

ELECTRONIC DISCOVERY: FOLLOWING THE PAPERLESS TRAIL

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INTRODUCTION

Technology has transformed the world in ways unimaginable just twenty years ago. First e-mail revolutionized the pace of communication. As information traveled faster and faster, cell phones, smartphones and wireless-enabled laptops, made it possible to stay connected 24/7. Digital workflow is now an integral part of the business landscape, with e-mail firmly established as the primary form of business communication. While there are no official statistics on the volume of e-mail generated annually, a technology market research firm has estimated billions of e-mails were sent each day in 2008. Commentators suggest that since 2006 at least 93% of all information was initially generated in digital format with 30% of it never printed in a hard copy.¹ E-mails are subject to replication and scores of duplicates can be created when the same message is forwarded to recipients who, in turn, forward the message on to others.

All of that electronic data, commonly referred to as electronically stored information (“ESI”), is potentially discoverable when a business organization faces a lawsuit or regulatory action. Electronic discovery differs from traditional paper discovery not only because of its sheer volume, but because ESI is extremely difficult to destroy. ESI has been aptly equated to corporate DNA because “deleting” electronic data does not actually erase it from a computer’s storage

devices.² Instead, erasure simply changes the way the computer indexes the data in the disk directory so that the “erased” data can be over-written by new data. Until an over-write occurs, however, the “deleted” data remains in a computer’s memory and can be restored using forensic recovery long after it has been “deleted.”³ Additionally, deleted data can continue to exist on backup tapes or disks if it was backed up before deletion. Unlike paper which can be destroyed by shredding or burning, ESI is difficult to eliminate and leaves a “metadata” trail of information (including file designation, create and edit dates, authorship, comments and edit history)⁴ which is also potentially discoverable. These characteristics make e-discovery complex and costly.

While advances in communication and information technology have revolutionized the business world, a great deal of corporate America is wholly unprepared for the potential liability presented by ESI both by lawsuits and by government investigations. In the first years of the last decade, a numbers of highly publicized cases involving ESI emerged. In 2002, the Enron scandal began to unfold. In that same year, Martha Stewart was accused of insider trading based, in part, on e-mail correspondence. Later the SEC would press obstruction of justice charges against Ms. Stewart based on the metadata trail from an electronic telephone log entry.⁵ Around the same time, a jury verdict sounded the death knell of accounting

1. Stephen Whetstone and Kara Millonzi, *E-Discovery Document Preservation & Cost-shifting: A Matter of Dollars and Sense* 3, http://www.stratify.com/resources/articles/Whetstone_DocPreserv_and_CostShifting.pdf (last visited July 12, 2010).

2. *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 313 n. 19 (S.D.N.Y. 2003) (“*Zubulake I*”).

3. *Id.*, citing Shira A. Scheindlin & Jeffrey Rabkin, *Electronic Discovery in Federal Civil Litigation: Is Rule 34 Up to the Task?*, 41 B.C. L. Rev. 327, 337 (2000).

4. THE SEDONA CONFERENCE WORKING GROUP ON ELECTRONIC DOCUMENT RETENTION & PRODUCTION, BEST PRACTICES RECOMMENDATIONS &

PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 3-4 (2d ed. 2007), available at http://www.thosedonaconference.org/dltForm?did=TSC_PRINCP_2nd_ed_607.pdf (“THE SEDONA PRINCIPLES”).

5. Martha Stewart, who epitomizes gracious living, homemaking and etiquette was convicted of obstructing justice during an investigation into her sale of \$228,000 worth of ImClone Systems Inc. stock one day before the Food and Drug Administration rejected ImClone’s application for approval of a cancer drug. Prosecutors charged that her broker left her a telephone message on the day of her trade, and that she later altered the message on the computer of her assistant, Ann Armstrong. The phone log entered on Dec. 27, 2001 read: “Peter

giant Arthur Andersen based on the e-mails of an in-house Andersen lawyer urging immediate document shredding. Throughout the first years of the new millennium, Wall Street brokerage firms such as Morgan Stanley repeatedly made headlines for high-profile failures to preserve and produce e-mail evidence in litigation.

Morgan Stanley's e-mail troubles began in December 2000, when it ignored SEC subpoenas and failed to produce tens of thousands of e-mails in the IPO and Research Analyst investigations.⁶ SEC rules require firms to keep e-mails and business communications for three years.⁷ The SEC charged Morgan Stanley with destroying e-mails and over-writing backup tapes, in violation of federal securities laws requiring it to produce its records and documents in a timely fashion.⁸ Morgan Stanley settled the SEC's lawsuit for \$15 million, but came under scrutiny again when a separate unit, Morgan Stanley DW Inc., failed to produce millions of e-mails in arbitration cases filed by its customers, and falsely claimed the e-mails were lost in the 9/11 terrorist attacks on the World Trade Center which housed its twelve e-mail servers.⁹ In fact, Morgan Stanley had millions of pre-9/11 e-mail messages because they were restored to its system from backup tapes just days after the 9/11 attack. In a complaint, the National Association of Securities Dealers ("NASD") alleged that Morgan Stanley was using the 9/11 tragedy to hinder claims against it, and had destroyed millions of e-mails by overwriting backup tapes and allowing the e-mails to be permanently deleted. Morgan Stanley paid \$12.5 million to settle the case, but its e-mail woes were not over. In 2005, billionaire Ronald Perelman was awarded \$1.45 billion based on a claim that Morgan Stanley defrauded him in the 1998 sale of his company. Morgan Stanley lost its case when it failed to produce e-mail evidence, and a jury found that the evidence was either willfully withheld or destroyed.

In the midst of these problems—and partly in reaction to them—the Sedona Conference, a think-tank of lawyers, jurists and academics, was formed to develop “best practices” for the archiving of ESI by law firms and their clients. In 2003, the Conference published a core set of principles, *The Sedona Principles*, that were intended to complement the Federal Rules of Civil Procedure, and serve as a basis for new federal rules dealing with discovery of ESI. *The Sedona Principles* also provided guidance for judges and practitioners throughout the country in handling e-discovery cases. In the same year, United States District Judge Shira A. Scheindlin¹⁰ began authoring a series of opinions in a case called *Zubulake v. UBS Warburg LLC*. These decisions sought to determine whether ESI production should be treated differently from paper production and, specifically, whether the presumption that the responding

party bears the expense of complying with discovery requests can be reconciled with the sometimes enormous expense of producing electronic data. Judge Scheindlin's opinions, discussed at considerable length below, and the *Sedona Principles* influenced the Advisory Committee on the Federal Rules of Civil Procedure, which, in 2004, published a draft set of Amendments to the Federal Rules specifically addressing electronic discovery. In April 2006, the U.S. Supreme Court adopted the amendments and they became effective on December 1, 2006.

To explain and describe current issues regarding discovery of ESI, this article proceeds in three parts. The first examines the Federal experience beginning with an overview of cases that shaped the present Federal ESI discovery rules, and then examines both the rules and their aftermath. The second part examines the experience with ESI discovery in Massachusetts and other states, and includes a discussion of several comprehensive and thoughtful proposals for managing e-discovery that have been made by non-governmental organizations. The article then concludes with ruminations on the possible content of future Massachusetts discovery rules, informed by current best practices, that would provide judges and practitioners with sensible guidance for handling the increasingly complex e-discovery challenges that confront them.

PART I. ESI IN THE FEDERAL SYSTEM

A. Historical Overview

Before 2006, the discovery of ESI was encompassed by Fed. R. Civ. P. 34. As early as 1970, Rule 34 had been amended to “accord with changing technology” by adding the term “data compilations” to the description of “documents.” After 1970, ESI was deemed a document subject to discovery, and it was widely accepted that ESI could be discovered in lawsuits along with paper documents. Nevertheless, courts struggled to reconcile the tenet that broad discovery is a “cornerstone of the litigation process contemplated by the Federal Rules”¹¹ with the reality that the “principle of liberal discovery is sorely tested when the object of the discovery is electronic data.”¹²

On December 1, 2006, the Amendments to the Federal Rules of Civil Procedure (“the Amendments”) specifically governing the discovery of ESI and the accompanying Advisory Committee Notes (“Committee Notes”) took effect in Federal court. The new rules responded to the explosive growth of discovery battles being waged over ESI, and were specifically tailored to meet the unique challenges posed by ESI discovery. The 2006 Amendments recognized the fundamental differences between ESI and paper, and attempted to provide sensible protocols for handling discovery of the new forms

Bacanovic thinks ImClone is going to start trading downward.” On Jan. 31, 2002, Stewart allegedly rewrote the electronic office phone log to read: “Peter Bacanovic re imclone.” After metadata revealed the alteration, the government charged that the alteration constituted tampering with evidence. *See Securities & Exchange Comm'n v. Martha Stewart and Peter Bacanovic*, Docket No. 03 CV 4070 (NRB) (S.D.N.Y. filed June 4, 2003).

6. In a complaint filed by the SEC against Morgan Stanley, the SEC alleged that “from December 11, 2000 through at least July 2005, Morgan Stanley failed to produce tens of thousands of e-mails sought by the Commission subpoenas and other requests issued in the course of two Commission investigations: an investigation into Morgan Stanley's practices in allocating shares of stock in initial public offerings (the IPO Investigation) and an investigation into conflicts of interest between the firm's research and investment banking practices (“the Research Analyst Investigation”).”

7. See 17 C.F.R. § 240.17a-4(b)(4).

8. The SEC Complaint alleged that Morgan Stanley violated the production provisions of the federal securities laws, Section 17(b) of the Securities Exchange Act of 1934 (“Exchange Act”) [15 U.S.C. § 78q(b)] and Exchange Act Rule 17a-4(j) [17 C.F.R. § 240.17a-4(j)]. *See also* SEC Press Release, *Morgan Stanley Sued For Repeated E-Mail Production Failures*, <http://www.sec.gov/news/press/2006/2006-69.htm>.

9. Susanne Craig, *Morgan Stanley Faces Questions On Lost Records Its Clients Need*, WALL ST. J., Nov. 29, 2002, <http://online.wsj.com/ad/article/ironmountain/SB1038530341917114468.html?mod=sponso>

10. When she authored the *Zubulake* opinions, Judge Scheindlin had been a member of the Civil Rules Advisory Committee since 1998.

11. *Zubulake I*, 217 F.R.D. at 311.

12. *W.E. Aubuchon Co., Inc. v. BeneFirst, LLC*, 245 F.R.D. 38, 41 (D. Mass. 2007).

of data. The new rules drew heavily from three decisions, two federal and one state.

The first of the three cases is *United States v. Arthur Andersen*, a high profile case that illustrates the peril of failing to monitor a data retention policy properly. *Andersen* was one of many cases “arising from the rubble of Enron Corporation, which fell from its lofty perch in 2001 wreaking financial ruin upon thousands of investors, creditors and employees.”¹³ As Enron’s financial difficulties became public and the SEC opened an informal investigation, its auditor, Arthur Andersen, instructed its own employees to destroy documents pursuant to its document retention policy. The criminal prosecution of Andersen focused largely on the actions of Andersen’s in-house legal department during a time between September 28, 2001 and November 8, 2001 when it was on notice that an SEC investigation was a likely possibility. Nancy Temple, Andersen’s in-house counsel, made notes following a meeting that an SEC investigation was “highly probable” and then sent a number of “smoking gun” e-mails directing an Andersen-Enron crisis group “to make sure to follow the [document retention] policy.”¹⁴ The government charged that the e-mails and directives about following Andersen’s document retention policy were “code” for a massive shredding campaign to destroy documents. Indeed, after the e-mails were sent, almost two tons of paper were trucked away to Andersen’s main office in Houston for shredding.¹⁵ The last-minute shredding of Enron-related documents continued until the SEC served a subpoena for records on November 8, 2001.

The *Andersen* case is a dramatic example of what can happen when an organization fails to follow its own document retention policy—and then compounds the problem by failing to implement a litigation hold. Ironically, many of the documents shredded at the last minute would already have been destroyed if Andersen had been routinely following its own “good housekeeping” retention policy. Nevertheless, after a six-week trial and 10 days of jury deliberations, Andersen, one of the world’s largest accounting and consulting firms, was convicted of obstructing justice for destroying Enron documents while it was on notice of an SEC investigation. Andersen’s conviction was upheld on appeal to the Fifth Circuit. Andersen pursued an appeal to the United States Supreme Court and obtained a reversal on May 31, 2005 when the Court unanimously overturned the conviction of the former Big Five accounting firm on the basis of a flawed jury instruction.¹⁶ But it was too late. The conviction had already forced Andersen out of business and 28,000 Andersen employees had lost their jobs. The reversal allowed Andersen to avoid a flood of civil lawsuits but could not bring the firm back to life.

The second case, *Zubulake v. UBS Warburg LLC*, produced several discovery decisions authored by Judge Shira Scheindlin from May, 2003 to July, 2004 that remain important guides for courts and litigants to follow in addressing best practices for e-discovery. Laura Zubulake, an equities trader specializing in Asian securities,

brought a gender discrimination claim against her employer. *Zubulake I*,¹⁷ the first decision in the series, is a seminal case on the issue of accessible and inaccessible data. The court defined five categories of electronic data in order of most accessible to least accessible: (1) active, online data such as hard drives; (2) near-line data such as optical discs; (3) offline archives such as removable optical discs; (4) backup tapes; and (5) erased, fragmented or damaged data. The court noted that the last two categories—backup tapes and erased or damaged data—are typically identified as inaccessible because the data is not readily useable and must be restored. In *Zubulake I*, the court found that “good cause” existed to require production of inaccessible, expensive-to-restore backup tapes, and created a new seven-factor test for weighing whether the costs of producing the backup material should be shifted to the requesting party. This seven-factor test is now identified in the Advisory Committee Notes to Rule 26.¹⁸

Another decision in the *Zubulake* series, *Zubulake IV*,¹⁹ focused on the circumstances that trigger a “litigation hold” and whether the hold applies to “inaccessible” ESI, both grey areas that had led to many questions. *Zubulake IV* addressed those questions as follows:

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. 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. On the other hand, if backup tapes are accessible (i.e., actively used for information retrieval), then such tapes would likely be subject to the litigation hold.²⁰

Important to note is the fact that the *Zubulake IV* decision created one exception to this general rule: “If the company can identify where particular employee documents are stored on backup tapes, then the documents of ‘key players’ to the existing or threatened litigation should be preserved if the information contained on those tapes is not otherwise available. This exception applies to *all* backup tapes.”²¹ The court found that the duty to preserve attached at the time that litigation was “reasonably anticipated” and extended to the backup tapes the “key players”—but in the *Zubulake* case these backup tapes were lost.

Finally, in *Zubulake V* the court examined whether sanctions should be imposed because UBS acted willfully in failing to preserve missing backup tapes and in destroying e-mails about the plaintiff.²² *Zubulake* presented extensive proof that key UBS personnel deleted e-mails relevant to her claims in contravention of its counsel’s “litigation hold” instructions.²³ Some of the deleted e-mails were restored from backup tapes that were eventually produced and some were

13. *United States v. Arthur Andersen, LLP*, 374 F.3d 281, 284 (5th Cir. 2004), *rev’d sub nom.* *Arthur Andersen, LLP v. United States* 544 U.S. 696, 125 S. Ct. 2129 (2005).

14. *Andersen*, 125 S.Ct. at 2133 (2005).

15. *Andersen*, 374 F.3d at 286.

16. See note 13, *supra*.

17. *Zubulake I*, *supra* note 2.

18. The seven factor test under Rule 26(b)(2)(B) is discussed in Part IB of this

article, *infra*.

19. *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003) (“*Zubulake IV*”).

20. *Id.* at 218 (emphasis added).

21. *Id.*

22. *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 437 (S.D.N.Y. 2004) (“*Zubulake V*”).

23. *Id.* at 429, 435-437.

fourtuitously recovered from an employee's active files after Zubulake had conducted thirteen depositions and four re-depositions.²⁴ Many others, however, were lost forever. The court concluded that UBS's spoliation of the e-mails was willful and warranted the sanction of an adverse inference instruction.²⁵ When the case went to trial, the jury returned a verdict in favor of the plaintiff for more than \$29 million.

The third of the three, *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co.*²⁶ is an extraordinary example of a company whose persistent spoliation and discovery abuses—in the face of a legal duty to preserve e-mail related to the firm's activities for two years—cost it an adverse inference instruction and a massive jury award. Billionaire Ronald Perelman, chairman of cosmetics giant Revlon, agreed to sell Coleman, Inc., a manufacturer of camping gear owned by his holding company, to Sunbeam Corp., a manufacturer of household appliances, for \$1.5 billion including \$680 million in Sunbeam stock. Following the merger, Sunbeam's stock price plunged amid reports of fraudulent bookkeeping.²⁷ Overleveraged, Sunbeam spiraled into bankruptcy amid emerging accusations that it had artificially inflated the value of its stock.²⁸ Sunbeam shares became worthless and Morgan Stanley & Co., Inc. ("Morgan Stanley"), Sunbeam's investment banker in the transaction, was accused of helping Sunbeam carry out its fraudulent scheme to inflate the price of Sunbeam stock.²⁹

The owner of Coleman, Inc., Coleman (Parent) Holdings, Inc. ("CPH"), sued Morgan Stanley in 2003 for conspiracy and aiding and abetting fraud, and sought damages of \$485 million.³⁰ Almost immediately, a battle over ESI began, but Morgan Stanley did not institute a legal hold. Instead, it continued its improper practice of overwriting e-mails after twelve months, despite an SEC regulation, 17 C.F.R. § 240.17a-4, requiring all e-mails to be retained in readily accessible form for two years.³¹ Unaware of these flagrant violations, the court entered an agreed discovery order requiring Morgan Stanley to search backup tapes for each of the employees involved in the Sunbeam transaction; review e-mails containing search terms such as "Coleman" and "Sunbeam;" produce all non-privileged responsive e-mails; provide a privilege log; and certify its full compliance. Morgan Stanley gave no thought to using an outside contractor to expedite discovery, but instead put Arthur Riel, its own manager of technology compliance, in charge of production. Riel certified falsely that production was complete in June 2004, although he knew in May 2004 that more than 1,000 backup tapes had been found at a Brooklyn facility (the "Brooklyn tapes") and had not been

processed.³² Thereafter, Riel's responsibilities were turned over to another employee, Allison Nachitigal, who was not informed about the litigation for five months. More and more damning evidence of the mishandling of discovery continued to surface as a Morgan Stanley executive returned to New York from his deposition and undertook his own search for ESI, finding 200 additional backup tapes that, openly stored and freely accessible, had not been produced. Later, Nachitigal reported that software problems had prevented the company's system from locating e-mail attachments and 7,000 Lotus Notes e-mails. By then, however, Magistrate Judge Frank Maas, who had been overseeing discovery in the case, had heard enough.

The judge found that Morgan Stanley willfully disobeyed the discovery order and spoiled evidence, warranting sanctions. The court found it unbelievable that a software flaw preventing retrieval of e-mail attachments and Lotus Notes e-mails was discovered only after a third-party vendor became involved pursuant to a court order to double check discovery compliance. To "level the playing field," the court granted the plaintiff's motion for an adverse inference instruction and ruled that the plaintiff could argue to the jury that Morgan Stanley's willful concealment was evidence of its malice or evil intent, going to the issue of punitive damages. The court also reversed the burden of proof which meant that Perelman's company no longer had to prove its case—instead, Morgan Stanley would need to convince the jury that it did not have knowledge of Sunbeam's fraud.³³ As a result, in May 2005 a Florida jury returned a verdict awarding Perelman \$604 million in compensatory damages and \$850 million in punitive damages.³⁴

B. The New Federal Rules Regarding Discovery of ESI

These three e-discovery cases (and others like them) served as a wake-up call that failure to preserve relevant ESI could result in a company losing its case and, in some instances, suffering financial ruin. Against that backdrop, the Federal Rules of Civil Procedure ("Federal Rules") were amended in 2006 to provide judges and lawyers with guidelines for better management of e-discovery economies, issues and disputes. Building on the early cases, the amendments address five general areas: (1) early attention to issues affecting electronic discovery; (2) discovery of ESI that is not reasonably accessible; (3) privilege issues; (4) the form of ESI production; and (5) a "safe harbor" for ESI lost as a result of routine good-faith operation of electronic information systems.³⁵ Each area merits brief discussion because it deals with an issue addressed in some fashion by all subsequent approaches to ESI discovery.

24. *Id.* at 429.

25. *Id.* at 437.

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

27. *Morgan Stanley & Co., Inc. v. Coleman (Parent) Holdings, Inc.*, 955 So.2d 1124, 1125-26 (Fla.Dist.Ct.App. 2007).

28. *Id.* at 1127.

29. *Id.* at 1125-26.

30. *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.*, 2005 WL 674885, *1, n. 1 (Fla.Cir.Ct. 2005) (March 23, 2005).

31. *Coleman (Parent) Holdings, Inc.*, 2005 WL 679071 at *1. See 17 C.F.R. § 240.17a-4 (1997).

32. *Id.* at *4.

33. *Id.* at *6.

34. Morgan Stanley appealed and in March 2007 won a reversal. The \$1.4 billion damages award was thrown out for reasons unrelated to the discovery sanctions. The District Court of Appeal ruled that Morgan Stanley should have been granted a directed verdict at trial because CPH's expert did not testify as to the actual fraud-free value of Sunbeam stock at the time of purchase, or perform an "event analysis" (the computation of a statistical regression analysis or a detailed analysis of each event that might have influenced the stock price) and instead treated the Sunbeam stock as though it had no value when the transaction occurred in 1998. That treatment left the jury to speculate as to the value of the stock on the date of sale. *Morgan Stanley & Co., Inc.*, 955 So.2d at 1131-1132. Additionally, the court threw out the \$850 million punitive damages award, ruling that proof of actual damages is required to prevail in an action for fraud.

35. The 2006 e-discovery rules were amended again in 2007 to "make them more easily understood." The 2007 amendments refined the wording and changed the enumeration of various subsections but did not change the substance of the new rules. See Advisory Committee Notes for the 2007 Amendments.

1. Early Attention to Electronic Discovery Issues

A central theme of the 2006 Amendments is early attention to e-discovery. Read together, Rules 16(b) and 26(f) set the stage for parties to raise issues related to e-discovery early in the case. Rule 26(f) requires the parties to confer at least twenty-one days before a scheduling conference is held or a scheduling order is due under Rule 16(b).³⁶ As part of this obligation to confer—and prior to the Rule 16 scheduling conference—the parties must draft and submit to the court a joint written discovery plan pursuant to Rule 26 which addresses issues including (1) preservation; (2) ESI sources; (3) ESI format of production; and (4) privilege issues.

Counsel must therefore act quickly to become knowledgeable about the client's information technology (IT) systems and in the early stages of litigation the topic of ESI preservation should be of paramount concern. The mandatory conference is an opportunity for the parties to "discuss any issues about preserving discoverable information" and, as the Advisory Committee Notes to Rule 26(f) suggest, it is folly for parties not to address preservation issues during the Rule 26(f) conference. Stressing the "dynamic nature of electronically stored information" the Committee Note explains that "ordinary operation of computers involves both the automatic creation and automatic deletion or overwriting of certain information." Rule 26(f) does not use the term "litigation hold" but the litigation hold process is precisely what counsel should be ready to discuss at the Rule 26(f) conference. The Rule 26(f) discovery plan must state the parties' views on the form of ESI to be produced and any claims of privilege that may occur as a result of the inadvertent disclosure of privileged information. "Metadata" is not addressed explicitly in Rule 26(f), but the Advisory Committee Note suggests that metadata should also be a topic of the parties' conference.³⁷

Counsel should also consider the strategic need for an *ex parte* preservation order or temporary restraining order (TRO) at the beginning of the case. Although one purpose of the new rules is to change how counsel approach ESI issues with their adversaries, the rules cannot change the fact that the "dynamic" nature of ESI is easily exploited. Decisions discussed in Parts IA and IC of this article highlight the reality that an enormous amount of data can be deleted, overwritten or irretrievably lost before discovery is even initiated. Courts presented with an *ex parte* motion must balance the parties' competing needs to preserve relevant evidence and continue routine operations. A proposed blanket preservation order requiring complete cessation of a party's routine computer operations could potentially paralyze the party's activities. On the other hand, a narrowly tailored preservation order requiring a party to modify or suspend certain features of its routine computer operations to prevent the loss of information will help to eliminate the risk that a party can exploit its data retention policy and/or its routine computer operations to destroy specific stored information before discovery is initiated.

Another important and early e-discovery responsibility is the obligation to prepare the mandatory initial discovery disclosures required by Rule 26(a). The e-discovery amendments modified Rule 26(a) to impose a new obligation on counsel to provide a "copy—or a description by category and location—of all documents, electronically stored information ... [the party] may use to support its claims or defenses." This means that counsel must be able to identify its "good" ESI early in the case. To satisfy the Rule 26(a) initial disclosure requirements and confer effectively under Rule 26(f), counsel must be prepared to disclose—very early in the case—the who, what, where and when of its client's ESI.

To satisfy obligations the Rules impose, counsel should meet promptly with the client's IT staff, records management personnel, and in-house counsel to (1) identify a "systems inventory" of ESI sources; (2) determine how ESI is created, processed, categorized, stored and deleted; and (3) coordinate preservation and collection efforts. As the *Zubulake* cases instruct, counsel will need to identify all "key players" in the litigation (these are the same people who would be identified in the initial disclosures) and communicate directly with them to determine how they stored information and on what media. The list of possible sources of ESI can include financial data and spreadsheets in Excel files, word processing documents, e-mail, Blackberries, voice-mail messages, instant messages, employee home computers, portable drives and media, and backup tapes. The duty to preserve ESI should be communicated directly to key players. If counsel is unable to identify all ESI at the time of the initial disclosure, there is a duty to supplement the initial disclosures seasonably.

Finally, counsel should consider retaining a competent consultant or vendor to assist in data collection, review and production of ESI. The *Sedona Principles* advise that "[d]ue to the complexity of electronic discovery, many organizations rely on consultants to provide a variety of services, including discovery planning, data collection, specialized data processing, and forensic analysis. Such consultants can be of great assistance to parties and courts in providing technical expertise and experience with the collection, review, and production of electronically stored information."³⁸ The *Sedona Principles* recommend a careful evaluation of the consultant's expertise and experience before selection. If a vendor is retained in a non-testifying capacity, counsel and clients should be aware of the potential need for expert testimony. When forensic or technical expertise is required to retrieve and prepare ESI for production, expert testimony may be needed to explain and defend the process that was used. Additionally, counsel and its client must understand that "[u]ltimate responsibility for ensuring the preservation, collection, processing, and production of electronically stored information rests with the party and its counsel, not with the nonparty consultant or vendor."³⁹

36. Rule 16(b) requires issuance of a scheduling order 120 days after a defendant has been served or 90 days after a defendant has appeared, whichever is earlier.

37. Metadata is commonly described as "data about data," and is defined as "information describing the history, tracking, or management of an electronic document." The *Sedona Principles* list some of the many examples of metadata, including "file designation, create and edit dates, authorship, comments, and edit history." E-mail metadata elements include "about 1,200 or more properties, such as information as the dates the e-mail was sent, received, replied to or forwarded, blind carbon copy ("bcc") information, and sender address

book information." THE SEDONA PRINCIPLES, *supra* note 4, at 3. Typical word processing documents include prior changes and edits, as well as hidden codes for paragraphing, font and line spacing. While metadata is usually not critical to understanding the substance of a word processing document, it may be crucial to understanding electronically created spreadsheets, which often contain calculations or formulas that are not visible in a printed version. See Advisory Committee Note to Federal Rule of Civil Procedure 26(f). See also Williams v. United Sprint Mgmt. Co., 230 F.R.D. 640, 647 (D. Kan. 2005).

38. THE SEDONA PRINCIPLES, *supra* note 4, at 40.

39. *Id.*

2. Reasonably Accessible Information and Inaccessible Information

Rule 26(b)(2)(B) adopts and codifies *Zubulake I*'s balanced approach to the producing party's responsibilities by dividing ESI into two categories: (1) ESI that is "reasonably accessible" which the responding party must produce; and (2) ESI that is "not reasonably accessible because of undue burden or cost," which need not be produced, at least at the outset. Rule 26(b)(2)(B) is often described as a "two-tier" system, because the Committee Notes contemplate that attorneys must first obtain and evaluate ESI that can be provided from easily accessed sources before insisting that it is necessary to search the difficult-to-access sources.

The fact that parties deem certain ESI "inaccessible" does not provide automatic relief from e-discovery responsibilities with regard to that material. The Rule 26(b)(2)(B) Advisory Committee Notes state that the responding party must still "identify by category or type, the sources containing potentially responsive information that it is neither searching nor producing." This disclosure duty corresponds to Rule 26(a)'s requirement that parties must, without awaiting a discovery request, provide a description by category and location of all electronically stored information they may use to support claims or defenses. More importantly, preservation duties may attach to inaccessible ESI. The Committee Notes emphasize that a party does not relieve itself of preservation duties simply by identifying data as inaccessible. Echoing Judge Scheindlin's discussion in *Zubulake IV*, the Committee Notes explain that the preservation duty with regard to inaccessible ESI "depends on the circumstances of each case."

The "second tier" of Rule 26(b)(2)(B) authorizes a party seeking inaccessible ESI to file a motion to compel and the responding party to file a motion for a protective order. The court may order production of the inaccessible ESI if the requesting party shows "good cause" for the production. The court's good cause determination will depend not only on the costs and burdens of production, but on whether the costs and burdens can be justified under the particular circumstances of the case. The Committee Notes set out seven factors to assist courts and litigants with the cost-benefit analysis, namely

- (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) the

- importance of the issues at stake in the litigation; and
- (7) the parties' resources.

Those seven factors were developed by Judge Scheindlin in *Zubulake I* and were first applied in that case as part of a cost-shifting analysis. Additionally, Rule 26(b)(2)(B) adopts Judge Scheindlin's balancing approach to cost sharing for e-discovery by stating explicitly that courts may "specify conditions for the discovery." The Committee Notes explain that the conditions may include cost sharing between the producing and requesting party.

Finally, Rule 26(b)(2)(B) recognizes that the good-cause determination may be complicated because the court and the parties know little about what information is contained in the sources identified as not reasonably accessible. The Committee Notes suggest solving that problem by "sampling of the sources, to learn more about ... what the information consists of, and how valuable it is for the litigation."

3. Potential Waiver of Confidentiality and Privilege

The large volume of ESI and the variety of forms in which it is stored create a problem that privileged materials may be hidden in the vast amounts of data. The risk of waiver and the time and effort required to sift through massive volumes of electronic materials to ensure that all information produced has been reviewed for privilege can add enormous costs to the discovery process. Rule 26(b)(5)(B) recognizes the potential for inadvertent production of privileged materials, and establishes a procedure for demanding their return. When a party realizes that it may have inadvertently produced privileged materials, the Rule provides that it "may notify any party that received the information of the [privilege] claim and the basis for it," and the receiving party must "promptly return, sequester, or destroy the information and any copies it has." If the receiving party challenges the privilege claim, the court will determine whether privilege applies or has been waived. The Rule, and accompanying Advisory Committee Note, essentially codify the common law approach for return of inadvertently produced materials.

Rule 26(b)(5)(B) exemplifies the way in which the new e-discovery rules seek to facilitate e-discovery by minimizing the risk production will waive a privilege. The Advisory Committee Notes to Rules 16(b), Rule 26(b)(5)(B) and Rule 26(f) all encourage parties to consider entering into voluntary agreements among themselves to protect against any waiver of privileges, including use of non-waiver agreements. Rule 26(b)(5)(B) is intended to work in tandem with Rule 26(f), which directs the parties to discuss privilege issues early in the case when preparing their joint discovery plan. The Committee Notes to Rule 26(f) suggest that parties may attempt to minimize the costs of privilege reviews by entering either "quick peek" or "clawback" agreements.⁴⁰ Thus, counsel should discuss the need for a nonwaiver agreement at the beginning of the litigation

40. A "quick peek" agreement is an arrangement where the parties agree that the responding party will provide certain requested ESI materials for initial examination without reviewing them for privilege, confidentiality or privacy and without waiving any privilege or protection. The requesting party then designates the documents it wishes to have produced (as part of a Rule 34 request) and the responding party responds by screening only the documents actually requested for formal production, and asserting privilege claims as needed in a privilege log. Although the new e-discovery rules encourage such arrangements, not all commentators believe they represent "best practices." *The Sedona Principles* point out some of the potential pitfalls, e.g., "the genie cannot be put

back in the lamp," and counsel have an ethical duty to guard zealously the confidences of their clients. *THE SEDONA PRINCIPLES*, *supra* note 4, at 54. "Clawback" arrangements allow the producing party to "claw back" or "undo" the production, but are substantively different from "quick peek" agreements. Under a "clawback" agreement the parties agree that production without intent to waive privilege should not be a waiver so long as the responding party identifies the documents mistakenly produced. The validity of clawback agreements was discussed at some length in the leading case of *Hopson v. Mayor of Baltimore*, 232 F.R.D. 228 (D. Md. 2005) and that discussion led the Advisory Committee on the Federal Rules of Evidence to begin its consideration of the issue.

and approach the court for entry of an appropriate order. Rule 16(b) states explicitly that the scheduling order issued by the court should “include any agreements the parties reach for asserting claims of privilege.” However, as the Advisory Committee Note to Rule 16(b) observes, “[t]he rule does not provide the court with authority to enter such a case-management order without party agreement.”

One very serious concern about the use of non-waiver arrangements has been that even if the court adopts the agreement and makes it binding in a case, there is no assurance that the non-waiver agreement will apply to third parties in a subsequent action. The most recent edition of the *Sedona Principles* points out that “parties in mass tort and product liability cases, who are subject to multiple suits by different counsel in different states, face the risk that their ‘quick peek’ agreement entered in one action may not protect the party from waiver arguments in other actions, even if they have a strong protective order in the first action.”⁴¹ In response to this concern, Federal Rule of Evidence 502 was amended effective September 19, 2008, to provide that an inadvertent disclosure made in a federal proceeding does not operate as a waiver in a Federal or State proceeding if “the disclosure is inadvertent . . . and the holder promptly took reasonable steps to rectify the error, including . . . following Federal Rule of Civil Procedure 26(b)(5)(B).” Additionally, the rule clarifies the controlling effect of a court order, providing that “[a] Federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other Federal or State proceeding.” Rule 502 should alleviate at least some of the concern surrounding the efficacy of nonwaiver agreements.

4. The Format of Production

Rule 34(b)(1)(C) provides that a party serving a request for production of ESI may “specify the form or forms in which electronically stored information is to be produced.” The Rule 34(b) Committee Notes clarify that the requesting party “may ask for different forms of production for different types of electronically stored information.” In other words, one form can be requested for e-mail, another form for word processing documents, and yet another form for electronic spreadsheets. Rule 26(f) requires the parties to discuss the form of production during their pre-discovery conference. Thus, counsel must consider whether to ask for ESI in native format, which generally includes associated metadata, or another form. ESI produced in native format (the form in which the file was created) will contain application metadata such as “tracked changes” in word processing documents or formulae in spreadsheets.⁴² Counsel may prefer to request a two-dimensional image file (such as TIFF or PDF) which has the practical advantage of a static format that can be Bates numbered, but does not contain original metadata. The *Sedona Principles* explain that “to replicate the usefulness of native files while retaining the advantages of static productions,” image formats such as TIFF can be “accompanied by ‘load files’ which are ancillary files that may contain textual content and relevant system metadata.”⁴³ A load file containing searchable text and selected metadata is in useable form because it is electronically searchable and also

has essential metadata.⁴⁴ Counsel might be planning to use litigation support software to review and search the production responses and would then request documents in native format (a form that is searchable) with metadata included. If the requesting party wants data in its native format with metadata retained, it should include an explicit request for metadata in the document request.

Although Rule 34(b) gives the requesting party the right to specify the form of ESI, the Committee Notes clarify that this is not an absolute right. The responding party may serve written responses to the production request objecting to the form the requesting party specifies. The parties must then attempt to resolve the dispute and must meet and confer under Rule 37(a)(2)(B) before the requesting party can file a motion to compel. If the form of production is not specified by agreement or court order, the responding party must produce the ESI in a “form or forms in which it is ordinarily maintained or in a form or forms that are reasonably useable.” The *Sedona Principles* refer to these as the “default forms.”⁴⁵ The Committee Notes stress that the responding party may not convert ESI from the form in which it is ordinarily maintained to a different form that makes it less searchable. Furthermore, Rule 34(a) requires that, if necessary, a responding party “translate” information it produces into a “reasonably useable” form.

5. The Safe Harbor

Finally, Rule 37(e)—formerly Rule 37(f)—is often described as a “safe harbor,” because it is intended to provide protection for information that is lost due to the routine operation of a computer system, including the overwriting of information, if the operation was carried out in good faith. The rule recognizes that information systems are often designed to recycle, overwrite and delete information on a routine basis and these operations are necessary components of regular business operations. For example, the purging of e-mails and other electronic communications is essential to prevent a build-up of data that can overwhelm a system. Rule 37(e) provides that “[a]bsent 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.” The determination of good faith may often depend upon whether a party took good faith efforts to institute a litigation hold to prevent the destruction of information.

The Committee Notes to the 2006 Amendments suggest that a preservation duty arises when there is “pending or reasonably anticipated litigation.” Before the new e-discovery rules were adopted, *Zubulake IV* offered this same guidance to litigants.⁴⁶ *Zubulake IV* identified “reasonably anticipated litigation” as the trigger for a party’s obligation to institute a litigation hold: “[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.”⁴⁷ As case law illustrates, e-discovery may itself provide evidence of the time when a party reasonably anticipated litigation.

Moreover, even though Rule 37(e) provides a safe harbor, questions remain regarding the scope of the preservation duty in a given case. For example, what types of ESI must be preserved? The safe

41. THE SEDONA PRINCIPLES, *supra* note 4, at 54.

42. *Id.* at 62.

43. *Id.*

44. *Id.* at 63.

45. *Id.* at 65.

46. *Zubulake IV*, 220 F.R.D. at 217.

47. *Zubulake IV*, 220 F.R.D. at 218.

harbor provision of the new rules does not address the scope of the preservation duty, except to mention that one of the factors bearing on good faith is the “steps the party took to comply with a court order in the case or party agreement requiring preservation of specific electronically stored information.”⁴⁸ The Committee Notes to the 2006 Amendments explain that “the good faith requirement of [Rule 37(e)] means that a party is not permitted to exploit the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it was required to preserve.” In other words, Rule 37(e) provides a safe harbor only for good faith loss of data and does not limit a court’s ability to impose sanctions for spoliation that occurred as a result of intentionally allowing routine operations to continue in order to thwart discovery.

In order to demonstrate “good faith” within the meaning of Rule 37(e), counsel and client should be certain to document all efforts to implement and monitor the litigation hold. Detailed “litigation hold letters” should be disseminated to all employees of the company who possess potentially relevant discoverable data advising them of the subject matter at issue and the background of the case; the reasons why specific data must be preserved; and that they should suspend any document destruction policy then in operation. The *Sedona Principles* suggest the following content for a litigation hold notice:

While the form and content of the notice may vary widely depending upon the circumstances, the notice need not provide a detailed list of all information to retain. Instead, it should describe the types of information that must be preserved, with enough detail to allow the recipient to implement the hold ... the notice should: (i) describe the subject matter of the litigation and the subject matter, dates, and other criteria defining the information to be preserved; (ii) include a statement that relevant electronically stored information and paper documents must be preserved; (iii) identify likely locations of relevant information (e.g., network, workstation, laptop or other devices); (iv) provide steps that can be followed for preserving the information as may be appropriate; and (v) convey the significance of the obligation to the recipients.⁴⁹

Additionally, as Judge Scheindlin advised in *Zubulake V*, “[a] party’s discovery obligations do not end with the implementation of a ‘litigation hold’—to the contrary, the hold is only the beginning. Counsel must oversee compliance with the litigation hold, monitoring the party’s efforts to retain and produce the relevant documents. Proper communication between a client and her lawyer will ensure (1) that all relevant information (or at least all sources of relevant information) is discovered, (2) that relevant information is retained on a continuing basis; and (3) that relevant non-privileged material is produced to the opposing party.”⁵⁰

48. FED. R. CIV. P. 37(f), Advisory committee note.

49. THE SEDONA PRINCIPLES, *supra* note 4, at 32.

50. *Zubulake V*, 229 F.R.D. at 432.

51. *Kentucky Speedway, LLC v. Nat’l Ass’n of Stock Car Auto Racing, Inc.*, 2006 WL 5097354 (E.D.Ky. 2006).

52. *Williams v. Sprint/United Mgmt. Co.*, 230 F.R.D. 640 (D.Kan. 2005).

53. *Id.* at 649. *Williams* is a pre-2006 Amendments opinion. However, the

In sum, counsel should advise their clients to document all efforts to comply with preservation duties and the litigation hold. A party who can demonstrate good faith in that fashion is far more likely to find refuge in the safe harbor of Rule 37(e) than one who cannot.

C. E-Discovery Cases After the E-Discovery Amendments

The e-discovery Amendments to the Federal Rules of Civil Procedure went into effect on December 1, 2006 and, almost four years later, the issues most often litigated lie, perhaps unsurprisingly, in the main areas addressed by the new Amendments. Lawyers are ultimately responsible for ensuring that their clients understand the rules governing preservation, identification, collection, and production of ESI within the guidelines established by the e-discovery rules. A number of recent cases show how failure by counsel or client to deal with those responsibilities in five general areas the rules address—(1) early attention to electronic discovery (2) discovery of ESI that is not reasonably accessible; (3) privilege; (4) the form of ESI production; and (5) a “safe harbor” for ESI lost as a result of routine good-faith operation of an electronic information system—can dramatically affect the outcome of the case.

Kentucky Speedway, LLC v. Nat’l Ass’n of Stock Car Auto Racing, Inc.,⁵¹ highlights how the new Amendments address—but do not resolve—the confusion in the law concerning metadata and the need for early attention to the issue in the discovery process. In this anti-trust action, *Kentucky Speedway* (“Speedway”) filed a complaint alleging that NASCAR and the International Speedway Corporation (“ISC”) attempted to monopolize the market for hosting national stock car racing events in violation of the Sherman Act, and wrongfully denied Speedway a NEXTEL Cup Series race. Speedway filed a motion to compel seeking metadata for virtually all of the ESI that ISC had already produced in the lawsuit. The court denied the motion on the grounds that Speedway did not notify ISC that it wanted metadata “until seven months after ISC had produced both hard copy and electronic copies of its documents.” The court’s decision was also based on the fact that Speedway had failed to raise the issue of metadata during the Rule 26(f) conference, which requires parties to discuss any issues about the form or forms in which ESI should be produced.

The plaintiff in *Kentucky Speedway* did not make any showing of a particularized need for metadata, and the court specifically declined to follow *Williams v. Sprint/United Mgmt. Co.*,⁵² which held that the default form of ESI under Rule 34 includes metadata. In *Williams*, the defendant had removed the metadata from Excel spreadsheets in a process called “scrubbing” before it produced the spreadsheets in their native electronic format. The *Williams* court noted that Rule 34 uses the phrase “in a form or forms in which [data] is ordinarily maintained” but provides no further guidance as to whether this encompasses metadata.⁵³ The court relied on *The Sedona Principles* for guidance and found that emerging standards “appear to articulate a general presumption against the production of metadata” unless

Civil Rules Advisory Committee had proposed initial e-discovery amendments in August 2004, and on September 20, 2005, the Judicial Conference of the United States recommended that the U.S. Supreme Court adopt the amendments. The proposed amendments were set to become effective on December 1, 2006, and the *Williams* opinion, dated September 29, 2005, construed the following language in the proposed amendment to Rule 34:

“(ii) if a request for electronically stored information does not specify the form or forms of production, a responding party must produce the information in a

the responding party knows the particular metadata is relevant to the dispute. Nevertheless, the court placed the initial burden with regard to metadata on the producing party, holding that if a party is producing ESI as it is maintained in the ordinary course of business, it must produce the documents with metadata intact unless it timely objects to the production of metadata, and the parties agree that metadata should not be produced, or the producing party requests a protective order.⁵⁴ The *Kentucky Speedway* court rejected the *Williams* reasoning, finding that in “the rapidly evolving world of electronic discovery, the holding of the *Williams* case is not persuasive.”⁵⁵ Having the benefit of “the newly amended rules, advisory notes, and commentary of scholars,” *Kentucky Speedway* held that the default form of ESI does not include metadata.⁵⁶ Relying on *Wyeth v. Impax Labs., Inc.*,⁵⁷ a case decided after *Williams*, the court noted that “emerging standards of electronic discovery appear to articulate a general presumption against the production of metadata.”⁵⁸

*W.E. Aubuchon Co., Inc. v. BeneFirst, LLC*⁵⁹ is a local case that applied the new e-discovery rules as well as Judge Scheindlin’s analysis from *Zubulake I*, to resolve a question of accessibility. The case involved the administration of benefit plans under ERISA. BeneFirst was the third-party administrator of several Aubuchon employee medical benefit plans (the “ERISA Plans”), and Aubuchon charged that BeneFirst breached its contract and fiduciary duties by failing to provide services accurately and completely. BeneFirst sought reconsideration of a court order requiring it to produce “all medical claim files, including actual medical bills in BeneFirst’s custody and control,”⁶⁰ on the grounds that the claims were “inaccessible” ESI.⁶¹ Paper versions of the claim forms had been destroyed by BeneFirst after they were scanned as electronic images and stored on BeneFirst’s server arranged by processing date and the person who processed the claim. There was no index of the images, and the system was only searchable by year of processing, claims examiner, month of processing, and claim date.⁶² The system was not searchable by name of the individual claimant, the date of the medical service, the name of the provider, or the company that employed the benefit holder. BeneFirst claimed the ESI was inaccessible because the system was “not set up for wholesale retrieval” of the claim images.

In resolving the dispute, the court followed *Zubulake*’s reasoning that “whether electronic data is accessible or inaccessible turns largely on the media on which it is stored.”⁶³ The court determined that records stored on a server are “clearly an accessible format,” but the images were not “reasonably accessible” within the meaning of Rule 26(b)(2)(B) because retrieval of the records would be difficult and costly. Balancing the Rule 26(b)(2)(C) considerations in

conjunction with *Zubulake I*’s seven-factor test, later incorporated in the Rule 26(b)(2) Advisory Committee Note, the court found that on balance, Aubuchon had established good cause for requiring BeneFirst to produce the ESI even though it was not reasonably accessible. The court’s decision recognized that the information was not available through any other source because BeneFirst had destroyed the original claim forms.

Privilege was the question at issue in *Victor Stanley, Inc. v. Creative Pipe, Inc.*,⁶⁴ a case decided several months before the new Federal Rule of Evidence 502 was adopted in September, 2008. The parties contested whether 165 electronic records inadvertently produced by the defendants during discovery were protected by the attorney-client privilege or whether the privilege had been waived by the voluntary production. Before responding to a discovery request, defendants gave their computer forensics expert a list of keywords to use in searching and retrieving privileged and protected documents. Nevertheless, given the volume of documents involved in the search, the defendants also asked the court to approve a “clawback agreement.” However, when the court requested additional briefing, the defendants abandoned their efforts to obtain the agreement.⁶⁵ The defendant’s consultant then conducted a privilege search of some documents using approximately seventy different keyword search terms and other “nontext-searchable” files were manually reviewed, page-by-page, for privilege.⁶⁶ Notwithstanding those efforts to uncover privileged documents, the contested documents were ultimately produced.

Rule 502 was still pending in Congress when the case was decided and, therefore, the court could not explicitly follow the new rule. However, the court applied mainstream legal principles on the topic of inadvertent waiver that are now codified into Rule 502’s “national standard.” Under those principles, “inadvertent disclosure of protected communications or information in connection with a federal proceeding or to a federal office or agency does not constitute a waiver if the holder took reasonable steps to prevent disclosure and also promptly took reasonable steps to rectify the error.”⁶⁷ A multi-factor test for determining whether inadvertent disclosure amounts to a waiver is described in the Rule 502 Advisory Committee Notes.⁶⁸

In applying the principles, the court found that “all keyword searches are not created equal,”⁶⁹ and that the defendants had failed to demonstrate the reasonableness of the keyword search they performed. They were too vague in their description of the seventy word search because they did not identify the actual keywords they used or the qualifications of the persons who designed the search; they did not state whether the search was a “simple keyword search or a

form or forms in which it is ordinarily maintained, or in a form or forms that are reasonably usable.”

Id., n. 45. As noted above, *The Sedona Principles* refer to these as the “default forms.” See THE SEDONA PRINCIPLES, *supra* note 4, at 65.

54. *Id.* at 652.

55. *Kentucky Speedway*, 2006 WL 5097354, at *8.

56. *Id.*

57. *Wyeth v. Impax Labs., Inc.*, 20248 F.R.D. 169 (D.Del. 2006).

58. *Kentucky Speedway*, 2006 WL 5097354, at *8.

59. *W.E. Aubuchon Co., Inc. v. BeneFirst, LLC*, 245 F.R.D. 38 (D. Mass. 2007).

60. BeneFirst had received a total of 34,112 claims forms under the ERISA Plans, but Aubuchon eventually narrowed its request to 3,000 claims. BeneFirst estimated it would cost \$80,000.00 to retrieve all 34,112 ERISA Plan claims

on its server, but provided no cost estimate for retrieval of the narrower 3,000 claims sought by Aubuchon.

61. It is unclear from the opinion whether Aubuchon narrowed its request to 3,000 claims before or after the court’s first order requiring production of “all” claims.

62. *W.E. Aubuchon Co., Inc.*, 245 F.R.D. at 43.

63. *Id.*, quoting *Zubulake I*, 217 F.R.D. at 318-319.

64. *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251 (2008).

65. “Clawback” agreements are described in note 40, *supra*.

66. *Victor Stanley, Inc.*, 250 F.R.D. at 256.

67. FED. R. EVID. 502, Advisory Committee Notes.

68. *Id.*

69. *Victor Stanley, Inc.*, 250 F.R.D. at 255.

more sophisticated one,” such as one that applied Boolean proximity operators;⁷⁰ and they failed to demonstrate that there was quality-assurance testing such as a sampling of the text-searchable ESI files to see if the search results were reliable.⁷¹ Significantly, the court noted that if the defendants had not voluntarily abandoned their request for a court-approved non-waiver agreement, they would have been protected from waiver, but under the circumstances it would not reward their carelessness with a protective order.

If the cases just discussed help shape approaches to discovery of ESI, *Qualcomm Inc. v. Broadcom Corp.*,⁷² a patent infringement case, provides a powerful example of what can happen to law firms and attorneys when they ignore their e-discovery obligations. Qualcomm, a developer of digital wireless communications products, sued Broadcom, a maker of semiconductors for wired and wireless communications, alleging patent infringement related to video compression technology, which is designed to transmit high quality video images with low volumes of data. The case presented the question of whether Qualcomm waived its right to assert its patents by failing to disclose them to the Joint Video Team (JVT), a standards-setting organization, prior to the JVT’s release of the H.264 standard, which was intended to be an industry-wide standard for video compression technology.⁷³ Broadcom, claiming that it was unaware of Qualcomm’s patents when it designed and manufactured numerous H.264-compliant products,⁷⁴ counterclaimed, alleging that Qualcomm engaged in inequitable conduct by intentionally shielding its patents from JVT consideration so that it could demand license fees from those who later sought to produce H.264-compliant products.⁷⁵ Qualcomm adamantly denied that it participated in the JVT during the relevant time period, and filed a summary judgment motion premised on this denial.⁷⁶

Despite numerous discovery requests, Qualcomm’s attorneys signed pleadings representing that Qualcomm had no documents responsive to Broadcom’s requests for JVT related documents without performing any basic searches of e-mail databases on Qualcomm’s computer system. Trial commenced and, while preparing a Qualcomm witness to testify, Qualcomm’s attorneys found on her laptop twenty-one e-mails from the JVT discussing the H.264 standard. Nevertheless, the attorneys did not investigate further, or look for additional e-mails. On cross-examination, the witness admitted knowledge of the e-mails.⁷⁷ The jury returned a unanimous verdict that Broadcom had not infringed Qualcomm’s patents and that Qualcomm’s patents were unenforceable due to inequitable conduct

and waiver. The trial judge subsequently issued a comprehensive order that Qualcomm had waived its rights to enforce its patents, and that its counsel participated in an “organized program of litigation misconduct and concealment.”

Following the trial, Qualcomm searched the e-mail archives of twenty-one current employees and located more than 46,000 documents which had not been produced. The documents showed that it had actively participated in the JVT.⁷⁸ As a result of Qualcomm’s bad faith participation in the JVT and litigation misconduct during discovery, motion practice, trial and post-trial proceedings, the court awarded Broadcom its attorney’s fees under 35 U.S.C. § 285, which provides that “the court in exceptional cases may award reasonable attorney fees to the prevailing party.”⁷⁹ The court found clear and convincing evidence that Qualcomm withheld “tens of thousands of e-mails” showing its participation in the JVT, and ordered Qualcomm to pay Broadcom \$9,259,985.09 in attorney’s fees, court costs, expert witness fees, travel expenses, and other litigation costs.

On a subsequent motion for sanctions against the Qualcomm attorneys,⁸⁰ Qualcomm asserted the attorney-client privilege so that its attorneys could not reveal any communications about Qualcomm’s participation in JVT activities. Without hearing from the attorneys, a Magistrate Judge ruled that Qualcomm could not have intentionally withheld tens of thousands of decisive documents in an effort to win its case without the assistance of its attorneys. The judge held that a reasonable discovery inquiry should have included searches of the computers belonging to knowledgeable Qualcomm employees, including all deponents and trial witnesses, and if the attorneys were unable to get Qualcomm to conduct a competent and thorough document search, “they should have withdrawn from the case or taken other action.”⁸¹ As a result, the judge referred six Qualcomm attorneys to the California State Bar for investigation (the “Qualcomm Six”) and ordered the sanctioned attorneys to participate in a comprehensive Case Review and Enforcement of Discovery Obligations program. The District Court later vacated the judge’s order, in part, on the grounds that the sanctioned attorneys had a due process right to defend themselves, and were entitled to assert a self-defense exception to Qualcomm’s asserted attorney-client privilege.⁸²

Southern New England Tel. Co. v. Global NAPs, Inc.,⁸³ also demonstrates the continued willingness of courts to impose severe sanctions for e-discovery abuses, including the ultimate sanction

70. Boolean proximity operators are logical relationships between search terms that help to insure that the search will retrieve all relevant documents without also producing a raft of those that are irrelevant. Use of Boolean operators is a recommended Sedona Conference best practices. See *The Sedona Conference Best Practices Commentary on the Use of Search & Information Retrieval Methods in E-Discovery*, 8 SEDONA CONF. J. 189, 200, 202, 217-18 (2007).

71. *Victor Stanley, Inc.*, 250 F.R.D. at 259.

72. *Qualcomm Inc. v. Broadcom Corp.*, 2008 WL 66932 (S.D. Cal. 2008), vacated in part by *Qualcomm Inc. v. Broadcom Corp.*, 2008 WL 63108 (S.D. Cal. 2008).

73. *Qualcomm Inc. v. Broadcom Corp.*, 548 F.3d 1004, 1008, 89 U.S.P.Q.2d 1321 (Fed. Cir. 2008).

74. *Id.* at 1010.

75. *Id.* at 1022.

76. *Qualcomm Inc.*, 2008 WL 66932 at *14.

77. *Id.* at *4.

78. *Id.* at *6.

79. See 35 U.S.C. § 285; see also *Qualcomm Inc.*, 548 F.3d at 1026.

80. The court referred Broadcom’s oral trial motion for sanctions to a Magistrate, whereupon Broadcom filed a written motion for sanctions against Qualcomm, and the court expanded the sanction proceedings by issuing to nineteen attorneys an order to show cause why sanctions should not be imposed on them for failure to comply with discovery. *Qualcomm, Inc. v. Broadcom Corp.*, 2008 WL 638108 (S.D. Cal. 2008).

81. *Id.* at *13.

82. *Qualcomm Inc.*, 2008 WL 638108 (S.D. Cal. 2008). On remand, the court provided responding attorneys an almost unlimited opportunity in which to conduct discovery and present new facts to the court. After hearing extensive arguments, and thinking “long and hard about this case,” the court resolved the matter by declining to sanction any of the attorneys. See *Qualcomm, Inc. v. Broadcom Corp.*, 2010 WL 1336937 (S.D. Cal. 2010).

83. *Southern New England Tel. Co. v. Global NAPs, Inc.*, 251 F.R.D. 82 (D. Conn. 2008).

of dismissal. Southern New England Telephone (“SNET”) filed a complaint against the Global NAPs defendants (“Global NAPs”) alleging that they failed to pay legally required charges for SNET’s special access services under a federal tariff on file with the Federal Communications Commission (“FCC”), and misrouted long-distance traffic in a scheme designed to deprive SNET of billings related to long-distance telephone traffic.⁸⁴ The court granted SNET’s motion for a prejudgment remedy in the amount of \$5.25 million and a long discovery battle over financial information began.⁸⁵

During the course of discovery, Global NAPs failed to comply with several court orders requiring it to produce evidence of its assets and financial condition, including financial statements. Global NAPs’s counsel and Vice President represented to the court that the relevant data was lost because a computer used by its bookkeeper had “crashed,” a representation that suggested to the court a “computer malfunction.”⁸⁶ It was later revealed that the bookkeeper had fallen and smashed her computer on the ground, causing it to break into many pieces. The hard drive of the computer survived but it was not produced, leading the court to comment that “defendants have never explained why documents were irretrievable from the hard drive, why the computer has not been produced, or where it is.”⁸⁷ Later however, the parties hired a consultant to “image” the replacement computer used by the bookkeeper following the “crash.” The consultant found that a software program designed to overwrite data had been installed on the new computer and had been used in a “wash with bleach” mode which prevents recovery of deleted files. The consultant also discovered another program that allows a user to erase files manually. After further analysis, the consultant concluded that nearly 20,000 files had been erased from the replacement computer.⁸⁸

SNET moved the court to sanction Global NAPs by entering a default judgment. The court recognized that dismissal for a discovery violation, although permitted by Rule 37(b)(2)(A)(v), is a drastic remedy and should only be imposed in extreme circumstances. Nevertheless, the court found that Global NAPs willfully violated the court’s order by failing to produce a general ledger despite evidence they were a multimillion dollar enterprise, and willfully erased its computer documents in bad faith. The court found that the bookkeeper’s computer had been “wiped” with the intent of irrevocably erasing files and that she deliberately chose to use the “wash with

bleach” option to permanently delete bookkeeping files that should have been preserved. In view of Global NAPs repeated violations, including prior civil contempt sanctions, the court ruled that its behavior warranted the ultimate sanction of dismissal, and entered a default judgment.

Finally, in another local case, Judge Edward Harrington’s decision in *Dahl v. Bain Capital Partners, LLC*, provides helpful guidance in the areas of cost-shifting and metadata.⁸⁹ In *Dahl*, the defendants sought to shift the costs of producing electronic documents to the plaintiffs and the court applied the Rule 26(b)(2)(B) dichotomy between “reasonably accessible” and “not reasonably accessible” data to resolve the issue. The court explained that cost shifting is only available under Rule 26 if the responding party “identifies the source of the requested documents as not reasonably accessible because of undue burden or cost.”⁹⁰ Since the defendants neglected to identify “which documents were inaccessible or the nature of that inaccessibility,” they failed to provide any grounds for shifting costs.

Insofar as metadata was concerned, the court applied Rule 34 and ruled that the defendants could produce the documents “as they are kept in the usual course of business,” with the caveat that if the documents were not reasonably useable as kept in the usual course of business, the defendants would have to translate them into useable form before production. The court denied the plaintiffs’ request for all metadata, however, holding that “Rule 34 militates against the broad, open disclosure of metadata.”⁹¹ Because Rule 34 and its Committee Note address the form of production, but do not explicitly reference metadata,⁹² Judge Harrington’s well-reasoned opinion will provide helpful guidance to Massachusetts litigants when metadata is sought.

PART II. THE STATE SYSTEMS

A. Introduction

Following enactment of the Federal e-discovery Amendments in 2006, many states hurried to adopt state e-discovery rules patterned on those Amendments.⁹³ By September 2009, at least twenty-five states had adopted some form of e-discovery provisions that modified existing rules governing discovery.⁹⁴ For a variety of reasons, however, few state schemes completely mirror the Federal approach to ESI discovery. For example, only Alaska, Arizona and

84. See Complaint For Injunctive And Other Relief, Civil Action No. 3:04-CV-2075 (JCH)(D. Conn. filed December 7, 2004).

85. *Southern New England Tel. Co.*, 251 F.R.D. at 85.

86. *Id.* at 87, n. 4.

87. *Id.* at 88.

88. *Id.* at 89.

89. *Dahl v. Bain Capital Partners, LLC*, 655 F.Supp.2d 146 (D. Mass. 2009).

90. *Id.* at 148.

91. The court, did, however, permit the defendants to produce twelve fields of metadata for word documents and e-mails, as they had offered to do. As authority, the court cited *Wyeth*, 248 F.R.D. at 171, and *Williams*, 230 F.R.D. at 651, which questioned the utility of metadata. The court’s analysis focused on the Rule 34 Committee Notes, which instruct that requests for ESI should be narrowly tailored so that only necessary data is produced. The court required that excel spreadsheets be produced in their native format, with all search capabilities and attributes such as formulae intact, since these are “integral elements” of a spreadsheet that should remain undisturbed. *Dahl*, 655 F.Supp.2d at 150.

92. The Advisory Committee Note to Rule 26(f) explains that treatment of metadata is one of the topics the parties should discuss at the Rule 26(f) conference and mentions metadata in its discussion of privilege and work-product

protection. Accidental disclosure of metadata can present a problem for attorneys because metadata can be missed easily in a privilege review and presents a unique danger of inadvertent disclosure of privileged or protected information. When producing electronic documents, attorneys should be aware of the potential for third parties to “mine” metadata for confidential client information or attorney-client privileged information. See generally, Adam Israel, *To Scrub Or Not To Scrub: The Ethical Implications of Metadata and Electronic Data Creation, Exchange, And Discovery*, 60 ALA. L. REV. 469 (2009) (discussing American Bar Association (ABA) Formal Opinion 06-442 which states, “[a] lawyer who is concerned about the possibility of sending a document that contains or might contain metadata may be able to limit the likelihood of its transmission by ‘scrubbing’ metadata from documents”).

93. See generally Thomas Y. Allman, *State E-Discovery Rulemaking after the 2006 Federal Amendments: An Update*, <http://www.ediscoverylaw.com/.../state%20Rulemaking%20-%20Allman.pdf>.

94. The twenty-five states that have enacted some form of e-discovery procedural rules are: Alaska, Arizona, Arkansas, California, Connecticut, Idaho, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, New Jersey, North Dakota, Ohio, Tennessee, Texas, Utah, and Virginia. *Id.* Additionally, New York has e-discovery legislative proposals pending in the New York General Assembly, and

Utah mandate early disclosures about ESI.⁹⁵ Pieces of the federal approach, however, appear in many state provisions. For example, Alaska, Arizona, California, Maine, and New Hampshire adopted rules requiring an early conference to discuss the subject of electronic discovery.⁹⁶ Other states, such as Utah, Ohio, Tennessee, Maryland, Montana, Michigan, Iowa, New Jersey, and Virginia have enacted procedural e-discovery rules that encourage the courts to address management of electronic discovery early, at the discretion of the court, or as part of a routine scheduling order or case management conference.⁹⁷ Arkansas Rule of Civil Procedure 26.1 embodies most aspects of the Federal Amendments, but is unique in that it is a “supplemental and optional rule ... because either the parties must agree that it will apply, or the circuit court must order that it will apply on motion for good cause shown.”⁹⁸

Thirteen states have adopted verbatim the language in Federal Rule 26(b)(2)(B) which creates a two-tiered approach to ESI

Florida is expected to propose state e-discovery rules in 2010. *Id.*

95. See ALASKA R. CIV. P. 26(a)(1)(D); ARIZ. R. CIV. P. 26.1; UTAH R. CIV. P. 26(a)(1)(B).

96. CALIFORNIA RULE OF COURT 3.724 already required parties to meet and confer prior to a case management conference, and was recently amended to include issues relating to discovery of ESI. Alaska amended Rule 26(f) to require parties to confer on the topic of electronic discovery at least 14 days before a scheduling order is due under Rule 16(b). Maine amended Rule 16(a) to provide that a scheduling order must include a conference to address electronic discovery, and Arizona amended Rule 16.3 to require that once a case “is determined to be a complex civil case,” a case management conference must be conducted to consider issues including the subject of electronic discovery. Arizona’s Rule 16(b) also allows the court to hold a discretionary conference, and to enter orders concerning additional disclosures, preservation, privilege and other issues. The Arizona State Bar Committee Note to Rule 16(b) explains that the purpose of the amendment is to clarify that a court has the power under Rule 16 to enter orders governing electronic discovery. The Arizona State Bar Committee Notes cite to and borrow from the Conference of Chief Justices Guideline 5 and 10. See note 120, *infra*. New Hampshire has not enacted any state rules regarding the scope of e-discovery, but SUPERIOR COURT RULE 62 (I) was amended on March 1, 2007 to require counsel to meet and confer prior to a “Structuring Conference” to discuss discovery and issues involving ESI, including “the extent to which such information is reasonably accessible, the likely costs ... who shall bear said costs, the form ... the need for and the extent of any holds... and the manner in which the parties propose to guard against the waiver of privilege.”

97. Utah, Ohio, and Tennessee amended Rule 16 to provide for discretionary conferences on the subject of electronic discovery. Montana amended Rule 16 to permit a scheduling order to include provisions regarding e-discovery. Iowa, New Jersey, Maryland, Michigan and Virginia expressly permit the court, in its discretion, to direct the parties to appear for a conference on e-discovery.

98. See ARK. R. CIV. P. 26.1.

99. The thirteen states that adopt verbatim the language of Rule 26(b)(2)(B) are Alaska, Arizona, Indiana, Iowa, Kansas, Maine, Michigan, Minnesota, Montana, Virginia, Utah, North Dakota, and New Jersey.

100. Ohio’s provisions set out four factors the court must consider in determining whether good cause exists. Maryland’s provisions addressing the “not reasonably accessible” threshold are unique because they highlight and codify the important concept found in the Federal Rules Advisory Committee Notes that the responding party must identify all sources it is not producing and “provide enough detail to enable the requesting party to evaluate the burdens and costs, and the likelihood of finding responsive information in the identified sources.” Additionally, Maryland Rule 2-402(b)(2) does not contain a “good cause” test. Instead, a Maryland litigant must establish that “its need for the discovery outweighs the burden and cost of locating, retrieving, and producing the information.” California’s e-discovery rule changes, enacted in June 2009, are based on legislation that was originally vetoed. The California amendments do not articulate a presumption against production of inaccessible ESI, but allow respondents to object to a request for ESI on the ground that the information

discovery by requiring “good cause” for production of “inaccessible” ESI, and allows courts to shift some or all costs to the requesting party by “specify[ing] conditions for the discovery.”⁹⁹ Four other states—Ohio, Maryland, California and Tennessee—have enacted rule changes that are modeled after the two-tiered test of the Federal Rules, but with modifications.¹⁰⁰ To date, Nebraska is the only state to enact a post-2006 e-discovery rule that does not address the scope of production, but provides simply that the responding party may object to a request for ESI “in which event the reasons for objection shall be stated,” including an objection to the requested form or forms of production.¹⁰¹

Three other states—New York, Wisconsin, and Florida—are currently considering e-discovery rules based on the Federal Rules, although a bill introduced in the New York State Assembly on February 23, 2009 is presently stalled.¹⁰² A few other states such as Illinois and Connecticut have rules that permit discovery of ESI, but

is “not reasonably accessible.” California’s provisions also explicitly require the responding party to identify inaccessible information in its responses. Arkansas, like California, allows a responding party to object to requests for ESI from sources that the party identifies as not reasonably accessible. The Tennessee Supreme Court developed a new set of rules on electronic discovery that became effective in July 2009. Patterned on the Federal Rules, the Tennessee rules cite a number of sources including the Federal Rules, as well as the Conference of Chief Justices Guidelines, see note 120, *infra*, and the Uniform Rules, see note 131, *infra*, discussed below.

101. See Neb. Ct. R. Disc. § 6-334.

102. New York Assembly Bill A-06000 would implement e-discovery rules in Article 31 of the Civil Practice Laws and Rules (“CPLR”), including a rule that a party “need not provide disclosure of electronically stored information that is not reasonably accessible” without a court order. See <http://assembly.state.ny.us/leg/?bn+A06000&sh=t>. The bill acknowledges that “the Commercial Division of the New York State Supreme Court has promulgated rules providing for the management of electronic discovery through early conferencing and inclusion of e-discovery issues in case management orders.” *Id.* See Rule 8 of the UNIFORM RULES OF THE COMMERCIAL DIVISION OF THE SUPREME COURT, 22 N.Y.C.R.R. § 202.70 (2006) (Rule 8 specifically requires counsel to confer regarding ESI prior to the Preliminary Conference). The bill also recognizes development of models such as the Uniform Rules, see note 131, *infra*, for states to employ but simply provides that “proposals to either adopt these Uniform Rules in New York or to incorporate any of their provisions into the CPLR are in the early stages of development.” *Id.* In August 2009, the Joint Committee on Electronic Discovery of the New York City Bar issued a report entitled *Explosion of Electronic Discovery in All Areas of Litigation Necessitates Changes in CPLR*, <http://www.nycbar.org/pdf/report/uploads/20071732-ExplosionofElectronicDiscovery.pdf> which proposes specific changes to the CPLR. The proposals suggest adoption of the two-tiered test for the scope of production under the Federal Amendments, but diverge from the amendments by suggesting a CPLR amendment to identify precisely when a party’s duty to preserve attaches. The Joint Committee’s proposed amendment to the CPLR would provide that a duty to preserve ESI is triggered if a dispute is “likely” to evolve into litigation. The Joint Committee rejects the standard of “reasonably anticipated” litigation applied by Judge Scheindlin in *Zubulake IV*, and quotes an interview with Judge Scheindlin in which she explains that the Second Circuit set this standard. *Id.* at 10. The Joint Committee believes that the word “likely” provides better guidance and a higher threshold for triggering the duty to preserve. *Id.* In April 2009, the Wisconsin Judicial Council petitioned the Supreme Court to adopt proposed e-discovery amendments which utilize some concepts from the Federal Rules, but after public hearings, the Court asked for a new petition that would rely more on the language of the Federal Amendments, including the Advisory Committee Notes, and require a mandatory meet and confer session. Wisconsin’s new rules will not be effective until January 2011. Additionally, the Court rejected the council’s recommendation for discretionary meet and confer sessions, and by a 5-2 vote, made conferences mandatory in all cases involving e-discovery. See *Say Cheese! Wisconsin Supreme Court Pictures New E-Discovery Rules ... Twice!*, E-DISCOVERY BYTES, <http://edicoverly.quarles.com/2010/05/>

have not been updated since 2006 to include any components of the Federal Amendments.¹⁰³ In several other states that have not adopted state-wide rules, local court rules may address electronic discovery.¹⁰⁴

B. Massachusetts

Massachusetts is among the states that have hesitated to act, preferring to take a wait and see approach by monitoring the Federal experience. In Massachusetts, the Standing Advisory Committee on the Rules of Civil and Appellate Procedure (SAC) is charged with reviewing existing rules and drafting the language of new rules or amendments, and all proposed amendments are published for public comment before they are submitted to the Supreme Judicial Court for approval. An Advisory Committee of judges, academics, legislators and lawyers drafted the original versions of the Massachusetts Rules of Civil Procedure (Mass. R. Civ. P.) and the Massachusetts Rules of Appellate Procedure (Mass. R. App. P.),¹⁰⁵ which were adopted by the Supreme Judicial Court, effective July 1, 1974. Subsequently, the Supreme Judicial Court established the SAC to study issues and assist the Supreme Judicial Court in reviewing and amending the rules.¹⁰⁶ The SAC monitors amendments to the Federal Rules of Civil Procedure to determine whether it should recommend similar amendments to the Massachusetts Rules, and is currently monitoring the new Federal electronic discovery rules and evaluating the experience of the Federal courts prior to proposing any e-discovery amendments to the Massachusetts Rules.¹⁰⁷ The deliberative process followed by the SAC is intended to ensure that any problems arising under the Federal Rules are fully considered before an amendment or rule change is recommended to the Supreme Judicial Court for promulgation.¹⁰⁸

In the meantime, of course, Massachusetts judges have had to deal with ESI issues under the existing rules. In 1999, for example, the Massachusetts Superior Court (Brassard, J.) issued a spoliation decision in *Linnen v. A. H. Robins Company, Inc.*,¹⁰⁹ one of the earliest e-discovery cases in which a court held that the defendant's spoliation of e-mail data stored on back-up tapes warranted the sanction of an "adverse inference" jury instruction. Mary J. Linnen, a 29-year old woman from Hingham, Massachusetts wanted to lose just enough weight to fit into her wedding dress, but before her marriage, she died from primary pulmonary hypertension (PPH). She

had taken the weight loss drugs Pondiminum (fenflouramine) and Ionamin (phentermine) that when prescribed together were called "fen/phen." Her parents brought a wrongful death lawsuit against the companies that manufactured, distributed and sold the weight loss drugs, as well as the prescribing doctor.

The *Linnen* case provided early guidance that companies must pay careful attention to their record retention policies. On the same day that the complaint was filed, the plaintiffs appeared before the court seeking an *ex parte* order "requiring preservation of documents."¹¹⁰ The court granted the motion and issued a preservation order that prohibited the defendants from destroying, erasing or deleting data compilations including "all backup computer files or devices." Under normal circumstances, recycling backup tapes is a widely accepted business practice, but Wyeth-Ayerst Laboratories ("Wyeth") did not suspend its normal practice or implement a "litigation hold" either in response to the lawsuit or to the court order. Two weeks later, the court vacated the order when Wyeth represented that it was not going to destroy evidence. For the next six months, Wyeth denied that it had any backup tapes containing e-mail responsive to plaintiff's discovery requests. Wyeth found "a few" backup tapes just prior to a Rule 30(b)(6) deposition, but designated a 30(b)(6) deponent who had no familiarity with the company's record retention policy and practices. Eventually, backup tapes "numbering over one thousand" were located but it was undisputed that backup tapes were not preserved until four months after the litigation began.

The court found that Wyeth's conduct in failing to preserve the ESI was "inexcusable" and warranted a jury instruction on a "spoliation inference" that would permit the jury to infer that the party who destroyed evidence did so "out of a realization that the evidence was unfavorable."¹¹¹ The case went to trial and Mary Linnen's family obtained a multi-million settlement—reportedly \$10 million—after the court imposed the sanction of an adverse jury instruction.¹¹²

Linnen, of course, is not binding on other cases and there are no specific state-wide e-discovery provisions. Although Mass. R. Civ. P. 34 permits a party to serve a request for documents that includes ESI,¹¹³ the Massachusetts Rules do not set out a mandatory or uniform approach to electronic discovery in every case. In Massachusetts, as in most jurisdictions, electronic discovery disputes are not a standard feature of state court litigation, but the frequency

articles/rules. See also *E-Discovery Under Construction*, WISCONSIN LAW JOURNAL, May 17, 2010, <http://www/wislawjournal.com>. The *Florida Bar News* reported in November 2009 that the Civil Procedure Rules Subcommittee on Electronic Discovery has been studying the application of the Federal Amendments since their passage, and is expecting to propose a set of e-discovery rules in Florida in 2010. *E-discovery Group to Introduce Rule Language in 2010*, THE FLORIDA BAR NEWS, November 15, 2009.

103. See ILL. SUP. CT. R. 201(b)(1) (Illinois defines "documents" to include "all retrievable information in computer storage"). In Connecticut, "good cause" must be shown for disclosure of ESI in a particular format. See CONNECTICUT PRACTICE BOOK, § 13-9 (Conn. P.B. § 13-9(d) also contemplates cost-shifting).

104. In Missouri, the statewide rules have not been updated, but the Local Court Rules for the Twenty-Fifth Judicial Circuit (Maries, Phelps, Pulaski, and Texas Counties), allow parties to request production of discovery in electronic format in addition to printed format. In North Carolina, the Local Rules for the North Carolina Business Court require a case management meeting that covers the topic of electronic discovery.

105. Christine P. Burak and Marc G. Perlin, *Making and Amending the Massachusetts Rules of Civil and Appellate Procedure*, 51 BOSTON BAR JOURNAL 13 (November/December 2007) (Hereinafter "*Burak, et al.*").

106. The SAC members are appointed by the Supreme Judicial Court and include judges, court clerks, law professors, and the practicing bar.

107. *Burak, et al.*, *supra* note 105, at 13.

108. *Id.* at 14. A Rules Committee of the Supreme Judicial Court, comprised of three Associate Justices, considers the SAC's recommendation and then presents the proposed rule or amendment to the Full Court for action. *Id.*

109. *Linnen v. A. H. Robins Company, Inc.*, 1999 WL 462015 (Mass. Superior Court 1999).

110. *Id.* at *8.

111. *Id.* at *11. The plaintiffs also asked the court to revoke the permission granted to defendants' attorneys to practice *pro hac vice* in Massachusetts, but the court declined to impose this sanction. *Id.* at *7.

112. *First PPH Diet Drug Wrongful Death Trial*, MARKET WIRE, March 2000, <http://findarticles.com>. A book was also written about Mary Linnen's story. See A. MUNDY, *DISPENSING WITH THE TRUTH* (2002).

113. See MASS. R. CIV. P. 34(a). Rule 34 defines the term document to include "data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form."

of electronic discovery-related questions is increasing, as reliance on electronic records by businesses and individuals becomes nearly universal.

One place where discovery issues involving ESI have become more common is the Superior Court's Business Litigation Section (BLS). As a consequence, in January 2010, the Court implemented a discovery pilot project that was developed through a joint effort of the BLS judges and the BLS Advisory Committee.¹¹⁴ The Pilot Project is voluntary for all cases filed in the BLS between January 4, 2010 and December 31, 2010. It adopts many of the proposed principles in the Final Report of the American College of Trial Lawyers and the Institute for the Advancement of the American Legal System. Those principles are discussed below and center on a premise that limited discovery proportionally tied to the magnitude of the claims actually at issue will be the guiding principle.¹¹⁵ The Pilot Project contemplates that issues such as the scope and timing of discovery will be determined by the court, in collaboration with the parties, generally at a Rule 16 case management conference and if possible, discovery will be staged. If the parties cannot agree about the scope of electronic discovery, the court will issue an order governing proportional electronic discovery and the allocation of its costs.¹¹⁶ Thus, participants in the BLS Pilot Program will have the opportunity to fully utilize Rule 16.

Neither Massachusetts trial or appellate courts have yet directly addressed the thorny issue of when a pre-litigation duty to preserve ESI arises. In *Testa v. Wal-Mart Stores, Inc.*, however, the First Circuit held that the district court properly gave an instruction permitting the jury to draw an adverse inference from pre-litigation destruction of a paper purchase order and telephone records pursuant to a routine corporate record retention policy.¹¹⁷ The First Circuit ruled that "[t]his permissive negative inference springs from the commonsense notion that a party who destroys a document (or permits it to be destroyed) when facing litigation, knowing the document's relevancy to issues in the case, may well do so out of a sense that the document's contents hurt his position."¹¹⁸ Likewise, in *Binzler v. Marriott International, Inc.*, the First Circuit ruled that an adverse inference could be drawn by the jury when a defendant destroyed a telephone log of a call for an ambulance approximately thirty days after the incident, even if the log was destroyed in the ordinary course of business, pursuant to established practice.¹¹⁹

C. Resources for State Approaches to ESI

To help Massachusetts and other states as they contemplate methods for dealing with the complexities of ESI discovery, several comprehensive reference tools aimed at state court practice and practitioners are available. These tools offer advice to judges and lawyers for dealing with ESI discovery, as well as a preview of what

future Massachusetts e-discovery amendments may provide. Each, therefore, is worth discussing.

1. The Chief Justices E-Discovery Guidelines

Responding to the need for ESI discovery guidance, the Conference of Chief Justices ("CCJ"), an organization comprised of the highest judicial officer of each state, established at its 2004 Annual Meeting a working group to develop a comprehensive document to guide state courts in the area of e-discovery. The Conference named then Supreme Judicial Court Chief Justice Margaret H. Marshall as chair of the e-discovery task force, and after a two-year process during which a draft of ESI discovery guidelines was circulated for comment to each state's Chief Justice, as well as to lawyer organizations and e-discovery experts, the Conference approved a document entitled "*Guidelines for State Trial Courts Regarding Discovery of Electronically Stored Information*" ("*The Guidelines*") on August 2, 2006.¹²⁰

The Guidelines state that they are designed to be a reference tool "to help in identifying the issues and determining the decision-making factors to be applied in the circumstances of a specific case,"¹²¹ and should be considered along with other resources such as the Federal Rules Amendments. According to Chief Justice Marshall, *The Guidelines* were issued "so that state courts could have the benefit of collective wisdom until each addresses the subject of rule changes."¹²² *The Guidelines* recognize that the "final determination of what procedural and evidentiary rules should govern questions in state court proceedings (such as when inadvertent disclosures waive the attorney-client privilege) are the responsibility of each state, based on its legal tradition, experience, and process."¹²³

The Guidelines are largely consistent with the Federal Rules Amendments but there are minor differences which, in practice, may eventually help to shape Massachusetts' own e-discovery amendments.¹²⁴ Guidelines 2 and 3 provide an approach to early conferencing that can be utilized by the Massachusetts bench and bar in place of the early discovery and conference provisions of the Federal Rules. Guideline 2 suggests that in cases where discovery of ESI may become an issue, judges should implement the early disclosure themes of Federal Rules 26(a) and 26(f) by establishing the expectation early in the case that counsel must become familiar with the operation of their client's information management systems. Guideline 3 recommends that if discovery of ESI may become an issue, the trial judge should encourage counsel to meet, confer and reach a voluntary agreement regarding ESI discovery. In cases where counsel do not reach an agreement, the judge should issue an order directing counsel to exchange basic descriptive information (8 categories are listed in the guideline) to identify ESI, and provide a framework for addressing preservation issues. This guideline

114. The Pilot Project will be in effect initially from January through December 2010. See Press release, Superior Court Implements Discovery Pilot Project, <http://www.mass.gov/courts/press/superior-bls-pilot-project.pdf> (last viewed May 23, 2010).

115. *Id.*

116. *Id.*

117. *Testa v. Wal-Mart Stores, Inc.*, 144 F.3d 173 (1st Cir. 1998).

118. *Id.* at 177-178.

119. *Binzler v. Marriott Int'l, Inc.*, 81 F.3d 1148 (1996).

120. CONFERENCE OF CHIEF JUSTICES, GUIDELINES FOR STATE TRIAL COURTS

REGARDING DISCOVERY OF ELECTRONICALLY STORED INFORMATION (2006) ("GUIDELINES"). *The Guidelines* are available at <http://www.ncsconline.org/images/EDiscCCJGuidelinesFinal.pdf>.

121. GUIDELINES, *supra* note 120, at ix.

122. See Barbara Rabinovitz, *State's Trial Courts To Offer Guidelines On E-Discovery*, *SJC's Marshall Leading National Effort On Topic*, MASSACHUSETTS LAWYERS WEEKLY, December 25, 2006.

123. GUIDELINES, *supra* note 120, at ix-x.

124. Jeffrey S. Follett, *The Chief Justices' E-Discovery Guidelines: Worth A Look*, 51 BOSTON BAR JOURNAL 9 (May/June, 2007).

combines elements from Federal Rules 26(a), 26(f), and 16(b)(3) (B). The comment notes that it is an alternative approach to the Federal Rules since most states do not require initial conferences or follow the three steps of Federal practice under Rules 16, 26(a)(1) and 26(f).¹²⁵

Although Mass R. Civ. P. Rule 16 is a mechanism for early pre-trial conferences available to Massachusetts judges and attorneys, it is used unevenly by the circuit-riding Superior Court judges. As noted earlier, an exception is in the Superior Court BLS which routinely conducts a Rule 16 conference for the purpose of establishing a case-specific tracking order. In operation, the BLS uses the Federal model where a single judge is assigned to the case from beginning to end, and participates with the lawyers in the management of the case. The BLS is ideally suited for the process outlined by *The Guidelines*, because management of e-discovery is facilitated by having a judge with full knowledge of the case.

Whether in the BLS or Federal court, however, the initial Rule 16(b) pretrial conference is usually not held until months after the complaint is served, and the reality is that an enormous amount of data can be deleted, overwritten or irretrievably lost during that period. In Federal practice, a party who fails to raise preservation issues, or request a “litigation hold” during the mandatory “meet and confer” process under Rule 26(f) does so at its own peril—absent actual awareness that specific sources of ESI are sought, a safe harbor may exist for good faith, routine destruction. The Chief Justices Guideline 9 highlights the availability of preservation orders, and underscores the court’s ability to enter a preservation order early in the case. A court order describing what must be preserved may avoid subsequent litigation about spoliation.

Another major difference between *The Guidelines* and the 2006 Federal Rules Amendments is that *The Guidelines* do not adopt the Rule 26(b)(2)(B) framework which depends upon presumptions regarding “reasonably accessible” and “not reasonably accessible” data.¹²⁶ Instead, Guideline 5 suggests that in deciding a motion for a protective order or to compel discovery, thirteen factors should be weighed by the court in determining whether to order production. The approach embodied in Guideline 5 implicitly sides with critics of the 2006 Amendments who suggest that its two-tiered approach invites parties to avoid discovery by keeping information in a form that is not “reasonably accessible,” and/or unilaterally claiming that information is “not reasonably accessible” without any real basis.¹²⁷ Some observers note that undue burden or cost in discovery can be addressed by the existing “good cause” limitations on discovery in Rule 26, without introducing a special “two-tiered” good cause requirement for electronic discovery. Other commentators counter that increased efficiency was at the forefront of the Advisory Committee’s concerns, and the “two-tiered” approach was intended to encourage party-managed discovery by defining the scope of discovery for various sources. The Advisory Committee felt that absent

an explicit “two-tiered” approach, a party would be required to file a motion for protective order every time a Rule 34 request “sought information that might be contained on backup tapes or in legacy data.”¹²⁸

Another consideration that supports the approach taken in *The Guidelines* is the effect that advances in technology may have on the presumption of inaccessibility Federal law attaches to certain categories of ESI. Six years ago when the *Zubulake* series of opinions were written, backup tapes were deemed *per se* inaccessible on the grounds that each tape took approximately five days to restore at an enormous expense.¹²⁹ Today, given sweeping advances in technology, it may be feasible to restore backup tapes in a few hours instead of days; thus data that was once deemed *per se* inaccessible because it was available only on expensive-to-restore backup media may be more accessible.¹³⁰ The 2006 Amendments, however, were written broadly enough to encompass advances in technology and define “inaccessibility” solely in terms of undue burden or cost.

Both the 2006 amendments and *The Guidelines* advise parties to consider the issue of metadata. Guideline 6, like Rule 34(b), provides that in the absence of an agreement, the producing party should produce ESI in the form in which it is “ordinarily maintained” or in a “reasonably useable” form. Neither the 2006 Amendments nor *The Guidelines*, however, reveal whether “in the form or forms in which it is ordinarily maintained” encompasses metadata. As the Comment to Guideline 6 points out, “[w]hether ... metadata and other forms of hidden information, are discoverable should be determined upon the particular circumstances of the case.” The form of production is also treated similarly under *The Guidelines* and the Federal Rules. *The Guidelines* provide simply that the judge should select the form in the absence of an agreement. Rule 34(b) reaches essentially the same result by giving the requesting party the right to specify the form. If the responding party objects and the parties cannot resolve the dispute, the court will ultimately decide the issue on a motion to compel.

Finally, *The Guidelines* offer the same “safe harbor” as Rule 37(e), and create the same “good faith” principles embodied in Rule 37(e) for information lost due to the routine operation of a computer system. Guideline 5 suggests that in determining a motion to compel or motion for protective order, a judge should consider whether the responding party has deleted ESI “after litigation was commenced or after the responding party was aware that litigation was *probable*.” The Committee Notes to the 2006 Amendments suggest that a preservation duty arises when there is “pending or *reasonably anticipated* litigation,” and similarly, *Zubulake IV* identified “*reasonably anticipated* litigation” as the trigger for a party’s obligation to institute a litigation hold.

To the extent *The Guidelines* differ from the 2006 Federal Amendments, they offer the state bench and bar a different perspective. More importantly, the pedigree of *The Guidelines*, with

125. The framework contains three steps. “Step 1: counsel exchange basic information and become familiar with their client’s ESI; Step 2: counsel confer to attempt to resolve key discovery issues and develop a discovery plan; Step 3: a hearing and order memorialize the plan and resolve issues.” GUIDELINES, *supra* note 120, at 3, n.7.

126. See generally Thomas Y. Allman, *The “Two-Tiered” Approach to E-Discovery: Has Rule 26(B)(2)(B) Fulfilled Its Promise*, 14 RICH J.L. & TECH. 1 (2008), <http://jolt.richmond.edu/v14i3/article7.pdf>.

127. See, e.g., INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL

SYSTEM AT THE UNIVERSITY OF DENVER, NAVIGATING THE HAZARDS OF E-DISCOVERY, A MANUAL FOR JUDGES IN STATE COURTS ACROSS THE NATION 11 (2007) (“STATE JUDGES’ MANUAL”).

128. Allman, *supra* note 127, at 33 n. 172.

129. See *Zubulake I*, 217 F.R.D. at 314.

130. David M. Hickey and Veronica Harris, *California Rules to Amend Inaccessible ESI*, THE RECORDER, March 27, 2009, <http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202429426048>.

Massachusetts Supreme Judicial Court Chief Justice Margaret Marshall the chair of the task force that drafted them, means they should be accorded a high level of authority as they may contain principles underlying future Massachusetts rule changes.

2. *The Uniform Rules Relating To the Discovery of Electronically Stored Information*

In 2007, the Uniform Law Commission (“ULC”), also known as National Conference of Commissioners on Uniform State Laws (“NCCUSL”) approved and recommended proposed judicial rules entitled “*Uniform Rules Relating to the Discovery of Electronically Stored Information*” (the “*Uniform Rules*”).¹³¹ A preface to the *Uniform Rules* recognizes the six-year effort by the Federal Civil Rules Advisory Committee that led to the 2006 amendments.¹³² The Uniform Law Commission promulgated rules that freely adopt, often verbatim, the language of the Federal Rules and comments, based on the conclusion that the major issues in electronic discovery had been vetted during the Federal Rules amendment process, and it was unnecessary to “reinvent the wheel.”¹³³ The *Uniform Rules* is intended to accommodate state procedures, and is presented in a form that facilitates adoption by states as a supplemental set of rules applicable to discovery of electronically stored information separate from other rules relating to civil discovery.¹³⁴ The *Uniform Rules* mirrors the spirit and direction of the Federal Rules.

The *Uniform Rules* is intended to strengthen the federal system by providing rules and procedures for electronic discovery that are consistent from state to state.¹³⁵ Like *The Guidelines*, the *Uniform Rules* is the product of a concerted effort to provide uniformity and predictability that is particularly helpful in resolving disputes arising out of interstate commerce.

3. *A Manual for Judges in State Courts Across the Nation*

The Institute for the Advancement of the American Legal System (“IAALS”) at the University of Denver has produced a manual on electronic discovery for state judges and practitioners. The manual is entitled *Navigating the Hazards of E-Discovery*, and is subtitled “*A Manual for Judges in State Courts Across the Nation*.” (“*State Judges’ Manual*” or “*Manual*”). In a forward to the *Manual*, former Colorado Supreme Court Justice Rebecca Love Kourlis, the Executive Director of the Institute, explains that “[w]hen I left the Colorado Supreme Court in January of 2006, I had never heard the acronym ‘ESI.’”¹³⁶ The *Manual* organizes vocabulary (including a short glossary of e-discovery terms), concepts, and issues, and provides critiques of various e-discovery tests for production and cost shifting that are now codified in the Federal Rules. While not itself proposing e-discovery rules, the *Manual* offers direction to the bench and bar in navigating the stormy e-discovery sea.

Potential traps for the unwary are detailed in a section on “Form of Production,” a subject addressed generally in the Federal Rules, *The Guidelines*, and *Uniform Rules*, but with limited terminology and

few practical tips. For example, the Federal Rules, *The Guidelines* and *Uniform Rules* are all in agreement that parties should not be required to produce electronically-stored information in multiple formats and that, in the absence of agreement, ESI should be produced in the form or forms in which the information is ordinarily maintained, or in a form that is “reasonably useable.”¹³⁷ By perusing both the Comment to Guideline 6, and the Advisory Committee Notes to Rule 34(b), one learns that producing all data in “native format”—streams of electrons on disks or tapes—will provide all of the hidden or metadata but may be difficult to search without the database software needed to organize the information in a coherent form. That problem led to the requirement in both the Federal Rules and *The Guidelines* for production in a “reasonably useable form,” which may require the responding party to provide software to “translate” or some technical support. The *Manual* goes a step further by providing helpful insights about the characteristics, benefits and drawbacks of various forms of production. For example, should the ESI be printed out? Or produced in its native format? Or converted to an electronic image such as a PDF or TIFF file?¹³⁸

The *Manual* instructs that information in a native file may be imaged to an unalterable electronic file such as a PDF or TIFF which provides a picture or snapshot of the native file, but does not allow the recipient to see any metadata. Spreadsheets in PDF files have limited searchability and may be only slightly more useful than reviewing the spreadsheet on paper.¹³⁹ (Invisible metadata, such as the formulae used to calculate figures on a financial spreadsheet is often input by human users but not displayed on the spreadsheet). TIFF files, like PDF files, are essentially a snapshot of the native file and do not allow the viewer to see any metadata, but can be Bates numbered and may be text searchable.¹⁴⁰

Still, practitioners must be careful to avoid spoliation, and be aware that improper shredding of paper documents is not without electronic analogues.¹⁴¹ Extreme examples of spoliation involve software such as “Evidence Eliminator” designed to scrub a hard drive of all documents. But also of concern, says the *Manual*, may be the “removal of all metadata from native electronic files before production to the opposing party.”¹⁴²

The often prohibitive cost of e-discovery is also explored at length in the *Manual*, which notes that in a complex litigation case between two large corporate parties, the amount of ESI “can generate the equivalent of more than one hundred million pages, which would require 6,250 trees to print out and would take about 30 person-years of review for each party.”¹⁴³ Several solutions are endorsed, such as the universally proposed suggestion of early conferencing to reach clear and specific agreements about the scope of production. Additionally, the *Manual* contains other tools to keep e-discovery under control such as those explored in detail in the *Zubulake* opinions. Those tools include limiting the amount of ESI that can be requested, requiring advanced search techniques, and, where backup tapes are at issue, requiring sampling to determine whether they really contain relevant evidence.¹⁴⁴

131. UNIFORM RULES RELATING TO THE DISCOVERY OF ELECTRONICALLY STORED INFORMATION (2007) (“UNIFORM RULES”), available at http://www.law.upenn.edu/bll/archives/ulc/udoera/2007_final.htm.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. STATE JUDGES’ MANUAL, *supra* note 127, at 1.

137. See FED. R. CIV. P. 34(a), (b); GUIDELINES, *supra* note 120, at 6.

138. STATE JUDGES’ MANUAL, *supra* note 127, at 16.

139. *Id.*

140. *Id.* at 17.

141. *Id.* at 13.

142. *Id.*

143. *Id.* at 5.

144. *Id.* at 9.

When backup or legacy data must be restored, electronic discovery may require the use of outside vendors, at enormous costs. Shifting all or part of the costs of electronic discovery has become accepted as a means to protect a party against undue burden or expense and the two-tiered test devised by Judge Scheindlin in the *Zubulake* cases is now codified in Federal Rule 26(b)(2)(B). Despite this endorsement, the *Manual* observes that “the test is not without significant flaws,”¹⁴⁵ and questions whether the test will become problematic for courts in practice. The *Manual* suggests, as have other commentators, that the “good cause” provision of Rule 26(b)(2)(B) is not fundamentally different from the other “good cause” provisions in Rule 26(b) that allow a court, in its discretion, to compel the production of documents and that the distinction between “accessible” and “inaccessible” ESI is both artificial and unnecessary.¹⁴⁶

A more bright-line test pioneered in Texas is whether the requested electronic data is “reasonably available to the responding party in the ordinary course of business.”¹⁴⁷ The *Manual* reports that only a small number of states have worked to address the cost-shifting issue and all have gravitated towards this test by placing the burden of production costs on requesting parties.¹⁴⁸ Since the manual was written, however, state approaches have changed and, by September 2009, at least twenty states had adopted e-discovery rules that do not utilize the Texas test. As a result, nearly half of the states have now implemented e-discovery rules with provisions either codifying or emulating the two-tiered approach of Rule 26(b)(2)(B).

4. Final Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System

Beginning in mid-2007, The American College of Trial Lawyers (“ACTL”)¹⁴⁹ Task Force on Discovery (“Task Force”)¹⁵⁰ and the Institute for the Advancement of the American Legal System (“IAALS”)¹⁵¹ at the University of Denver began working together on a joint project to study the role of discovery in the state and federal civil justice system and to make recommendations for reform.¹⁵² The Task Force administered a written survey to ACTL Fellows¹⁵³ in the Spring of 2008, and three major themes emerged from the survey: First, although the object of the civil justice system, as described in Rule 1 of the Federal Rules of Civil Procedure, is “the just, speedy, and inexpensive determination of every action and proceeding,”

that object is not being met and the system is “in serious need of repair.”¹⁵⁴ Civil bench trials and civil jury trials are disappearing due to the expense and delay of discovery, as cases are being settled rather than tried.¹⁵⁵ Second, the existing discovery rules promote an approach to discovery that makes electronic discovery, in particular, a “nightmare ... the bigger the case the more the abuse and the bigger the nightmare.”¹⁵⁶ Third, judges need to manage each case more actively in order to contain costs.¹⁵⁷

On March 11, 2009, after serious consideration of solutions for the problems they identified, the Task Force and IAALS issued a *Final Report* unanimously recommending twenty-nine “Proposed Principles” that call for sweeping changes in discovery and case management, including a revision of the rules of civil practice and procedure in jurisdictions throughout the United States. Targeting the discovery process as lacking proportionality and failing a rational cost-benefit test, the *Final Report* recommends that at the pleading stage, notice pleading should be replaced by fact-based pleading to avoid unnecessary discovery. The *Final Report* recommends a new summary procedure on legal issues similar to a declaratory judgment action, where full discovery is not required, and urges counsel and the courts to embrace the “principle of proportionality”, by staging discovery. The principle of proportionality permits only limited discovery proportionately tied to the issues in dispute and amount in controversy.

In the first stage of discovery, immediately after the commencement of litigation, each party should produce without a formal request, all documents readily available that can be used to support that party’s claims, counterclaims or defenses.¹⁵⁸ These initial disclosures would be broader than those required by Federal Rule 26(a)(1)(ii) because the *Final Report* would require actual production rather than a description of documents by category and location. The *Final Report*’s most radical proposal is that after the initial disclosures, only limited additional discovery should be permitted. Although broad unbridled discovery limited only by relevance and/or materiality has been the hallmark of our system, the *Final Report* seeks to “reverse the default,” and change the scope of discovery to allow only such “limited discovery as will enable a party to prove or disprove a claim or defense.”¹⁵⁹ Thus, the goal is to change the default from unlimited discovery to limited discovery.

In the arena of electronic discovery, the *Final Report* recommends that judges hold an initial mandatory ESI conference immediately

145. *Id.* at 11.

146. *Id.*

147. *See* TEX. R. CIV. P. 196.4.

148. *Id.*

149. The American College of Trial Lawyers was founded in 1950, and “strives to improve and elevate the standards of trial practice, the administration of justice and the ethics of the trial profession.” FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM i (2009) (“FINAL REPORT”) available at <http://www.du.edu/legalinstitute/form-ACTL-Final-Report.html>.

150. The Task Force has been renamed the “Task Force on Discovery and Civil Justice.”

151. The Institute for the Advancement of the American Legal System (IAALS) at the University of Denver is a national non-partisan organization “dedicated to improving the process and culture of the civil justice system.” FINAL REPORT, *supra* note 149, at iii.

152. FINAL REPORT, *supra* note 149, at 1. The project had its genesis when

former Colorado Supreme Court Justice Rebecca Love Kourlis, the Executive Director of the Institute, participated in the ACTL’s Spring 2007 Meeting project, which addressed the phenomenon of the vanishing civil trial. Justice Kourlis suggested a joint study with her organization, the IAALS, and David J. Beck, then president of the ACTL, appointed an ad hoc task force to work jointly with the IAALS. *See Task Force Report Gets Wide Publicity*, THE BULLETIN, <http://www.du.edu/legalinstitute/news/BulletinACTLSummer09.pdf> (last visited July 23, 2010)

153. The survey was administered to the 3,812 Fellows of the ACTL and of those, 1,494 responded. The respondents averaged 38 years in the practice of law, with 24% representing plaintiffs exclusively, 31% representing defendants exclusively, and 44% representing both. FINAL REPORT, *supra* note 149, at 2.

154. *Id.* at 2.

155. *Id.* at 3.

156. *Id.*

157. *Id.*

158. *Id.* at 7-8.

159. *Id.* at 8, 9. The FINAL REPORT explains that, “Today, the default is that

after a complaint is served for the purpose of issuing a preservation order identifying what must be preserved, thereby avoiding “collateral litigation about evidence spoliation ... [which] can be used tactically to derail a case, drawing the court’s attention away from the merits of the underlying dispute.” The *Final Report* recommends increased judicial case management, with a single judge assigned to each lawsuit from beginning to end, as in Federal practice, and initial pretrial conferences as early as possible. The goal is for early intervention by judges, especially in complex cases, to help narrow the issues and limit discovery.¹⁶⁰

5. The May 2010 Conference on Civil Litigation at Duke Law School

The *Final Report* inspired the trial bar, the judiciary, rule makers, and other stakeholders in the civil justice system to convene a major conference aimed at exploring civil litigation reform. Shortly after the *Final Report’s* release in March 2009, the Civil Rules Advisory Committee of the United States (“Civil Rules Advisory Committee”) asked the American Bar Association Section of Litigation (the “Section”) to administer essentially the same survey to its members to determine their views about pre-trial practice in the Federal courts. The Federal Judicial Center also administered the survey to members of the National Employment Lawyers Association (“NELA”).¹⁶¹ In addition, the Federal Judicial Center performed a survey of closed cases to look at discovery patterns they contained.¹⁶²

With the survey results in hand, the Civil Rules Advisory Committee then sponsored a conference at Duke University School of Law on May 10 and 11, 2010 (the “Duke Conference”) to assess and discuss the empirical research, explore the current costs of civil litigation, and consider improvements that could be made in the federal civil litigation process, including the discovery process (and particularly e-discovery) to effectuate the primary purpose of the Civil Rules, i.e., “to secure the just, speedy and inexpensive determination of every action and proceeding.” A number of thoughtful papers addressing ESI were presented at the conference and provide

a significant resource for those who are thinking about methods for dealing with the myriad issues discovery of ESI presents.¹⁶³

One major proposal that emerged from the Conference was addition to the Federal Rules of a rule addressing preservation of ESI.¹⁶⁴ As presently drafted, the Federal Rules do not directly say when a company must start preserving ESI that would otherwise be destroyed as part of a general record-retention policy. The Committee Notes to Rule 37 advise that “[w]hen 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,’” but the comment does not say when the obligation begins. Moreover, authorities generally agree that procedural rules should not regulate prelitigation conduct, and Rule 37 does not by its terms permit sanctions for destruction of ESI prior to the commencement of a lawsuit.¹⁶⁵ Thus, when a court imposes sanctions for prelitigation conduct, it relies on its inherent powers, rather than on a rule. Therefore, it is likely that any new amendments to the Federal Rules that address preservation will be limited to post-commencement conduct, while common law principles or statutory obligations will continue to apply to prelitigation duties.¹⁶⁶

The Federal Rules likewise do not address what a party must preserve once a preservation obligation arises. Before the 2006 Amendments were finalized, a draft version of the Advisory Committee Note under Rule 26(b)(2)(B) explained that “[I]n most instances, a party acts reasonably by identifying and preserving [only] reasonably accessible electronically stored information.”¹⁶⁷ The Advisory Committee did not include this draft language in the final version of Rule 26 in order to “clarify that the rule does not undermine or reduce common-law or statutory preservation obligations.”¹⁶⁸

The e-discovery panelists at the Duke Conference also considered whether a new Federal Rule should define the standard of conduct applicable to preservation obligations in order to remove any ambiguity in the Federal Rules and promote uniformity in the decisions of the circuit courts regarding the degree of culpability

there will be discovery unless it is blocked.” *Id.* at 10.

160. The Task Force and the Institute also drafted a set of rules that can be used to govern pilot projects aimed at implementing reforms the *Final Report* suggests. See THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, 21ST CENTURY CIVIL JUSTICE SYSTEM: A ROADMAP FOR REFORM, PILOT PROJECT RULES,

http://www.du.edu/legalinstitute/pubs/pilot_project_rules.pdf

161. See *Report from the Task Force on Discovery and Civil Justice of the ACTL and IAALS to the 2010 [Duke] Civil Litigation Conference*, p. 2, n. 2, <http://www.du.edu/legalinstitute/form-2010civil.html>.

162. Lee and Willging, Federal Judicial Center National, Case-Based Civil Rules Survey (October 2009). Available at [http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/\\$file/dissurv1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf).

163. The Duke Conference maintains a website at <http://civilconference.uscourts.gov>, where the conference agenda, empirical research, and all of the papers submitted by the conference panelists are available.

164. The proposal was made by a panel that addressed a topic entitled “E-Discovery: Discussion of the Cost Benefit Analysis of E-Discovery and the Degree to Which the New Rules are Working or Not.” The panel was comprised of leaders in the field of e-discovery including United States District Judge Shira Scheindlin and Thomas Allman, an editor of *The Sedona Principles*.

165. See Thomas Allman, *Preservation and Spoliation Revisited: Is it Time for Additional Rulemaking?*, 2010 Litigation Review Conference, Duke Law

School, (May 10-11, 2010) available at [http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/\\$defaultview/02E441B3AD64B2D9852576DB005D976D/\\$File/Thomas%20Allman%2C%20Preservation%20and%20Spoliation%20Revisited.pdf?OpenElement](http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/02E441B3AD64B2D9852576DB005D976D/$File/Thomas%20Allman%2C%20Preservation%20and%20Spoliation%20Revisited.pdf?OpenElement). In his article, Allman notes, “The conventional wisdom is that the Enabling Act does not authorize rulemaking applicable to conduct during the period before commencement of litigation, a situation which is particular[ly] complex when federal jurisdiction rests in diversity.” *Id.* at 6.

166. See John Barkett, *Walking the Plank, Looking Over Your Shoulder, Fearing Sharks Are in the Water: E-Discovery in Federal Litigation?*, 2010 Litigation Review Conference, Duke Law School, (May 10-11, 2010) p. 28, n. 6. available at [http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/\\$defaultview/699991AD4965C1A78525771C0060372C/\\$File/John%20Barkett%2C%20Walking%20the%20Plank.pdf?OpenElement](http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/699991AD4965C1A78525771C0060372C/$File/John%20Barkett%2C%20Walking%20the%20Plank.pdf?OpenElement).

167. See Ken Withers, *Two Tiers and a Safe Harbor: Federal Rulemakers Grapple with E-Discovery* 38 (2004), <http://www.kenwithers.com/articles/tf0904.pdf>.

See also Allman *supra* note 165 at 3. In *Zubulake IV*, Judge Scheindlin instructed that “as a general rule, th[e] litigation hold does not apply to inaccessible backup tapes ... however, it does make sense to create one exception to this general rule. If the company can identify where particular employee documents are stored on backup tapes, then the tapes storing the documents of ‘key players’ to the existing or threatened litigation should be preserved if the information contained on those tapes is not otherwise available.” *Zubulake IV*, 220 F.R.D. at 217-218.

168. See Allman, *supra* note 165.

required to trigger sanctions, but no uniform approach emerged. In some circuits, negligence is enough to warrant sanctions, but in other circuits bad faith is required.¹⁶⁹ Federal Rule 37(e) provides a safe harbor for “information lost as a result of the routine good-faith operation of any electronic system,” but the rule bars sanctions only if the party took reasonable steps to preserve information after the duty to preserve arose. The Committee Notes to Rule 37(e) explain that “good faith ... 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.” But the nature of the conduct required for imposition of sanctions remains unclear.

One approach is taken in Judge Scheindlin’s recent opinion in *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC*,¹⁷⁰ which addresses the culpability standards that apply in the Southern District of New York when a party fails to implement a litigation hold. In *Pension Committee*, the court found that no plaintiff engaged in willful misconduct, but that after the final *Zubulake* opinion was issued in July 2004, a failure to issue a written litigation hold when the duty to preserve has attached “supports a finding of gross negligence,” and warrants an instruction permitting an adverse inference.¹⁷¹ The *Pension Committee* opinion drew the gross negligence standard from the Second Circuit’s 2002 decision in *Residential Funding Corp. v. DeGeorge*,¹⁷² which was not a typical spoliation case because the plaintiff had not destroyed ESI, but instead had delayed the production of e-mails on back-up tapes until just before the trial started.

The question of what standard of culpability applies to ESI preservation duties has not been addressed yet in the First Circuit, but in *Sacramona v. Bridgestone/Firestone, Inc.*, the First Circuit rejected the notion that sanctions for spoliation may not be imposed in the absence of bad faith.¹⁷³ In a case decided two years later, *Trull v. Volkswagen of America, Inc.*, the Court confirmed that “our case law does not require bad faith or comparable bad motive” to impose a serious evidentiary sanction.¹⁷⁴ In other jurisdictions, including the Fifth and Eleventh Circuits, however, bad faith is required before an adverse inference may be drawn from the destruction of potential evidence.¹⁷⁵

More recently, judges and commentators (including several Duke Conference e-discovery panelists) have questioned whether the Supreme Court’s decision in *Chambers v. NASCO, Inc.*¹⁷⁶ limits a court’s inherent power to impose sanctions to cases in which a litigant has engaged in bad faith conduct.¹⁷⁷ In *Chambers*, the sole

shareholder of a television station, G. Russell Chambers (“Chambers”), entered into an agreement to sell the station’s facilities and broadcast license for \$18 million, but later changed his mind. Aware that the buyer, NASCO, Inc. (“NASCO”) was planning to seek specific performance of the agreement and a TRO to prevent alienation of the properties, Chambers and his attorneys attempted to deprive the Court of jurisdiction by acts of fraud and engaged in other tactics of delay, oppression, harassment and massive expense intended to “reduce plaintiff to exhausted compliance.”¹⁷⁸ The district court resorted to its inherent powers to award \$996,644.65, the entire amount of NASCO’s attorney’s fees and costs, as a sanction for Chambers’s conduct. In doing so, the court did not rely on Rule 11 or 28 U.S.C. § 1927¹⁷⁹ because these mechanisms would not reach all of the acts that degraded the judicial system.

The Supreme Court affirmed the district court’s sanction of attorney’s fees, ruling that a court’s inherent “powers are ‘governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.’”¹⁸⁰ The Court cautioned, however, that “[b]ecause of their very potency, inherent powers must be exercised with restraint and caution ... [and] [a] primary aspect of that discretion is the ability to fashion an appropriate sanction for conduct which abuses the judicial process.”¹⁸¹ The Court then addressed three exceptions to the American rule against fee shifting which permit a court to exercise its inherent powers to assess attorney’s fees, one of which is “bad faith” conduct by a party. The Court made it clear that, although “the inherent power must continue to exist to fill in the interstices” in statutes and rules that provide sanctions for particular conduct, bad faith was required for an award of attorney’s fees to fill in the gaps for conduct that was not specifically sanctionable under a rule or statute.¹⁸²

Whether bad faith conduct is also required before a Federal court may impose evidence-based sanctions for prelitigation destruction of ESI is debatable.¹⁸³ Uncertainty regarding the level of culpability required to invoke a court’s inherent powers to impose sanctions may remain until the issue is addressed by the Supreme Court or Congress. It would seem, however, that the states are free to address the issue through statutes, rules or judicial decisions.

PART III. RECOMMENDATIONS

As noted in the introduction to this article, e-mail use has exploded in the past ten years and the digital revolution has transformed the legal landscape. As electronically created and stored

169. See Allman, *supra* note 165.

170. *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC*, 2010 WL 184312 (S.D.N.Y. 2010)

171. *Pension Committee*, 2010 WL 184312 at *18-19 (S.D.N.Y. 2010) (explaining that the right to impose sanctions for spoliation arises from a court’s inherent power to control the judicial process and litigation.)

172. *Residential Funding Corp. v. DeGeorge*, 306 F.3d 99, 107 (2d Cir. 2002).

173. *Sacramona v. Bridgestone/Firestone, Inc.*, 106 F.3d 444, 447 (1st Cir. 1997). There, the First Circuit ruled that “[c]ertainly bad faith is a proper and important consideration in deciding whether and how to sanction conduct resulting in the destruction of evidence. But bad faith is not essential. If such evidence is mishandled through carelessness, and the other side is prejudiced, we think that the district court is entitled to consider imposing sanctions, including exclusion of the evidence.” *Id.*

174. *Trull v. Volkswagen of Am., Inc.*, 187 F.3d 88, 95 (1st Cir. 1999). See also *Veletz v. Marriott PR Mgmt., Inc.*, 590 F. Supp. 2d 235, 258-259 (D.P.R. 2008).

175. *Barkett*, *supra* note 166, at 29.

176. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 111 S.Ct. 2123 (1991).

177. *Barkett*, *supra* note 166, at 29. See also *Rimkus Consulting Group, Inc. v. Cammarta*, 2010 WL 645253 (S.D.Tex. 2010).

178. *Chambers*, 501 U.S. at 45-46. Justice White wrote for the majority joined by Justices Marshall, Blackmun, Stevens, and O’Connor. Justice Scalia wrote a dissenting opinion. Justice Kennedy also wrote a dissenting opinion, in which Chief Justice Rehnquist and Justice Souter joined.

179. The statute provides:

“Any attorney ... who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney’s fees reasonably incurred because of such conduct.”

28 U.S.C. § 1927.

180. *Chambers*, 501 U.S. at 49.

181. *Id.* at 44-45.

182. *Id.* at 46.

documents increase exponentially, the sheer volume of electronic data has created enormous stress for parties and courts because all of the ESI is potentially discoverable during a lawsuit. In 1974, when the Supreme Judicial Court adopted the Massachusetts Rules of Civil Procedure, paper was the standard for discovery, and the discovery rules were designed with paper exchanges in mind. The drafters could not have envisaged the explosion of ubiquitous digital data that has transformed discovery in the past decade and frustrated Rule 1's directive that the Mass. R. Civ. P. be "construed to secure the just, speedy and inexpensive determination of every action." Rules that developed for the paper world are not easily applied to the digital world because electronic evidence is intrinsically different than paper evidence. Changes in the Massachusetts discovery rules patterned on the Federal Amendments would promote uniformity and provide for more effective and fair discovery in the Massachusetts courts.

When synthesized, the various sources explored in this article give rise to a number of "best practices" dealing with data retention plans and the duty to preserve ESI. Those sources also suggest an approach for Massachusetts to follow in adopting changes to the Mass. R. Civ. P. that are patterned on or track the 2006 Federal e-discovery Amendments.

A. Data Retention Plans

Every business organization should have in place a comprehensive written information management plan that describes legitimate business objectives and provides rational, defensible guidelines for ESI retention, recycling and destruction. If a company is operating without a data retention plan, or its policy is not being followed, it will be unprepared in the event of litigation or regulatory action. For example, companies without a valid document retention policy that are retaining too little data may be accused of spoliation, and risk being sanctioned by courts. On the other hand, companies that retain too much information may be accumulating the ESI equivalent of a vast garbage landfill.¹⁸⁴

The reality is that many companies keep their ESI for much longer than they need to because of the ease with which information can be retained. As technology has improved, the disincentives to storing massive amounts of information have plummeted. The decreasing cost of storage—in 1990 a typical gigabyte of storage cost about \$20,000; today it costs less than \$1 dollar¹⁸⁵—provides little incentive for companies to pay attention to data storage. The consequences of this crushing volume of stored information are not felt until the company is sued. The retained information is then potentially discoverable, which means that the organization will be faced with enormous and often unnecessary costs for retrieving, reviewing and producing the information as part of its discovery obligations. Beyond these economic practicalities, organizations risk preserving the "smoking gun" e-mail or ESI document that can undermine their case.

183. Some commentators suggest that Rule 37(e) should be amended so that sanctions would be available only for intentional or reckless preservation failures, consistent with the standard enunciated in the Private Securities Litigation Act ("PSLRA"), 15 U.S.C. § 78u-4(b)(3)(C)(i), which requires a defendant in a securities action to preserve evidence, but imposes sanctions "only" when a party is "aggrieved by the willful failure of an opposing party to comply" with the statute. See Allman, *supra* note 165, at 19.

184. Shira A. Scheindlin and Kanchana Wangkeo, *Electronic Discovery Sanctions In The Twenty-First Century*, 11 MICH. TELECOMM. & TECH. L. REV. 71 (2004), <http://www.mttr.org/voleleven/scheindlin.pdf>.

Best practices demand, of course, that organizations follow applicable federal and state regulatory requirements for document retention. Organizations should, therefore, design a record retention plan that is tailored to the needs of its business and consistent with federal and state law, industry standards, and statutes of limitation. Organizations that do business in a regulated industry have a specific legal obligation to implement a document retention plan that complies with industry-specific regulations for retention of ESI. Ignorance of the law is no excuse and will not be tolerated by courts. For example, overwriting e-mails after twelve months when regulations require e-mails to be retained in a readily accessible form for two years, as occurred in *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co.*, discussed earlier, is conduct that will be sanctioned when litigation arises.

On the other hand, the United States Supreme Court recognized in *Arthur Andersen LLP v. United States*¹⁸⁶ that as long as a records destruction protocol complies with applicable laws and regulations, there is nothing improper about following routine recycling and/or destruction protocols even if one purpose of the policy is to "withhold documents from unknown future litigation."¹⁸⁷ The Supreme Court noted, "[d]ocument retention policies which are created in part to keep certain information from getting into the hands of others ... are common in business."¹⁸⁸ All data has a natural life cycle and need not be retained longer than necessary. If there is no legal obligation to retain ESI because the requisite regulatory retention period has expired, businesses may follow their ordinary record retention schedule for data elimination to prevent accumulation of billions of unnecessary ESI objects.

Once an appropriate ESI retention policy has been created, a company follows "best practices" by ensuring that the policy is disseminated to all company employees and that it is understood, implemented and followed. To ensure compliance with the company's policy, a records retention committee should be created to "test" or "audit" whether the policy is working as intended—a detailed document retention policy is not routine if it is not followed throughout the company on a routine basis.¹⁸⁹ As the *Andersen* case illustrates, a company may not suddenly instruct its employees to institute or energize a lazy document retention policy when it "sees investigators around the corner."¹⁹⁰ In that instance, steps must be taken to preserve, not destroy, information.

B. Litigation Hold

Whatever the contours of a company's general retention plan, changes must occur with the advent of litigation. Then, whatever destruction policy might otherwise apply, preservation of relevant documents assumes paramount importance. However, identifying the date when the shift occurs is not always easy. In *Zubulake* and *Pension Committee*, Judge Scheindlin relied on Second Circuit precedent to hold that evidence should be preserved when litigation is "reasonably anticipated."¹⁹¹ The Advisory Committee Notes

185. *Sedona Conference Best Practices Commentary on the Use of Search & Information Retrieval Methods in E-Discovery*, *supra* note 70, at 198.

186. See *Arthur Andersen*, *supra* note 13.

187. *Arthur Andersen*, 374 F.3d. at 287.

188. *Arthur Andersen*, 125 S.Ct. at 2135.

189. See Shira A. Scheindlin, *et al.*, *supra* note 184.

190. *Id.*

191. *Zubulake V*, 229 F.R.D. at 432.

to the 2006 Federal Rules Amendments adopt this test, advising that a preservation duty arises when there is “pending or reasonably anticipated litigation.”¹⁹² Amplifying that standard, the Sedona Conference advises that “[r]easonable anticipation of litigation arises when an organization is on notice of a credible threat it will become involved in litigation or anticipates taking action to initiate litigation.”¹⁹³ But not all Federal decisions adopt the same approach. In *Cache La Poudre Feeds, LLC v. Land O’Lakes, Inc.*, the Colorado district court held that the duty to preserve relevant ESI requires more than a “mere possibility” of litigation.¹⁹⁴ And in *Optowave Co., Ltd. v. Nikitin*, the Florida district court’s opinion suggests that the duty to preserve is triggered by “notice as to possible litigation,” *i.e.*, a “demand letter ... making it abundantly clear that ‘legal action’ was anticipated.”¹⁹⁵

The variations in the standard have prompted some commentators to complain that the duty is too malleable and to suggest that individuals and companies, no matter how sophisticated, may not realize when the duty arises. These commentators suggest that federal and state rules could be amended to include a new rule addressing preservation. In August 2009, the New York City Bar issued a report which suggested amendments to the Civil Practice Law and Rules (“CPLR”), including a proposed rule addressing preservation. As noted earlier, in May 2010, the e-discovery panel at the Duke Conference also reported that a new federal rule addressing preservation obligations would be beneficial.

Individuals and business organizations are currently instructed by the common law, the Advisory Committee Notes to the 2006 Federal Rules Amendments, *The Sedona Principles*, and e-discovery literature to institute a litigation hold on relevant ESI when they are aware of circumstances that would lead a reasonable person to anticipate litigation or a governmental investigation. But the only bright-line standard that will apply in every case is the date on which a party is on notice that a lawsuit has been filed. Codifying a pre-litigation standard such as “reasonably anticipated” or “probable” or “likely” litigation will not pinpoint the precise pre-litigation attachment point, since a fact-specific assessment will still be required and the outcome of that assessment will vary with the circumstances of each case.

To promote uniformity, amendments to the Mass. R. Civ. P. could include an Advisory Committee Note that tracks the Federal Rule 37(e) Advisory Committee Note by pointing out the common law preservation standard of pending or reasonably anticipated litigation, and explaining that “[a] preservation obligation may arise from many sources, including common law, statutes, regulations, or a court order in a case.” Although it is not possible within the confines of a rule to include an exhaustive list of every potential trigger, a Massachusetts Advisory Committee Note could expand upon the Rule 37(e) Committee Note by listing illustrative examples of specific pre-litigation triggers, such as steps taken by the parties in anticipation of asserting or defending a potential claim (e.g., preparation

of an incident report, hiring experts, drafting/filing claims with regulators, drafting/sending pre-litigation notices, drafting a complaint, hiring counsel, destructive testing). That would help, but in the end the date when an obligation to institute a pre-litigation hold first arose will inevitably require a factual inquiry.

C. Retention Plan Enforcement

Whenever the obligation to institute a litigation hold arises, a key step will be issuance of a document retention directive to guard against the destruction of evidence. The company’s general record retention policy should provide procedures for communicating, implementing and observing a legal hold, including provisions that explicitly address the need to suspend routine destruction protocols in response to “pending or reasonably anticipated litigation,” government investigations or audits.¹⁹⁶

A response team also should be set up every time there is a need to implement a “litigation hold.” The team should be responsible for taking reasonable steps to ensure that sources of relevant ESI are located, including speaking to information technology personnel who can explain system-wide backup procedures and the actual (as opposed to theoretical) implementation of the firm’s recycling policy.¹⁹⁷ Additionally, it is not enough to send out a “legal hold” memo—the response team should periodically audit compliance with the legal hold in order to document and prove their preservation efforts.

In addition, counsel should interview each “key player” in the litigation to determine how they stored information and thereby insure that all potential sources of information have been inspected. In *Zubulake*, for example, a brief conversation with one key player would have revealed that she maintained a separate on-line computer file of e-mails concerning the plaintiff, and not a backup tape.¹⁹⁸ If an interview with every key player is not feasible, *Zubulake* recommends that counsel may choose to run a system-wide keyword search, but when utilizing a particular ESI search, parties need to be “aware of the literature describing the strengths and weaknesses of various methodologies.”¹⁹⁹ *Pension Committee* reiterates the duty to identify and preserve the ESI of key players, explaining that a finding of gross negligence is supported by the failure to identify all of the key players and ensure that their ESI and paper records are preserved. Additionally, *Pension Committee* reiterates the *Zubulake* holding that backup tapes must be preserved “when they are the sole source of relevant information or when they relate to key players, if the relevant information maintained by those players is not obtainable from readily accessible sources.”

Many potential bases of liability could be avoided if organizations faced with a lawsuit involving ESI hired an outside consultant and developed a budget for e-discovery. If Morgan Stanley had hired a consultant when the court in *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co.* required it to search backup tapes for each employee involved in the Sunbeam transaction, it might not have

192. See FED. R. CIV. P. 37, Advisory Committee Note.

193. The Sedona Conference explains that “lack of credibility” may arise from past experience regarding the type of threat, and “the trigger point for a small dispute where the risk of litigation is minor might occur at a later point than a dispute that is significant in terms of business risk or financial consequences.” *The Trigger and the Process*, THE SEDONA CONFERENCE COMMENTARY ON LEGAL HOLDS 6 (2007), http://www.thosedonacommunity.org/dltForm?did=Legal_holds.pdf.

194. *Cache La Poudre Feeds, LLC v. Land O’Lakes, Inc.*, 244 F.R.D. 614, 621

(D.Colo. 2007), *citing* Nat’l Union Fire Ins. Co. v. Murray Sheet Metal Co., Inc., 967 F.2d 980, 984 (4th Cir. 1992).

195. *Optowave Co., Ltd. v. Nikitin*, 2006 WL 3231422, *10 (M.D.Fla. 2006).

196. FED. R. CIV. P. 37(e), Advisory Committee Notes.

197. *Id.*

198. *Id.*

199. *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 261-62 (D. Md. 2008) *citing* *Sedona Conference Best Practices Commentary on the Use of Search & Information Retrieval Methods in E-Discovery*, *supra* note 70, at 200, 202,

mishandled or “botched” its retrieval and production of ESI. Judge Maass’s written opinion emphasized that Morgan Stanley “gave no thought to using an outside contractor to expedite the discovery.”²⁰⁰

It is worth noting that a good faith standard is now codified in Rule 37(e) which states that “absent exceptional circumstances, a court may not impose sanctions under these rules for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.”²⁰¹ An amendment to Mass. R. Civ. P. 37 patterned on Rule 37(e) would provide uniformity with the Federal rule and a framework that can be invoked by Massachusetts litigants if they have complied with their preservation duties by effectuating a litigation hold. To be sure, adding a provision like Rule 37(e) to the Massachusetts Rules would not solve all problems. As pointed out by one leading commentator, “Assuming I have not missed any cases in my research, no party in a reported decision has successfully invoked the [Federal] rule. And those who have tried have done so on very bad facts.”²⁰² Despite the absence of any reported cases that insulate a party from sanctions for a loss of data from the “routine” and “good faith” operation of an electronic information system, a Massachusetts amendment parallel to Rule 37(e) would give organizations that have implemented and are monitoring a legal hold a mechanism for protecting themselves against allegations of spoliation by demonstrating that any destruction of data occurred in good faith.

D. Discovery Plan Including Accessible and Inaccessible ESI

Early conferencing is an important theme of the 2006 Federal Amendments and a majority of states that have adopted e-discovery rules have amended Rule 16, or a comparable state version, to provide for either a mandatory or discretionary e-discovery conference. Massachusetts is among the states that have not yet acted, and, with the exception of the BLS, Rule 16 is used unevenly by Massachusetts Superior Court judges. An amendment to Mass. R. Civ. P. 16 to clarify the availability of an optional or discretionary conference and e-discovery scheduling order would be beneficial, and would increase the possibility that parties would meet, confer and reach early voluntary agreements regarding preservation and production issues.

If Massachusetts adopts e-discovery rules patterned after the Federal Rules amendments, Superior Court judges will be able to expect litigants, prior to an optional or discretionary conference under Rule 16 and/or the receipt of discovery requests under Rule 34, to know how much ESI they possess, where it resides, and most importantly, to be able to discuss the scope of production, including the identification of both accessible and inaccessible sources. The 2006 Amendments added Rule 26(b)(2)(B) and its “two-tiered” approach, to encourage party-managed discovery, and obviate the need for a protective order every time a Rule 34 request seeks information that might be contained on backup tapes, or in legacy data. More than three years have passed since the 2006 Amendments became effective and it is evident from decisions that the two-tiered approach has worked in practice. To assist the bench and bar in reaching a uniform construction that is consistent with Federal practice, language could be adopted from the Rule 26 Advisory Committee Notes into a corresponding Mass. R. Civ. P. Advisory

Note that provides examples of inaccessible data, and reflects the seven-factor test of appropriate considerations for court-ordered production from the second tier.

E. Production Format

Federal Rule 34(b) establishes a framework within which parties may seek the production of ESI in a particular form or forms, and object to a requested form. This rule has worked well in practice, and a vast majority of states that have adopted statewide amendments have adopted Rule 34(b)’s requirement that absent an agreement by the parties, or a court order, a party must produce ESI in the form in which it is ordinarily maintained or in a reasonably useable form. An amendment to Mass. R. Civ. P. 34 that emulates the Federal approach would permit uniformity in result between state and Federal decisions on the same topic.

There is no consensus on whether production of the “default” forms of ESI should include metadata and courts will likely continue to address this issue on a case by case basis. Under Federal Rule 26(f)(3), parties must meet, confer and develop a discovery plan containing the parties’ views and proposals on topics including the form or forms in which ESI should be produced, and this is perhaps the proper time to raise issues about metadata if discussion is needed. Although Rule 26(f) does not explicitly require discussion of metadata when the parties confer about the format of production, the Advisory Committee Notes suggest that metadata should be a topic of the conference.

Currently, there is no analog to Rule 26(f) in the Mass. R. Civ. P., and the Federal requirement for the submission of a written discovery plan does not exist under Massachusetts state practice. For this reason, it is unlikely that Massachusetts rule makers will recommend wholesale adoption of an equivalent amendment to the Mass. R. Civ. P. But the form of production could be one of the topics discussed at an optional Rule 16 conference. Additionally, it would be possible for Massachusetts rule-makers to incorporate selections from the Rule 26(f) Advisory Committee Notes (albeit in a different section of the Massachusetts rules), to stress that addressing the form of production early in the litigation will facilitate application of Rule 34(b).

F. Inadvertent Disclosure

Finally, the pretrial process of privilege review can be the most onerous, expensive and time-consuming aspect of discovery when it involves huge volumes of electronic evidence. It would assist litigants if the Mass. R. Civ. P. included an amendment that tracks or emulates Rule 26(b)(5) by setting forth a procedure through which a party who has inadvertently produced privileged information or protected trial preparation materials may nevertheless assert a protective claim to the documents, and if the claim is contested, submit the matter to the court for resolution. Massachusetts common law is consistent with Federal Rule 26(b)(5) and recognizes that a party does not waive a privilege if there is an unintentional disclosure of a privileged communication and reasonable precautions were taken to prevent the disclosure.²⁰³

The Advisory Committee Notes for Rule 26(f) outline protocols

217-18 (2007).

200. *Coleman (Parent) Holdings, Inc.*, 2005 WL 679071 at *2.

201. FED. R. CIV. P. 37(e), Advisory Committee Notes.

202. See Barkett, *supra* note 166, at 54. See also Technical Sales Assoc., Inc.

v. Ohio Star Forge Co., 2009 WL 728520 (E.D.Mich. 2009); *Adams v. Dell*, 621 F.Supp.2d 1173 (D.Utah 2009); *Doe v. Norwalk Community College*, 248 F.R.D. 372 (D.Conn. 2007).

203. See MASSACHUSETTS GUIDE TO EVIDENCE § 523 (c) (2010 ed.)(conduct

that can help parties to minimize the risk of inadvertent forfeiture or waiver of privilege such as quick peek arrangements and claw-back agreements, and suggests that a “case-management or other order including such agreements may facilitate the discovery process.” Selections from the Advisory Committee Notes for Rule 26(f) that describe these voluntary arrangements would also be helpful in any future Massachusetts amendments, as they promote the policy that cases should be decided on their merits. It can take months and crushing costs to review mountains of data for privileged

information, and the e-discovery battle may then determine the outcome of the lawsuit. As noted by one court, “[e]lectronic discovery may encompass ‘millions of documents’ and to insist upon ‘record-by-record pre-production privilege review, on pain of subject matter waiver, would impose upon parties costs of production that bear no proportionality to what is at stake in the litigation.’”²⁰⁴ Although there is currently no analog to Rule 26(f) in the Mass. R. Civ. P., the topic of privilege and the possibility of a non-waiver agreement could be discussed at a an optional Rule 16 conference.

not constituting waiver). *See also* Adoption of Sherry, 435 Mass. 331, 336, 757 N.E.2d 1097, 1102 (2001); Matter of the Reorganization of Elec. Mut. Liab. Ins. Co., 425 Mass. 418, 422-423, 681 N.E.2d 838, 841-842 (1997). FED. R.

CIV. P. 26(b)(5) is intended to work in tandem with Rule 26(f), which was amended to direct the parties to discuss privilege issues.

204. *Hopson*, *supra* note 40, 232 F.R.D. at 244.