of every action will become a reality in discovery.).

<sup>3</sup> Rosenthal, *supra* note 1, at 167 (stating “[o]n December 1 [2006], amendments will go into effect to make the discovery rules better able to accommodate the vast changes in information technology that have already occurred and that will inevitably continue.”).

<sup>4</sup> There have been a number of decisions since December 1, 2006 addressing the issue of whether the inadvertent production of ESI constituted a waiver of the attorney-client privilege or the attorney work product doctrine. *See, e.g. In re Vioxx Prod. Liab. Litig.*, 501 F. Supp. 2d 789, 791 (E.D. La. 2007); *Pinnacle Pizza Co. v. Little Caesar Enters.*, No. CIV. 04-4170, 2007 WL 1960585, at \*1 (D.S.D. July 3, 2007); *Corvello v. New England Gas Co.*, 243 F.R.D. 28, 28 (D.R.I. 2007); *Amersham Biosciences Corp. v. PerkinElmer, Inc.*, No. 03-4901 (JLL), 2007 WL 329290, at \*1 (D.N.J. Jan. 31, 2007). These issues are beyond the scope of this article.

<sup>5</sup> *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 465 (2000) (stating that “[t]he Federal Rules of Civil Procedure are designed to further the due process of law that the Constitution guarantees.”).

Part II addresses steps a company facing litigation may have to address to satisfy the legal requirement of preserving relevant ESI;

Part III shows that Rule 26(b)(2)(C) allows a court to restrict production of ESI when the marginal utility of that ESI seems small, even though that ESI contains relevant and accessible information;

Part IV addresses the difficult issue of the production of information that is periodically changing, such as metadata, databases and information on RAM; and

Part V argues that “good cause” under Rule 26(b)(2)(B) for the production of not reasonably accessible ESI generally should require a showing that there have been discrepancies in the production or preservation of accessible documents/ESI.<sup>6</sup>

[4] This article concludes that clients and their attorneys take risks in making unilateral decisions on many of these issues, rather than disclosing their decisions early to the court and opposing counsel.

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<sup>6</sup> The term used in Rule 26(b)(2)(B) is “electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost.” FED. R. CIV. P. 26(b)(2)(B). This article sometimes uses the phrase “inaccessible format” as a shorthand for the longer phrase used in Rule 26(b)(2)(B).

## II. TO SUSPEND OR NOT TO SUSPEND COMPUTER DOCUMENT DESTRUCTION PRACTICES

### A. INTRODUCTION

[5] The general duty to preserve documents and ESI<sup>7</sup> arises not from any specific federal rule, but from federal case law.<sup>8</sup> The contours of the duty to preserve are extremely difficult to determine.<sup>9</sup> The general statement about the duty to preserve is that when litigation is reasonably likely, a company has an obligation to preserve documents and ESI relevant to both the anticipated claims and defenses, but there are at least three separate elements to the duty to preserve.<sup>10</sup> One is when the duty to preserve

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<sup>7</sup> The Advisory Committee Notes (“Committee Notes”) to the ESI Rules state that although “documents” generally include ESI, ESI is in many ways distinct from other documents:

[I]t has become increasingly difficult to say that all forms of electronically stored information, many dynamic in nature, fit within the traditional concept of a ‘document.’  
. . . At the same time, a Rule 34 request for production of ‘documents’ should be understood to encompass, and the response should include, electronically stored information unless discovery in the action has clearly distinguished between electronically stored information and “documents.”

234 F.R.D. 219 (2006). Advisory Committee Notes are instructive in determining the intent of Congress in the rules, but they do not have the force of law. *McKnight v. Purdue Pharma Co.*, 422 F. Supp. 2d 756, 758 (E.D. Tex. 2006).

<sup>8</sup> Thomas Y. Allman, *Managing Preservation Obligations After the 2006 Federal E-Discovery Amendments*, 13 RICH. J.L. & TECH. 9, ¶ 1 (2007). Of course, various statutes require certain companies to preserve certain documents and ESI. In addition, to the extent a party violates a court order for the production of evidence, the court has authority both under Rule 37(b) and its inherent power to sanction the non-producing party. *See Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216-17 (S.D.N.Y. 2003) (stating that “[t]he authority to sanction litigants for spoliation arises jointly under the Federal Rules of Civil Procedure and the court’s own inherent powers. . . . The duty to preserve attached at the time that litigation was reasonably anticipated.”).

<sup>9</sup> Kenneth J. Withers, *Electronically Stored Information: The December 2006 Amendments to the Federal Rules of Civil Procedure*, 7 SEDONA CONF. J. 1, 13 (2006) (stating “[p]erhaps the most vexing issues in electronic discovery, and the issues that grab the most headlines, are the issue of data preservation and its flip side, spoliation.”).

<sup>10</sup> *See Zubulake*, 220 F.R.D. at 216-18; *see also* The Sedona Conference Commentary on Legal Holds, *The Trigger & the Process* (Aug. 2007 Public Cmt. Version), available at [www.thosedonaconference.org](http://www.thosedonaconference.org).

commences.<sup>11</sup> A second is to determine how far beyond the physical boundaries of the company, if at all, the duty to preserve documents within

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<sup>11</sup> See, e.g., *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001) (holding that no sanction for spoliation occurred); *Kronisch v. U.S.*, 150 F.3d 112, 126-27 (2d Cir. 1998) (holding that reason for destruction – such as fear of litigation – can show there was obligation to preserve); *Doe v. Norwalk Cmty. Coll.*, No. 3:04-CV-1976 (JCH), 2007 WL 2066497, at \*3 (D. Conn. July 16, 2007) (stating that the defendant had a duty to preserve based on a meeting among certain employees regarding the incident that showed defendant “was aware of Doe’s allegations of sexual assault by MASI,” even before counsel sent a demand letter); *Google, Inc. v. Am. Blind & Wallpaper Factory, Inc.*, No. C 03-5340 JF (RS), 2007 WL 1848665, at \*1 (N.D. Cal. June 27, 2007) (stating that duty to preserve documents arose at time of cease and desist letter); *Cache La Poudre Feeds, Inc. v. Land O’Lakes, Inc.*, 244 F.R.D. 614, 623 (D. Col. 2007) (holding that pre-suit demand letter from counsel for company B concerning possible trademark infringement by company A did not trigger obligation to preserve, because letter (1) did not threaten litigation, and (2) discussed resolving the matter); *PML N. Am., LLC v. Hartford Underwriters Ins. Co.*, No. 05-CV-70404-DT, 2006 WL 3759914, at \*5 (E.D. Mich. Dec. 20, 2006) (holding that statement of adverse party that it rejected change to insurance agreement, that threatened legal action for fraud, gave rise to duty to preserve); *In re Napster, Inc. Copyright Litig.*, 462 F. Supp. 2d 1060, 1068 (N.D. Cal. 2006) (stating that litigation against company does not, by itself, create obligation to preserve documents regarding possible litigation against shareholder of company); *In re Quintus Corp.*, 353 B.R. 77, 84 (D. Del. 2006) (holding that the party should have anticipated litigation over its failure to comply with asset purchase agreement, since it destroyed books and records at a time it had not paid all the liabilities it had assumed); *Kemper Mortgage, Inc. v. Russell*, No. 3:06-cv-042, 2006 WL 2319858, at \*1 (S.D. Ohio Apr. 18, 2006) (adopting *Zubulake* that duty to preserve “was triggered when defendant learned that plaintiff was likely to sue, well before she filed a discrimination charge” with the EEOC); *Broccoli v. Echostar Commc’n Corp.*, 229 F.R.D. 506, 510-511 (D. Md. 2005) (linking duty to preserve to “notice of potential litigation” and verbal complaints to supervisors); *Rutgerswerke AG v. Abex Corp.*, No. 93 CIV .2914 JFK, 2002 WL 1203836, at \*13 (S.D.N.Y. June 4, 2002) (discussing steps by the prospective plaintiff to collect certain evidence on the advice of its own counsel, triggering the duty to preserve more documents); *Sanchez v. Stanley-Bostitch, Inc.*, No. 98 Civ. 0494 LMM, 1999 WL 639703, at \*4 (S.D.N.Y. Aug. 23, 1999) (stating that steps the prospective plaintiff took in preparation of litigation upon the advice of counsel, triggered obligation to preserve, or at least to notify the third party who held the allegedly defective product); *Lamarca v. United States*, 31 F. Supp. 2d 110, 127 (E.D.N.Y. 1998) (stating that death of a patient created duty to preserve records pertaining to the patient, even before the patient’s estate complained about death); *AAB Joint Venture v. United States*, 75 Fed. Cl. 432, 441-42 (2007) (stating that duty to preserve arose, before suit filed, when the plaintiff wrote letter asking for equitable adjustment to contract price, not on earlier letter from the plaintiff alleging differing note conditions at work location).

its possession, custody or control extends.<sup>12</sup> Once there is a duty to preserve and the locations of the documents/ESI to consider for preservation are identified, the third is to determine what to preserve.<sup>13</sup>

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<sup>12</sup> *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001) (affirming dismissal of the lawsuit in a products liability action because the defendant failed to preserve the automobile he was driving, even though it was owned by someone else).

If a party cannot fulfill this duty to preserve because he does not own or control the evidence, he still has an obligation to give the opposing party notice of access to the evidence or of the possible destruction of the evidence if the party anticipates litigation involving that evidence.

*Id.* See *World Courier v. Barone*, No. C 06-3072 TEH, 2007 WL 1119196, at \*2 (N.D. Cal. Apr. 16, 2007) (holding unspecified adverse inference for destruction of hard drive by the husband of the defendant in case alleging the defendant misappropriated trade secrets of the plaintiff); *In re NTL, Inc. Sec. Litig.*, 244 F.R.D. 179, 195-96 (S.D.N.Y. 2007) (stating that company had duty to preserve documents at overseas company that resulted from reorganization of original company into two companies); *A. Farber & Partners, Inc. v. Garber*, 234 F.R.D. 186, 189 (C.D. Cal. 2006) (affirming that documents are within a party's possession, custody, or control for purposes of Rule 34 production if it has the legal right to obtain the documents on demand).

<sup>13</sup> See, e.g., *School-Links Techs., Inc. v. Applied Res., Inc.*, No. 05-2088-JWL, 2007 WL 708213, at \*3 (D. Kan. Feb. 28, 2007) (stating that there is a duty to preserve and provide an opportunity for inspection to a potentially responsible party before destruction); *Phillips v. Netblue, Inc.*, No. C-05-4401 SC, 2007 WL 174459, at \*2-3 (N.D. Cal. Jan. 22, 2007) (holding that the plaintiff did not have obligation to preserve images obtained by clicking on links embedded in e-mails he was required to preserve); *In Re Napster, Inc. Copyright Litig.*, 562 F. Supp. 2d at 1070 (stating that "Hummer had a continuing duty to preserve documents after the *Katz* lawsuit was dismissed in July 2001."); *Del Campo v. Kennedy*, No. C-01-21151 JW (PVT), 2006 WL 2586633, at \*2 (N.D. Cal. Sept. 8, 2006) (ordering Defendant to maintain voice mails beyond scheduled retention period); *Consol. Aluminum Corp. v. Alcoa, Inc.*, 244 F.R.D. 335, 345 (M.D. La. 2006) (stating that "Alcoa was not required to preserve every shred of paper but only those documents of which it had 'actual knowledge' that they would be material to future claims."); *Kemper Mortgage*, 2006 WL 2319858, at \*2 (holding that one must preserve what it knows or reasonably should have known is reasonably likely to be requested during discovery and must not destroy unique evidence helpful to adversary); *Concord Boat Corp. v. Brunswick Corp.*, No. LR-C-95-781, 1997 WL 33352759, at \*7 (E.D. Ark. Aug. 29, 1997) (rejecting argument that because the defendant was involved in antitrust matters from 1992 to 1997, it was under a duty to preserve all e-mails relevant to antitrust issues from that date on, and concluded it "would simply be inappropriate to give an adverse inference instruction based upon speculation that deleted emails would be unfavorable to Defendants' case."); see also THE SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 32 Cmt. 5.d. (2d ed. June 2007) (stating that "[i]t must be recognized that in some circumstances, a legal hold notice may be unnecessary (e.g., the relevant information is already secured). . . .") [hereinafter *Sedona Principles*].

[6] One reason the duty to preserve ESI is important is that if a party violates its duty to preserve, the court can impose significant sanctions.<sup>14</sup> These can include monetary sanctions, a prohibition against that party questioning witnesses on certain issues, an instruction to the jury that it can find the party destroyed the ESI because the ESI was harmful to that party on specified issues (an adverse inference instruction), a finding by the court that certain issues are deemed to have been established against

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<sup>14</sup> The federal courts have decided many cases since December 1, 2006 on the sources of authority to sanction parties and counsel for destruction of ESI and other discovery abuses. *See, e.g.*, *Greyhound Lines, Inc. v. Wade*, 2007 WL 1189451 (8th Cir. 2007); *Google, Inc.*, 2007 WL 1848665, at \*1; *In re Sept. 11th Liab. Ins. Coverage Cases*, 243 FRD 114 (S.D.N.Y. 2007); *Miller v. Holzmann*, No. 951231 (RCL), 2007 WL 781841 (D.D.C. Mar. 12, 2007); *Floeter v. City of Orlando*, No. 6:05-cv-400-Orl-22KRS, 2007 WL 486633 (M.D. Fla. 2007); *Padgett v. City of Monte Sereno*, 2007 WL 878575 (N.D. Cal. 2007); *Wachtel v. Health Net, Inc.*, 2006 WL 3538935 (D.N.J. Dec. 6, 2006); *United Med. Supply Co. v. United States*, 77 Fed. Cl. 257 (2007); *Tri-State Armored Servs., Inc. v. Subranni*, 366 B.R. 326 (D.N.J. 2007). Although the standard can vary among jurisdictions:

Generally, a party claiming spoliation of evidence must show the following elements: (1) that the party had an obligation to preserve the electronic evidence at the time it was destroyed; (2) that the electronic evidence was destroyed with a culpable state of mind (may include ordinary negligence, gross negligence, recklessness, willful, or intentional); and (3) the destroyed evidence was relevant and favorable to the party's claim such that a reasonable trier of fact could find it would support that claim.

*In re Krause*, 367 B.R. 740, 766-67 (D. Kan. 2007). Some courts say that if there is evidence that the party facing sanctions destroyed the ESI willfully or in bad faith, that is sufficient to satisfy the third point. *Id.* at 767; *see also Phoenix Four, Inc. v. Strategic Res. Corp.*, No. 05 Civ. 4837, 2006 WL 1409413 (S.D.N.Y. 2006). *But see, e.g.*, *Condrey v. SunTrust Bank of Ga.*, 431 F.3d 191 (5th Cir. 2005); *Morris v. Union Pacific R.R.*, 373 F.3d 896 (8th Cir. 2004); *Stevenson v. Union Pacific R.R.*, 354 F.3d 739 (8th Cir. 2004); *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99 (2d Cir. 2002); *Bashir v. Amtrak*, 119 F.3d 929 (11th Cir. 1997); *Optowave v. Nikitin*, No. 6:05-cv-1083-Orl-22DAB, 2006 WL 3231422 (M.D.Fla. 2006); *Mosaid Techs., Inc. v. Samsung Elec. Co., Ltd.*, 348 F. Supp. 2d 332 (D. N.J. 2004). This article analyzes steps to consider to avoid sanctions, not the authority of courts to impose, and the standards for, sanctions. *But see In re Napster, Inc. Copyright Litig.*, 462 F. Supp. 2d 1060 (N.D. Cal. 2006); *Consol. Aluminum Corp.*, 244 F.R.D. at 335; *Concord Boat Corp.*, 1997 WL 33352759, at \*1. There is disagreement over what constitutes a culpable state of mind, and courts sometimes apply different standards, depending on the sanctions in question

the sanctioned party, and even a judgment on liability against the sanctioned party.<sup>15</sup>

[7] This article considers any guidelines that exist to help companies determine - once the duty to preserve has arisen - which policies/practices that result in the “automatic”<sup>16</sup> deletion or change by computer of ESI they must suspend.<sup>17</sup> In other words, what ESI must a company preserve? For instance, a document retention policy of a company may provide for the destruction of all e-mails within 90 days after being received. Although perhaps not thought of as document destruction policies, another example of an automatic deletion/change practice is the change in a company’s database of orders, shipments, and receipts, in which the dollar amount of total orders will change automatically each time the company records a new order.<sup>18</sup>

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<sup>15</sup> See, e.g., *Qualcomm Inc. v. Broadcom Corp.*, No. 05cv1958-B (BLM), 2008 WL 66932 (S.D. Cal. 2008) (finding attorneys’ fees and costs in the amount of \$8,568,633.24); *J. P. Morgan Chase Bank v. Neovi, Inc.*, No. 2:06-cv-0095, 2007 WL 1989752 (S.D. Ohio 2007) (precluding the defendant from contesting one dispositive legal issue); *Doe*, 2007 WL 2066497, at \*8 (holding adverse inference); *World Courier*, 2007 WL 1119196, at \*3 (holding adverse inference); *Teague v. Target Corp.*, No. 3:06CV191, 2007 WL 1041191, at \*2 (W.D. N.C. 2007) (holding adverse inference); *Claredi Corp. v. Seebeyond Techs. Corp.*, No. 4:04CV1304 RWS, 2007 WL 735018, at \*4 (E.D. Mo. 2007) (monetary); *May v. Pilot Travel Ctrs., LLC*, No. 2:05-cv-918, 2006 WL 3827511 (S.D. Ohio Dec. 28, 2006) (holding unspecified, except attorneys’ fees); *PML N. Am., LLC*, 2006 WL 3759914, at \*9 (entering a default judgment); *Wachtel*, 239 F.R.D. at 115 (deeming certain facts admitted); *Krumwiede v. Brighton Assocs., LLC*, No. 05 C 3003, 2006 WL 1308629 (N.D. Ill. May 8, 2006) (entering a default judgment on certain counterclaims); *United Med. Supply Co.*, 77 Fed. Cl. at 276 (2007) (prohibiting the sanctioned party from questioning witness).

<sup>16</sup> It is automatic based on the instructions previously provided to the computer.

<sup>17</sup> The same question arises for document policies of a company imposing certain volume limits on an employee’s e-mail, such as after 1 gigabyte, the employee cannot save any additional e-mail. See Allman, *supra* note 8, at 58.

<sup>18</sup> “Dynamic databases, for example, are . . . constantly changing as data are added or modified. . . . More generally, computer systems routinely supersede and replace data, and most also discard data according to some directions installed with them.” Richard L. Marcus, *E-Discovery & Beyond: Toward Brave New World or 1984?*, 236 F.R.D. 598, 610, 615. See also Allman, *supra* note 8, at ¶ 7 (“[R]outine business processes are often designed to free up storage space for other uses without any intent to impede the preservation of potential evidence for use in discover. Interruption of those routine processes is notoriously difficult to implement in a consistent fashion.”).

[8] Must a company suspend these policies/practices when litigation is likely? The next section looks at what the cases under the new ESI rules have said on this issue.

#### B. PRESERVATION CASES UNDER THE NEW ESI RULES

[9] The ESI Rules now provide a “limited safe harbor”<sup>19</sup> for preservation decisions in Rule 37(e):<sup>20</sup> “Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.”<sup>21</sup> Thomas Allman correctly noted – even before many of the decisions discussed next – that

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<sup>19</sup> See Allman, *supra* note 8, at ¶ 33; see also Philip J. Favro, *A New Frontier in Electronic Discovery: Preserving and Obtaining Metadata*, 13 B.U. J. SCI. & TECH. L. 1, \*20 (2007). Cf. *Ex rel. Edmondson v. Tyson Foods, Inc.*, No. 05-CV-329-GKF-SAJ, 2007 WL 149873, \*6 (N.D. Okla. 2007) (“The Court further advises the parties that they should be very cautious in relying upon any ‘safe harbor’ doctrine as described in new Rule 37(f).”).

<sup>20</sup> On December 1, 2007, what had been Rule 37(f) became Rule 37(e). See FED. R. CIV. P. 37, see also *Electronic Discovery and Evidence: Newly Revised Federal Rules of Civil Procedure Proceedings Effective December 1st, 2007*, available at <http://arkfeld.blogs.com/ede/2007/12/newly-revised-f.html> (last visited Jan. 12, 2008). In discussing court decisions issued prior to December 1, 2007, this article refers to Rule 37(f). Otherwise, this article refers to Rule 37(e).

<sup>21</sup> FED. R. CIV. P. 37(e). It is significant that Rule 37(e) does not relate only to formal document retention programs but to all changes in information due to the “operation of an electronic information system.” The Committee Notes explain:

Examples of this feature in present systems includes programs that recycle storage media kept for brief periods against the possibility of a disaster that broadly affects computer operations; automatic overwriting of information that has been ‘deleted’; programs that change metadata (automatically created identifying information about the history or management of an electronic file) to reflect the latest access to particular electronically stored information; and programs that automatically discard information that has not been accessed within a defined period or that exist beyond a defined period without an affirmative effort to store it for a longer period. Similarly, many database programs automatically create, discard, or update information without specific direction from, or awareness of, users.

Advisory Committee notes, 234 F.R.D. at 370. Rule 37(e) does not purport to address a court’s inherent authority to impose sanctions for destruction of documents. See Allman, *supra* note 8, at ¶¶ 10, 35; Judge S. A. Scheindlin, *Address, Moore’s Federal Practice - E-Discovery: The Newly Amended Federal Rules of Civil Procedure (2006)*, at 27.

the “cases are far from uniform on the need to routinely interrupt the recycling of existing backup media.”<sup>22</sup> However, keeping in mind that Rule 37(e) “reflects the fact that in the world of electronic information it is simply not fair to assume that a loss of ESI necessarily equates to intent to destroy evidence,”<sup>23</sup> certain principles arise from the following cases.

### 1. KEY EMPLOYEES

[10] In *In re NTL, Inc. Securities Litigation*, the court granted an adverse inference instruction as the result of the destruction of the e-mails of forty-four key employees<sup>24</sup>. Magistrate Judge Peck said, “[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>25</sup> However, the magistrate judge also indicated in his decision that the obligation to preserve documents applied only to key employees of the defendant, such as “directors, officers, managers and the employees in charge of financial decision making.”<sup>26</sup>

[11] Determining the key players was also an important issue in deciding the parameters of the scope of the duty to suspend document destruction policies in *Cache La Poudre Feeds, LLC v. Land O’Lakes, Inc.*<sup>27</sup> The

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<sup>22</sup> Allman, *supra* note 8, at ¶ 42.

<sup>23</sup> *Id.* at ¶ 34. In addition, “[i]nterruption of those routine processes is notoriously difficult to implement in a consistent fashion.” *Id.* at ¶ 7. *See also id.* at ¶ 35.

<sup>24</sup> *In re NTL, Inc. Sec. Litig.*, 244 F.R.D. 179 (2007).

<sup>25</sup> *Id.* at 193 (quoting *Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003)). In *Zubulake*, the court also said that “the duty to preserve extends to those employees likely to have relevant information - the ‘key players’ in the case.” *Zubulake*, 220 F.R.D. at 218.

<sup>26</sup> *In re NTL, Inc. Sec. Litig.*, 244 F.R.D. at 194. The court applied this obligation to affiliates in other countries and said that where more severe sanctions were issue, the moving party must show that the lost information would be favorable to it. *Id.* at 199 (quoting *Chan v. Triple 8 Palace, Inc.*, 2005 WL 1925579, at \*7 (S.D.N.Y. Aug. 11, 2005)). However, it also stated that when a party destroyed evidence in bad faith, that faith alone was circumstantial evidence from which a fact finder could conclude the evidence was unfavorable to the destroying party. *Id.* at 199 (quoting *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 109 (2d Cir. 2002)).

<sup>27</sup> *Cache La Poudre Feeds, LLC v. Land O’Lakes, Inc.*, 244 F.R.D. 614 (D. Colo. Mar. 2, 2007). The court in *Cache* took a limited view of when the obligation to preserve was triggered. It said that “while a party should not be permitted to destroy potential evidence

court said that counsel for the defendants in this trademark infringement action was required to undertake a reasonable investigation of “employees who played a significant or decision-making role.”<sup>28</sup> The court concluded that the fact Land O’Lakes – after the duty to preserve had arisen – continued its document retention practice of expunging the hard drives of former key employees in the development and implementation of the brand violated the defendant’s obligation to preserve ESI in the case.<sup>29</sup>

[12] Magistrate Judge Facciola discussed the obligation to turn off automatic delete features in *Peskoff v. Faber*.<sup>30</sup> He at first appeared to state an absolute, inflexible legal rule when he said that “[t]he Advisory Committee comments to amended Rule 37(f) make it clear that any automatic deletion feature should be turned off and a litigation hold imposed once litigation can be reasonably anticipated.”<sup>31</sup> However, he then used more flexible language when he concluded:

Faber’s not turning the automatic deletion feature off once informed of pending litigation *may* serve as a premise for additional judicial action, including a sanction, without offending amended Rule 37(f). It is a legitimate exercise of discretion to require Faber to participate in a process to ascertain whether a forensic examination can yield e-mails that were deleted after February 6, 2004, because at that

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after receiving unequivocal notice of impending litigation, the duty to preserve relevant documents should require more than a mere possibility of litigation.” *Id.* at 621. Since the letter from counsel “implied that a client preferred and was willing to explore and negotiate a resolution,” the court concluded that this letter did not create an obligation to preserve. *Id.* at 622.

<sup>28</sup> *Id.* at 629 (emphasis added). The court said it 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.* at 627.

<sup>29</sup> *Id.* at 629. The court also said that “once a litigation hold has been established, a party cannot continue a routine procedure that effectively ensures that potentially relevant and readily available information is no longer ‘reasonably accessible’ under Rule 26(b)(2)(B).” *Id.* It also added that Land O’Lakes’ general counsel and its retained counsel had “failed in many respects to discharge their obligation to coordinate and oversee discovery.” *Id.* at 630. The court, however, only imposed a monetary sanction of \$5,000.

<sup>30</sup> *Peskoff v. Faber*, 244 F.R.D. 54 (D.D.C. 2007).

<sup>31</sup> *Id.* at 60.

time, Faber could reasonably anticipate that *Peskoff* would sue him.<sup>32</sup>

It seems likely the court meant that once litigation became reasonably likely, a failure to suspend automatic deletion features of a document destruction program would put the burden on that party if a challenge to the destruction arose in the litigation.

[13] After all, in the report and recommendation of Magistrate Judge Facciola in *Miller v. Holzmann*,<sup>33</sup> with which District Judge Lambreth agreed,<sup>34</sup> the magistrate judge said the hold memo needed to be sent to “only those *reasonably likely to maintain documents relevant to the litigation* or investigation.”<sup>35</sup> This statement implicitly recognizes that some relevant documents held by non-key employees may be deleted without adverse consequences to the company, or otherwise the litigation hold notice would have to be sent to more employees.

## 2. LIKELY SOURCES OF RELEVANT ESI

[14] Key employees should know what documents/ESI they create or modify, but they may not know where the company stores the relevant ESI. This imposes responsibility on not just the key employees, but IT personnel in a company. Moreover, key employees probably have created a lot of ESI of no relevance to a dispute. The cases have not adopted a uniform standard on how certain a company must be that some source contains relevant ESI in order to have to preserve that source.

[15] In *Escobar v. City of Houston*, the court indicated that under Rule 37(f), a company can continue to operate a document destruction program

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<sup>32</sup> *Id.* (emphasis added). As a result, the court ordered counsel for the parties to collaborate on a request for proposals to conduct a forensic examination of the hard drives of the applicable computers. *Id.* at 66.

<sup>33</sup> *Miller v. Holzmann*, No. 95-01231 (RCL/JMF), 2007 WL 172327 (D.D.C. Jan. 17, 2007). *Miller* was a government contracting case, in which a copy of the response to a FOIA request involving allegations of fraud in previous years had been made. That copy was later destroyed as part of the authorized record destruction schedule of the National Archives Administration Act. *Id.* at \*4-5.

<sup>34</sup> *Id.* at \*1.

<sup>35</sup> *Id.* at \*6 (emphasis added).

after a duty to preserve arises, unless the company knows, or reasonably should know, that responsive documents would be destroyed by such program.<sup>36</sup> Specifically, the court ruled that the “*threshold issue is whether and when the City knew or should have know[sic] that electronic communications exchanged the day after a police shooting in November of 2003 were likely to contain information about that shooting.*”<sup>37</sup> The court concluded:

The record shows that the officers involved in the shooting were not likely to have used e-mail to communicate about the event in the day after it occurred. The plaintiffs do not point to specific evidence in the record demonstrating that the City knew that information relevant to the shooting was being destroyed because of the feature of the computer system’s routine operation that e-mails were destroyed after ninety days.<sup>38</sup>

The court added the City had demonstrated that “when it anticipated that information or records would likely be relevant to the shooting, such information and records were preserved.”<sup>39</sup> The court therefore denied sanctions.

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<sup>36</sup> Escobar v. City of Houston, No. 04-1945, 2007 WL 2900581, at \*18 (S.D. Tex. Sept. 29, 2007).

<sup>37</sup> *Id.* at \*18 (emphasis added). The plaintiffs stated that they had provided notice to the City of their claim within 60 days after the shooting and that the Houston Police Department’s electronic communications in the 24 hours after the shooting were likely to discuss events that occurred after the shooting of the individual involved. The City, in turn, argued that it had preserved material it believed were relevant, including the homicide file containing relevant video and audio files, the internal affairs investigation filed and the record of the 911 calls. *Id.* at \*17.

<sup>38</sup> *Id.* at \*19.

<sup>39</sup> *Id.* Referring to the records of the 911 calls and the internal investigation into the shooting, the court held that since the plaintiffs had not made a showing that the City’s destruction of electronic communications was done in bad faith, and since there was no evidence the information destroyed was relevant, it could not impose the sanctions the plaintiff sought—an adverse inference. *Id.* at \*18. The court did not discuss the possibility of imposing milder sanctions. However, since the court appeared to conclude the City had operated in good faith, presumably the court could not have imposed milder sanctions under Rule 37(f). Milder sanctions under the court’s inherent power would have been a possibility, but such a ruling would leave Rule 37(e) as a “safe harbor” in which ships might not want to dock.

[16] Similarly, in *Benton v. Dlorah, Inc.*, the court concluded that the duty to preserve required the party to *preserve what she knows or reasonably should know* is relevant in the action.<sup>40</sup> The court added that although “the scope of the duty to preserve evidence is not boundless, at a minimum an *opportunity for inspection* should be afforded a potentially responsible party before relevant evidence is destroyed.”<sup>41</sup>

[17] On the other hand, the district court in *In re K-Mart Corp.*<sup>42</sup> indicated the requesting party must prove actual knowledge of the likely destruction of relevant ESI in order for the court to impose sanctions for spoliation of evidence.<sup>43</sup> Under the company’s document retention policy, e-mails in inboxes were deleted 90 days after the date sent, e-mails in sent folders were deleted 30 days after the date sent, e-mails in the deleted items folder were deleted when the user shut down her computer, and e-mails in user defined folders were deleted 180 days after the date sent.<sup>44</sup> The court found that K-Mart did not put a litigation hold in place, and said that “while the failure to implement a litigation hold does not necessarily give rise to sanctions for spoliation of evidence, it is at least ‘relevant’ to the spoliation inquiry.”<sup>45</sup> The court concluded, however, that “Global has *failed to establish that K-Mart knew there was relevant, discoverable information* among the documents being destroyed pursuant to the company’s pre-existing document retention/destruction policy. Indeed, as discussed further below, it is not entirely clear that such information was, in fact, destroyed.”<sup>46</sup> The court declined to sanction K-Mart for spoliation at that time.<sup>47</sup>

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<sup>40</sup> *Benton v. Dlorah, Inc.*, No. 06-CV-2488-KHV, 2007 WL 3231431, at \*4 (D. Kan. Oct. 30, 2007) (“A litigant has a duty to preserve evidence that it knows or should know is relevant to imminent or ongoing litigation”) (citing *Workman v. AB Electrolux Corp.*, 2005 WL 1896246, at \*5 (D. Kan. Aug. 8, 2005)).

<sup>41</sup> *Id.* at \*4 (citing *Workman v. AB Electrolux Corp.*, 2005 WL 1896246, \*6 (D. Kan. Aug. 8, 2005) (emphasis added)). The court also mentioned that “preservation may not be ‘selective,’ saving only the evidence supporting the theory of liability and impeding the examination of another theory.”

<sup>42</sup> *In re K-Mart Corp.*, 371 B.R. 823 (Bankr. N.D. Ill., 2007).

<sup>43</sup> *Id.* at 849.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 847.

<sup>46</sup> *Id.* at 848-49 (emphasis added).

<sup>47</sup> *Id.* at 855. The court did award Global’s attorneys fees and costs. The court did not expressly discuss Rule 37(f) in the opinion. The court did order the defendant, “to the

## 3. AVAILABILITY FROM OTHER SOURCES

[18] Whether there are alternate sources available for the same ESI can be an important consideration for some courts in determining the scope of the duty to preserve. In *Greyhound Lines, Inc. v. Wade*,<sup>48</sup> an Archway truck rear-ended a Greyhound bus, and litigation ensued.<sup>49</sup> Ten days after the accident, Greyhound removed the electronic control module that stored certain information concerning speed, starts, stops, and the times and types of mechanical failures that could befall a bus.<sup>50</sup> The electronic control module (ECM) indicated that failure in a speed-sensor had caused the slow speed of the bus.<sup>51</sup> Greyhound had sent the electronic control module to the engine manufacturer, who erased the information before the case was filed.<sup>52</sup> Archway moved for sanctions against Greyhound for spoliation, but the district court denied the motion and the court of appeals affirmed.<sup>53</sup> The Eighth Circuit said that “although some material was not preserved, the ECM data identified the specific mechanical defect that slowed the bus, and several bus passengers testified about how the bus acted before the collision.”<sup>54</sup> In other words, lack of prejudice – because the necessary information was otherwise available – was important to the Eighth Circuit.<sup>55</sup>

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extent it has not already done so, [to] perform a systematic search of all documents on its P-drive and W-drive and produce them to counsel for Global. . . .” *Id.* The e-mails could not be stored on either the P-drive or W-drive, and it appeared this part of the decision was a response to testimony at the hearing by a witness (not listed on the pretrial statement) about the P-drive and W-drive. *Id.* at 833.

<sup>48</sup> *Greyhound Lines, Inc. v. Wade*, 485 F.3d 1032 (8th Cir. 2007).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 1034.

<sup>51</sup> *Id.*

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

<sup>53</sup> *Id.* at 1035.

<sup>54</sup> *Id.*

<sup>55</sup> In *Wingnut Films, Ltd. v. Katja Motion Pictures Corp.*, the court sanctioned defendant’s document destruction policy “or otherwise take adequate steps to preserve documents.” *Wingnut Films, Ltd. v. Katja Motion Pictures Corp.*, No. CV05-15160-RSWL SHX, 2007 WL 2758571, \*5 (C.D. Cal. Sept. 18, 2007). This language suggests that if the documents had been available from another source, the court would not have sanctioned the defendant for its failure to suspend an automatic deletion policy for certain ESI.

[19] The court seemed to take a different view in *Miller*.<sup>56</sup> The government argued that “most, if not all, of the documents that the magistrate found to be lost and irretrievable were likely given to the defendants over the course of discovery.”<sup>57</sup> The court said that even if that were true, the government’s conduct created a situation where the court could not assess whether information had been lost and how important that information was.<sup>58</sup> The court concluded that even without proof of prejudice, the government’s failure to act to preserve the documents constituted sanctionable negligence.<sup>59</sup>

#### 4. WHAT IS ROUTINE OPERATION?

[20] Courts have appeared skeptical of claims of routine operation defenses under Rule 37(e). For instance, in *Doe v. Norwalk Community College*, the court granted an adverse inference instruction based on the defendant’s spoliation of evidence in a case in which the plaintiff alleged violation of Title IX of the Education Amendments of 1972.<sup>60</sup> The defendants argued that it was a normal practice at Norwalk Community College to scrub the hard drives of employees who had left college employment.<sup>61</sup> The court said that Rule 37(f) “appears to require a routine system in order to take advantage of the good faith exception, and the court cannot find that the defendants had such a system in place.”<sup>62</sup>

[21] The court in *Doe* also said that “in order to take advantage of the good faith exception, a party needs to act affirmatively to prevent the system from destroying or altering information, even if such destruction

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<sup>56</sup> *Ex rel. Miller v. Holzmann*, No. 95-1231 (RCL), 2007 WL 781941 (D.D.C. Mar. 12, 2007).

<sup>57</sup> *Id.* at \*1.

<sup>58</sup> *Id.* How can one party prove relevant e-mails were destroyed by a document retention program? One typical way is for the requesting party to produce from some other source an e-mail that should have been produced by the producing party. It might then be logical to infer that other relevant e-mails had been deleted and the requesting party harmed as a result.

<sup>59</sup> *Id.* The court agreed with the magistrate judge’s earlier decision in the case to wait until after trial to fashion an appropriate sanction.

<sup>60</sup> *Doe v. Norwalk Cmty. Coll.*, No. 3:04-CV-1976 (JCH), 2007 WL 2066497 (D. Conn. July 16, 2007).

<sup>61</sup> *Id.* at \*4.

<sup>62</sup> *Id.*

would occur in the regular course of business.”<sup>63</sup> This sentence suggests that if a party allows its routine document retention policy to destroy *any* relevant documents, the party cannot take advantage of the good faith exception in 37(f). However, if only irrelevant documents were destroyed under a document destruction policy, there should be no sanctions, even without 37(f). If 37(f) provides a party any protection, it consequently means a routine document destruction policy may destroy some relevant documents without sanction.

[22] The court in *Doe* relied on the Advisory Committee Notes to the ESI Rules: “When a party is under a duty to preserve information because of pending or reasonably anticipated litigation, intervention in the routine operation of an information system is one aspect of what is often called a ‘litigation hold.’”<sup>64</sup> However, an earlier sentence in the Committee Notes states, “[g]ood faith in the routine operation of an information system *may* involve a party’s intervention to modify or suspend certain features of that routine operation to prevent the loss of information, if that information is subject to a preservation obligation.”<sup>65</sup> The Committee Notes do not contemplate that a document retention policy must necessarily be suspended, or the Committee would not have used “may.”<sup>66</sup>

[23] The defendants in *Doe* argued that they had no choice but to continue the routine deletion of the backup server, because otherwise, they would have had to reveal the identity of the “Jane Doe plaintiff” in sending out

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

<sup>64</sup> *Id.* at \*4 (citing FED. R. CIV. P. 37(f), Advisory Comm.’s Notes to 2006) (emphasis added).

<sup>65</sup> FED. R. CIV. P. 37(f), Advisory Comm.’s Notes to 2006.

<sup>66</sup> Of course, if a company has retention policies (some companies apparently have no such policies) involving periodic deletion of ESI, or volume limits on ESI, presumably the application of some retention policies or volume limits will have to be suspended, unless perhaps the dispute involves events occurring before the company had ESI. The Committee Notes say, “[i]t is unrealistic to expect parties to stop such routine operation of their computer systems as soon as they anticipate litigation. It is also undesirable; the result would be even greater accumulation of duplicative and irrelevant data that must be reviewed, making discovery more expensive and time-consuming.” 234 F.R.D. 219. However, the Committee Notes also admit, “[t]here is considerable uncertainty as to whether a party – particularly a party that produces large amounts of information – nonetheless has to interrupt the operation of the electronic information systems it is using . . . .” *Id.*

the litigation hold notice. The court rejected that argument, saying that “the defendants could at least have conferred with Doe’s counsel regarding this question of how to send a system-wide communication on document retention without revealing Doe’s real name,” or it could have instructed IT employees “to cease the deletion or scrubbing of electronic data.”<sup>67</sup> The court did not address whether it would have been burdensome for the defendant to preserve the data.

[24] A court also rejected the “routine operation” defense in *In re Krause*, which involved the debtor’s use of GhostSurf on his computers.<sup>68</sup> The court ordered Krause to turn over the hard drives of his computers to the trustee, but Krause installed and ran GhostSurf on his computers immediately prior to turning over the hard drives, resulting in the deletion of files.<sup>69</sup> Krause argued that the two hard drives on his computer had crashed in 2006, that he had been using GhostSurf prior to 2006 “to protect his computers from viruses and worms that he feared would infect them because of his extensive use of the internet in his work,”<sup>70</sup> and that he re-installed and operated Ghost Surf after his computers had crashed.<sup>71</sup>

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<sup>67</sup> *Doe*, 2007 WL 2066497, at \*4 n.9. (emphasis added).

<sup>68</sup> *In re Krause*, 367 B.R. 740, 767 (D. Kan. 2007). The court said:

GhostSurf is designed to wipe or eradicate data and files as part of its protective and security functions. GhostSurf wipes files that may be infected with viruses and worms. It can also be set to purge or wipe ‘deleted files’ in such a way that the data is actually overwritten, precluding the ability to recover or restore the files and data. Both experts agreed that when a user “deletes” files from a hard drive, the data remains intact. The act of deletion merely eliminates the “pointer” that allows the computer to locate the data on the hard drive. By using data recovery software, that data may be extracted (as, indeed, some has been in this case). An additional step is necessary to eradicate this data entirely. GhostSurf performs this function by overwriting the file with a new file that contains no bytes of data . . . .”

*Id.* at 749-50. The court also said that GhostSurf included an application, Tracks Cleaner, that “tracks and cleans files in all applications . . . . The user can select which ‘elements – browsers, email programs, Office applications, etc. – to wipe.” *Id.* at 752. In other words, it appears that GhostSurf can erase the remnants of deleted files and can also eliminate active files.

<sup>69</sup> *Id.* at 749.

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

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

The court said there was “no credible evidence” to support that claim.<sup>72</sup> In other words, the operation of GhostSurf had not been routine, since Krause had used GhostSurf promptly after installation and immediately prior to turning his hard drives over to the trustee.<sup>73</sup>

[25] The court in *Krause* found that even after the duty to preserve had arisen, Krause “generally deleted e-mails once they were no longer relevant to his ongoing enterprises,”<sup>74</sup> and he allowed the Tracks Cleaner application in GhostSurf to wipe other relevant files.<sup>75</sup> The court entered a partial default judgment against Krause.<sup>76</sup>

[26] The court in *Krause* made a statement that might suggest a general obligation to preserve inaccessible data, such as deleted files, in addition to accessible data. For instance, it said, “[o]nce the duty to preserve attached, Krause was required to suspend his routine document destruction practices, be it the deletion of e-mails or the operation of wiping software to prevent recovery of the electronic evidence,” citing *Zubulake*.<sup>77</sup> However, the court in *Zubulake* expressly rejected normally requiring a party to preserve inaccessible ESI as follows: “As a general rule, that litigation 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>78</sup>

[27] The court in *Krause*, in fact, expressly recognized that the debtor had not necessarily been under an obligation to preserve “every e-mail or electronic document he generated or existed on his hard drive.”<sup>79</sup> Quoting *Zubulake*, the court said Krause was “under a duty to preserve what [he]

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<sup>72</sup> *Id.*

<sup>73</sup> “[A] litigant has an obligation to suspend features of a computer’s operation that are not routine if those features will result in destroying evidence.” *Id.* at 768. The court also said it was crucial that Krause had purged “his electronic data and files immediately prior to turning over his computers and after learning that the Court was ordering their production.” *Id.*

<sup>74</sup> *Id.* at 753.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 777.

<sup>77</sup> *Id.* at 766.

<sup>78</sup> *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003).

<sup>79</sup> *In re Krause*, 367 B.R. at 766.

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>80</sup>

[28] A key in *Krause* is that after the duty to preserve had arisen, Krause “continued his routine practice of deleting e-mails.”<sup>81</sup> Upon such deletions, the only evidence of those e-mails would be in the inaccessible parts of the computer. As a result, Krause had the obligation not to erase the inaccessible parts of his computer, because that was the only source in which the trustee could recover the deleted e-mails. This is consistent with other cases in 2007, discussed next, holding that deletion of accessible ESI after the duty to preserve has attached provides good cause to search ESI in inaccessible formats.

#### 5. FAILURE TO PRESERVE ACCESSIBLE ESI

[29] The fact that the defendant’s auto-delete practices allowed responsive information to be deleted from accessible storage provided good cause to order the search of inaccessible storage media in *Disability Rights Counsel of Greater Washington v. Washington Metropolitan Transit Authority*.<sup>82</sup> The plaintiffs alleged violations of the Americans with Disabilities Act, which prohibits discrimination against individuals with disabilities.<sup>83</sup> Although the complaint had been filed on March 25, 2004, the defendant acknowledged that until at least June of 2006 it had done nothing to stop its e-mail system from obliterating all e-mails after 60 days, as a result of the automatic delete feature of its computer system.<sup>84</sup> The court ordered the defendants to search backup tapes that

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<sup>80</sup> *Id.* at 766.

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

<sup>82</sup> *Disability Rights Council v. Wash. Metro. Transit Auth.*, 242 F.R.D. 139 (D.D.C. 2007). The plaintiff in *Disability Rights Counsel* was not seeking sanctions, but simply asking that the defendant be required to search the backup tapes for discoverable information deleted by the document retention policy. The court considered the balancing factors listed in Rule 26(b)(2)(B) and 26(b)(2)(C) and concluded that “these factors make for an overwhelming case for production of the backup tapes.” *Id.* at 148.

<sup>83</sup> *Id.* at 141.

<sup>84</sup> *Id.* at 145.

they held.<sup>85</sup> The court said that the good faith requirement of Rule 37(f) meant 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>86</sup>

[30] In *Benton v. Dlorah, Inc.*, a different district court ordered the plaintiff in an employment discrimination action to produce for inspection her hard drive to determine if e-mails had been deleted.<sup>87</sup> The communications in questions were e-mails with the plaintiff’s husband about what she thought was happening at the corporate defendant and e-mails with the defendant’s paralegals.<sup>88</sup> The court said that “if the emails have been deleted, she shall produce for inspection her computer hard drive from which the deleted emails were sent. This will allow defendants to use the services of a computer forensics specialist, if necessary, to retrieve them.”<sup>89</sup>

[31] *Benton* is evidence that sometimes, individual sentences in many decisions concerning the discovery of ESI should not be considered separately. For instance, the court in *Benton* stated that “[o]nce the duty to preserve documents attached, [the party] was required to suspend her routine document destruction practices, including the deletion of e-mails.”<sup>90</sup> That suggests an absolute duty to suspend document destruction policies. However, the court also said, “Once 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>91</sup> In other words, the second sentence suggests a party to litigation does not have to totally suspend routine document destruction practices, but instead, must put in place practices only to preserve relevant documents.

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<sup>85</sup> *Id.* at 146 (discussing the e-mails of three employees that had been retained, because those three individuals archived all of their e-mails after 60 days).

<sup>86</sup> *Id.*

<sup>87</sup> *Benton v. Dlorah, Inc.*, No. 06-CV-2488-KHV, 2007 WL 3231431, at \*3 (D. Kan. Oct. 30, 2007).

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

<sup>89</sup> *Id.* (explaining that the expert was limited to reviewing specific relevant e-mails).

<sup>90</sup> *Id.* at \*4.

<sup>91</sup> *Id.* (emphasis added).

## 6. DATABASES AND OTHER CHANGING DATA

[32] If databases or other data compilations are the source of relevant information, a party cannot delete that database or data compilation once the duty to preserve has attached.<sup>92</sup> The more difficult issue is what does a party do with a database that may change every day in the regular course of its business? The Sedona Principles indicate that generally, courts should not compel the preservation of “particularly transitory” ESI, but recognize that in certain circumstances a court may order such preservation.<sup>93</sup>

[33] This statement does not suggest that a company must take a snapshot of the database at a particular point in time, but it does not preclude such possibility. In *Best Buy Stores, L.P. v. Developers Diversified Realty Corp.*, the court rejected the argument of the defendant that the plaintiff had to restore to a searchable format, a relevant database it had downgraded to an unsearchable format.<sup>94</sup> The court observed that Best Buy did not destroy the information but removed it from a searchable format. However, “[a]bsent specific discovery requests or additional facts suggesting that the database was of particular relevance to this litigation, the court determines that Best Buy did not have an obligation to maintain the *Odom* database at a monthly cost of over \$27,000.”<sup>95</sup> The court also said that “Best Buy .... need not restore the information to searchable format unless defendants establish good cause.”<sup>96</sup> However, the court noted that the defendants had not argued the requested materials were uniquely available from the database and said, “[i]n the absence of particularized arguments, the court cannot conclude that defendants have established the good cause required to restore” the database.<sup>97</sup>

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<sup>92</sup> See *Sedona Principles*, *supra* note 13 (“Organizations must properly preserve electronically stored information that can reasonably be anticipated to be relevant to litigation.”).

<sup>93</sup> *Id.* at 33.

<sup>94</sup> *Best Buy Stores, L.P. v. Developers Diversified Realty Corp.* No. 05-2310 (DSD/JJG), 2007 WL 423086, at \*2 (D. Minn. Nov. 29, 2007).

<sup>95</sup> *Id.* at \*3.

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

<sup>97</sup> *Id.* at \*4.

[34] Similar questions may arise with metadata that can change every time a party revises a document. If in fact, a business is in the process of revising a document, must it preserve a picture of each draft of the document? In *Wyeth v. Impax Laboratories, Inc.*, the court denied a motion to compel the production of metadata, at least for the time being, but added, “the producing party must preserve the integrity of the electronic documents it produces.”<sup>98</sup> This does not state, however, whether the party had to preserve metadata without change, or simply had to preserve the metadata in whatever form it existed as the document changed. The *Sedona Principles* suggest:

If such overwriting [presumably either in databases or metadata] is incidental to the operation of the systems – as opposed to a deliberate attempt to destroy evidence in anticipation of or in connection with an investigation or litigation – it should generally be permitted to continue . . . unless the overwriting destroys potentially discoverable electronic information that is not available from other sources.<sup>99</sup>

#### 7. ESI CREATED IN THE FUTURE

[35] When the litigation involves not just claims for which past ESI are relevant, but claims for which ESI created after the commencement of the litigation will be relevant, the courts have not provided much guidance.

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<sup>98</sup> *Wyeth v. Impax Labs., Inc.*, No. 06-222-JJF, 2006 WL 3091331, at \*2 (D. Del. 2006). See further discussion *infra* Part IV.A.3.

<sup>99</sup> See *Sedona Principles*, *supra* note 13, at 28. Comment 12a to *Sedona Principles* 12 provides:

The extent to which metadata should be preserved and produced in a particular case will depend on the needs of the case. Parties and counsel should consider: (a) what metadata is ordinarily maintained; (b) the potential relevance of the metadata to the dispute . . . and (c) the importance of reasonably accessible metadata to facilitating the parties’ review, production, and use of the information. In assessing preservation, it should be noted that the failure to preserve and produce metadata may deprive the producing party of the opportunity later to contest the authenticity of the document if that metadata is material to that determination.

*Id.*, at 61

For instance, in *Turner v. Resort Condominiums Int'l*, the court denied a motion for sanctions for the defendant's failure to comply with a demand "for an indefinite time not modify or delete any electronic data in any mainframe, desktop, or laptop computers or other storage or media devices . . . ." <sup>100</sup> *Turner* was a suit alleging pregnancy/sex discrimination. Although decided in July 2006, the court discussed Rule 37(f), saying that the "proposed Rule 37(f) recognizes that *discovery should not prevent continued routine operation of computer systems.*" <sup>101</sup> The court observed that "the pre-suit letter *did not accommodate the routine day-to-day needs of a business with a complex computer network* and demanded actions by RCI that went well beyond its legal obligation on the 29 C.F.R. § 1602.14 and under its more general duty to avoid deliberate destruction of evidence." <sup>102</sup> The court concluded that "[t]here is no evidence of any bad faith alteration or destruction of evidence, and plaintiff has been given ample opportunity to discover such evidence." <sup>103</sup>

[36] In *Wingnut Films, Ltd. v. Katja Motion Pictures Corp.*, the court sanctioned the defendant for its failure to suspend the automatic deletion of electronic documents, including documents created after the commencement of the litigation. <sup>104</sup> The dispute was over the plaintiff's right to an accounting of royalties from the defendant's sale and licensing of various documents related to *Lord of The Rings*. <sup>105</sup> Addressing not only ESI created before the dispute arose, but also after the litigation had commenced, the court said that the litigation concerned the accounting "from the film's release *through to the present*. New Line's continued purging of e-mails during the pendency of this litigation therefore cannot be excused." <sup>106</sup> As in *Turner*, the court in *Wingnut* did not indicate how

<sup>100</sup> *Turner v. Resort Condos. Int'l*, No. 1:03-CV-2025-DFH-WTL, 2006 WL 1990379, at \*6 (S.D. Ind. July 13, 2006).

<sup>101</sup> *Id.* at \*6 n.2 (emphasis added).

<sup>102</sup> *Id.* at \*6 (emphasis added).

<sup>103</sup> *Id.* at \*8. It is not clear whether there had been an automatic delete feature working on the defendant's computer systems, or simply the active use of computer systems and databases by which the information contained in the systems/databases necessarily changes.

<sup>104</sup> *Wingnut Films, Ltd. v. Katja Motion Pictures Corp.*, No. CV 05-1516-RSWL SHX, 2007 WL 2758571, at \*15 (C.D. Cal. Sept. 18, 2007).

<sup>105</sup> *Id.* at \*2.

<sup>106</sup> *Id.* (emphasis in original). The court had issued an order requiring the defendant to produce all "damages-related documents for all accounting periods through the date of

the defendant or a forensic expert should implement an ongoing document preservation program for newly created ESI. But, since the subject of damages was focused, it is logical that the preservation of such ESI would be easier to accommodate than if a plaintiff is claiming an ongoing conspiracy of some nature and wants the defendant to preserve all documents relevant to those continuing claims and defenses.

### C. PRINCIPLES

[37] It is clear that a party must not destroy documents it knows, or should know, are likely to be relevant to reasonably expected litigation.<sup>107</sup> However, the majority of cases show that automatic suspension of all automatic deletion practices would be an over-reaction.<sup>108</sup> Similarly, the Sedona Principles state that “it is unreasonable to expect parties to take every conceivable step to preserve all potentially relevant electronically stored information.”<sup>109</sup>

[38] For instance, a party should not have to preserve all possible sources of e-mail simply because it is possible that an existing or former employee, who claims she was harassed, may have forwarded an e-mail from her supervisor to other employees, or because one of the e-mails may

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trial.” *Id.* at \*2 n.1. The court concluded that the defendant “should be required to retain an outside vendor experience in electronic document retrieval to collect responsive documents” from servers and hard drives of specified employees. *Id.* at \*17.

<sup>107</sup> *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003).

<sup>108</sup> Focusing on individual sentences in court decisions could lead one to argue that a party must preserve everything. For instance, in *Zubulake*, Judge Scheindlin said, “[a] party or anticipated party must retain all relevant documents (but not multiple identical copies) in existence at the time the duty to preserve attaches, and any relevant documents created thereafter.” 220 F.R.D. at 218. However, in the same decision, Judge Scheindlin recognized practical limits to this general statement: “Must a corporation, upon recognizing the threat of litigation, preserve every shred of paper, every e-mail or electronic document, and every backup tape? The answer is clearly, ‘no.’” *Id.* at 217. *See also* Scheindlin, *supra* note 21, at 7-8 (rejecting the idea that “every scrap of ESI that could possibly contain relevant information” must be saved and stating that “a balance must be struck between meeting the obligations imposed by litigation and continuing to function as a business. The answer is that it is impossible to save everything, but a good faith effort must be made to save relevant evidence.”).

<sup>109</sup> *Sedona Principles*, *supra* note 13, at 28.

have been exported into a .pst file<sup>110</sup> outside of the e-mail folders in the cache<sup>111</sup> of a computer.<sup>112</sup> Comment 5a to Sedona Principle 5 explains:

The obligation to preserve relevant evidence is generally understood to require that the producing party make reasonable and good faith efforts to identify and manage the information that it has identified as reasonably likely to be relevant. Satisfying this obligation must be balanced against the right of a party to continue to manage its

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<sup>110</sup> Pst (abbreviated from Personal Storage Table) files (files with \*.pst extension) are files used by Microsoft Outlook to store some certain data. Such files can be exported from Microsoft Outlook and stored on an individual computer's hard drive outside the Outlook environment. See SEDONA CONFERENCE GLOSSARY: E-DISCOVERY & DIGITAL INFORMATION MANAGEMENT (May 2005), available at <http://www.sedonaconference.org/> [hereinafter *Sedona Glossary*]; Microsoft Outlook Backup, available at <http://www.outlookbackup.com/pst-file.html> (last visited Jan. 1, 2008).

<sup>111</sup> Cache is “[a] dedicated, high speed storage location which can be used for the temporary storage of frequently used data. As data may be retrieved more quickly from cache than the original storage location, cache allows applications to run more quickly. Web site contents often reside in cached storage locations on a hard drive.” See *Sedona Glossary*, *supra* note 110, at 7.

<sup>112</sup> *Sedona Principles*, *supra* note 13, at 38 (“Responding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information.”). Comment 6a explains, “[t]ypically, the producing party identifies and informs the key individuals likely to have relevant information of the specific need to preserve all available relevant information – this instruction is sometimes referred to as a ‘litigation hold notice.’” *Id.* There is no automatic need to go beyond the key individuals and the IT personnel who would know where the company keeps the ESI of those key individuals. Of course, to the extent a company has notice that relevant documents exist beyond those held by key individuals, the obligation to preserve can expand. For instance, it presumably would not protect a company that has issued and enforced a litigation hold to key employees, but otherwise let document destruction continue, if the Comptroller of the company, who might not normally be expected to be a key employee about personnel matters, knew she had a damaging e-mail in his e-mail inbox and let the document retention policy destroy that e-mail after 60 days. Alternatively, it could be argued that any employee whose knowledge of events could be attributed to the company should be deemed a key employee. A company should consider two separate “types” of knowledge: actual knowledge of the location of relevant documents and constructive knowledge. A litigation hold should cover sources where it is known relevant documents exist and those sources where it reasonably can be anticipated that relevant documents exist that are not available elsewhere.

electronic information in the best interest of the enterprise, even though some electronic information is necessarily overwritten on a routine basis by various computer systems.<sup>113</sup>

[39] On the other hand, to the extent the company knows certain relevant ESI is contained only in a source for which the applicable document retention policy will delete that ESI in the foreseeable future, the company must suspend that policy retaining the ESI. Even if a company does not know of specific relevant files contained in ESI, *Escobar* and *Benton* show that if the company *reasonably should know that relevant files are likely to exist in ESI* that do not exist elsewhere in the company in an accessible format, the company should suspend the document retention policy for that source and retain that ESI.<sup>114</sup> This *includes the preservation of metadata* for such files. To allow document retention policies to destroy the ESI in either situation (actual or constructive knowledge that the e-mails are relevant and not otherwise available) probably would not constitute the good faith operation of a document retention policy. It would, in effect, be using a document retention policy with the intent to remove relevant evidence.<sup>115</sup>

[40] Ignorance of the ESI is no excuse. As Judge Scheindlin said in *Zubulake*, “[c]ounsel must become fully familiar with her client’s document retention policies, as well as the client’s data retention architecture.”<sup>116</sup> Judge Rosenthal has said, “[e]lectronic discovery imposes

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<sup>113</sup> *Id.*; see also Steven C. Bennett, *E-Discovery by Keyword Search*, 15 No. 3 PRAC. LITIGATOR 7 10-11 (Am. Law Ins. 2004).

A company need not preserve every scrap of paper in its files . . . . In the electronic context, similarly, the standard for a search is reasonableness. . . . When the relevant electronic documents are confined in scope, they may be preserved in their entirety. When the records are vast (such as a company’s entire e-mail system, a keyword search may be employed.

*Id.* at 11.

<sup>114</sup> See *supra* text accompanying notes 36-41.

<sup>115</sup> “The good faith concept permits inquiry into whether a system was arranged to remove embarrassing information, and also into whether the party took suitable measures—sometimes called a ‘litigation hold’ - to curtail discarding of information when the prospect of litigation arose.” Marcus, *supra* note 18, at 615.

<sup>116</sup> *Zubulake v. UBS Warburg, LLC*, 229 F.R.D. at 432.

new requirements on lawyers and litigants to learn large amounts of information about their own and their adversary's information systems, early in the case."<sup>117</sup> Parties and their counsel must make thoughtful preservation decisions, no matter how difficult.

### 1. KEY EMPLOYEES

[41] An important step in document preservation is determining who the key employees are, based on the reasonably anticipated claims and defenses of the parties or anticipated parties. As the commentary to the Sedona Principles states, "[t]ypically, the producing party identifies and informs the key individuals likely to have relevant information of the specific need to preserve all available relevant information . . . ."<sup>118</sup> This commentary is consistent with the cases decided in 2007 on ESI focusing on key employees as the base for determining the scope of a document hold.<sup>119</sup> Those key employees are likely to include IT personnel, who probably can best identify the servers and other media containing ESI (perhaps once the business personnel describe the relevant ESI they created for the applicable businesses at issue).

[42] Identification of key employees, however, does not mean that the company must preserve every file that may contain any ESI created by that key employee. For instance, in *Healthcare Advocates, Inc. v. Harding, Early, Follmer & Frailey*, the court refused to impose sanctions on the defendants for failure to preserve cache files in its computers that the plaintiffs claimed contained infringing copies of the plaintiffs' copyrighted works that the defendant had copied from the Web.<sup>120</sup> The

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<sup>117</sup> Rosenthal, *supra* note 1, at 177; *see also* Allman, *supra* note 8, at 20-23.

<sup>118</sup> *See Sedona Principles*, *supra* note 13, at 38. Sedona Principle 6 states, "[r]esponding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronic data and documents." *Id.*

<sup>119</sup> *See supra* notes 24-29, 33-35 and accompanying text.

<sup>120</sup> *Healthcare Advocates, Inc. v. Harding, Early, Follmer & Frailey* 497 F. Supp. 2d 627, 640 (E.D. Pa. 2007).

A cache file is a temporary storage area where frequently accessed data can be stored for rapid access. When a computer accesses a web page, it will sometimes store a copy of the web page in its cache in case the page is needed again . . . . When the Harding firm viewed archived screenshots of Healthcare Advocates' website through the Wayback

court said, “[t]o impose a sanction on the Harding firm for not preserving temporary files that were not requested, and might have been lost the second another website was visited, does not seem to be a proper situation for an adverse spoliation inference.”<sup>121</sup> Although the plaintiff apparently only requested an adverse inference, the court’s ruling hopefully would have been the same for any request for sanctions.

## 2. ALTERNATE SOURCES FOR THE SAME ESI

[43] Whether there are alternate sources for the same relevant documents can also be an important consideration that addresses prejudice and the need for sanctions.<sup>122</sup> If there are alternate sources for the same documents, there should be no need to preserve a duplicate set. However, a judgment to allow automatic deletion because there are alternate sources will often raise problems, including proving the alternate sources and convincing the court that the availability of alternate sources is a defense.<sup>123</sup>

## 3. TIME PERIODS FOR SUSPENSION

[44] If the litigation involves events only occurring in the past, then an important task is determining for what time periods a party should retain documents. In *Apsley v. Boeing Co.*, the magistrate judge rejected the request for “background information” and concluded that “a reasonable period of time for discovery extends back to January 1, 2002, the earliest

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Machine, copies of the screenshots may have been automatically stored in the cache files of the Harding firm’s computers.

*Id.* at 640.

<sup>121</sup> *Id.* at 642.

<sup>122</sup> See *supra* notes 45-47 and accompanying text.

<sup>123</sup> *Sedona Principles*, *supra* note 13, at 45. Comment 8a to the Sedona Principles states:

The mere suspicion that a source may contain potentially relevant information is not sufficient to demand the preservation of that source ‘just in case.’ Rather, the appropriate standard should be to preserve information on and search sources where the producing party is reasonably likely to locate potentially relevant information not available from other available, searched sources.

*Id.*

date of Boeing's alleged scheme."<sup>124</sup> Moreover, when past events are the focus of litigation, documents generated after the basic events at issue may be irrelevant.<sup>125</sup>

#### 4. INACCESSIBLE ESI

[45] For ESI in inaccessible format, including back-up tapes, there should be no obligation to preserve, unless the party in question has some notice that there is a need to preserve the inaccessible ESI. This conclusion is consistent with Sedona Principle 9, which provides, "[a]bsent a showing of a special need and relevance, a responding party should not be required to preserve, review, or produce deleted, shadowed, fragmented, or residual electronically stored information."<sup>126</sup>

[46] On the other hand, that conclusion is subject to the requirement in Rule 26(b)(2)(B) that "[a] party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost." Presumably, if a party has not notified the other side that it is allowing inaccessible ESI with potentially relevant information to be destroyed, if that ESI is destroyed, then the party allowing the destruction may be subject to sanctions for spoliation if the opposing party complains once it learns of the destruction.<sup>127</sup> If the opposing party is notified of the pending

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<sup>124</sup> *Apsley v. Boeing Co.*, No. 05-1368-MLB, 2007 WL 163201, at \*3 (D. Kan. Jan. 18, 2007); *see also Hayes v. Compass Group USA, Inc.*, 202 F.R.D. 363, 366 (D. Conn. 2001) (stating that the "[d]efendants will not be required to manually search their files for complaints filed prior to January 1, 1998.").

<sup>125</sup> *See McPeck v. Ashcroft*, 212 F.R.D. 33, 35 (D.D.C. 2003) (stating that "it is unlikely that people, working in an office, generate data about an event that is not contemporaneous unless they have been charged with the responsibility to investigate that event or to create some form of history about it.")

<sup>126</sup> *Sedona Principles*, *supra* note 13, at 49. Furthermore, Sedona Principle 11 says, "a responding party may satisfy its good faith obligation to preserve and produce relevant electronically stored information by using electronic tools and processes, such as data sampling, searching, or the use of selection criteria, to identify data reasonably likely to contain relevant information." *Id.* at 57.

<sup>127</sup> *Allman*, *supra* note 8, at 26 (stating that "absent agreement with opposing counsel, unilateral preservation decisions about inaccessible sources always carry some risk of post-production challenge for potential spoliation.").

destruction and does not object, the party destroying the documents would appear to have a good argument on waiver.<sup>128</sup>

## 5. RISK OF UNILATERAL DECISIONS

[47] In light of the different views courts have expressed over the scope of the duty to preserve, the relatively safe practice for a party, who has an obligation to preserve, is to quickly and conscientiously determine what reasonable preservation steps it will take and then notify the other party of its conclusions. If the other party objects, then the court should resolve the issue, and there will not be a dispute months or years later after the destruction of the ESI.

[48] This is consistent with Sedona Principle 3 about the duty to preserve: “Parties should confer early in discovery regarding the preservation and production of electronically stored information when these matters are at issue in the litigation and seek to agree on the scope of each party’s rights and responsibilities.”<sup>129</sup> This is also consistent with the statement in *Benton* in connection with the duty to preserve that “at a minimum an *opportunity\_for inspection* should be afforded a potentially responsible party before relevant evidence is destroyed.”<sup>130</sup> This is consistent with the statement in *Doe v. Norwalk Community College* that “the *defendants*

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<sup>128</sup> Adoption and Amendments to Civil Rules, 234 F.R.D. 219 (2006).

A party’s identification of sources of electronically stored information as not reasonably accessible does not relieve the party of its common-law or statutory duties to preserve evidence. Whether a responding party is required to preserve unsearched sources of potentially responsive information that it believes are not reasonably accessible depends on the circumstances of each case. It is often useful for the parties to discuss this issue early in discovery.

*Id.* Cf. *Marketfare Annunciation, LLC v. United Fire & Casualty Ins. Co.*, No. 06-07232, 2007 WL 3273440 (E.D. La. Nov. 5, 2007).

The Plaintiffs filed this motion for sanctions on September 18, 2007, on the eve of the discovery deadline. . . . Given that trial is imminent and that discovery has closed, the Court in its discretion declines to address the merits of the Plaintiffs’ motion for sanctions because doing so at this juncture would be in direct contravention of the Scheduling Order.

*Id.* at \*3-4.

<sup>129</sup> *Sedona Principles*, *supra* note 13, at 21.

<sup>130</sup> *Benton v. Dlorah, Inc.*, No. 06-CV-2488-KHV, 2007 WL 3231431, at \*4 (D. Kan. Oct. 30, 2007) (emphasis added).

*could at least have conferred with Doe's counsel* regarding this question of how to send a system-wide communication on document retention without revealing Doe's real name."<sup>131</sup>

[49] For instance, the *Best Buy* decision suggests that as a general matter, a party with a database does not have to take a snapshot of that database periodically to fulfill its duty to preserve, and may even be able to change the format of the database. However, the court in *Best Buy* cautioned that there had been no particularized request for information, so the decision may have limited effect.<sup>132</sup> In *Turner*, the court recognized that requests for documents created after the duty to preserve attaches can create additional burdens on the party receiving the request, but did not propose a solution. A similar issue arises with metadata that continually or periodically changes over time as the document changes.<sup>133</sup>

[50] Generally, the stronger argument would appear to be that a party cannot delete the database or metadata, but can allow changes in databases or metadata that occur in the normal course of business, unless perhaps the dispute is about one event occurring in the past for which the party should preserve a "snapshot." Whichever position a party takes, however, such issue would seem to be a perfect candidate for the requirement in Rule 26(f) that "the parties must, as soon as practicable . . . confer . . . to discuss any issues relating to preserving discoverable information."<sup>134</sup> Especially in areas that are not clear, parties acting unilaterally on preservation

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<sup>131</sup> *Doe v. Norwalk Community College No. 3:04-CV-1976 (JCH)*, 2007 WL 2066497, at \*4, n.9 (D. Conn. July 16, 2007) (emphasis added). *See also* Withers, *supra* note 9, at ¶ 77:

Almost every survey, research project, or round of commentary conducted on electronic discovery between 1999 and 2004 produced the same fundamental finding – many of the problems associated with electronic discovery can be worked out between opposing parties who meet and confer early in the litigation, before discovery formally begins, and who continue to communicate with each other and the court throughout discovery.

<sup>132</sup> *See supra* notes 77-80 and accompanying text.

<sup>133</sup> *See supra* notes 84-87 and accompanying text.

<sup>134</sup> FED. R. CIV. P. 26(b)(2); *see also Sedona Principles, supra* note 13, at 21 (stating that "[p]arties should confer early in discovery regarding the preservation and production of electronically stored information when these matters are at issue in the litigation and seek to agree on the scope of each party's rights and responsibilities.").

proceed at their own risk because the court may disagree with the unilateral decision, and there may be no case law to support that decision.

### III. CONSIDERING MARGINAL UTILITY IN THE PRODUCTION OF ACCESSIBLE ESI

#### A. PROPORTIONALITY

[51] Although remaining in obscurity for many years,<sup>135</sup> the proportionality provisions in Rule 26(b) apply to all discovery requests, including requests for paper documents and ESI in accessible format.<sup>136</sup> Indeed, the Supreme Court inserted the proportionality provisions in Rule 26(b)(1) in 1983, before the issue of inaccessible ESI had arisen.<sup>137</sup>

The Advisory Committee Notes for 1983 explained:  
Rule 26(b)(1) has been amended to add a sentence to *deal with the problem of over-discovery*. The objective is to *guard against redundant or disproportionate discovery* by giving the court the authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry.<sup>138</sup>

The Committee noted that a “court must apply the standards in an even-handed manner that will *prevent use of discovery to wage a war of attrition* or as a device to coerce a party, whether financially weak or affluent.”<sup>139</sup> The Committee said that the rules existing prior to the 1983

<sup>135</sup> Marcus, *supra* note 18, at 613. (“[T]he proportionality provisions had remained in obscurity for two decades, although they seemed to be getting more attention.”).

<sup>136</sup> FED. R. CIV. P. 26(b)(2).

<sup>137</sup> Federal Rules of Civil Procedure, 97 F.R.D. 165, 214-15 (1983); Richard L. Marcus, *The 2000 Amendments to the Discovery Rules*, 2001 FED. CTS. L. REV. 1, 22 (2001).

<sup>138</sup> *Federal Rules of Civil Procedure*, 97 F.R.D. at 217 (emphasis added).

<sup>139</sup> *Id.* at 218 (emphasis added). The new paragraph in Rule 26(b)(1) provided:

[t]he frequency or extent of use of the discovery methods set forth in subdivision (a) shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive,

amendments had been “exploited to the disadvantage of justice,” and that the practices of over-discovery “impose costs on an already overburdened system and impede the fundamental goal of the ‘just and speedy, and inexpensive determination of every action.’”<sup>140</sup>

[52] In 1993, the Supreme Court put the proportionality provisions into a separate paragraph, (b)(2), modified introductory text in the paragraph, and amended subparagraph (iii) of the proportionality provision to its current text.<sup>141</sup> The Committee Notes stated that the changes were made “to enable the court to keep tighter rein on the extent of discovery. The information explosion of recent decades has greatly increased both the potential cost of wide-ranging discovery and the potential for discovery to be used as an instrument for delay or oppression.”<sup>142</sup> In 1998, the Supreme Court emphasized the discretion a district court has in limiting discovery when it said, “Rule 26 vests the trial judge with broad discretion to tailor discovery narrowly and to *dictate the sequence of discovery*.”<sup>143</sup>

[53] In 2000, the Supreme Court amended Rule 26(b)(1) to include the following sentence: “[a]ll discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii).”<sup>144</sup> The Committee Notes to this change

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taking into account the needs of the case, the amount in controversy, limitations on the parties’ resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).

*Id.* at 172.

<sup>140</sup> *Id.* at 217 (citing *Herbert v. Lando*, 441 U.S. 153, 179 (Powell, J. concurring)).

<sup>141</sup> Amendments to the Federal Rules of Civil Procedure, 146 F.R.D. 401, 403, 613-14 (1993); see also Stephen N. Surbin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 744-45 (1998).

<sup>142</sup> Amendments to the Federal Rules of Civil Procedure, 146 F.R.D. at 638; see also Surbin, *supra* note 141, at 744-45 (“We have begun to adapt to the notion of ‘proportionality’ in discovery. . . . The court may now consider ‘the importance of the proposed discovery in resolving the issues.’”).

<sup>143</sup> *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998) (emphasis added).

<sup>144</sup> Amendments to Federal Rules of Civil Procedure, Federal Rules of Evidence, Federal Rules of Criminal Procedure and Federal Rules of Bankruptcy Procedure, 192 F.R.D. 340, 388 (2000). Amended Rule 26(b)(1) also narrowed the normal scope of discovery from any matter relevant to the subject matter of the action to “any matter, not privileged, that is relevant to the claim or defense of any party.” Thomas D. Rowe, Jr., *A Square Peg In a Round Hole? The 2000 Limitations on the Scope of Federal Civil Discovery*, 69 TENN. L. REV. 13, 13 (2001). As a result of the 2006 amendments, discussed in the next

explained that the purpose of the additional sentence was to “emphasize the *need for active judicial use of subdivision (b)(2) to control excessive discovery.*”<sup>145</sup>

[54] As a result of the 2006 amendments, the proportionality provisions are now Rule 26(b)(2)(C), and provide that a court may limit the frequency and extent of otherwise permitted discovery if the court determines either:

- (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;
- (ii) the party seeking discovery has ample opportunity by discovery in the action to obtain the information sought; or
- (iii) the burden or expense of the proposed discovery 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. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Rule 26(c).<sup>146</sup>

The Committee Notes to the 2006 Amendments state that, “[t]he limitations of Rule 26(b)(2)(C) continue to *apply to* all discovery of

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paragraph of text of this article, what was Rule 26(b)(2)(i)(ii) and (iii) are now located at Rule 26(b)(2)(C)(i),(ii) and (iii).

<sup>145</sup> Amendments to Federal Rules of Civil Procedure, 192 F.R.D. at 390 (emphasis added). In the 2000 amendments, the Supreme Court also limited the scope of discovery without the intervention of the trial court to non-privileged matters relevant to claims or defenses, rather than what the scope had previously been: anything relevant to the subject matter of the litigation. *Id.* at 388-89. The Committee Notes explained, “[t]he amendment is designed to involve the court more actively in regulating the breadth of sweeping or contentious discovery.” *Id.* at 389.

<sup>146</sup> FED. R. CIV. P. 26(b)(2)(C). Prior to December 1, 2006, what is now 26(b)(C) had been part of 26(b)(2). With the 2006 amendments, what had been Rule 26(b)(2) was split into Rule 26(b)(2)(A) and Rule 26(b)(2)(C), and 26(b)(2)(B) was added.

electronically stored information, including that stored on *reasonably accessible electronic sources*.<sup>147</sup>

[55] Judge Scheindlin, U.S. District Judge for the Southern District of New York,<sup>148</sup> similarly concluded that “it is important to recognize that a party may still object, on the grounds set forth in Rule 26(b)(2)(C) – the proportionality rule – to producing presumptively discoverable information that falls in the so-called first tier” of reasonably accessible information.<sup>149</sup> Judge Scheindlin explained that “even when a source is accessible, a court might not require production of information from that source if, for example, the ‘discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive.’”<sup>150</sup> In *Zubulake II*, Judge Scheindlin stated, “[w]hether electronic data is accessible or inaccessible turns largely on the media on which it is stored.”<sup>151</sup>

[56] Before discussing cases after December 1, 2006 on discovery of accessible ESI, what are the general lines between ESI in accessible format and in inaccessible format? It is agreed that active on-line data, near-line data (such as robotic storage and retrieval of optical disks), and offline storage of optical disks that can effectively be searched when inserted into a computer generally are considered accessible formats.<sup>152</sup> On the other hand, it is agreed as a general matter that the following media constitute inaccessible formats:<sup>153</sup> backup tapes;<sup>154</sup> erased, fragmented or

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<sup>147</sup> See Amendments to the Federal Rules of Civil Procedure 16 (2006), available at [http://www.uscourts.gov/rules/EDiscovery\\_w\\_Notes.pdf](http://www.uscourts.gov/rules/EDiscovery_w_Notes.pdf).

<sup>148</sup> Judge Scheindlin also authored the landmark discovery decisions in *Zubulake v. UBS Warburg LLC*. See *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D. N.Y. 2003) (“*Zubulake II*”); 216 F.R.D. 280 (S.D. N.Y. 2003) (“*Zubulake III*”); 220 F.R.D. 212 (S.D. N.Y. 2003) (“*Zubulake IV*”); 229 F.R.D. 422 (S.D. N.Y. 2004) (“*Zubulake V*”).

<sup>149</sup> Scheindlin, *supra* note 21; see also *Patterson v. Avery Dennison Corp.*, 281 F.3d 676, 681 (7th Cir. 2002) (stating that “[r]ule 26(b)(2) of the Federal Rules of Civil Procedure empowers district courts to limit the scope of discovery if ‘the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive’”).

<sup>150</sup> Scheindlin, *supra* note 21 (quoting FED. R. CIV. P. 26(b)(2)(C)(i)).

<sup>151</sup> *Zubulake II*, 217 F.R.D. at 318.

<sup>152</sup> *Id.* at 318-19.

<sup>153</sup> *Id.* at 319.

<sup>154</sup> See *Sedona Glossary*, *supra* note 110, at 5.

damaged data;<sup>155</sup> and legacy data stored on obsolete systems.<sup>156</sup> Next, this article turns to the cases on accessible ESI.

B. CASES DECIDED AFTER DECEMBER 1, 2006 INVOLVING INFORMATION IN ACCESSIBLE FORMAT

[57] There is at least one federal decision, *Peskoff v. Faber*, that appears to state Rule 26(b)(2)(C) only applies to inaccessible information and does not apply to data in accessible format.<sup>157</sup> In discussing a dispute between the parties on the production of e-mail, Magistrate Judge Facciola stated that:

[A]ccessible data must be produced at the cost of the producing party; cost-shifting does not even become a possibility unless there is first a showing of inaccessibility. Thus, it cannot be argued that a party should ever be relieved of its obligation to produce accessible data merely

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ESI on backup tapes is generally recorded and stored sequentially, rather than randomly, meaning in order to locate and access a specific file or data set, all data on the tape preceding the target must be read first, a time-consuming and inefficient process. Backup typically tapes use data compression, which increases restoration time and expense, given the lack of uniform standards governing data compression.

*Id.*

<sup>155</sup> *Id.* at 14 (stating that “[d]eleted data is data that existed on the computer as live data and which have been deleted by the computer system or end-user activity. Deleted data may remain on storage media in whole or in part until they are overwritten or ‘wiped.’”); *see also* Withers, *supra* note 9, at ¶ 14.

By now, all computer users should be aware that the action of “deleting” an electronic file does little more than change the name and eliminate reference to it in the operating system’s list of active files, a situation aptly described by computer forensics expert Joan Feldman as a “witness protection program for bad documents.”

*Id.* at ¶ 14 (quoting Joan Feldman, “Technology Experts Panel,” Presentation Before the Advisory Committee on Civil Rules at Hasting College of Law (Mar. 27, 2000)).

<sup>156</sup> *Zubulake I*, 217 F.R.D. at 318-20; *see also* Scheindlin, *supra* note 21, at 16; *Sedona Glossary*, *supra* note 110, at 30 (stating that “[l]egacy [d]ata is ESI . . . created or stored by the use of software and/or hardware that has become obsolete or replaced. . . . Legacy data may be costly to restore or reconstruct when required for investigation or litigation analysis or discovery.”)

<sup>157</sup> *Peskoff v. Faber*, 240 F.R.D. 26 (D.D.C. 2007).

because it may take time and effort to find what is necessary.<sup>158</sup>

The second sentence is accurate because under 26(b)(2)(C)(iii), a court cannot limit production simply because of costs; it must balance costs against the likely benefits and other factors. However, the first sentence - that there can only be cost-shifting if the information sought is accessible - is not accurate.

[58] The court in the first *Peskoff* opinion cited two cases, *Zubulake v. UBS Warburg LLC*<sup>159</sup> and *Oppenheimer Fund, Inc. v. Sanders*.<sup>160</sup> Interestingly, neither *Zubulake* nor *Oppenheimer* stand for the proposition that a party can only be relieved of its obligation to produce documents if there has been a showing of inaccessibility. In *Zubulake*, before the adoption of 26(b)(2)(B), Judge Scheindlin did state that the presumption was the responding party must bear the expense of complying with discovery requests,<sup>161</sup> but she also said that under the Rule 26 proportionality test, a court could condition discovery on the requesting party's payment of costs of discovery.<sup>162</sup> Although inaccessible data from backup tapes was at issue in *Zubulake*, the court's statements about cost shifting were not limited to inaccessible data. Saying the presumption is that the producing party must bear the cost of production, as the court said in *Zubulake*, is different than saying the producing party must always bear the cost of production, as the court suggested in the first quoted sentence above in *Peskoff*.

[59] In *Oppenheimer*, the United States Supreme Court similarly (to the court in *Zubulake*) said that:

[T]he presumption is that the responding party must bear the expense of complying with discovery requests, but he may invoke the district's court's discretion under Rule 26(c) to grant orders protecting him from 'undue burden or

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<sup>158</sup> *Id.* at 31.

<sup>159</sup> *Zubulake III*, 216 F.R.D. at 280

<sup>160</sup> *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978).

<sup>161</sup> *Zubulake III*, 216 F.R.D. at 283.

<sup>162</sup> *Id.*

expense' in doing so, including orders conditioning discovery on the requesting party's payment of the cost of discovery.<sup>163</sup>

The Court did not limit this statement to inaccessible information.<sup>164</sup>

[60] In a subsequent decision in *Peskoff*, Magistrate Judge Facciola seemed to modify his previous statement in the original *Peskoff* decision, or at least put it in different context.<sup>165</sup> He stated that when an objection is made, "the search for data, even if accessible, must be justified under the relevancy standard of Rule 26(b)(1)."<sup>166</sup> He added:

The point is that balancing under Rule 26(b)(2)(C) was not invoked here to oppose the search, and I cannot accept the proposition that Faber may be relieved of searching accessible data when he does not argue that the search is not justified by the potential relevancy of what may be found.<sup>167</sup>

The court added:

I am hard pressed to understand why I am required to, *sua sponte*, balance utility against cost and relieve Faber of searching accessible, relevant data any more than I would have to do the same balancing before I required him to look through the file cabinet outside his office for a paper file.<sup>168</sup>

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<sup>163</sup> *Oppenheimer*, 437 U.S. at 358.

<sup>164</sup> *Id.* *Oppenheimer* involved the propriety of shifting the costs of notifying a class of the pendency of the action. The discovery rule was only mentioned to draw an analogy. *Id.*

<sup>165</sup> *Peskoff v. Faber*, 244 F.R.D. 54 (D.D.C. 2007).

<sup>166</sup> *Id.* at 63.

<sup>167</sup> *Id.* In fact, the last sentence in Rule 26(b)(2)(C) allows a court to limit discovery "on its own initiative after reasonable notice." However, certainly Magistrate Judge Facciola's statement that the producing party must make an objection states the practice in his court and is a reasonable position. How is a court able to know when discovery is excessive unless a party objects and brings it to the attention of the court?

<sup>168</sup> *Peskoff*, 244 F.R.D. at 62-63.

In other words, the court in *Peskoff* recognized that a court can limit the production of relevant, accessible data under the proportionality provisions in 26(b)(2)(C).<sup>169</sup>

[61] Other decisions since the effective date of the ESI rules support the conclusion that a court can condition or limit the requested production of accessible information. *Bolton v. Sprint/United Management Company* was an age discrimination case that thirteen plaintiffs filed, challenging a reduction in force by the defendants and alleging violations of the Americans with Disabilities Act.<sup>170</sup> The plaintiffs moved to compel the defendants to produce certain accessible ESI, electronic files in active databases. Although not citing 26(b)(2)(C), the court said it must balance the burden on the producing party against the benefit to the discovering party and should allow the discovery, unless the hardship was “unreasonable compared to the benefits to be secured from the discovery.”<sup>171</sup> Balancing the likely benefits against the burden, the court rejected six of the plaintiffs’ fourteen requests for documents.

[62] In *Hill v. Eddie Bauer*, the court rejected a request for accessible comprehensive wage and hour documents.<sup>172</sup> In *Hill*, the plaintiffs filed individual and class action law suits against Eddie Bauer, alleging, among other things, that Eddie Bauer violated the California labor code for unpaid overtime, and sought, for all putative class members,

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<sup>169</sup> *Id.* (“[A] party must search available electronic systems to answer any discovery requests not objected to . . .”).

<sup>170</sup> *Bolton v. Sprint/United Mgmt. Co.*, No. 05-2361-JWL, 2007 WL 756644, at \*1 (D. Kan. Mar. 8, 2007).

<sup>171</sup> *Id.* at \*3. Interestingly, the court concluded that the request for certain data within a database was overly broad, because the department in Sprint that would have been responsible for retrieving the information was understaffed and that responding to the request would take at least eighty hours. *Id.* at \*4. In contrast, the court concluded that a request for information in native format pertained to all employees selected for termination and a reduction in force during certain time periods, even though the testimony that the process required to respond to this request would take far in excess of the eighty hours needed to respond to request 1. *Id.* It would appear the difference was the more direct relevance, and thus benefit, of the information sought in request 3 (pertaining to employees who had been selected for termination), compared to request 1 (information concerning all employees).

<sup>172</sup> *Hill v. Eddie Bauer*, 242 F.R.D. 556, 563 (C.D. Cal. 2007) (indicating that the records involved certain reports that could be generated electronically).

documentation relating to the hours, wages, business related expenses, repayment of wages to employer, termination wages, meal breaks, and rest breaks.<sup>173</sup> The court relied, in part, on Rule 1 of the Federal Rules of Civil Procedure, which provides that the federal rules “shall be construed and administered to secure the just, speedy and inexpensive determination of every action.”<sup>174</sup> The court stated that:

To track historical sales of Eddie Bauer merchandise to employees for a period longer than the immediately preceding six months, hard copy sales records must be gathered manually and reviewed by a live individual. Sales records [were] maintained both at [defendant’s] corporate campus in Redmond, Washington as well as off-site.<sup>175</sup>

The court concluded that it would be unduly burdensome to respond to these document requests, but that the plaintiff was entitled to responsive sample information to pursue class action certification.<sup>176</sup>

[63] Another court also limited pre-certification class discovery for information that included data in accessible format, based on balancing burdens and benefits, in *O’Bar v. Lowe’s Home Centers, Inc.*<sup>177</sup> A particular issue in this employment discrimination case was whether the plaintiffs had standing to represent the class.<sup>178</sup> The court limited precertification discovery to managers and officers at the regional, district and national level.<sup>179</sup>

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<sup>173</sup> *Id.* at 560

<sup>174</sup> *Id.* (quoting FED. R. CIV. P. 1).

<sup>175</sup> *Id.* at 563.

<sup>176</sup> *Id.* at 564. The court stated, however, that it might reconsider its limitation on the discovery of this request “in the event plaintiff’s experts are unable to devise some statistical analysis based on sampling data, and opine they need data from all 1,800 putative class members.” *Id.* at 565.

<sup>177</sup> *O’Bar v. Lowe’s Home Ctrs., Inc.*, No. 5:04-cv-00019-W, 2007 WL 1299180 (W.D.N.C. May 2, 2007). The court limited pre-class production not simply with respect to information it deemed inaccessible, but did include specific guidelines for information not reasonably accessible.

<sup>178</sup> *Id.* at \*1.

<sup>179</sup> *Id.* at \*3.

[64] The court in *Fifty-Six Hope Road Music Ltd. v. Mayah Collections, Inc.* also limited discovery of accessible information after expressly considering the Rule 26(b)(2)(C) balancing factors.<sup>180</sup> *Fifty-Six Hope Road* was a case alleging trademark infringement and the defense of abandonment of the mark. The court said that under Rule 26(b)(2)(C):

*[T]he court on its own initiative after reasonable notice or pursuant to a motion under Rule 26(c), may limit the discovery sought if it determines that it is unreasonably cumulative or duplicative or the burden and expenses of the discovery 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>181</sup>

[65] The court in *Fifty-Six Hope Road* then denied the requests for all advertisements and documents evidencing use of the marks at issue since the first date of use.<sup>182</sup> The court said:

*[E]ven some minor or limited use in a given year is sufficient to defeat a claim of abandonment. The Court will, therefore, order that, to the extent they have not done so, Plaintiffs produce representative documents showing that they made use of the marks in the years since the mark was first used.*<sup>183</sup>

[66] In *Haka v. Lincoln County*, the requested information included active data on external hard drives – accessible information.<sup>184</sup> Referring to the balancing factors in 26(b)(2)(C), the court took into account the dollar amount at issue in the case, rejected the request to copy and produce the hard drives in their entirety, and said instead that:

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<sup>180</sup> *Fifty-Six Hope Road Music, Ltd. v. Mayah Collections, Inc.*, No. 2:05-cv-0105-KJD-GWF, 2007 WL 1726558 (D. Nev. June 11, 2007). The disputed requests included advertisements and apparently other paper documents.

<sup>181</sup> *Id.* at \*4 (emphasis added).

<sup>182</sup> *Id.* at \*10.

<sup>183</sup> *Id.*

<sup>184</sup> *Haka v. Lincoln County*, 246 F.R.D. 577 (W.D. Wis. 2007)

[F]airness and efficiency require the parties to proceed incrementally, limiting the initial search to the e-mail stored on the hard drives. Plaintiff is required to narrow his search terms to the narrowest set with which he is comfortable. Any additional searches shall occur only by joint agreement or court order. The parties will divide the cost of performing plaintiff's term searches of the e-mail 50/50.<sup>185</sup>

In other words, the court ordered cost sharing, even though the e-mails were in accessible format.

[67] In *Smith v. Café Asia*, in responding to a request for discovery of images stored on a cell phone – accessible information – Magistrate Judge Facciola said that “relevancy alone does not entitle a requesting party to carte blanche in discovery,” citing the Supreme Court’s decision in *Crawford-El v. Britton*.<sup>186</sup> Magistrate Judge Facciola also pointed out that admissibility of the discovery being sought could be an important consideration, even though information sought in discovery generally did not have to be admissible, but only reasonably likely to lead to the discovery of admissible evidence. If the items sought in discovery were, in fact, items the requesting party would seek to admit at trial, then “the question of discoverability is inseparable from admissibility.”<sup>187</sup> Magistrate Judge Facciola ordered that the images on the cell phone be preserved, but that only one attorney for the plaintiff be designated by the defendant to inspect the images, so subsequently both the plaintiff and the defendant could make an argument on admissibility to the trial judge.

[68] The production of e-mails in Lotus Notes format, an accessible format, was at issue in *Parkdale America, LLC v. Travelers Casualty and Surety Company of America, Inc.*<sup>188</sup> *Parkdale* was a declaratory judgment

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<sup>185</sup> *Id.* at 579. There would also be inaccessible data on the hard drives, such as deleted files. However, this decision addressed accessible ESI and limited the search for accessible ESI.

<sup>186</sup> *Smith v. Café Asia*, 246 F.R.D. 19, 20 (D.D.C. 2007) (citing *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998)).

<sup>187</sup> *Id.* at 20.

<sup>188</sup> *ParkDale Am., LLC. v. Travelers Cas. & Surety Co. of Am.*, No. 3:06CV78-R, 2007 WL 4165247 (W.D.N.C. Nov. 19, 2007).

action to determine whether the insurance company had a duty to defend and indemnify Parkdale in an antitrust lawsuit. The court applied Rule 26(b)(2)(C), noted that the insurance policy at issue in the case was over \$2.7 million and the cost of producing the e-mails not more than \$20,000, and concluded that the “Plaintiffs have not articulated a sufficient basis to relieve them of their obligation to produce e-mails.”<sup>189</sup> The court also concluded that the plaintiffs had failed to establish that the e-mails were “not reasonably accessible because of undue burden or cost.”<sup>190</sup> It is unclear if the court thought “not reasonably accessible” was a separate test from the 26(b)(2)(C) test.

[69] In *PSEG Power New York, Inc. v. Alberici Constructors, Inc.*, a dispute over a construction contract, as the result of some incompatibility between the software used by PSEG and the vendor, PSEG initially produced documents that had been attached to e-mails separately from the e-mails.<sup>191</sup> The court said the e-mails/attachments still existed in their original pst files, with nothing lost. PSEG could collect the documents attached to the e-mails by running another search, but at an additional cost that PSEG did not want to bear. The court applied the 26(b)(2)(C) proportionality test and rejected switching any cost to Alberici, largely because originally, the “attachments should have been produced with their corresponding e-mails as such are kept in the usual course of business.”<sup>192</sup> The court did acknowledge, however, that the presumption that the producing party bears the expense of complying with discovery requests “may place an undue burden or cost upon the responding party, especially when it comes to electronic discovery.”<sup>193</sup>

[70] The court ordered the production of a database in *Ryan v. Stanton Island University Hospital*.<sup>194</sup> The plaintiff, on behalf of her deceased husband, sued the defendant for medical malpractice, fraud, and other claims. The discovery issue revolved around a database of patients who

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<sup>189</sup> *Id.* at \*13.

<sup>190</sup> *Id.* at \*12.

<sup>191</sup> *PSEG Power NY, Inc. v. Alberici Constructors, Inc.*, No. 1:05-CV-657, 2007 WL 2687670, at \*2 (N.D.N.Y. 2007)

<sup>192</sup> *Id.* at \*12.

<sup>193</sup> *Id.* at \*10

<sup>194</sup> *Ryan v. Staten Is. Univ. Hosp.*, No. 04-CV-2666, 2006 WL 3497875 (E.D.N.Y. Dec. 5, 2006).

had received radiosurgery, and the defendant had produced a paper document that purported to be a printout of a database listing all of the patients who were treated with radiosurgery, their diagnoses, years of treatment, and types and locations of cancer, through December 31, 2002. The court ordered the defendant to produce a complete and true copy of the database.<sup>195</sup> The court said, “[p]ursuant to Rule 26(b), any information that is not privileged and is ‘reasonably calculated to lead to the discovery of admissible evidence’ may be discovered.”<sup>196</sup> The producing party had objected on the grounds that the production would reveal privileged or other confidential information, not on the grounds that the information would be cumulative or was simply a fishing expedition. In its order, the court attempted to address the privilege/confidentiality objection in the limits placed on production.<sup>197</sup>

### C. PRINCIPLES

[71] Courts have the authority under Rule 26(b)(2)(C) to restrict and put conditions on discovery of relevant and accessible documents and ESI.<sup>198</sup>

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<sup>195</sup> *Id.* at \*8.

<sup>196</sup> *Id.* at \*4. The court appeared to treat the database as accessible ESI. Requests for information from databases may not always be construed as a request for information from an accessible source. For instance, in discussing inaccessible formats, the Committee Notes for the ESI Rules said, “Examples from current technology include...databases that were designed to create certain information in certain ways and that cannot readily create very different kinds or forms of information.” 234 F.R.D. at 331.

<sup>197</sup> The court ordered production of the database “in electronic and hard copy, subject to the redaction only of the patients’ names, addresses, telephone numbers and social security numbers, and specifically stamped ‘REDACTED’ on each and every entry for which information was redacted.” *Ryan*, 2006 WL 3497875 at \*8. The court did not explain in the decision how a completed database could be produced in electronic format, with REDACTED stamped on each element that, in fact, was redacted.

<sup>198</sup> The amended rule does *not* say that judges may only consider cost allocation if the subject of the discovery is electronically stored information; if the electronically stored information is not reasonably accessible, or if the costs that the producing party is seeking to shift go beyond the costs of forensic work necessary to make certain information accessible.

Rosenthal, *supra* note 1. Phrases taken out of context are often misleading. The statement in *Peskoff* that “accessible data must be produced” is subject to the qualification in the next *Peskoff* decision - unless the producing party objects to such production. See *supra* text accompanying notes 27-28, 35-39. The statement in *Ryan* that a party may discover any non-privileged information likely to lead to the discovery

The 2007 decisions in *Bolton*, *Hill*, *O'Bar*, *Fifty-Six Hope Road*, *Haka*, and *Smith* support this position.<sup>199</sup> As the Committee Notes state, “the limitations of Rule 26(b)(2)(C) continue to apply to all discovery of electronically stored information, including that stored on reasonably accessible electronic sources.”<sup>200</sup>

[72] Another 2007 decision, *Christian v. Central Records Service*, involving a requested search for printed copies of e-mails in an individual employment discrimination case, also supports the application of Rule 26(b)(2)(C) to limit requests for production of relevant information in accessible format.<sup>201</sup> In *Christian*, the plaintiff requested “all of her e-mails from the date of her hire until the date of her termination,” and Central Records responded that the requested e-mails “have been deleted in the normal course of business.”<sup>202</sup> The plaintiff said she always printed out her e-mails and asked the court to order Central Records to search several hundred thousand boxes in storage for those e-mails. The court rejected the request, stating, “[t]he ability to discovery and retrieve the e-mails in question would be unnecessarily burdensome to the Defendant. Even if the court would order a sample of the various boxes the sample size, to be effective, would be cost prohibitive and may not produce any of the requested e-mails.”<sup>203</sup>

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of admissible evidence is also subject to the same qualification - unless the producing party raises a valid objection to its production. In *Ryan*, the court cited *National Congress for Puerto Rican Rights v. City of New York*, 194 F.R.D. 88, 92 (S.D.N.Y. 2000) for the proposition of what information may be discovered. In *National Congress*, Judge Scheindlin made the general statement that all relevant materials likely to lead to the discovery of admissible evidence are discoverable, and then added the qualification, “Given the breadth of discovery in federal actions, all of the documents listed above are relevant—whether they are discoverable is a different matter.” *Id.* at 92. In other words, whether some information is within the scope of permissible discovery is a separate issue than whether the court should allow discovery of that information.

<sup>199</sup> See *supra* text accompanying notes 170-84.

<sup>200</sup> 234 F.R.D. at 339 (emphasis added).

<sup>201</sup> *Christian v. Cent. Record Serv.*, No. 2:06-CR-2198-RTD, 2007 WL 3094513 (W.D. Ark. Oct. 19, 2007). Central Records Service provides record storage and retrieval services for other businesses and to individuals. *Id.* at \*1.

<sup>202</sup> *Id.* It is not clear whether the deletion occurred before the obligation to preserve ESI attached, and in any case, the decision does not mention any motion for sanctions for the deletion of the e-mails.

<sup>203</sup> *Id.* at \*2 (citing Rule 26(b)(2) and *Roberts v. Shawnee Mission Ford, Inc.*, 352 F.3d 358, 361 (8th Cir. 2003)). The paper documents in boxes were in accessible format.

[73] Monetary expense does not even have to be an express factor to limit production under Rule 26(b)(2)(C). A court can limit discovery if “the information is obtainable from some other source that is more convenient,”<sup>204</sup> or if the requesting party has already had ample opportunity to obtain the requested information.<sup>205</sup> Under Rule 26(b)(2)(C)(i), a court can limit discovery if “the discovery sought is unreasonably cumulative or duplicative.”<sup>206</sup>

[74] As the modifications to Rule 26(b) over the last twenty-five years show, Rule 26(b) instructs the parties to engage in, and the courts to enforce, discovery proportionate to the circumstances of the case.<sup>207</sup> Requests for “all information” pertaining to a particular topic often are overly broad.<sup>208</sup> When parties object, courts should narrow requests to search all the e-mails and documents of all employees, or search all servers of a company, including cache files, when it is reasonably anticipated that the documents and e-mails of the key employees are likely to be found on specific servers, or a limited sample of information may

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However, the cost of retrieving and searching the boxes caused the court to determine that production would be unnecessarily burdensome. When the only issue arguing against production of accessible information is cost, as appeared to be the case in *Christian, Parkdale and PSEG*, it is reasonable to conclude the objecting party should have a more difficult time persuading the court to reject production than when there are additional objections to production, such as the request is duplicative or an unnecessary fishing expedition unlikely to produce additional, important information in light of what has already been produced.

<sup>204</sup> FED R. CIV. P. 26(b)(2)(C)(i).

<sup>205</sup> FED R. CIV. P. 26(b)(2)(C)(ii).

<sup>206</sup> Of course, a party who objects to a request as “unreasonably cumulative” can attempt to put a dollar value on the amount of staff time required to comply with the request, but only 26(b)(2)(C)(iii) expressly refers to “expense.”

<sup>207</sup> *Cf.*, *In re Microcrystalline Cellulose Antitrust Litig.*, 221 F.R.D. 428, 430 (E.D. Pa. 2004) (stating that the “plaintiffs’ request for sales data through the end of 2003 is unreasonable given the minimum potential benefits of this information”).

<sup>208</sup> *See, e.g.*, *Johnson v. Kraft Foods N. Am., Inc.*, 236 F.R.D. 535, 542 (D. Kan. 2006); *Williams v. Sprint/United Mgmt. Co.*, No. 03-2200-JWL-DJW, 2006 WL 2734465, at \*7 (D. Kan. Sept. 25, 2006); *BG Real Estate Servs., Inc. v. Am. Equity Ins. Co.*, No. Civ.A. 04-3408, 2005 WL 1309048, at \*5 (E.D. La. May 18, 2005); *Byers v. Ill. State Police*, No. 99 C 8105, 2002 WL 1264004, at \*11 (N.D. Ill. June 3, 2002); *Cardenas v. Dorel*, 232 F.R.D. 377, 382 (D. Kan. 2005); *Wright v. AmSouth Bancorporation*, 320 F. 3d 1198, 1205 (11th Cir. 2003).

serve the same purpose more efficiently.<sup>209</sup> Courts should also reject or narrow vague requests that will require the producing party to spend a lot of time evaluating documents to determine if they are responsive.<sup>210</sup>

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<sup>209</sup> Cf. *Fifty-Six Hope Road Music, Ltd. v. Mayah Collections, Inc.*, No. 2:05-cv-0105-KJD-GWF, 2007 WL 1726558 (D. Nev. June 11, 2007); *Wells v. XPEDX*, No. 8:05-CV-2193-T-EAJ, 2007 WL 1200955 (M.D. Fla. Apr. 23, 2007); *Semsroth v. City of Wichita*, No. 04-1245-MLB, 2006 WL 33885024 (D. Kan. Spet. 5, 2006); *Quinby v. Westlb AG*, No. 04Civ.7406(WHP)(HBP), 2005 WL 3453908 (S.D.N.Y. 2005); *Quinby v. Westlb AG*, No. 04Civ.7406 WHP HBP, 2006 WL 59521 (S.D.N.Y. 2006); *Quinby v. Westlb AG*, 245 F.R.D. 94 (S.D.N.Y. Jan. 11, 2006); *supra* text accompanying notes 180-86.

Where samples are identified for initial production, it may be logical to expect a stipulation that the fact at issue will be decided based on the sample, or an agreement to preserve the more extensive information not included in the sample, in case it was later determined the sample was not sufficient. Cache is “a dedicated, high speed storage location which can be used for the temporary storage of frequently used data. As data may be retrieved more quickly from cache than the original storage location, cache allows applications to run more quickly. Web site contents often reside in cached storage locations on a hard drive.” See *Sedona Conference Glossary*, *supra* note 110.

<sup>210</sup> *Williams v. Sprint/United Management Co.*, No. 03-2200-JWL-DJW, 2006 WL 2734465, \*7 (D. Kan. Sept. 25, 2006) (stating that “[c]ourts may find requests overly broad when they are ‘couched in such broad language as to make arduous the task of deciding which of numerous documents may conceivably fall within [their] scope.’” (emphasis added)). See also *Sedona Principle 4* (stating that “[d]iscovery requests for electronically stored information should be as clear as possible, while responses and objections to discovery should disclose the scope and limits of the production.”). In such case, the producing party may have to produce a subset of the requested information. See, e.g., *Johnson*, 236 F.R.D. at 542 (stating that “[d]espite the overly broad nature of Requests 7, 8, and 10 on their face, the Court is mindful of a party’s duty under the federal rules to respond to the extent that discovery requests are not objectionable”).

[75] As in *Haka*,<sup>211</sup> limitations on key word searches can make sense.<sup>212</sup> No method of reviewing ESI electronically, so far, produces very accurate results.<sup>213</sup> Production based on broad word searches alone is likely: (1) to result in the over-production of proprietary material that the receiving party has no right to receive but receives anyway;<sup>214</sup> or (2) to require a large amount of time spent by the producing party individually reviewing

<sup>211</sup> *Haka v. Lincoln County*, 246 F.R.D. 577, 579 (W.D. Wis. 2007).

<sup>212</sup> See also *Quinby v. Westlb AG*, 245 FRD 94,106 (S.D.N.Y. 2006) (stating that “[f]ollowing multiple conferences before me, the electronic discovery as it pertained to e-mails was limited to searches of seventeen current and former WestLB employees, utilizing a limited number of search terms and, in some instances, more limited time frames.”); *Alexander v. Fed. Bureau of Investigations*, 194 F.R.D. 316, 335 (D.D.C. 2000):

The EOP [Executive Office of the President] responds, however, that the burden of searching the e-mails of those individuals with such attenuated knowledge to any relevant issues far outweighs any likely benefit that would be obtained by adding these persons to the list. The court agrees with the EOP's argument. The court further notes, as discussed above, that to the extent that any of these persons sent or received e-mails to or from those persons already included in the search who are alleged to be directly involved in the matters at issue, those e-mails will already be captured by the more limited search.

*Id.*

<sup>213</sup> Paul & Baron, *supra* note 1, at ¶ 40.

[T]he assumption on the part of lawyers that any form of present-day search methodology will fully find ‘all’ or ‘nearly’ all available documents in a large, heterogeneous collection of data is wrong in the extreme. A leading study by Blair & Maron, where the legal teams only found 20% of the responsive documents in a large subway crash case, has been widely cited as recognizing this inherent problem.

*Id.* See also *The Sedona Conference Best Practices Commentary on the Use of Search & Information Retrieval Methods in E-Discovery*, 8 THE SEDONA CONF. J. 189, 199-204 (Fall 2007).

<sup>214</sup> In explaining the general limitation on the scope of discovery in 2000 to non-privileged matters relevant to the claims or defenses in the case rather than the subject matter of the case, the Committee said the change “signals to the parties that they have no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings.” Amendments to Federal Rules of Civil Procedure, 192 F.R.D. 340, 389 (2000). Production based simply on word searches can provide free fishing for the requesting party into uncharted and unclaimed waters, in spite of the intention of the rules. Of course, word searches can miss relevant documents also. However, initial “under-production” from word searches can be corrected over time through stages of discovery. In other words, start with certain word searches and compare the results with what would reasonably be expected.

the documents flagged by the electronic search to determine which of the documents flagged by the computer are, in fact, responsive and not privileged.

[76] Court restrictions on the timing of discovery also can be appropriate. For instance, as long as the parties preserve the information, there is no reason to approve broad class-wide discovery before the court has determined whether there is a valid class.<sup>215</sup> Similarly, since the appropriate remedy in a case, if any, may change over time, as long as the parties preserve the information, it may make sense to limit discovery of damages until later in the case.<sup>216</sup>

[77] As in the case of preservation decisions, counsel and parties cannot safely take decisions on overbreadth, or other production decisions, into their own hands—they must object if they are not going to produce.<sup>217</sup> For instance, in *Qualcomm, Inc. v. Broadcom Corp.*,<sup>218</sup> Qualcomm responded to a request for production of documents by stating, “Qualcomm will produce non-privileged relevant and responsive documents describing Qualcomm’s participation in the JVT, if any, which can be located after a reasonable search.” However, Qualcomm did not produce thousands of pages of ESI (e-mail) that the court deemed relevant, and Qualcomm argued the court should take no action when the failure to produce was discovered because Broadcom had not objected to Qualcomm’s discovery response. The court rejected this argument as “gamesmanship”<sup>219</sup> and

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<sup>215</sup> See, e.g., *Hill v. Eddie Bauer*, 242 F.R.D. 556 (C.D. Cal. 2007); *Rebman v. Follett Higher Educ. Group, Inc.* 2007 U.S. Dist. WL 1303031, at \* 3 (M.D. Fla. May 3, 2007).

<sup>216</sup> *Rebman*, 2007 WL 130303, at \*3.

<sup>217</sup> See *Sedona Principles*, *supra* note 13 (stating that “[d]iscovery requests for electronically stored information should be as clear as possible, while responses and objections to discovery should disclose the scope and limits of the production.”).

<sup>218</sup> *Qualcomm, Inc. v. Broadcom Corp.*, 2008 U.S. Dist. WL 66932, at \*8 (S.D. Cal. Jan. 7, 2008).

<sup>219</sup> *Id.* at \*8 n. 4.

This argument is indicative of the gamesmanship Qualcomm engaged in throughout this litigation. Why should Broadcom file a motion to compel when Qualcomm agreed to produce the documents? What would the court have compelled: Qualcomm to do what it already said it would do? Should all parties file motions to compel to preserve their rights in case the other side hides documents?

*Id.*

ruled that “agreeing to produce certain categories of documents and then not producing all of the documents that fit within such a category is unacceptable. Qualcomm’s conduct warrants sanctions.”<sup>220</sup>

[78] Unnecessary discovery and secrecy both burden the judicial process. The Supreme Court adopted the proportionality rule to enable courts and parties to constrain excessive discovery. In light of the ESI explosion, Rule 26(b)(2)(C), used openly, is perhaps today, an even more important tool to restrain excessive discovery than it was in 1983.

#### IV. PRODUCTION OF REGULARLY CHANGING ESI

##### A. METADATA

##### 1. DEFINITIONS

[79] The possible relevance and use of metadata<sup>221</sup> can vary significantly, depending on the type of metadata involved.<sup>222</sup> Although this article cites the definitions of types of metadata from the Sedona Glossary, there are not generally agreed upon definitions of the types of metadata.<sup>223</sup>

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<sup>220</sup> *Id.* at \*9.

<sup>221</sup> Sedona Conference Glossary for E-Discovery and Digital Information Management (the “Sedona Glossary”) defines metadata as:

[I]nformation about a particular data set or document which describes how, when and by whom it was collected, created, accessed, modified and how it is formatted. Can be altered intentionally or inadvertently. Can be extracted when native files are converted to image. Some metadata, such as file dates and sizes, can easily be seen by users; other metadata can be hidden or embedded and unavailable to computer users who are not technically adept. Metadata is generally not reproduced in full form when a document is printed.

*Sedona Glossary*, *supra* note 110, at 28.

<sup>222</sup> Allman, *supra* note 8, at \*31 (stating that “[t]he need for metadata and embedded data varies depending upon the type of ESI involved and the issues in the case.”).

<sup>223</sup> Lucia Cucu, *The Requirement for Metadata Production Under Williams v. Sprint/United Management Co.: An Unnecessary Burden for Litigants Engaged in Electronic Discovery*, 93 CORNELL L. REV. 221, 229, 236 (2007) (stating that “metadata is not clearly defined . . . different courts have used the word ‘metadata’ to mean different things”).

[80] The Sedona Glossary defines user-added metadata as, “data or work product created by a user while reviewing a document, including annotations and subjective coding information.”<sup>224</sup> This type of metadata can often be privileged or constitute attorney-work product. Some place the “track changes” function and the invisible spreadsheet formulas of Microsoft Word in this category.<sup>225</sup> Arguably, this type of metadata is more likely to be relevant than other types of metadata, and not otherwise available in the document. For instance, although the author and date of creation are often very important and revealed in document metadata, which is discussed next, information about author and date is often apparent from the document itself.

[81] The Sedona Glossary defines document metadata as, “data about the document stored in the document, as opposed to document content. Often this data is not immediately viewable in the software application used to create/edit the document but often can be accessed via a ‘Properties’ view. Examples include document author and company, and create and revision dates.”<sup>226</sup>

[82] The Sedona Glossary defines e-mail metadata as, “data stored in the e-mail about the e-mail. Often this data is not even viewable in the e-mail client application used to create the e-mail. The amount of e-mail metadata available for a particular e-mail varies greatly depending on the e-mail system.”<sup>227</sup> This metadata can include “internet protocol addresses, the dates the e-mail was sent, received, replied to and forwarded, and . . . blind carbon copy (‘bcc’) information and sender address book data.”<sup>228</sup>

[83] The Sedona Glossary defines file system metadata as, “data that can be obtained or extracted about a file from the file system storing the file.

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<sup>224</sup> See *Sedona Glossary*, *supra* note 110, at 45.

<sup>225</sup> *Sedona Principles*, *supra* note 13, at 3-4 (referring to formulas in spreadsheets as metadata); Favro, *supra* note 19, at \*7-10 (discussing track changes and formulas as metadata). Cf. Cucu, *supra* note 223, at 229, 236 (stating that “[t]he Williams court [Williams v. Sprint/United Management Co., 230 F.R.D. 640, 647 (D. Kan. 2005)] . . . viewed spreadsheet formulas as metadata, but it is not clear why such formulas are not a part of the document instead.”).

<sup>226</sup> See *Sedona Glossary*, *supra* note 110, at 16.

<sup>227</sup> *Id.* at 18.

<sup>228</sup> Favro, *supra* note 19, at \*9.

Examples include file creation time, last modification time, and last access time.”<sup>229</sup>

[84] In considering the production of metadata, it is necessary to consider Rule 34 on the form of production, even though that Rule and the Committee Notes do not take a position on whether a responding party must produce metadata.<sup>230</sup> The next section, therefore, reviews the applicable parts of Rule 34 and the Committee Notes.

## 2. RULE 34

[85] Rule 34(b)(1)(C) provides that the requesting party “may specify the form or forms in which electronically stored information is to be produced.”<sup>231</sup> Rule 34(b)(2)(D) provides that the responding party may object to the form in which the requesting party asks for the ESI, and if it does object, it must specify the form in which it proposes to produce the ESI.<sup>232</sup> Rule 34(b)(2)(E)(ii) provides that absent a court order or stipulation, “[i]f a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.”<sup>233</sup> If either party raises objection to the form, then of course the court decides the form.<sup>234</sup>

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<sup>229</sup> See *Sedona Principles*, *supra* note 13, at 4 (stating generally “metadata will have no evidentiary value - it does not matter when a document was printed, or who typed the revisions, or what edits were made before the document was circulated.”).

<sup>230</sup> Cucu, *supra* note 223, at 224.

<sup>231</sup> FED. R. CIV. P. 34(b)(1)(C).

<sup>232</sup> FED. R. CIV. P. 34(b)(2)(D).

<sup>233</sup> FED. R. CIV. P. 34, Committee Notes, 1993 Amendments.

A number of commentators expressed concern that ‘a form ordinarily maintained’ required ‘native format’ production, which can have disadvantages ranging from an inability to redact, leading to privilege problems; an inability to bates-stamp the ‘document’ for purposes of litigation management and control . . . ; and the receiving party’s ability to create ‘documents’ from the produced native format data and present them back to the producing party as deposition or proposed trial exhibits that, while based on the native format data and produced, are totally unfamiliar to the producing party.

*Id.*

<sup>234</sup> FED. R. CIV. P. 34, Committee Notes, 2006 Amendment.

[86] The Committee Notes on Rule 34 state, “[i]f 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.”<sup>235</sup> In addition, the Committee Notes say, “[u]nder some circumstances, the responding party may need 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>236</sup> The Committee Notes also warn:

A party that responds to a discovery request by simply producing electronically stored information in a form of its choice, without identifying that form in advance of 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.<sup>237</sup>

[87] The language of the Rule and Committee Notes add a consideration beyond relevance to responding to requests for production of metadata. The additional consideration is that metadata can assist in making the “document” part of the ESI more usable, and that in turn may require the production of metadata, even though by itself, the metadata is not relevant.<sup>238</sup>

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<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> Perhaps an analogy is the requirement imposed by some courts that the producing party provide an index or other direction for the production of paper documents. *See, e.g., Ex rel. Edmondson v. Tyson Foods, Inc.*, No. 05-CV-329-GKF-SAJ, 2007 U.S. Dist. WL 1498973, at \*5 (N.D. Okla. May 17, 2007) (stating, “[T]o the extent the producing party elects to produce responsive documents as they are kept in the ordinary course of business, it must either direct the responding party to the location or locations within its files where documents responsive to each of their specific requests may be found, or provide a key or index to assist the responding party in locating the responsive documents.”); *Wagner v. Dryvit Sys., Inc.*, 208 F.R.D. 606, 611 (D. Neb. 2001).

## 3. METADATA CASES

[88] The plaintiff sought to compel the production of “metadata for virtually all records maintained in electronic form which have been produced to date” in *Kentucky Speedway LLC v. National Ass’n of Stock Car Auto Racing, Inc.*<sup>239</sup> The court disagreed with what it said was the decision in *Williams v. Sprint/United Mgmt. Co.*, “that a producing party ‘should produce electronic documents with the metadata intact unless the party timely objects... the parties agree that the metadata should not be produced, or the producing party requests a protective order.’”<sup>240</sup> The court agreed with the decision of *Wyath v. Impax Labs., Inc.* that emerging standards on ESI “‘appear to articulate a general presumption against the production of metadata.’”<sup>241</sup>

[89] The court in *Kentucky Speedway* continued that “in most cases for most documents, metadata does not provide relevant information.... Depending on the format, the metadata may identify the typist but not the document’s author, or even just a specific computer from which the document originated or was generated.”<sup>242</sup> The court concluded that “[t]o the extent that plaintiff seeks metadata for a specific document or documents where date and authorship information is unknown but relevant, plaintiff should identify that document or documents by Bates Number or by other reasonably identifying features.”<sup>243</sup> Whether the court

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<sup>239</sup> *Kentucky Speedway, LLC v. Nat’l Ass’n of Stock Car Auto Racing, Inc.*, No. 05-138-WOB, 2007 WL 4260517, at \*21 (E.D. Ken. Dec. 18, 2006).

<sup>240</sup> *Id.* at \*22 (quoting *Williams v. Sprint/United Mgmt. Co.*, 230 F.R.D. 640, 652 (D. Kan. 2005)). Although the quote from *Williams* is accurate, the decision in *Williams* does not, in fact, suggest that metadata should generally be produced. Referring to Sedona Principle 12, the court said that “emerging standards of electronic discovery appear to articulate a general presumption against the production of metadata, but provide a clear caveat when the producing party is aware or should be reasonably aware that particular metadata is relevant to the dispute.” *Williams*, 230 F.R.D. at 652. *Williams* simply advises producing parties that they are in the best position to object to the production of the relevance or privileged nature of any metadata, and thus have the obligation to object, when appropriate. *Id.* at 652. (holding “that party already has access to the metadata and is in the best position to determine whether producing it is objectionable”).

<sup>241</sup> *Kentucky Speedway*, 2007 WL 4260517, at \*22 (quoting *Wyeth v. Impax Labs. Inc.*, No. Civ.A. 06-222-JJF, 2006 WL 3091331, at \*2 (D. Del. Oct. 26, 2006)).

<sup>242</sup> *Id.* at \*24

<sup>243</sup> *Id.*

thought the metadata was application metadata or file system metadata, as defined above, clearly user-added metadata (which is more likely to be relevant) was not at issue.

[90] The court in *Kentucky Speedway* rejected *Williams* and relied on *Wyeth*, but those two decisions involved significantly different facts that emphasize the importance of understanding the type of ESI and metadata involved. In *Williams*, the issue was the production of Excel spreadsheets in electronic formats, including metadata. The court said that generally, “the more interactive the application, the more important the metadata is to understanding the application's output. At one end of the spectrum is a word processing application where the metadata is usually not critical to understanding the substance of the document.”<sup>244</sup> In contrast, the court concluded that the tables of a database would have “little meaning” without the metadata.<sup>245</sup> With respect to Excel spreadsheets, the court said, “[w]hile metadata is not as crucial to understanding a spreadsheet as it is to a database application, a spreadsheet's metadata may be necessary to understand the spreadsheet because the cells containing formulas, which arguably are metadata themselves, often display a value rather than the formula itself.”<sup>246</sup> In short, the type of ESI and metadata involved seemed crucial to the court’s decision in *Williams*.

[91] Just as *Williams* does not stand for the proposition that a party must always produce metadata, *Wyeth* does not stand for the proposition that a party never has to produce metadata. *Wyeth*, decided before the effective date of the ESI Rules, involved the defendant’s request for all documents the plaintiffs had produced in previous patent litigation against another defendant.<sup>247</sup> Referencing *Williams*, the court in *Wyeth* noted, “[m]ost metadata is of limited evidentiary value, and reviewing it can waste litigation resources.”<sup>248</sup> The court recognized that if there were a showing

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<sup>244</sup> *Williams*, 230 F.R.D. at 647.

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Wyeth v. Impax Labs. Inc.*, No. Civ.A. 06-222-JJF, 2006 WL 3091331 (D. Del. Oct. 26, 2006).

<sup>248</sup> *Id.* at \*2.

of particularized need, however, the court could order the production of metadata.<sup>249</sup>

[92] In *Michigan First Credit Union v. Cumis Ins. Soc’y, Inc.*, the court rejected the plaintiff’s motion for sanctions for the defendant’s failure to produce metadata for Lotus Notes e-mail messages, metadata involved the date and time of creation of the messages, “as well as a long string of characters that serves as a unique identifier for each message.”<sup>250</sup> The defendant contended that the identifier would have no evidentiary value, and that the date and time of the creation of the message already appeared in the PDF copy produced. The court agreed, but added, “[w]ere this not the case, there would be value in producing the metadata.”<sup>251</sup> In other words, it was the type of metadata and the availability of the same information in other form that caused the court to reject sanctions for the failure to produce metadata.<sup>252</sup>

[93] The use of metadata to search ESI arose as issues in a number of cases in 2007. In *Scotts Co. LLC v. Liberty Mutual Insurance Co.*, the plaintiff asked that the defendant produce ESI, including metadata, in electronic form, instead of the hard copy form in which the defendant had produced the documents.<sup>253</sup> The court rejected the plaintiff’s argument that as a matter of law, a party’s discovery obligations are not satisfied by the production of computerized information in hard copy format.<sup>254</sup> However, the court quoted the Advisory Committee Notes on Rule 34 that if a “responding party ordinarily maintains the information it is producing

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<sup>249</sup> *Id.* For other court decisions ordering the production of metadata before the ESI Rules went into effect, see *Rodriguez v. Fresno*, No. 1:05cv1017 OWW DLB, 2006 WL 903675 (E.D. Cal. Apr. 7, 2006); *Hagenbuch v. 3B6 Elettronici Industriali*, No. 04 C 3109, 2006 WL 665005 (N.D. Ill. Mar. 8, 2006); *Nova Measuring Instruments, Ltd. v. Nanometrics, Inc.*, 417 F. Supp. 2d 1121 (N.D. Cal. 2006); *CP Solutions PTE, Ltd. v. Gen. Elec. Co.*, No. 3:04cv2150(JBA)(WIG), 2006 WL 1272615 (D. Conn. Feb. 6, 2006); *In re Priceline.com Inc. Secs. Litig.*, 223 F.R.D. 88 (D. Conn. 2005).

<sup>250</sup> *Michigan First Credit Union v. Cumis Ins. Soc’y, Inc.*, No. 05-74423, 2007 WL 4098213, at \*2 (E.D. Mich. Nov. 16, 2007).

<sup>251</sup> *Id.*

<sup>252</sup> The court also concluded, without explanation, that “the production of this metadata would be overly burdensome with no corresponding evidentiary value.” *Id.* at \*3.

<sup>253</sup> *Scotts Co. LLC v. Liberty Mut. Ins. Co.*, No. 2:06-CV-899, 2007 WL 1723509 (S.D. Ohio June 12, 2007).

<sup>254</sup> *Id.* at \*4.

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.”<sup>255</sup> The plaintiff argued that the documents were not reasonably usable, because they were not searchable.<sup>256</sup> Since it was not clear that the parties had exhausted efforts to resolve the dispute, the court ordered the parties to confer and report back to the court.<sup>257</sup>

[94] In *In re Payment Card Interchange Fee & Merch. Discount*, the plaintiffs had “rather laboriously stripped their text-searchable electronic documents of metadata that would not appear in printed form, and then converted them back into text searchable electronic documents without that subset of metadata.”<sup>258</sup> The court compelled the defendants, in the future, to produce the ESI, including metadata, in native format.<sup>259</sup> The court said, as to prospective production, that the defendants “have run afoul of the Advisory Committee’s proviso that data ordinarily kept in electronically searchable form ‘should not be produced in a form that removes or significantly degrades this feature.’”<sup>260</sup>

[95] In *John B. v. Goetz*, the court ordered the defendants to provide complete responses to the discovery requests of the plaintiffs, and that these responses “shall include all metadata.”<sup>261</sup> The court said that:

[G]iven the need for hash coding of the ESI, Brent Antony’s limited formal computer training and the Defendants’ position about possible alteration of ESI, the

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<sup>255</sup> *Id.*

<sup>256</sup> The court specifically said the plaintiff argued that “some of the documents produced in hard copy form are not reasonably usable for the purpose for which they were requested since they cannot be searched for metadata.” *Id.*

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

<sup>258</sup> *In re Payment Card Interchange Fee & Merch. Discount*, No. MD 05-1720(JG)(JO), 2007 WL 121426, at \*1 (E.D.N.Y. Jan. 12, 2007). It is not clear from the decision the content of the stripped metadata, so it is difficult to evaluate this decision.

<sup>259</sup> Because “the Individual Plaintiffs provided a significant amount of discovery to the defendants, in several instalments, [sic] in the form they prefer, and heard no objection for several months,” the court did not grant the motion to compel the defendants to reproduce the documents/ESI they had already produced. *Id.* at \*4.

<sup>260</sup> *Id.*

<sup>261</sup> *John B. v. Goetz*, No. 3:98-0168, 2007 WL 3012808, at \*1 (M.D. Tenn. Oct. 10, 2007).

Plaintiff's expert Thomas Tigh or his designee shall be present for the Defendants' ESI production and provide such other services to the Defendants as are necessary to produce the metadata, as ordered by the Court.<sup>262</sup>

Since this decision was based on a prior consent decree, however, it is not clear whether this decision should have any weight when there is no agreement between the parties or a final disposition of the case.

#### B. RAM AND OTHER EPHEMERAL DATA

[96] Rule 34(a) allows a party to obtain discovery of “electronically stored information – including writings, drawings, graphs, charts, photographs, sound recording, images, and other data or data compilations stored in any medium from which information can be obtained...”<sup>263</sup> The Federal Rules of Civil Procedure do not define ESI. The Committee notes state that the addition of “electronically stored information” to Rule 34 “clarifies that Rule 34 applies to information that is fixed in a tangible form and to information that is stored in a medium from which it can be retrieved and examined.”<sup>264</sup> In other words, ESI refers to information that a party can obtain from any storage medium and then examine – storage is distinct from obtaining/retrieving/examining the information.

[97] In *Columbia Pictures, Inc. v. Bunnell*, the court held that “data stored in RAM, however temporarily, is electronically stored information subject to discovery under the circumstances of the instant case,” and denied the objection of the responding party to the earlier report and recommendation

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<sup>262</sup> *Id.* The Computer Dictionary Online defines “hash coding” in part as:  
A scheme for providing rapid access to data items which are distinguished by some key. Each data item to be stored is associated with a key, e.g. the name of a person. A hash function is applied to the item's key and the resulting hash value is used as an index to select one of a number of “hash buckets” in a hash table. The table contains pointers to the original items.

Computer-Dictionary-Online.org, Hash Coding, <http://www.computer-dictionary-online.org/?q=hash%20coding> (last visited Feb. 1, 2008).

<sup>263</sup> FED. R. CIV. P. 34(a) (emphasis added).

<sup>264</sup> FED. R. CIV. P. 34(a) advisory committee's note (emphasis added).

of the Magistrate Judge ordering the production of RAM.<sup>265</sup> The plaintiffs had filed a complaint against the defendants for knowingly enabling, encouraging, inducing, and profiting from massive online piracy of the plaintiffs' copyrighted works (movies and television programs) through the operation of their website.<sup>266</sup> The defendants' website offered users files for downloading that contained code enabling computers to access and copy copyrighted content without the permission of the copyright holder.<sup>267</sup> In order to prove the defendants liable for contributory infringement, the plaintiffs had to prove that someone who the defendant had assisted directly infringed a copyrighted work in question.<sup>268</sup> The plaintiffs sought Server Log Data that would show what files users were requesting, and the plaintiffs believed would establish that users were directly infringing the copyrighted files.<sup>269</sup>

[98] The court said that it was "undisputed that the Server Log Data Plaintiffs seek can be copied from RAM in Defendants' computers and produced to Plaintiffs."<sup>270</sup> Although the defendants' software had the capability of recording Server Log Data, the defendants had not turned on that function. The court ordered the production of that Server Log Data under Rule 34.<sup>271</sup>

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<sup>265</sup> *Columbia Pictures Inc. v. Bunnell*, 245 F.R.D. 443, 446 (C.D. Cal. 2007). On December 13, 2007, the court granted the plaintiffs' motion for terminating sanctions for willful/bad faith spoliation of evidence. *Id.*

<sup>266</sup> *Id.* at 445.

<sup>267</sup> *Id.*

<sup>268</sup> *Columbia Pictures Indus. v. Bunnell*, No. CV 06-1093 FMC(JCx), 2007 WL 4916963, at \*19 (C.D. Cal. May 29, 2007).

<sup>269</sup> *Id.* at \*18.

<sup>270</sup> *Columbia Pictures*, 245 F.R.D. at 447.

<sup>271</sup> *Id.* at 448. Since the defendant in *Columbia Pictures* had the software that, in the court's mind, could easily record the data in question, the court concluded that producing the information in the future would not be a burden. Therefore, the proportionality test of Rule 26(b)(2)(C) did not prevent production. The court noted that its order:

[S]imply requires that the defendants in this case, as part of this litigation, after the issuance of a court order, and following a careful evaluation of the burden to these defendants are preserving and producing the specific information requested in light of its relevance and the lack of other available means to obtain it, begin preserving and subsequently produce a particular subset of the data in RAM under defendant's control.

*Id.* at 448. Interestingly, plaintiff had not submitted an interrogatory asking for the same

[99] The court in *Columbia Pictures* relied, in large part, in making its decision that RAM was not too ephemeral to satisfy Rule 34 storage requirement, on the Ninth Circuit's decision of *MAI Systems Corp. v. Peak Computer, Inc.*<sup>272</sup> In *MAI*, the Ninth Circuit held copying of another party's software onto RAM was sufficient to meet the statutory requirement for copyright infringement that the copy must be "fixed in a tangible medium of expression ... sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."<sup>273</sup>

[100] The purpose of copyright law, however, is to give individuals the financial incentive to create literary and other works by giving those creators limited monopolies in the form of copyrights.<sup>274</sup> The broader the definition of "copy," the greater the financial incentive copyright law provides for the creation of the original works. In other words, with a broad definition of copy, the author would have greater control over future production of similar works by third parties. That aspect of copyright law supports a broad definition of what constitutes a copy of a work. In contrast, under Rule 1, the inexpensive and speedy administration of justice, not the celebration of the profit motive, are the purposes of the Federal Rules.<sup>275</sup>

[101] The issue in *MAI* was whether a copy had been fixed.<sup>276</sup> In *Columbia Pictures*, the issue should have been whether the information was "stored" (in "electronically stored information").<sup>277</sup> On that point, the common understanding of "to fix" is "to make firm or stable,"<sup>278</sup> whereas the common understanding "to store" is "to stock or furnish against future time."<sup>279</sup> Since fix and store mean different things, and the purpose of

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information requested in the Request for Production of Documents. It is not clear what objections the defendant could have made if the request had been in the form of an interrogatory.

<sup>272</sup> *Id.* at 447.

<sup>273</sup> *MAI Sys. Corp. v. Peak Computers, Inc.*, 991 F.2d 511, 517 (9th Cir. 1993) (citing 17 U.S.C. § 101).

<sup>274</sup> *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

<sup>275</sup> FED. R. CIV. P. 1.

<sup>276</sup> *MAI*, 991 F.2d at 517.

<sup>277</sup> *Columbia Pictures Inc. v. Bunnell*, 245 F.R.D. 443, 446 (C.D. Cal. 2007).

<sup>278</sup> MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 440 (10th ed. 1999).

<sup>279</sup> *Id.* at 1159.

copyright law is different than the purpose of discovery in civil cases, the result in *MAI* should not have directed the result in *Columbia Pictures*.

[102] The court in *Columbia Pictures* made clear that it was not saying the defendant had violated any duty to preserve documents before the issuance of the order.<sup>280</sup> However, if the court had the authority to order production of the information on RAM because the RAM constituted ESI, it could logically follow that the defendants have a duty to preserve that information to the extent it is relevant, at least from the time the litigation starts:

When a “forensic image” is taken of a computer, that image only records data (bits) on the hard drive of the computer, not data on RAM. In order to capture data on RAM, typically one “(1) saves the data to a hard drive or CD ROM, or (2) installs a ‘data dump program,’ which downloads the data on RAM at any particular time through the hard drive of the computer.”<sup>281</sup>

In other words, a strong argument can be made that data is not retrieved and examined from RAM, but is retrieved and examined from hard drives and CD ROM’s.

[103] Although not directly on point, the reasoning of a 2005 Florida state court decision on RAM seems to contain better reasoning than the reasoning in *Columbia Pictures*. In *O’Brien v. O’Brien*, an appeal of a divorce decision, the court addressed the use at trial of communications intercepted by the wife from the husband’s computer.<sup>282</sup> The wife had installed, without the knowledge of the husband, a spyware program on the husband’s computer that copied and stored electronic communications

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<sup>280</sup> *Columbia Pictures*, 245 F.R.D. at 448

<sup>281</sup> Douglas L. Rogers, *Columbia Pictures v. Bunnell*, 4-11 MEASLEY’S LITIG. REP. DISC. 20 (2007). See also CSO Security Counsel, Cybercrime, <http://www.csoonline.com/counsel/session9/question806.html> (last visited Feb. 11, 2008); X-Ways Software Technology AG, *X-Ways Capture: Successfully Seize All Hard Disks, Files, and RAM*, <http://www.winhex.com/capture/index-m.html> (last visited Feb. 11, 2008).

<sup>282</sup> *O’Brien v. O’Brien*, 899 So.2d 1133 (Fla. App. 2005).

between the husband and another woman.<sup>283</sup> That spyware program took snapshots of what appeared on the computer screen, allowing it to capture and record chat conversations, instant messages, and e-mails.<sup>284</sup> The husband learned of the software, removed the software, and obtained a permanent injunction to prevent the wife's disclosure of the intercepted communications in violation of the Florida equivalent of the Federal Wiretap Act.<sup>285</sup> The wife appealed and argued that the communications were retrieved from storage, and therefore, were not intercepted communications in violation of the Florida Act.<sup>286</sup>

[104] The court in *O'Brien* rejected the wife's argument that the communications were, in fact, stored once the text image became visible on the screen.<sup>287</sup> The court reasoned:

We do not believe that this evanescent time period is sufficient to transform acquisition of the communication from a contemporaneous interception to retrieval from electronic storage. We conclude that because the spyware installed by the Wife intercepted the electronic communication contemporaneously with transmission, copied it, and routed the copy to a file on the computer's hard drive, the electronic communications were intercepted in violation of the Florida Act.<sup>288</sup>

[105] In other words, the Florida court concluded that simply because information was displayed on a computer screen, and thus was on RAM, did not mean it was stored information. Although *O'Brien* involved the Florida equivalent of the Wiretap Act, and not Rule 34, *O'Brien* draws a reasonable distinction between information on RAM and information stored on non-volatile memory.

[106] Before the ESI Rules, one federal court refused to order the production of similar ephemeral information. In *Convolve Inc. v.*

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<sup>283</sup> *Id.* at 1134.

<sup>284</sup> *Id.*

<sup>285</sup> *Id.*

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

<sup>287</sup> *Id.* at 1137

<sup>288</sup> *Id.*

*Compaq Computer Corp.*, Convolve sued Compaq for patent infringement and trade secret misappropriation, and asked for sanctions for failing to print data displayed temporarily on the computer screen involving tests of an oscilloscope.<sup>289</sup> The court said that “the data at issue here are ephemeral. They exist only until the tuning engineer makes the next adjustment, and then the document changes. No business purpose ever dictated that they be retained, even briefly.”<sup>290</sup> Therefore, “absent the violation of a preservation order,” the court concluded that no sanctions were warranted.<sup>291</sup>

[107] Similarly, in a 2007 decision, *Phillips v. Netblue, Inc.*, the defendants moved to dismiss the complaint for the plaintiff’s failure to preserve the images that would have been obtained by clicking on the hyperlinks in the e-mails retained by the plaintiff.<sup>292</sup> The court rejected the argument that the “plaintiff had the obligation to memorialize the e-mails as they would have appeared if opened in an e-mail program soon after their receipt, *i.e.* with the images which the e-mail program would have displayed upon automatically accessing the remote web-server where those images resided.”<sup>293</sup> The court concluded that this was not a failure to preserve evidence, but a failure to gather evidence, and the “law opposes

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<sup>289</sup> *Convolve, Inc. v. Compaq Computers Corp.*, 223 F.R.D. 162 (S.D.N.Y. 2004).

<sup>290</sup> *Id.* at 177.

<sup>291</sup> *Id.* See also *Proctor & Gamble Co. v. Haugen*, 427 F3d 727 (10th Cir. 2005). Proctor & Gable sued the defendants for trademark infringement. The district court dismissed the claims of Proctor & Gamble for failing to comply with discovery orders, in particular market share computer data that the plaintiff had viewed on line but did not own or possess. The Tenth Circuit said that:

[T]he record indicates that the data was compiled, possessed, and owned by IRI, which in turn provided P&G with access to that data for a fee. Although the IRI data in general could be deemed to have fallen within certain of defendants’ broadly-worded discovery requests, it is unclear precisely how P&G was to produce that data to defendants.

*Id.* at 739. The court focused on a number of different ways Proctor & Gamble might have obtained that information and whether those ways would have been burdensome. The Tenth Circuit reversed the district court, but did not conclude that the data was not ESI. Instead, it concluded that “the district court offered no explanation of what it meant by ‘relevant electronic data’ and what steps it believed P&G could and should have taken to preserve such data.” *Id.* at 739-40.

<sup>292</sup> *Phillips v. Netblue, Inc.*, No. C-05-441 SC, 2007 WL 174459 (N.D. Cal. Jan. 22, 2007).

<sup>293</sup> *Id.* at \*2.

no obligation upon a party to gather evidence other than the requirement that a party have sufficient evidence to support their claim.”<sup>294</sup>

### C. PRINCIPLES

[108] A party considering a request from opposing counsel to produce metadata needs to ask at least five questions.<sup>295</sup> First, what type of metadata is the other party actually requesting, and has that party provided an explanation of the reason for the request? Second, is the metadata relevant to claims or defenses in the case, including authentication of any documents/other ESI? Third, even if the metadata is not relevant, does the requesting party have a good argument that the metadata will help it search the relevant ESI? Fourth, if there is user-created metadata,<sup>296</sup> how will any privileged material be redacted, identified, and preserved in case there is a subsequent challenge to the redaction? Fifth, if the party produces metadata existing on a particular date, does it have to supplement that production later under Rule 26(e) as the metadata changes? The answers to such questions will determine the response to the request, including any objections.

[109] A party considering a request to produce a database should ask similar questions to a request for metadata. For instance, what information in the database is really relevant to the claims or defenses in the case? If only parts of the database contain relevant non-privileged material, how can the relevant material be produced while sufficiently maintaining the usability of the database in order for the producing party to comply with Rule 34? If the information in the database changes over time, is there a need to supplement?

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<sup>294</sup> *Id.* at \*3.

<sup>295</sup> See, e.g., *Sedona Principles*, *supra* note 13, at Guideline 12, Comment 12.c.

To the extent that the parties believe that production of metadata is needed because of either relevance or usability, that should be raised at this conference as it will be a consideration in determining both the need to preserve information in a particular form and the ultimate form or forms of production. . . . To the extent that the requesting party seeks a ‘native’ production or some other form of production with accompanying metadata, the revised rule places a burden on the party to make that request explicit.

*Id.*

<sup>296</sup> See *supra* notes 225-27 and accompanying text.

[110] The decision in *Columbia Pictures* that information on RAM constitutes ESI raises a number of issues, even though the specific facts in *Columbia Pictures* are not likely to occur in many future cases.<sup>297</sup> In a future case in the jurisdiction of the *Columbia Pictures* court, does a party have to decide whether information on RAM is relevant and then tell opposing counsel the RAM is not reasonably accessible within the meaning of Rule 26(b)(2)(B),<sup>298</sup> or risk waiving any objection to the production of information on RAM? Would making such a statement unnecessarily “flag” an issue that opposing counsel might not otherwise raise? Although this article argues that information on RAM is not ESI within the meaning of Rule 34, at least the Central District of California has concluded that “data stored in RAM, however temporarily, is electronically stored information . . . ,” so failing to make an early statement concerning not searching RAM could be risky.<sup>299</sup>

[111] One should not attempt to answer these questions in the abstract, however, but should address these questions as quickly as possible in the context of an actual dispute. A party should probably approach opposing counsel and, if necessary, the court, to resolve disputes on these questions instead of having to fight a motion for sanctions months later. Indeed, this suggested approach simply follows the requirement of Rule 26(f) that “the parties must confer, as soon as practicable . . . [to] discuss any issues about preserving discoverable information [] and develop a proposed discovery plan . . . [concerning] any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced.”<sup>300</sup>

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<sup>297</sup> Rarely will server log data be as relevant as it was in *Columbia Pictures*. Also, because the server had the software to record each request received for a file, except for volume, there would be no difficulty in turning on the server log function and recording each request, rather than trying to develop a program to perform the desired function.

<sup>298</sup> See discussion *infra* Part V.

<sup>299</sup> *Columbia Pictures Indus. v. Bunnell*, 245 F.R.D. 443, 446 (C.D. Cal. 2007).

<sup>300</sup> FED. R. CIV. P. 26(f).

## V. GOOD CAUSE FOR PRODUCTION OF NOT REASONABLY ACCESSIBLE ESI

### A. INTRODUCTION

[112] The ESI Rules create a two-tier system of discovery.<sup>301</sup> The presumption is that a party must produce relevant accessible ESI, but does not have to produce inaccessible ESI.<sup>302</sup>

[113] Under Rule 26(b)(2)(B), a party initially does not have to produce ESI containing relevant information that it “identifies as not reasonably accessible because of undue burden or cost.”<sup>303</sup> After all, in contrast to searching accessible sources, searching for deleted documents in the unallocated space<sup>304</sup> of a hard drive, or in the slack space<sup>305</sup> of a hard

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<sup>301</sup> Theodore C. Hirt, *The Two-Tier Discovery Provision of Rule 26(b)(2)(B) - A Reasonable Measure for Controlling Electronic Discovery*, 13 RICH. J.L. & TECH. 12 (2007); Rosenthal, *supra* note 1; Withers, *supra* note 9, at \*82-90.

<sup>302</sup> This presumption about the production of relevant, accessible ESI is of course subject to the proportionality provisions of Rule 26(b)(2)(C). *See supra* Part III.

<sup>303</sup> FED. R. CIV. P. 26(b)(2)(B). Only inaccessible ESI not being searched that contains potentially responsive information needs to be identified; a party does not have to identify all inaccessible ESI not being searched. In addition to producing relevant, accessible ESI that is not privileged, “[t]he responding party must also identify, by category or type, the sources containing potentially responsive information that it is neither searching nor producing.” FED. R. CIV. P. 26, 234 F.R.D. 219, Committee Note (b)(2) (2006). *See also infra* text accompanying note 307, at Guideline 2, Comment 2.c. (“Importantly, the Rules do not require the identification of all inaccessible sources of electronically stored information, but only those that the producing party believes in good faith may contain relevant, non-duplicative information.”).

<sup>304</sup> Unallocated space is usually the result of a file being deleted. When a file is deleted, it is not actually erased, but is simply no longer accessible through normal means [the directory or index of folders for the hard drive]. The space that it occupied becomes unallocated space. . . . Until portions of the unallocated space are used for new data storage, in most instances, the old data remains and can be retrieved using forensic techniques.

*Sedona Glossary*, *supra* note 110, at 52.

<sup>305</sup> The unused space on a cluster that exists when the logical file space is less than the physical file space. . . . A form of residual data, the amount of on-disc file space from the end of the logical record information to the end of the physical disc record. Slack space can contain information soft-deleted from the record, information from prior records stored at the

drive, by itself, can be very time consuming and expensive. If the other party files a motion to compel, then the resisting party has the burden of showing that the “information is not reasonably accessible because of undue burden or costs.”<sup>306</sup> If the resisting party shows the information is not reasonably accessible, production may still be ordered if the requesting party shows “good cause,” considering the proportionality provisions in 26(b)(2)(C).<sup>307</sup> If the court finds good cause for production, it can still impose conditions on the production, including shifting costs for accessing and converting the ESI to a useable format.<sup>308</sup>

[114] There is no good cause for the production of inaccessible ESI if: (i) the discovery sought is unreasonably cumulative or duplicative; (ii) the party seeking discovery has ample opportunity by discovery to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit.<sup>309</sup> The Committee Notes state:

Appropriate considerations may include: (1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (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)

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same physical location as current records, metadata fragments, and other information useful for forensic analysis of computer systems.

*Id.* at 48.

<sup>306</sup> FED. R. CIV. P. 26(b)(2)(B).

<sup>307</sup> FED. R. CIV. P. 26, 234 F.R.D. 219, Amendments and Committee Note (2006).

<sup>308</sup> *Id.* For an early discussion of cost-shifting with respect to discovery of ESI, see Martin H. Redish, *Electronic Discovery and The Litigation Matrix*, 51 DUKE L.J. 561 (2001). In that article, Redish noted, “[b]ecause litigants do not bear the costs created by their discovery requests their incentive to confine those requests in a procedurally efficient manner is significantly distorted.” *Id.* at 569.

<sup>309</sup> For the complete text of the proportionality provisions of Rule 26(b)(2)(C), see text accompanying *supra* note 146.

the importance of the issues at stake in the litigation; and  
(7) the parties' resources.<sup>310</sup>

[115] The requesting party has the burden, in light of all of these factors, "of showing that its need for the discovery outweighs the burdens and costs of locating, retrieving and producing the information."<sup>311</sup> In other words, before finding good cause for the production of inaccessible information, a court must consider the seven factors, including the time it takes the producing party to review the ESI for responsiveness and privilege, and not simply the cost of collecting the ESI. The possibility of shifting the cost of restoring ESI to an accessible format does not resolve the issue.<sup>312</sup>

[116] With this information as background, the next section examines how the courts in fact have responded under the ESI Rules to requests for the discovery of ESI in inaccessible format, or if in accessible format, information not reasonably accessible because of undue burden or cost.<sup>313</sup>

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<sup>310</sup> See Committee Notes, *supra* note 7 (emphasis added). These seven factors are an extension of the three proportionality factors.

<sup>311</sup> See *id.*

<sup>312</sup> The Committee Notes state, "A requesting party's willingness to share or bear the access costs may be weighed by the court in determining whether there is good cause. But the producing party's burden in reviewing the information for relevance and privilege may weigh against permitting the requested discovery." *Id.* Comment 13b to Sedona Principle 13 states:

Shifting the costs of extraordinary electronically stored information discovery efforts should not be used as an alternative to sustaining a responding party's objection to undertaking such efforts in the first place. Instead, such efforts should only be required where the requesting party demonstrates substantial need or justification. The courts should discourage burdensome requests that have no reasonable prospect, given the size of the case, of significantly contributing to the discovery effort, even if the requesting party is willing to pay.

*The Sedona Principles*, *supra* note 13, at 68, Principle 13.

<sup>313</sup> Since December 1, 2006, some courts have responded without expressly referring to 26(b)(2)(B).

## B. CASES DECIDED ON PRODUCTION OF INACCESSIBLE ESI

### 1. GOOD CAUSE

#### A. PRODUCTION DISCREPANCIES

[117] In a decision issued a few days before the effective date of the new ESI rules, the district court ordered the imaging of hard drives.<sup>314</sup> Although the court had previously rejected defendant's motion, this time the court granted the motion, in part because:

[S]erious questions exist both as to the reliability and the completeness of materials produced in discovery by Advante. Among other things, there is evidence that copies of e-mails were altered at some point in time in a matter that arguably served to downplay or even conceal a relationship between Advante and James Liu, and the extent to which Liu may have worked with Advante to develop the products at issue in this action.<sup>315</sup>

[118] The court also granted the plaintiff's motion to compel the imaging of the hard drive of the defendants in *Ameriwood Industries, Inc. v. Liberman*, but said that "a party may not inspect the physical hard drives

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<sup>314</sup> *Advante Int'l. Corp. v. Mintel Learning Techs.*, No. C 05-01022 JW (RS), 2006 WL 3371576 (N.D. Calif. Nov. 21, 2006). *Advante* involved trade secret litigation. *Id.* at \*2. The court ordered the parties to report back by December 1, 2006 on a protocol for the examination of the hard drive, and presumably the court was applying the ESI Rules.

<sup>315</sup> *Id.* at \*1. The court rejected the argument of the defendant that production of the e-mails in native format should be sufficient, concluding that "sufficient questions exist, not only with respect to these emails but also with respect to other discrepancies in Advante's discovery responses, such that a forensic examination of Advante's hard drives is warranted." *Id.* The court ordered counsel for the parties to meet and confer on a protocol for the imaging and production of responsive documents, and added that "whatever documents or data may be recovered in the inspection, whether existing documents, recovered deleted documents, or other information, should all be produced first to counsel for Advante for its review as to relevance, responsiveness, and privilege, prior to any disclosure to Mintel or its counsel." *Id.* (citing *Playboy Enterprises, Inc. v. Wells*, 60 F. Supp. 2d 1050, 1054-55 (S.D. Calif. 1999)). In *Playboy*, referring to then Rule 26(b)(2), the court said, "The only restriction in this discovery is that the producing party be protected against undue burden and expense and/or invasion of privileged matters." *Playboy*, 60 F. Supp. 2d at 1053.

of a computer merely because the party wants to search for additional documents responsive to the party's document requests."<sup>316</sup> The court added that "discrepancies or inconsistencies in the responding party's discovery responses may justify a party's request to allow an expert to create and examine a mirror image of the hard drive."<sup>317</sup> However, the specific good cause the court found for ordering the imaging of the hard drive of the defendants was that the plaintiff provided to the court a relevant e-mail sent by the defendant to a third party that the defendant had not produced. The court concluded that other deleted or active versions of e-mails might exist on the defendant's computers, so the court ordered the search.<sup>318</sup> The plaintiff did "not object to incurring ... the costs involved in creating the mirror images, recovering the information, and translating the information into searchable formats," so the court said plaintiff would incur those costs.<sup>319</sup> However, the court did not indicate whether the defendant had objected to the time it would take to review the restored material for responsiveness and privilege. In fact, restoring ESI to an accessible format can cost less than the cost of reviewing that restored ESI for responsiveness and privilege.

[119] In *Disability Rights Council of Greater Washington v. Washington Metro. Transit Auth.*, the court ordered the defendants to search backup tapes as a result of their failure to turn off automatic delete procedures in their computer system.<sup>320</sup> The court noted that "the request is for the e-mails of specific persons, and there is absolutely no other source from

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<sup>316</sup> *Ameriwood Indus. Inc. v. Liberman*, No. 4:06CV524-DJS, 2006 WL 3825291 at \*4 (E.D. Mo. Dec. 27, 2006) (citing *McCurdy Group v. Am. Biomedical Group, Inc.*, 9 Fed. Appx. 822, 831 (10th Cir. 2001)).

<sup>317</sup> *Id.* at \*4 (citing *Simon Property Group LP v. mySimon, Inc.*, 194 F.R.D. 639, 641 (S.D. Ind. 2000)) (emphasis added).

<sup>318</sup> *Id.* at \*3. The court also suggested a type of case in which there may be good cause for searching a hard drive: "cases where defendant allegedly used the computer itself to commit the wrong that is the subject of the lawsuit. ..." *Id.* at \*4. The Court then set forth a procedure for imaging the hard drive, which included the plaintiffs selecting an expert of its choice to go to the defendants' places of business and take forensic images. No employee of the plaintiff, or its counsel, would inspect or otherwise handle the equipment or information produced. The expert would then provide the recovered documents to the defendants' counsel, with a notice to the plaintiff. *See id.* at \*5 and \*6.

<sup>319</sup> *Id.* at \*5.

<sup>320</sup> *Disability Rights Council of Greater Washington v. Washington Metro. Transit Auth.*, 242 F.R.D. 139, 148 (D.D.C. 2007).

which electronically stored information can be secured, thanks to WMATA's failure to impose the litigation hold."<sup>321</sup> Moreover, "WMATA [did] not defend its failure to prevent the automatic feature from operating during the course of this litigation," when it had an obligation to preserve documents.<sup>322</sup>

[120] The court ordered the defendants to restore at their cost a portion of their inaccessible backup tapes in *AAB Joint Ventures v. United States*, which was a dispute over construction contracts.<sup>323</sup> The plaintiffs asserted that the defendant had identified numerous individuals who were participants in the project, but did not produce their e-mail. The court noted that the defendant countered that it had produced thousands of electronic documents, but had conceded it was unable to locate e-mails of some of the individuals who presumably generated e-mails within the scope of the documents requested by the plaintiff. The court said it could not "relieve defendant of its duty to produce those documents merely because defendant had chosen a means to preserve the evidence [referring to backup tapes] which makes ultimate production of relevant documents expensive."<sup>324</sup>

#### B. OTHER REASONS

[121] Medical claims files in electronic, but essentially unsearchable, format were the documents the court ordered the defendant to produce in *W.E. Aubuchon Co., Inc. v. Benefirst, LLC*.<sup>325</sup> Once they were processed for payment, the requested claims forms were retained for a 60 day period. Batches of these claims forms were scanned and stored as electronic

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<sup>321</sup> *Id.* The court also said that the plaintiffs had no substantial resources and that the law firm representing them was proceeding pro bono, and noted that the fact "persons who suffer from physical disabilities have equal transportation resources to work and to enjoy their lives with their fellow citizens is a crucial concern of this community." *Id.*

<sup>322</sup> *Id.* at \*146.

<sup>323</sup> *AAB Joint Ventures v. United States*, 75 Fed. Cl. 432 (2007). Without expressly discussing Rule 26(b)(2), the court said that from the results of that sample, the court would determine whether additional restoration of backup tapes would likely lead to the production of relevant evidence. *Id.* at \*443-44.

<sup>324</sup> *Id.* at \*440. Similarly, the court later said that "defendant's decision to transfer the e-mails to backup tapes does not exempt defendant from its responsibility to produce relevant emails." *Id.* at \*443.

<sup>325</sup> *W.E. Aubuchon Co., Inc. v. Benefirst, LLC*, 245 F.R.D. 38 (D. Mass. 2007).

images (in groups according to when they were processed and the person who processed the claims). The original forms were then destroyed.

[122] The issues the judge considered in his February 6, 2007 decision in *Aubuchon* were whether the information was reasonably accessible, and if it was not, should it be produced. The court agreed that a media-based approach to considering accessibility was reasonable and concluded that since the images were stored on a server, they were in an accessible format. However, the court continued that to in fact be accessible, the ESI must be readily usable once it is obtained, whereas inaccessible data has to be “restored or otherwise manipulated to be usable,” citing *Zubulake*.<sup>326</sup> Since the information was stored in images, and only indexed in load files by processing date and the person who processed the claim, the court concluded that “the retrieval of the records will be costly and... such retrieval would involve undue burden or cost.”<sup>327</sup> In other words, even though the ESI was in an accessible format, the court concluded the ESI was not reasonably accessible due to undue burden or cost.

[123] The court in *Aubuchon* then turned to the issue of good cause for production and considered the seven points discussed in the Committee Notes.<sup>328</sup> It noted that the digital images were not available through any other source, and that the information was crucial to the outcome of the litigation. There was no discussion of when the duty to preserve attached, perhaps because of the statement that “although in the custody and control of Benefirst, the records at issue are the property of the plaintiffs.”<sup>329</sup> The court also relied on the fact that the plaintiffs had significantly narrowed their original request from approximately 34,000 claims to 3,000 claims, and ordered the defendant to produce the approximately 3,000 claims at the defendant’s expense.<sup>330</sup>

[124] The court granted the plaintiff’s motion to have a digital image made of the hard drives in *Cenveo Corp. v. Slater*, a case alleging that the defendants improperly used confidential information and trade secrets to

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<sup>326</sup> *Id.* at 42.

<sup>327</sup> *Id.* at 43.

<sup>328</sup> See *supra* note 7 and accompanying text.

<sup>329</sup> *Id.* at 44.

<sup>330</sup> *Id.* at 45.

divert business from the plaintiff to the defendants.<sup>331</sup> The court said the issue:

[R]equires a weighing of defendants' burden in producing the information sought against plaintiff's interest in access to that information. Because of the close relationship between plaintiff's claims and defendants' computer equipment, the Court will allow plaintiff to select an expert to oversee the imaging of all the defendants' computer equipment.<sup>332</sup>

Presumably the reference to "close relationship" referred to the fact that the plaintiff thought the defendants' computers contained the proprietary information of the plaintiff. However, there was no discussion in the decision about the basis for that belief, whether e-mails had been previously produced, and if so, what the e-mails or other earlier production had disclosed.

[125] The court ordered the forensic examination of the hard drive of the plaintiff's computer in *Thielend v. Juan Bongiorno USA, Inc.*,<sup>333</sup> in which the plaintiff had sued the defendant for sending text messages to plaintiff's cell phone without the plaintiff's permission. The court said:

Unlike the not so distant past, when individual file folders pertaining to specific subjects could be readily identified and removed from a file drawer for inspection without disclosing the rest of the contents of the file cabinet to the opposing side, inspection of an opponent's computer may open up countless files to the searcher that are not relevant and that may be proprietary or privileged.<sup>334</sup>

The court concluded that the defendant had established "a viable reason" for the discovery, in particular whether the plaintiff had used his computer

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<sup>331</sup> *Cenveo Corp. v. Slater*, No. 06-CV-2623, 2007 WL 442387 (E.D. Pa. Jan. 31, 2007).

<sup>332</sup> *Id.* at \*2.

<sup>333</sup> *Thielend v. Juan Bongiorno USA, Inc.*, No. 1:06-CV-16, 2007 WL 465680 (W.D. Mich. Feb. 8, 2007).

<sup>334</sup> *Id.* at \*2.

to initiate contact with the defendant, an issue relevant to whether the plaintiff had received unsolicited communications from the defendant.<sup>335</sup>

[126] The court in *Thieland*, however, said that to allow the defendant unrestricted access to the plaintiff's computer would constitute an undue burden, not due to cost, but due to the defendant's access to proprietary and privileged information of the plaintiff.<sup>336</sup> The court ordered the defendant, through an expert, to conduct the forensic examination of the plaintiff's computer and to limit its examination of the forensic image to determining whether from December 1 through December 15 of 2005, the plaintiff accessed the defendant's website, and what, if any, information about those transactions had been deleted.<sup>337</sup>

[127] In *In re Veeco Instruments, Inc. Securities Litigation*,<sup>338</sup> a shareholders' derivative action against the board of directors for breach of fiduciary duty,<sup>339</sup> the court concluded that plaintiff had demonstrated good cause to order defendants to restore backup tapes pursuant to Rule 26(b)(2)(C). The court explained:

[E]-mails sent or received by defendants relating to the issues herein could constitute important relevant evidence and are reasonably calculated to lead to admissible evidence. It has not been demonstrated that said information is reasonably available from any other easily

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<sup>335</sup> *Id.*

<sup>336</sup> "Cost to plaintiff is not a factor. It appears there would be little out-of-pocket expense to plaintiff if the defendant was to take an image of the hard drive of his computer." *Id.* at \*2, n. 3.

<sup>337</sup> *Id.* at \*3. The defendant was ordered to select an experienced forensic examiner to conduct the investigation and to conduct the investigation outside of the presence of the parties or their attorneys. The expert was to provide a hard copy of the proposed findings to the plaintiff's counsel for review prior to furnishing them to the defendant's counsel. *Id.*

<sup>338</sup> *In re Veeco Instruments, Inc. Securities Litigation*, No. 05 MD 1695(CM)(GAY), 2007 WL 983987 (S.D.N.Y. Apr. 2, 2007).

<sup>339</sup> *See In re Veeco Instruments, Inc. Securities Litigation*, 434 F. Supp. 2d 267 (S.D.N.Y. 2006).

accessed source. The discovery requests are specific. The resources of the parties are not an issue.<sup>340</sup>

There was no explanation in the decision of why the court concluded resources were not an issue, no discussion of when the duty to preserve documents attached, and no discussion of why the court appeared to put the burden on the objecting party to prove that the requested information was reasonably available from accessible sources.

## 2. NO GOOD CAUSE

[128] In *Oxford House, Inc. v. City of Topeka* the court rejected the plaintiff's motion to compel restoration and searching of the defendant's backup tapes.<sup>341</sup> The litigation involved the City of Topeka's decision to deny a request for conditional use permits. Defendant Topeka had deleted, in June of 2005, the electronic communications that formed the basis of the discovery dispute, but the defendant received notice of the likelihood of litigation on August 12, 2005. The court said that "there is no evidence on the record to indicate that at the time of the receipt of the demand letter the backup tapes on the server system contained allegedly deleted e-mails from June, 2005."<sup>342</sup> The court added that even if such backup tapes had been shown to possess deleted e-mail communications, litigation holds generally did not apply to inaccessible backup tapes, and such tapes could "continue to be recycled on the schedule set forth in the company's policy."<sup>343</sup>

[129] The court in *Oxford House* then considered whether searching the backup tapes would be unduly burdensome. The court said that the mere fact that compliance would cause great labor and expense or considerable

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<sup>340</sup> In re Veeco Instruments, Inc. Securities Litigation, No. 05 MD 1695(CM)(GAY), 2007 WL 983987 at \*1 (S.D.N.Y. Apr. 2, 2007). The court declined to rule on any cost shifting until the defendant had produced electronic discovery at its own expense and then submitted an affidavit detailing the results of its search and the time and money spent.

<sup>341</sup> *Oxford House, Inc. v. City of Topeka*, No. 06-4004-RDR, 2007 WL 1246200 (D. Kan. Apr. 27, 2007).

<sup>342</sup> *Id.* at \*3.

<sup>343</sup> *Id.* at \*4 (Quoting *Zubulake*, 220 F.R.D. at 217).

hardship did not, in itself, require denial of the motion.<sup>344</sup> Instead, there should be a cost-benefit analysis investigating the marginal utility of additional production versus the cost.<sup>345</sup> The court denied the motion to compel because “the likelihood of retrieving these electronic communications is low and the cost high.”<sup>346</sup>

[130] Also, in *Ameriwood Industries, Inc. v. Liberman*,<sup>347</sup> the court did not find good cause to order the production of e-mails and Microsoft Office files. Ameriwood claimed that the defendants, former employees of Ameriwood, had formed a company and improperly used confidential information taken from Ameriwood. The defendants moved to compel the production of ESI that included 52,124 potentially responsive e-mails and 4,413 additional computer files, such as Microsoft Office files. The court held that “the information is not reasonably accessible because the request is unduly burdensome, and turns to defendants for a showing of good cause.”<sup>348</sup> In other words, although in an accessible format, the court found that the e-mails were not reasonably accessible due to undue burden, presumably not because collecting the e-mails and Microsoft files would be burdensome, but because reviewing them for responsiveness and privilege would have taken a lot of time and effort by attorneys.

[131] The court in this *Ameriwood* decision considered the question of good cause and the factors identified by the Committee Notes. The court concluded that the defendants’ request was not narrowly tailored to seek only information relevant to the affirmative defense that the plaintiff’s lost sales were due to the plaintiff’s mismanagement, and did not discuss any of the other six factors in the Committee Notes.<sup>349</sup> The court added that the “defendants have failed to show good cause to order disclosure of the

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<sup>344</sup> *Id.* (quoting *Snowden v. Cannaught Lab., Inc.*, 137 F.R.D. 325, 332-333 (D. Kan. 1991)).

<sup>345</sup> *Id.*

<sup>346</sup> *Id.* at \*5

<sup>347</sup> *Ameriwood Industries, Inc. v. Liberman*, No. 4:06CV524-DJS, 2007 WL 496716 (E.D. Mo. Feb. 13, 2007). This decision ruled on a motion to compel by the defendant, whereas the earlier *Ameriwood* decision, No. 4:06CV524-DJS, 2006 WL 3825291 (E.D. Mo. Dec. 27, 2006), text accompanying *supra* notes 316-19, involved a motion to compel by the plaintiff.

<sup>348</sup> *Id.* at \*2.

<sup>349</sup> *Id.*

communications and documents, even if the court were to limit the request of the documents involving the six aforementioned employees.”<sup>350</sup>

[132] In *Calyon v. Mizuho Securities USA, Inc.*, the court tentatively denied the plaintiff’s motion to have direct, complete access to the defendant’s hard drives to show that the defendants had transmitted the proprietary business information of the plaintiff through the defendant’s computers.<sup>351</sup> The court noted that the plaintiff had not argued that (1) the individual defendants had failed to produce all responsive documents, (2) there were discrepancies or inconsistencies in defendant’s responses to previous discovery requests, or (3) relevant documents or data had been lost.<sup>352</sup> The court rejected the plaintiff’s motion to compel, but ordered the defendants to preserve mirror images of the hard drives and other storage devices at issue.<sup>353</sup>

[133] In *Scotts Company LLC v. Liberty Mutual Insurance Co.*, the court rejected the plaintiff’s request to require the defendant to allow a forensic expert to search the defendant’s computer system, network service and databases and to require the defendant to provide backup tapes of certain information systems.<sup>354</sup> The court noted that imaging of computer hard drives was an expensive process, because “an examination of a hard drive by an expert automatically triggers the retention of an expert by the

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<sup>350</sup> *Id.*

<sup>351</sup> *Calyon v. Mizuho Sec. USA, Inc.*, No. 07CIV02241RODF, 2007 WL 1468889, at \*5 (S.D.N.Y. May 18, 2007). The plaintiff and the individual defendants reached an agreement to preserve the hard drives of the personal computers and the computer storage devices of the individual defendants by creating mirrored images, but the parties had not agreed on a protocol for reviewing the mirror images. The plaintiff alleged that former employees, the defendants, had conspired to transmit the plaintiff’s proprietary business information to the other defendant. *Id.* at \*1.

<sup>352</sup> *Id.* at \*5.

<sup>353</sup> If, after the Individual Defendants’ production of documents and data from those mirror images, Calyon can demonstrate that relevant and responsive information has been withheld or is missing, or that the Individual Defendants’ expert has failed to consult fully, in good faith, with Calyon’s expert in order to develop an appropriate search protocol, then Calyon may renew its application for direct access to the mirror images.

*Id.* at \*6.

<sup>354</sup> *Scotts Co. v. Liberty Mutual Ins. Co.*, No. 2:06-CV-899, 2007 WL 1723509, at \*1, \*3 (S.D. Ohio June 12, 2007).

responding party for the same purpose.”<sup>355</sup> The court also noted that imaging a hard drive resulted in the production of “massive amounts of irrelevant, and perhaps privileged information.”<sup>356</sup> The court said it was “loath to sanction intrusive examination of an opponent’s computer as a matter of course, or on the mere suspicion that the opponent may be withholding discoverable information.”<sup>357</sup>

[134] In *Pipefitters Local No. 636 Pension Fund v. Mercer Human Resources Consulting, Inc.*, the district court vacated the report and recommendation of the magistrate judge that the plaintiffs would bear the cost of restoring or locating electronic data, if the defendants requested such data.<sup>358</sup> The court said, “[d]ue to the lack of a record it is not apparent that the Magistrate Judge engaged in the proper analysis before shifting the cost of discovery to plaintiffs.”<sup>359</sup>

### C. PRINCIPLES

[135] The issue of whether there is good cause to require a party to search for inaccessible ESI should focus on the conduct of that party, as the courts did: (1) in ordering searches of inaccessible data in *Advante, Ameriwood* (2006), *Disability Rights* and *AAB*; and (2) in rejecting a motion to search inaccessible ESI in *Calyon* and *Scotts*. As the court held in *Disability Rights*, good cause to order the search of inaccessible ESI clearly arises when the requesting party shows that the producing party allowed the destruction of ESI in accessible format when it had an obligation to preserve documents.<sup>360</sup> Under *Advante*, good cause to order the search of inaccessible ESI clearly arises when there has been alteration of documents or ESI produced.<sup>361</sup> Also, if a party fails to produce many relevant e-mails that clearly existed at a time when that party had an

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<sup>355</sup> *Id.* at \*2.

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

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

<sup>358</sup> *Pipefitters Local No. 636 Pension Fund v. Mercer Human Res. Consulting, Inc.*, No. 05-CV-74326, 2007 WL 2080365, at \*1, \*3 (E.D. Mich. July 19, 2007).

<sup>359</sup> *Id.* at \*2.

<sup>360</sup> *Disability Rights Council of Greater Washington v. Washington Metropolitan Transit Authority*, 242 F.R.D. 139, 147-48 (D.D.C. 2007).

<sup>361</sup> *Advante Int’l Corp., v. Mintel Learning Tech.*, No. C. 05-01022 JW (RS), 2006 WL 3371576, at \*1 (N.D. Cal. Nov. 21, 2006).

obligation to preserve documents, as appeared to be the case in *AAB*, that would also appear to justify an initial finding of “good cause” to search for ESI in inaccessible format.<sup>362</sup>

[136] To conclude, however, that there is good cause because a defendant failed to produce one e-mail it had sent to a third party, as the court apparently did in the 2006 *Ameriwood* decision, seems to be a very low standard.<sup>363</sup> It could be the reason the producing party did not retain the e-mail is that the producing party had a different, and perfectly reasonable, document retention policy than the third party receiving the e-mail. There would not necessarily be any indication that the producing party had failed to comply with any of its obligations, so there would not necessarily appear to be good cause to impose the burden of searching for, and then reviewing for responsiveness and privilege, inaccessible information.

[137] Rule 26(b)(2)(B) says the requesting party must show good cause, “considering the limitations of Rule 26(b)(2)(C).”<sup>364</sup> Rule 26(b)(2)(B) does not say “good cause” equals the limitations in 26(b)(2)(C) or the factors in the Committee Notes.

[138] Failing to put primary weight on the conduct of the party who has the ESI, or only considering (a) the three proportionality factors in 26(b)(2)(C), incorporated into 26(b)(2)(B), and (b) the related seven factors listed in the Committee Notes, would let the tail wag the dog. If the party with the ESI has complied with all of its obligations to preserve documents/ESI and produce accessible ESI, then generally there should not be good cause to order the search of inaccessible ESI. At least in the case of the producing party having complied with all of its legal obligations, the marginal utility of the ESI sought should be much greater to warrant an order requiring a search of inaccessible ESI than if the party has not complied with all its obligations.

[139] Why should there be a finding of good cause simply because the requesting party alleges that the producing party used the computers in

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<sup>362</sup> *AAB Joint Venture v. U.S.*, 75 Fed. Cl. 432, 440 (Fed. Cl. 2007).

<sup>363</sup> *Ameriwood Indus., Inc. v. Liberman*, No. 4:06CV524-DJS, 2006 WL 3825291, at \*1 (E.D. Mo. Dec. 27, 2006). See *supra* text accompanying notes 316-19.

<sup>364</sup> FED. R. CIV. P. 26(b)(2)(B).

question to commit tortuous acts? Although the court in *Cenveo* found the allegation of such conduct in the complaint good cause, the decision in *Scotts* rejecting a per se rule appears more sound.<sup>365</sup> At a minimum, a requesting party should have to show that it requested accessible e-mails, and then show that what was produced as a result of that request supports a finding of good cause.<sup>366</sup> The burden is on the requesting party to show good cause.

## VI. CONCLUSION

[140] Parties to litigation should not be hesitant to fight for reasonable restrictions on preservation and production. The Federal Rules of Civil Procedure allow for – and the intent behind them indeed call for – more restraints on discovery than many courts and parties recognize.

[141] On the other hand, a responding party wanting to narrow overly broad preservation demands or discovery requests should understand that unilateral imposition of what seems to that party to be reasonable preservation and production decisions can significantly increase the risks for that responding party and its attorneys, because the law is unclear in these areas. What is clear is that the ESI Rules tie the tools for restraints on discovery to increased disclosure between the opposing parties and increased judicial supervision of discovery.<sup>367</sup> Parties to litigation proceed at their own risk if they disregard either branch of the “bargain:” (1) tools to enforce balanced preservation/discovery and (2) greater transparency in preservation/discovery.

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<sup>365</sup> *Cenveo Corp. v. Slater*, No. 06-CV-2632, 2007 WL 442387, at \*1 (E.D. Pa. Jan. 31, 2007); *Scotts Co. v. Liberty Mutual Ins. Co.*, No. 2:06-CV-899, 2007 WL 1723509, at \*2 (S.D. Ohio June 12, 2007).

<sup>366</sup> More easily accessed sources—whether computer-based, paper, or human – may yield all the information that is reasonably useful for the action. Lawyers sophisticated in these problems are developing the two-tier practice in which they first sort through the information that can be provided from easily accessed sources and then determine whether it is necessary to search the difficult-to-access sources.

Court Rules, Administrative Office of the United States Courts, Federal Rules of Civil Procedure, 234 F.R.D. 219, 331 (2006).

<sup>367</sup> See, e.g., Robert Douglas Brownstone, *Collaborative Navigation of the Stormy E-Discovery Seas*, 10 RICH. J.L. & TECH. 53 (2004); Paul & Baron, *supra* note 1.