

Electronic Discovery: A VIEW from the FRONT LINES



INSTITUTE FOR THE ADVANCEMENT
OF THE AMERICAN LEGAL SYSTEM

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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.

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I N T R O D U C T I O N

The impact of e-discovery troubles judges, lawyers and litigants alike. The Honorable James K. Bredar, Magistrate Judge of the United States District Court for the District of Maryland, summarizes its potential threat:

On the one hand, the purpose of litigation is to find the truth of the matter, so the availability of more information that might be relevant to that quest is a good thing. On the other hand, recent experience teaches that meaningful and complete access to new information troves is expensive – prohibitively so for some litigants. The just resolution of a dispute has little value to a party if bankruptcy was the price of its achievement.

The sheer amount of electronic information to be discovered can mean not only staggering costs, but also devastating mistakes—like erasing or failing to find relevant electronic information—which can win or lose cases or force parties to pay significant fines or sanctions to their opponents.

These problems have not gone unrecognized. On December 1, 2006, the Federal Rules were amended to incorporate specific guidelines concerning e-discovery. Several states quickly followed suit, either enacting their own version of the new federal e-discovery rules or adopting uniform rules based on them. The changes were meant to simplify the process, clarify parties' responsibilities, and reduce costs. It is not yet clear, however, that the new rules have achieved their desired effect. Few litigants and potential litigants were prepared for e-discovery when the new rules were passed and many remain unprepared today. Moreover, some of

Imagine being asked to locate, review and categorize every e-mail, instant message, voicemail, word processing document, spreadsheet, database and every other electronic document you created, sent or received over the last five years. Imagine having to do it not just for your own files, but also for those of your employees or co-workers, family or friends. Now imagine you have less than three months to get it all done, while still performing your regular job. Where would you start? Would you even know where to look? Who could help you? And how much would it cost?

These are just some of the real issues facing businesses, organizations and individuals due to the rapid growth of electronic discovery (or “e-discovery”) in the last decade. Under the Federal Rules of Civil Procedure (the “Federal Rules”) and the vast majority of state court rules, in most civil lawsuits, the plaintiff and the defendant are allowed to seek or “discover” an almost limitless amount of information from each other in the search for relevant evidence. Traditionally, discovery mostly meant the exchange of paper documents and other physical things. Thanks to accelerating advances in technology, discovery increasingly means the exchange of electronically stored information (ESI). Because of the staggering pace with which electronic information is growing (both in terms of quantity and kind), litigants now have almost limitless access to an almost limitless amount of information.

the new rules have proven to be vague and difficult to apply, while the case law remains thin, inconsistent, and frequently outdated. Until organizations and individuals are prepared for e-discovery, and until the case law provides consistent guidance on how the new rules should be applied, e-discovery has the capacity to wreak havoc on litigants and the civil justice system.

The purpose of this report is to provide a snapshot of the practical effects of the new e-discovery rules one and a half years after their enactment. In the months since the release of our first e-discovery publication, *Navigating the Hazards of E-Discovery: A Manual for Judges in State Courts Across the Nation*, we have reached out to individuals from businesses and organizations to learn more about their concerns and to harvest their expertise. We have also spoken with individuals from the judicial, legal and information technology (IT) worlds who have a keen interest in e-discovery. This publication is, to a large extent, informed by the expertise of those people—all members of what we have termed our “virtual advisory group.” We would like to acknowledge their significant contributions, and their names are listed in the front of this publication. In discussions with our virtual advisors and in our review of existing empirical and credible anecdotal data on the impact of e-discovery in various arenas, it has become clear to us that e-discovery is traditional discovery magnified. This publication attempts to survey the sometimes competing views on the degree to which e-discovery presents problems in the day-to-day worlds

of individuals and organizations (including large and small businesses, non-profit entities, and government offices) and attempts to determine whether we are on the track of best practices or not—and if not, why not and where should we go instead.

This report, therefore, is a view from the front lines—a real-time analysis of the problems and opportunities that e-discovery has posed and where the groundwork is being laid next. In Part I, we illustrate how e-discovery is playing out in the real world. Part II is a brief overview of the new e-discovery rules and why they were adopted. In Part III, we report how the unsettled state of the law governing e-discovery has made it difficult for many organizations to become e-discovery ready. Part IV is an examination of why failing to prepare for e-discovery can lead to mistakes and unnecessary costs and how the fear of e-discovery has created a vicious spending cycle that does little to promote long-term e-discovery readiness. We also uncover how the shifting state of e-discovery law has encouraged some organizations and their lawyers to resort to sharp, evasive and, ultimately, wrongheaded litigation tactics. Finally, Part V concludes the report with some recommendations on how e-discovery and civil litigation in general can be improved.

We recognize that the law and practice of e-discovery is dynamic and that some of the information we present here may change quickly. But the immediacy of this report is also a virtue. Because e-discovery is such a fast-moving target, we believe it is important to capture its evolution and explore its broader context.



ABC is a small marketing company with 20 employees. Two years ago, one of its sales associates, Mrs. Smith, left ABC to form her own company, XYZ. Her departure was particularly acrimonious—after she gave her notice, Mrs. Smith accused ABC’s managers of discriminatory behavior and ABC later accused Mrs. Smith of stealing the company’s entire client list, causing ABC to lose profits and clients.

ABC considered suing Mrs. Smith and XYZ for misappropriating ABC’s trade secrets, but feared that discovery costs and attorneys’ fees would fail to justify that course of action. To ABC’s surprise, Mrs. Smith filed a lawsuit against it alleging several claims ranging from accounting (for past commissions she claims she is owed) to employment discrimination (hostile work environment).

ABC hired a lawyer just after Mrs. Smith filed her lawsuit. The lawyer now summarizes ABC’s most immediate e-discovery obligations. The lawyer explains that it was ABC’s duty to preserve any relevant electronically stored information (ESI) once litigation was reasonably anticipated (arguably, around the time Mrs. Smith left the company). ABC is troubled because it made no effort to preserve its ESI until after Mrs. Smith filed the lawsuit. Nevertheless, ABC’s lawyer advises the company to immediately implement a “litigation hold” on

its ESI. ABC does not know how much potentially relevant ESI it has because it does not have a routine document retention policy and, except for a very specific set of documents that are important to ABC’s daily operations or that ABC is required by law to keep for specified periods, it never instructed its personnel on what documents (electronic or otherwise) should be retained and for how long.

Shortly after the lawsuit was filed, Mrs. Smith’s lawyer told ABC’s lawyer that Mrs. Smith would be seeking discovery of ESI going back five years, and that the discovery would touch on all of the company’s e-mails, text messages, electronic documents, all sales-related databases, and any paper documents. ABC’s lawyer now explains that they have just over eight weeks to fully assess where all potentially relevant ESI is located and how it can be produced; at that time, there will be a court-mandated conference at which each side’s attorney will have to share that information.

The lawyer learns that ABC creates or stores ESI in all of the following places: 20 desktop computers; 10 laptops; 20 personal data assistants (PDAs); 25 telephones; 15 cell phones; 3 network servers; and up to 100 backup tapes. Additionally, the majority of ABC’s directors and employees use their personal home computers and cell phones to do ABC-related work and send company-related e-mails or text messages.

ABC's lawyer informs the company that discovery will be invasive, time-consuming, and expensive. First, once the litigation hold is in place, all employees will have to search for relevant ESI while someone at ABC will need to make sure that no one is deleting or changing any ESI until all potential sources of ESI have been scoured and all potentially relevant ESI preserved. This will require significant follow-up and policing. Second, computers or other ABC devices used by former employees but reassigned to new employees may need to be mined for data by a forensic specialist (hardly any electronic data is really lost forever). Third, because much of the information sought by Mrs. Smith is probably no longer available on the company's computers and servers, Mrs. Smith will want ABC to hunt for the information on its backup tapes. Not all backup tapes will need to be searched, but for those that do, it could cost thousands or even tens of thousands of dollars to restore and index each tape, depending on each tape's condition. Finally, ABC's lawyer recommends hiring an e-discovery consultant and vendor to help process and ready all ESI for attorney review and production.

ABC's lawyer advises the company that it can expect to find up to 500 gigabytes (GB) of potentially relevant data.¹ In paper terms, this could translate into 50 million pages

of documents that would need to be culled, processed, and reviewed for production—that is, reviewed by lawyers for responsiveness to discovery requests served by Mrs. Smith's lawyers, for attorney-client privilege, for work-product immunity, and for possible protection under a court protective order to preserve the confidentiality of trade secrets and other confidential business and information. ABC's lawyer estimates that the entire process could cost as much as \$3.5 million.² This estimate includes attorney time and all outside vendor bills, but does not include the costs to restore and review information on the backup tapes (if necessary). ABC's lawyer additionally cautions the company that it may face fines or even lose the case because of its unknowingly belated attempts to preserve ESI and because of the inconsistent way it stored and retained ESI.

This scenario represents a discovery predicament that is by now becoming familiar to many organizations, where the cost of e-discovery rivals or even exceeds the amount at issue or the cost of settling a lawsuit. Recall, too, that our fictional business is a small company. A case like this could destroy a business of this size. And the stakes and complexity of e-discovery only grow with the size of the players.

Commentators note that a midsize case can generate up to 500 gigabytes (GB) of potentially relevant data. It could cost as much as \$3.5 million to process and review that much information before production.



Over 99% of the world's information is now generated electronically,³ and its volume is breathtaking. Worldwide, "[p]robably close to 100 billion e-mails are sent daily,"⁴ with the average employee sending and receiving more than 135 e-mails each day.⁵ And every day, the world generates five billion instant messages.⁶ The number of voicemail messages left daily is incalculable (telephone calls still account for 98% of all electronically transmitted information⁷). The quantity of electronic information is growing exponentially; one report shows that new stored information increases about 30% annually.⁸

The information explosion is transforming civil lawsuits. Although discovery of electronically stored information has existed in limited forms for several decades, the real growth in this area has occurred in the last five years, as an increasing number of attorneys have recognized its potential both as a litigation tool (to gather evidence for trial) and as a litigation tactic (to apply pressure to opposing parties). One commentator estimates that as recently as 2002, a "midsize case" involved 5 GB of data,⁹ or the potential equivalent of 500,000 pages of printed e-mails without attachments.¹⁰ "Today, anything less than 500 GB is considered small."¹¹

Moreover, the sky-rocketing and disproportionate costs of e-discovery would make even the most battle-tested lawyer anxious. Robert Krebs, a litigation paralegal at Perkins Coie LLP, estimates that e-discovery vendor bills, for instance,

can run three to four times the low estimate of a client's liability in a case, and sometimes twice the high estimate. He recently worked on a smaller case where a portion of the data that the plaintiff requested was located on seventy-five hard drives. The processing quotes for just twenty of those hard drives ranged from over \$400,000 to nearly \$600,000, a price that included no attorney hours. The low estimate of liability in that case was about \$750,000, and the "pie-in-the-sky" estimate was about \$6 million.

Verizon, a company at the forefront of e-discovery issues, has collected data on the costs of e-discovery and internally benchmarked the costs of processing, reviewing, culling and producing 1 GB of data at between \$5,000 and \$7,000 (assuming precise keyword searches have been employed). If a "midsize" case produces 500 GB of data, this means organizations should expect to spend \$2.5 to \$3.5 million on the processing, review and production of ESI. The continued explosion of information may mean that discovery will only get more expansive and more expensive. In a report released this year, the RAND Institute for Civil Justice warns that even in low-value cases, the costs of e-discovery "could dominate the underlying stakes in dispute."¹²

These eye-popping figures have spurred efforts at reform, most notably at the federal level.¹³ On December 1, 2006, several e-discovery-related amendments to the Federal Rules became effective.

E-DISCOVERY AND SMALL CASES

Among the most significant amendments were:

- The requirement that the parties meet and confer specifically on e-discovery issues early in the litigation;¹⁴
- A discovery exemption created for ESI that is not “reasonably accessible because of undue burden or cost;”¹⁵
- The ability for the court to shift the cost of producing ESI under certain circumstances to the party requesting the information;¹⁶
- The creation of a “safe harbor” to prevent sanctions against a party who fails to produce ESI lost as a result of the routine, good-faith operation of an electronic information system;¹⁷ and
- The inclusion of a special “claw back” provision to account for the increased likelihood that ESI subject to the attorney-client privilege would be inadvertently produced to the opposing party.¹⁸

There was also a growing effort in the latter half of 2007 to introduce e-discovery rules at the state level. The National Conference of Commissioners on Uniform State Laws has developed a set of uniform e-discovery rules for state courts.¹⁹ Those uniform rules largely mirror the changes instituted by the amendments to the Federal Rules. The Conference of Chief Justices, an organization comprising the highest judicial officers from each state, has also set out a series of guidelines for state courts which incorporate many of the provisions found in the Federal Rules.²⁰

According to attorney and e-discovery consultant Winlock Brown, “many in the legal profession still think that e-discovery is limited to giant commercial litigation, but that is far from the truth.” With the expansion of electronic information and the widespread use of computers, it is easy to imagine e-discovery taking center stage in almost any kind of case.¹ Text messages may be central to the now-pending criminal case against Detroit Mayor Kwame Kilpatrick. The messages may be used to decide whether the mayor perjured himself in a case that led to a \$6.5 million whistleblower verdict against the city.²

Even the smallest disputes might turn on an e-mail, an electronic client list or a MySpace or Facebook posting. For example, Brown says, “if a disgruntled hairdresser downloads her former salon’s client contact list onto a flash drive and informs all those clients about her new endeavor, you can expect the plaintiff salon to make every effort to prove the hairdresser’s perfidy through e-discovery.”

As early as 2004, e-discovery began permeating cases brought by or against individuals like simple divorce cases. In one Connecticut case,³ the husband, convinced that e-mails residing on his wife’s laptop would help his case, received an order requiring the wife to surrender her laptop to the court. Pending a forensic inspection of the laptop, which was to be performed in open court, the wife was ordered immediately to “stop using, accessing, turning on, powering, copying, deleting, removing or uninstalling any program, files and or folders or booting up her laptop computer.”⁴ The court’s order also required the husband to provide a replacement laptop, which was to occur simultaneously with the wife’s surrender of the old laptop. The husband, however, was dilatory in delivering the replacement computer and while the wife waited for her new laptop, she was afraid even to touch her computer for fear of violating the court’s order. This was a problem for the wife, who used her laptop to prepare the lessons she taught as a daycare instructor.⁵ As one prominent commentator notes, “as awareness of the range of electronically stored information penetrates all sectors of the litigation community, more and more individual litigants will also be relying on the provisions included in the [new e-discovery rules].”⁶



There is a growing consensus that e-discovery is changing the way law is practiced and businesses are run. According to a recent *Richmond Journal of Law & Technology* article, the ability to handle e-discovery “equates to perhaps the biggest new skill set ever thrust upon the profession.”²¹ Denver trial lawyer Malcolm Wheeler says that the new rules “represent the greatest sea change in the practice of law in recent memory.” Recent reports echo the sentiment. For example, a December 2007 survey of attorneys in some of the largest law firms and corporations in the U.S. and Canada chose electronic discovery—ahead of globalization and international expansion—as the issue sure to “have the biggest impact on the practice of law in the next five years.”²² E-discovery is also starting to transform the way business is being done. As a result of e-discovery, 73% of corporate legal departments saw an increase of up to 20% in 2007 in their discovery-related workload.²³ And, growing numbers of corporations like Verizon and Pfizer have created special departments dedicated to planning for and processing e-discovery matters.²⁴ Trial lawyer and noted e-discovery expert Craig Ball says that lawyers who have not yet felt the impact need not wait long. He explains that most lawyers are not yet comfortable enough to make e-discovery an issue in their cases, but “this will change rapidly.”

Even though the new rules were intended

to minimize disputes and calm the e-discovery waters, they have, at least for the moment, caused significant new anxieties. As we see it, there are two principal sources of these anxieties, each source feeding off the other. First, the new rules are vague and the case law interpreting them is thin and fluid. Second, the new e-discovery rules presuppose that organizations and businesses are prepared for e-discovery—and by and large, they are not. The untested state of the law and low levels of e-discovery readiness have combined to create a chaotic e-discovery environment, where parties are handling e-discovery reactively and spending exorbitant amounts of money doing so.

E-Discovery Law is a Moving Target

Many of the new Federal Rules that govern the preservation and early sharing of ESI employ a reasonableness standard that can be difficult to apply and differs from case to case and even judge to judge. Indeed, there is very little case law interpreting the new rules and a near void of e-discovery case law in general, save for high-profile cases like *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.*,²⁵ where the plaintiff received a \$1.45 billion verdict against Morgan Stanley because of e-discovery errors. This murky legal environment provides little or no predictability to litigants or potential litigants and, according to some of our advisors, such unpredictability drives up litigation

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costs because it causes litigants and their lawyers to take expensive, cautionary actions that could be avoided with clearer, more precise guidance. The trepidation, and therefore the expense, rises when cases like *Morgan Stanley* report large-scale adverse e-discovery consequences.

To make matters worse, while influential organizations like the Sedona Conference²⁶ continue to publish e-discovery guidelines and best practices, business leaders may be hesitant to implement those recommendations. Patrick Oot, Director of Electronic Discovery and Senior Counsel at Verizon, explains that more business persons should become involved in the work of policy think tanks like the Sedona Conference. Without significant participation by corporations and other actual or potential litigants, he explains, the Sedona Conference's future e-discovery guidelines could rely heavily on the input of e-discovery vendors, consultants and outside lawyers—individuals who may benefit financially from some of the recommendations. Additionally, notes the RAND Institute for Civil Justice, guidelines like those offered by the Sedona Conference and the American Bar Association's *Civil Discovery Standards* "are merely recommendations, not the sorts of authority that a lawyer would stake his or her case on."²⁷

The practice-changing effects of e-discovery may be particularly acute for government agencies. The sheer volume of ESI that resides in federal databases is staggering. Each year, federal agencies create or receive approximately 30 billion e-mails.⁷ Billions of e-mails may potentially reside in any given branch or agency of the federal government and, according to Jason Baron, director of litigation at the National Archives and Records Administration, "[e]very federal agency has legacy information that can't be read anymore."⁸ One commentator notes that "for the federal government, the challenges of identifying and locating records are compounded because agencies have widely varying IT systems, processes, policies, records retention schedules, and training practices."⁹

The sheer volume of ESI has already posed litigation challenges. In a recent, major piece of tobacco litigation, *United States v. Philip Morris*, the defendant tobacco companies served requests for production on thirty separate federal agencies, yielding roughly 200,000 e-mail "hits" in the government's internal searches. Manual review of these e-mails required a "small army" of lawyers, law clerks and archivists working full time for over six months.¹⁰ That was before the new e-discovery rules hit. In a race discrimination lawsuit filed against the Secret Service in 2000, the government just this year produced ten ostensibly inculpatory e-mails following an internal search of 20 million electronic documents created over sixteen years. The production came after a rebuke from the presiding magistrate judge who criticized the government for production failures and for destroying relevant ESI.¹¹

In light of these challenges, state agencies are not sitting idly by. In September 2007, the National Association of State Chief Information Officers (NASCIO) published an "issue brief" called *Seek and Ye Shall Find? State CIOs Must Prepare Now for E-Discovery!*, which is aimed at educating state CIOs on, among other things, electronic records management and the retrieval of electronic information.¹²

The Honorable Craig Shaffer, Magistrate Judge of the United States District Court of the District of Colorado, has taken an informal leadership role on e-discovery matters for his district. Judge Shaffer believes that because the new rules fail to provide specific guidance to lawyers and litigants, they create “new battle grounds” for discovery disputes. Cases like *Morgan Stanley*, he explains, only generate headlines and offer little guidance to litigants except at the margins. Judge Shaffer says that many judges are not up to speed on the rules and, without a significant body of case law to cite, practitioners may find little predictability in applying the new rules. Judge Shaffer’s concerns are echoed by RAND, which recently reported that technology continues to evolve faster than the law. RAND found that the near-void of e-discovery precedent “creates a real risk that outmoded and ineffective discovery paradigms could be inappropriately applied by sitting judges, thereby leading to inefficiencies and potential inequities.”²⁸

The *Intel* case (described in the ESI Preservation sidebar on page 12) illustrates one particularly troubling point for organizations on which there is very little legal guidance—the litigation hold. A litigation hold overrides the normal document retention policy and halts the disposal or deletion of documents and ESI that might be relevant to the litigation. A litigation hold

is specific to a particular dispute and is used only when litigation is known or anticipated. However, litigation hold processes and procedures should be implemented prior to litigation. According to a recent survey conducted by e-discovery consultant Fortiva, only 8.4% of companies have adopted a litigation hold procedure informed by the new e-discovery rules.²⁹

Verizon’s Patrick Oot believes that there is a worrisome “creep toward overprotectiveness and unreasonableness” in the scope of litigation holds at many organizations that have attempted to put a “hold” policy in place. Specifically, there is a tendency to identify too many employees as holders of relevant ESI. This leads to excessive retention of ESI that attorneys will eventually review at significant cost. As some of our advisors note, devising an appropriate litigation hold is an art, not a science. For a variety of reasons, discovery in a case can be delayed and many parties fail to understand what exactly needs to be preserved until discovery has begun in earnest. Accordingly, lawyers tend to err on the side of over-retention.

But, over-retaining irrelevant documents and ESI is expensive and unreasonable and often results from misguided recommendations. Because there is little judicial guidance on proper litigation hold procedures, companies frequently rely on

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the advice of lawyers, who are themselves often more concerned about avoiding malpractice suits and sanctions than about helping their clients implement sound protocols. Moreover, says Oot, the business models of some law firms rely on revenues received from large document and ESI reviews. We fear that the profits firms may garner from voluminous e-discovery and the anxiety over sanctions caused by high-profile e-discovery cases create a potential conflict between law firm and client. Clients may begin to question their attorneys' review and retention recommendations.

Oot believes that a sound investigation early in the life of a case will winnow out irrelevant ESI custodians, a process that will make relevant ESI easier to find, easier to retain and cheaper to review. It will also make the litigation hold easier to police and reduce the likelihood of sanctions. Documenting the process, Oot says, is important. Digital forensics and e-discovery strategist Rob Kleeger says the key is to develop a hold and collection procedure that is scalable, repeatable and reasonable based on business needs. If an organization waits to develop a hold procedure until after the case is filed, it can find itself scrambling and, like Intel, having a court assess the reasonableness of its process before the organization has had a chance to do so.

Recent court decisions illustrate the hazards of failing to implement an effective litigation hold. In one case, the court ordered a large company that had failed to use a litigation hold to retain an outside vendor at its own expense to collect and produce ESI, and imposed sanctions on the company of approximately \$125,000.¹³ In the Intel case, described in greater detail in the ESI Preservation sidebar on page 12, the company attempted to implement a litigation hold for company e-mails when it circulated notices asking employees to retain relevant documents and emails.¹⁴ Several employees, however, saved e-mails only from their inboxes, neglecting to retain e-mails from their "sent" folders. E-mails in their outboxes were destroyed according to normal protocol.¹⁵ Intel's hold procedure is now under review. As organizations are learning, merely sending a litigation hold letter is insufficient; organizations must take additional steps to police employees and make sure relevant evidence is being preserved.

Organizations Are Not Prepared for E-Discovery

Preparing for e-discovery can require many steps and several different strategies depending on the nature and size of one's organization. But basic e-discovery preparation means that when the lawsuit is anticipated, (1) the litigant and its counsel should be able to identify and discuss the location and retrieval of all potentially relevant and "reasonably accessible" ESI at the mandatory early meeting of the parties; and (2) all potentially relevant ESI can and will be preserved during the life of the lawsuit.³⁰ Few organizations are prepared to meet these expectations. Fulbright & Jaworski's *2006 Litigation Trends Survey* revealed that 81% of companies were "not at all prepared to only somewhat prepared" to handle e-discovery matters.³¹ In an October 2007 survey of in-house counsel conducted by Lexis/Nexis and the Association of Corporation Counsel, 44% of respondents reported that their organizations were not prepared for e-discovery when the new rules became effective on December 1, 2006, and 20% were unaware of whether their companies had prepared for the new rules.³² Studies released by various other e-discovery consultants in 2007 demonstrated similar levels of unpreparedness; anywhere from 65% to 94% of the organizations responding indicated that they were not ready.³³

Being unprepared may not only reflect actions not taken, but also uncertainty about what being prepared even means when the rules themselves are unclear. The lack of e-discovery preparation could have serious consequences for any organization facing a lawsuit.

Because the new rules presuppose that organizations have already thought about and planned for e-discovery, an organization that is ill-prepared for e-discovery—and even an organization that believes it is reasonably prepared—can become overwhelmed quickly. This is especially true for the new "meet and confer" requirement. In federal court, depending on when the defendant makes an appearance, within roughly 90 days of the filing of the lawsuit (or earlier, if ordered by the court), the parties must meet to discuss the location and configuration of each party's ESI and how it will be produced.³⁴ For this early meeting, each attorney should know and be prepared to explain what computers his or her client uses on a daily basis, what potentially relevant information is available, how routine operations may change that information, and precisely what kind of effort and cost is involved in producing the information.³⁵ The attorney should also be ready to name individuals who have special knowledge of those computer systems and be able to identify what information is and

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is not “reasonably accessible” by virtue of the burdens or costs of retrieval, including whether the information to be discovered has been deleted or is available only through backup or legacy systems.³⁶ The attorneys may also be expected to discuss an anticipated schedule for the production of ESI, the format of production (native or other form), and the responsibilities of each side to preserve ESI.³⁷ The proposed uniform state rule carries similar requirements.³⁸

For most organizations and their lawyers—especially the uninitiated—compiling all the information needed for this early meeting in under three months’ time is like preparing for a hurricane on an hour’s notice—there is far too much to do and not nearly enough time. For larger businesses and organizations, this could mean having to locate thousands of network servers in many different locations, as well as learning what data resides on each server and how it can be preserved for the lawsuit, assuming it has been preserved in the first place (see ESI Preservation sidebar, this page).³⁹ And this is just the start. Lawyers must also familiarize themselves with their clients’ backup systems, which may include potentially hundreds of backup tapes containing massive amounts of unindexed electronic information—backup tapes that can be difficult and costly to restore and review.⁴⁰ Next comes the investigation

The new e-discovery rules assume a party has preserved relevant ESI. But how do potential litigants know ahead of time what and how much ESI to preserve? The 2006 federal amendments and the proposed uniform state rule include a “safe harbor” to protect litigants from court-imposed sanctions where ESI was lost or destroyed through ordinary or good faith computer use.¹⁶ The concern was that an organization should not feel the need to keep every piece of ESI and should not be punished for destroying ESI through a routine disposal policy when no litigation is ongoing or anticipated. In practice, however, the “safe harbor” is vague and difficult to work with, and consequently has rarely driven the courts’ spoliation and sanctions analysis.¹⁷ Some courts have warned that the “safe harbor” addresses only rule-based sanctions; courts still retain inherent powers to impose sanctions for the loss of ESI.¹⁸

The murkiness of the “safe harbor” rule and other retention-related doctrines has bewildered organizations attempting to develop ESI retention policies. The paralysis is evident in several recent reports, one of which shows that only 10% of organizations made changes to their document retention policies following the adoption of the new e-discovery rules and 20% of them are still in the planning stages of adopting a policy.¹⁹ Digital forensics and e-discovery strategist Rob Kleegeer explains that “the problem is that businesses don’t understand what their obligations are on a day-to-day basis; some are afraid they are not allowed to destroy any electronic documents, confusing a destruction policy with a litigation hold.”²⁰

Without a retention policy, organizations risk inconsistent treatment of their ESI and, thus, sanctions. In a major piece of antitrust litigation, computer giant Intel admitted to “document retention lapses” after its opponent accused it of destroying e-mails.²¹ Intel attempted to preserve or “hold” potentially relevant e-mails at the onset of litigation, but before they could ever be searched, entire folders of e-mails were destroyed pursuant to Intel’s pre-existing document destruction protocol. The court ordered an investigation into the issue, which was ongoing as this report went to press.²² When that investigation is complete, the court may offer some guidance on what kinds of hold procedures and retention policies will satisfy the “safe harbor.” The *Intel* case shows that even large, technically adept companies can make huge mistakes in their retention and “hold” approaches.

into employee desktops, laptops, flash drives, telephones, other mobile technologies and anything else that may contain relevant data, including home computers and telephones that employees may use for business, as well as Internet-based e-mail accounts (discovery into which may require the cooperation of the webmail provider). If the company has changed any software or hardware systems during the relevant period (and according to our advisors, almost every company has), its lawyers will have to learn about every applicable legacy system, what gaining access to it would entail, and what would have to be accomplished to make the legacy information readable using currently available software and hardware. Even small businesses have to think about where their ESI is kept, how it is maintained, and who is in charge of it.

Early conferencing was developed in part as a method to keep discovery costs under control.⁴¹ Indeed, some commentators note its potential to encourage transparency, cooperation and negotiation, all of which can keep ESI volume, disputes and costs down.⁴² The 2007 Lexis/Nexis-Association of Corporate Counsel survey, however, reports that 76% of companies do not believe that new rules changes, including the early meet-

and-confer changes, have reduced the cost or the scope of e-discovery.⁴³ According to e-discovery strategist, Rob Kleegeer, the cost savings are achieved only if both sides ignore e-discovery altogether or if the parties are fully prepared for e-discovery once the lawsuit hits. The first option, ignoring e-discovery, is an option that is quickly becoming impossible. Some judges and some lawyers may approach e-discovery and the early conference less formally than others and may not expect the level of early preparation that the rules and existing guidelines contemplate.⁴⁴ But many commentators anticipate that the aura of laxity will soon disappear everywhere. In a 2004 online e-discovery forum, Mark Yacano, a principal in the Richmond, Virginia office of law firm Wright, Robinson, Osthimer & Tatum, warned that “[t]he blind-eye approach is an affront to established e-discovery law, one that won’t go unpunished much longer.”⁴⁵

Organizations that have not gained a thorough understanding of their data systems by the time the lawsuit has been filed will spend a lot of time and money on hurried preparation.

Attorney Malcolm Wheeler explains that in the age of paper discovery, the early conference typically meant a phone call between two lawyers and an informal exchange

of documents, which would often lead to the quick resolution of many cases. Now, he says, the early conference “has become a mandatory meeting with lawyers and their IT staff, tantamount to spending tens of thousands of dollars before the case starts on any practical level.”

DEVELOPING A RETENTION POLICY

Many organizations are struggling to develop retention policies and protocols in light of the new e-discovery rules. In some cases, they strain to develop a policy that can be enforced in a consistent way. Denver trial attorney Dick Holme, who practices and lectures in the area of e-discovery, says that despite retention protocols that automatically destroy ESI after specified periods of time, employees are still inclined to save their e-mails, files and information because they think “it may be useful in the future.” However, over-retention can drive up ESI volume and needlessly increase e-discovery costs. He explains that businesses—except for the very small ones—would need to hire a well-educated, full-time retention and destruction “enforcer” to avoid over-retention. In other cases, companies are hesitant to adopt uniform destruction rules out of fear of being sanctioned in a future lawsuit. Fulbright & Jaworski attorney Jeff Dykes says that courts expect that an “intelligent effort” be made to craft and enforce a retention policy—they do not expect perfection. Over-retention, he says, makes it more likely that organizations will have to produce largely inaccessible data from media like backup tapes.



A burgeoning e-discovery industry is taking advantage of the panic arising from litigants who are unprepared to meet their e-discovery obligations. First, intentionally or unintentionally, many e-discovery vendors are profiting from the fear and lack of preparation of organizations. Second, law firms are logging significant hours on e-discovery cases, even though their services are expensive and not always leveraged appropriately. Finally, some lawyers and their clients seem to be using the panic as an excuse to game the system and evade their obligations. All of these developments are disturbing in their own right but they are particularly troubling for two overarching reasons—they detract from the salient and immediate task of making organizations and businesses ready for e-discovery in the long term, and they increase the expense and delay of getting to the actual resolution of disputes on the merits.

Vendors

Rightly or wrongly, as some commentators have noted, “hiring an e-discovery consultant is starting to look mandatory.”⁴⁶ Organizations are afraid of discovery sanctions and their lawyers are afraid of malpractice suits. According to some observers, these fears combine to fuel vendor growth.⁴⁷ Recent headlines about e-discovery mix-ups may be perpetuating the fear. In the *Morgan Stanley* case, for instance, the court ruled

that Morgan Stanley thwarted discovery by taking too long to find, preserve and produce relevant e-mails.⁴⁸ The court chastised Morgan Stanley for, among other things, giving “no thought to using an outside contractor to expedite the process of completing the discovery.”⁴⁹

For the e-discovery vendor industry, fear is a boon. The *Socha-Gelbmann Electronic Discovery Report* has been tracking the number and revenues of e-discovery vendors since 2003. *Socha-Gelbmann* estimated that vendor and other non-attorney e-discovery revenues grew from \$40 million in 1999 to approximately \$2 billion in 2006 (with 51% growth between 2005 and 2006).⁵⁰ They predicted a 33% revenue growth from 2006 to 2007, and similar—albeit slowing—growth through 2009, where revenues are expected to reach \$4 billion.⁵¹ Numbers-wise, 100 service providers made up the e-discovery vendor market in 2003, compared to nearly 600 today.⁵² These revenue figures reflect actual e-discovery litigation work, not necessarily money being spent on early preparation. According to International Data Corporation Research (IDC), the revenue figures increase dramatically when one accounts for the money that organizations are spending on records management and litigation-readiness plans. IDC reports that the e-discovery industry as a whole enjoyed \$9.7 billion in revenues in 2006, a figure

that is predicted to reach \$21.8 billion by 2011.⁵³

Discovering and learning all the places where data can hide and collecting it in a sound manner, all in such a short period of time, is a daunting task for any organization, no matter the size or available resources. Attorney and e-discovery consultant Winlock Brown says that for this reason, most litigants reactively delegate early ESI matters to an e-discovery vendor. She estimates that e-discovery vendor rates range from \$125 per hour to over \$600 per hour, depending on the size of the vendor and the specific service for which they are hired.

One report prices the average engagement in excess of \$200,000 per case.⁵⁴ In the past few years, Brown regularly saw organizations rack up vendor bills in the \$2 million to \$4 million range before a single attorney hour had been billed for document review. Patrick Oot reports that Verizon frequently spends up to \$1 million on e-discovery processing, hosting and production in a single large case, exclusive of attorneys' fees. And, Verizon has spent years making itself largely e-discovery ready.

For less prepared organizations, early costs can spiral even higher. At between \$125 and \$600 per hour, an e-discovery vendor working without direction from the client can thrash around at significant cost and at risk of both recovering unnecessary ESI and missing critical ESI. In *Phoenix Four Inc. v. Strategic Resources Corp.*,⁵⁵ the

defendant learned late in discovery that its search for ESI missed entire sections of its company hard drives, and that the equivalent of 200-300 boxes of relevant electronic documents had not been produced. The court ordered the defendant and its attorneys to pay about \$30,000 to redepose three witnesses whom the plaintiff wanted to ask about information contained in the missing ESI. Winlock Brown explains that a thorough understanding of your own systems and infrastructure can help you direct your outside counsel's and e-discovery vendor's work—this can reduce costs and even prevent mistakes.

According to noted e-discovery consultant and former litigator George Socha, some vendors are preying on e-discovery panic and are making a lot of money in the process. The revenue growth of the e-discovery industry has encouraged hundreds of new vendors to enter the market. While Socha believes that the majority of e-discovery vendors are reputable and competent, the sheer number of new, untested entrants into the market means that clients should be wary. Some vendors may not have the competence to handle complex e-discovery matters. Others may wittingly or unwittingly capitalize on their clients' ignorance of effective e-discovery processes.

While e-discovery vendors can provide an invaluable service, they are not a substitute for

A burgeoning e-discovery industry is taking advantage of the panic arising from litigants who are unprepared to meet their e-discovery obligations, increasing the expense and delay of getting to the actual resolution of disputes on the merits.

e-discovery preparation. Rather, their primary function is a narrow, technical one—they help organizations process and prepare electronic documents for review and, ultimately, production. However, according to George Socha, organizations and their lawyers seem to be hiring e-discovery vendors in the hopes that they will take care of e-discovery from top to bottom. But a vendor should not be perceived as a cure-all. Patrick Oot says that vendors almost “always over-promise and under-deliver and they often overcharge.” The responsibility of knowing what ESI exists and where it is located lies with the litigant. Such knowledge will prevent mistakes and lead to smarter spending. In any event, says Socha, “vendors are not always accountable to the court if they make mistakes and companies and attorneys should not be relying on vendors to do the work they should be doing themselves.”

Vendors do make mistakes, sometimes big ones, and the parties themselves are responsible for them.⁵⁶ Take the example of *PSEG Power New York v. Alberici Constructors, Inc.*⁵⁷ There, plaintiff PSEG hired a vendor to help it produce 750 GB of e-mails to the defendant. The vendor prepared a disk containing all of the necessary documents, but accidentally separated all e-mails from their respective attachments during the transfer. The problem resulted from incompatibility between the

plaintiff’s software and the vendor’s own software and it led to an expensive discovery dispute.

PSEG was ordered to remarry each attachment to its corresponding e-mail, even though PSEG’s vendor estimated that the process could cost as much as \$206,000.⁵⁸ Late last year, the high-profile New York law firm of Sullivan & Cromwell filed a first-of-its-kind federal lawsuit against its outside vendor for allegedly shoddy and untimely e-discovery work.⁵⁹

Outside Counsel

The e-discovery boom has hit the law firm market, too. The 2007 Fulbright & Jaworski survey showed a 4% increase from 2006 to 2007 in the use of law firms possessing e-discovery expertise.⁶⁰ And the trend seems to be on the rise. Patrick Oot says he is aware of at least four major, national law firms that sought lawyers to head up e-discovery departments in the last year. Denver attorney Erin Eiselein says that in client interviews of prospective law firms, “the firm’s expertise in e-discovery is becoming an increasingly important factor in selecting litigation counsel.”

Several of our advisors, however, cautioned that organizations should investigate any law firm touting its e-discovery expertise. George Socha believes that “law firms are eager to be viewed as informed about e-discovery and able to advise clients on its application, but in truth, many are

not.” He says that in some cases law firms are afraid of looking incompetent by admitting to a lack of e-discovery knowledge or practice. In other cases, lawyers talk their clients into spending more than necessary on e-discovery, taking deliberate advantage of the client’s lack of experience and knowledge in the area. Unfortunately, other commentators support Socha’s conclusions. Attorney and e-discovery expert Craig Ball believes that the majority of lawyers (even big-firm lawyers) “are unsophisticated about ESI and e-discovery.” IT managers throughout the nation’s law firms seem to agree—they report that one of their biggest e-discovery challenges is “attorney education.”⁶¹

Socha explains that most lawyers have not had adequate e-discovery training. Part of the blame, he says, goes to the “outrageous” billable hours requirements to which many attorneys are subject. According to Socha, learning e-discovery takes a significant amount of time—roughly equivalent to a month-long course—that few lawyers or law firms have been able to afford. Craig Ball, on the other hand, believes that lawyers are subject to a debilitating inertia when it comes to e-discovery. He says that lawyers lament the time and expense involved in e-discovery, but are loath to change the way they practice. For example, Ball explains that lawyers have become comfortably aggressive in discovery, regularly submitting discovery requests

that seek “any and all” documents pertaining to a particular subject. With e-discovery, “any and all” requests become oppressive for both the seeking and the producing parties. Ball says that lawyers and courts should no longer tolerate those over-inclusive methods of practice. Instead, he says, the process must become efficient, cooperative, transparent and separate from the traditional antagonism of lawyering. Two prominent commentators argue that e-discovery is the clarion call for a new body of “case law that makes explicit what, for the past 70 years or so, has been left as a largely unstated goal of ‘cooperation’ within the adversary system.”⁶²

For organizations that cannot staff an in-house team (as Verizon and other corporations have done), Patrick Oot recommends either hiring an outside boutique law firm that focuses exclusively on e-discovery⁶³ or a larger firm with an e-discovery practice group headed by senior leadership. Oot says that a partner-level firm leader will have the credibility to direct the group competently and have the courage to give the best advice. Be wary, he says, of the law firm that assigns a junior associate to manage the discovery on any case.

The Costs of Ad Hoc E-Discovery

The ad hoc nature in which many organizations approach e-discovery is also causing them to incur significant legal costs at the review

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stage. Most organizations do not organize their ESI in ways that facilitate a quick and easy review of potentially relevant ESI. For this reason, a client sometimes locates massive amounts of ESI early in the case and sends it to outside lawyers to determine which documents should be produced to the other side and which documents should be withheld for reasons of privilege. Craig Ball calls it the “band-aid approach to e-discovery,” where clients and lawyers “dodge bullets on a case-by-case basis.”

The reactive approach toward e-discovery causes inefficiencies at both the front-end search and retrieval stage and at the back-end attorney review stage. Both stages are responsible for high e-discovery costs. Craig Ball explains that on the front end, ESI can be expensive and burdensome to find and produce because the company has not assigned it a “power of place.” In the age of paper-only discovery, documents had to be stored and filed in cabinets or other designated repositories according to some taxonomy. If a lawsuit hit, the client would know where to find relevant and responsive information. This was the “power of place.” Today, electronic information is stored easily, but it can exist in multiple places across a vast, unstructured data universe. Now, when the lawsuit hits, clients must look everywhere for potentially relevant information, not just one place.

Fulbright & Jaworski attorney Jeff Dykes explains that “volume drives costs” and that companies should maintain systems that are designed to reduce the pools of data so that discovery management can become affordable. Large pools of data can easily lead to excess costs. According to a December 2005 report released by Gartner Research, “companies that have not adopted formal e-discovery processes will spend nearly twice as much on gathering and producing documents as they will on legal services.”⁶⁴ The Honorable Marcia Krieger, United States District Judge for the District of Colorado, explains that “although discovery may unearth relevant information, it also produces information that is duplicative, marginally relevant or not relevant at all.” Judge Krieger says that “because e-discovery expands the scope and volume of information which can be obtained, it potentially worsens the problem of having too much information.” Gartner Research recommends instituting a “records management” program to reduce the amount of information retained by a company and creating a “map” showing where data resides and how it can be identified and accessed quickly.⁶⁵ Unfortunately, researchers lament that the majority of organizations are years away from establishing records management procedures that would enable them to make discovery more efficient.⁶⁶

Commentators seem to agree, however, that the bulk of e-discovery costs are found at the back-end review stage. One recent article states that the costs of document review and production run between \$2.70 and \$4.00 per document (inclusive of collection costs and attorneys' fees).⁶⁷ With even midsize cases generating hundreds of thousands of potentially relevant documents, costs skyrocket. RAND reports that as much as 75-90% of the costs of e-discovery may be attributable to "eyes-on" ESI review by attorneys.⁶⁸ Craig Ball similarly estimates that 50-70% of e-discovery costs are incurred at the attorney review stage and believes that nearly all of that is spent on preproduction privilege review. Ball believes that e-discovery and new technologies have the capacity to make discovery easier, faster, cheaper and even more accurate. One e-discovery vendor's system, for instance, was found to reduce reviewable data by 80-90%.⁶⁹ The problem, he says, is that despite available technologies, attorneys still review documents turned over by the client page by page. Ball explains that lawyers feel that they are committing malpractice if they don't review every document for every possible "tidbit of privilege."

At present, however, there are few appealing ways to balance cost reduction efforts and privilege review. While the new rules do provide that a party producing ESI may designate material as privileged after it has been produced, the rules do not affect

the substantive law governing privilege waiver.⁷⁰ Because existing doctrine in many jurisdictions suggests that the disclosure of privileged ESI, even if inadvertent, will waive the privilege for all related information, attorneys naturally feel forced to scour mountains of ESI before production.⁷¹ Moreover, while the new rules permit a "claw-back" or "quick peek" agreement in order to reduce the costs and time involved in pre-production review (under which the parties may agree to disclose potentially privileged ESI without waiving the right to claim privilege later) that too is unsatisfactory; privileged information, once learned, cannot be unlearned and it can permeate and alter the course of a case. Craig Ball believes that a fundamental shift needs to occur both in the way lawyers search for and review documents for privilege and in the way they think about privilege in the first place.

Gaming the System

Finally, some lawyers and clients may be taking advantage of the chaotic nature of e-discovery and the unpredictable state of the law to cover up their own sharp discovery tactics. For certain, most parties and lawyers will approach e-discovery in good faith. Nevertheless, ambiguities in the system created by the ever-shifting legal landscape may tempt some to avoid e-discovery responsibilities. For example, recent case law suggests that it is not beneath attorneys to plead

Although discovery may unearth relevant information, it also produces information that is duplicative, marginally relevant or not relevant at all. Because e-discovery expands the scope and volume of obtainable information, it potentially worsens the problem of having too much information.

technological ignorance of e-discovery if they believe it will advance their clients' interests.⁷²

Additionally, some attorneys and judges have noted the increased use of "spoliation" (destruction of relevant ESI) allegations and requests for sanctions as a tactical maneuver. One commentator notes that "[i]t is almost a certainty in litigation involving electronic discovery that something will be lost that should have been preserved."⁷³ Knowing this, some attorneys may seek ESI that likely does not exist, rather than seeking out the specific evidence to make their case, hoping to get a severe sanction against the opposing party when that party is unable to produce the requested information. This search for the absence of evidence, rather than the evidence itself, raises troublesome ethical questions. It also raises the significant possibility that cases will be decided on e-discovery issues, rather than on their facts. Malcolm Wheeler says that the specter of sanctions motions and spoliation allegations has become a "nuclear weapon" that may force many organizations to settle otherwise meritless cases. He also says that under some circumstances, organizations with strong, but modest-sized cases—cases that they would have pursued before the advent of e-discovery—may choose not to pursue those claims because the predicted e-discovery costs would exceed the expected recovery.

While incidents of evasiveness and gamesmanship in discovery have become all too routine in civil litigation generally, courts thus far seem to have cracked down on those tactics when it comes to e-discovery. Now, all parties to the case are expected to come to court with the same clear picture of the applicable IT infrastructure and where all potentially relevant ESI might reside. The point was made recently in *In re Seroquel Products Liability Litigation*.⁷⁴ There, the defendant was slow to identify all of the databases housing potentially relevant information (by the case management deadline, it named only fifteen databases, even though plaintiff had asked about forty-four others). The defendant argued that the plaintiff's initial inquiries involved only fifteen databases and if it wanted ESI from the others, it should have issued formal discovery requests.⁷⁵ The court bemoaned the parties' "failure to communicate" and wrote that "[i]dentifying relevant records and working out technical methods for their production is a cooperative undertaking, not part of the adversarial give and take."⁷⁶ For the defendant's "purposeful sluggishness" and for failing "to make a sincere effort to facilitate an understanding of what records [were] kept and what their availability might be," the court imposed sanctions.⁷⁷

*Qualcomm, Inc. v. Broadcom Corp.*⁷⁸ is now a notorious e-discovery cautionary tale. In that

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case, Qualcomm sued Broadcom for patent infringement. Broadcom's defense was that Qualcomm waived its right to enforce its patent by participating in an industry group. Throughout discovery, Broadcom repeatedly sought documents and ESI to support that defense. Up until trial, Qualcomm maintained that documents requested by Broadcom did not exist. During trial, however, twenty-one relevant e-mails came to light that supported Broadcom's defense, but that were not produced in discovery. Qualcomm's attorneys found the e-mails during trial preparation through a basic search conducted on a key witness's laptop. After some debate, Qualcomm produced the e-mails during trial. Broadcom then won the case. Post-verdict, Qualcomm produced more than 40,000 additional e-mails that were responsive to Broadcom's discovery requests.⁷⁹

After trial, the court began an inquiry into Qualcomm's discovery lapses. It found that Qualcomm's efforts to look for the damaging documents and ESI were less than thorough. As a sanction for not producing the e-mails during discovery, Qualcomm was ordered to pay all of Broadcom's legal fees—\$8.5 million. Qualcomm argued that its outside attorneys were responsible for the discovery mess since, Qualcomm claimed, it was outside counsel's responsibility to find and produce the relevant e-mails.⁸⁰ The judge rejected

Federal courts are also keeping a tight lid on efforts to unnecessarily expand the forms of electronic discovery production. Specifically, some courts have held that the new amendments do not automatically require production of ESI in native form (or any specific electronic form),²² or the production of metadata,²³ or the production of information previously produced in paper form.²⁴ Similarly, methods of electronic discovery that are particularly invasive (such as searches of hard drives) have been permitted only in rare circumstances.²⁵ Indeed, the amended Federal Rules make clear that the requesting party should specify the form in which it wants ESI produced, and if no specification is made, the producing party need only produce the ESI in a form that is reasonably useable.²⁶ The courts' insistence that duplicative ESI production not occur should encourage agreement among parties to future lawsuits on the forms of production early in the case.

Qualcomm's explanation, stating that there was no evidence that outside counsel knew enough about Qualcomm's organization and operation to identify all of the individuals whose computers should be searched and determine the most knowledgeable witness [M]ore importantly, Qualcomm is a large corporation with an extensive legal staff; it clearly had the ability to identify the correct witnesses and determine the correct computers to search and search terms to use.⁸¹

Inquiries into whether Qualcomm intentionally evaded Broadcom's discovery requests are ongoing. The lesson of *Qualcomm* is that organizations cannot delegate their responsibilities entirely to their lawyers.

The *Seroquel* and *Qualcomm* cases represent one category of litigation where the courts are targeting gamesmanship. But there are other kinds of cases where the risk of hiding, failing to look for, or demanding unnecessary ESI can become central to the case. For example, in cases involving trade secret misappropriation, software piracy and computer fraud, the dispute itself centers on electronically stored information, and debates over the discovery of ESI morph into debates over the merits of the case.

Another category of cases where ESI can play a major role are those in which one side to the

dispute possesses all or nearly all of the relevant ESI. These cases typically involve individuals suing a business or organization and appear most frequently in the context of employment disputes, civil rights and discrimination claims, product liability cases and insurance claims. In those cases the individual litigant usually has no ESI and, accordingly, has no fear of serving discovery requests that impose huge burdens on the opposing side, since there is no risk of retaliation in the form of similarly onerous discovery.

In a typical employment termination case, for example, the employer company is likely to have electronic personnel files, e-mails, logs of websites visited, the hard drive of the employee's work computer, the hard drives of all other officers and employees to whom the plaintiff directly or indirectly reported and who might have commented on or evaluated the plaintiff's job performance, and more. E-discovery, therefore, becomes a significant undertaking for the company and virtually no issue at all for the former employee. *Zubulake v. UBS Warburg, LLC*, for instance, began as a relatively routine employment case but soon evolved into a multi-year discovery battle yielding several separate opinions on the subject of e-discovery.⁸² The plaintiff in *Zubulake* sued her former company for gender discrimination after she was fired. Contending

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that her case rested on deleted company e-mails, the plaintiff succeeded in forcing the company to restore and sift through seventy-seven e-mail backup tapes, at a cost of almost \$166,000 (exclusive of attorneys' fees, 75% of which was to be paid by the company).⁸³ When it was revealed that some relevant e-mails had been "irretrievably lost" when the company recycled certain backup tapes, the court imposed several sanctions against the company, including monetary fines and an adverse inference instruction to the jury that missing and deleted e-mails would have been favorable to the plaintiff.⁸⁴ Cases since *Zubulake* have seen plaintiffs with little or no ESI successfully require commercial defendants to unearth significant amounts of electronic data in discovery.⁸⁵ We recognize that some courts take their gate-keeping function seriously and will intervene when necessary to prevent e-discovery that is truly overly broad in scope.⁸⁶ But, one should expect that any case where an imbalance of ESI exists between the plaintiff and the defendant will be more susceptible to e-discovery disputes (and e-discovery abuse) under the current system.

The breathtaking volume of ESI generated in litigation is starting to take a human toll. The potentially millions of pages produced in civil disputes must still be reviewed by human eyes, a task usually delegated to young associates in law firms. A recent article by Ben W. Heineman, Jr., former senior vice president-general counsel at General Electric and current senior fellow at Harvard Law School's Program on the Legal Profession, reports that large law firms are losing 30-50% of their associates within three or four years, up to two-thirds of whom leave of their own volition. Included among the reasons for their departures are the long hours and the "steady diet of drudge work," including document and e-mail review.²⁷ The advent of e-discovery is unlikely to stanch the flow of associates leaving law firm life. One mid-level litigation associate who has spent more than three years practicing in large law firms tells us that two of those years were spent reviewing documents. She says "young lawyers don't learn how to lawyer when all they are doing is reviewing and coding documents for responsiveness and privilege." She predicts that "unless some checks on this system are developed, the explosion of electronic information has the capability to destroy the civil litigation system and to run attorneys out of the profession in droves."



The current era of e-discovery is unsettling and unsettled. The law that governs and dictates parties' e-discovery responsibilities is fluid and creates an environment that can make preparing for e-discovery seem overwhelming. And nearly all interested parties—lawyers, litigants and even judges—are scrambling to prepare themselves. The short answer and the immediate one is that judges and lawyers must educate themselves on the technology and the case law; and companies and other entities must take immediate steps to develop standardized storage, retention and retrieval policies for electronic information.

However, preparing for where we are is not enough. We also need to think about where we should be. Should we accept such a huge increase in the costs of civil litigation? Are we comfortable with a system that requires litigants to spend their resources on the process and not the outcome? In discussions with our virtual advisory group and with other professionals coping with the impact of e-discovery, there is an overwhelming sense that the problems with e-discovery are but a subset—albeit a major one—of bigger issues surrounding civil litigation in general. Litigants deserve a civil justice system that is accessible to all and fair in its process. A system is not accessible unless it is affordable. And a system is not fair unless it produces decisions that are based on the merits of

a dispute rather than on technicalities. Fairness is ultimately a product of outcomes—not just process. Having too much discovery at too great an expense may in fact defeat, rather than serve, fairness.

As recent court decisions have noted, however, “[t]oo often litigation is not just about uncovering the truth, but also about how much of the truth the parties can afford to disinter.”⁸⁷ The costs of litigation can soar when electronic information is involved, thus ratcheting up the tension between “access” and “process” that has always existed.

Access. The quantity of electronic information is increasing at astounding rates, with a corresponding increase in the impact of e-discovery. In 2002, e-discovery issues seemed to affect only the behemoth cases. Now, e-discovery has penetrated even “midsize” cases, potentially generating an average of \$3.5 million in litigation costs for a typical lawsuit. The new rules require every lawyer in every case to think about e-discovery, which means that e-discovery could potentially touch every civil case, even small ones. If electronic information is expanding for every case, so are the costs. This means that e-discovery has the potential to push all but the largest cases out of the system. Litigants who cannot afford the services of e-discovery vendors and lawyers with e-discovery expertise will avoid the system altogether and bottom-line-minded organizations

will prefer to settle low-value cases rather than spend millions in legal fees and costs. We share Judge Bredar's concern that such barriers to the justice system are "a threat to the rule of law."

Process. Many, if not most, organizations have not developed methods and policies for the retention and retrieval of potentially relevant ESI and they are not prepared for litigation involving e-discovery. This reality suggests that potentially relevant information will inevitably be lost or destroyed in many lawsuits. We agree with those of our advisors who believe that unless courts exercise restraint and control over e-discovery issues, there is the potential that even modest litigation will degenerate into a calculus over the potential for sanctions due to the failure to preserve ESI instead of a resolution of the merits of a case.

E-discovery increases the tension between access and process, and simultaneously alters the sliding scale on which these two axes rest. Simply put, e-discovery in its current form creates a vicious cycle of cost and unpredictability that traps any rational litigant. Because the rules and case law of e-discovery are not well-established, and because the cost of e-discovery continues to spiral upward, many litigants may reasonably choose to avoid the court system altogether. Defendants and even plaintiffs may feel forced to settle or dismiss cases that they would otherwise actively defend

or prosecute if their e-discovery responsibilities were more certain, predictable and proportional. They may even feel compelled to pursue their cases in alternative forums like arbitration, where the expense and scope of discovery is frequently more limited than in federal and state courts. But the more people avoid the courts, the less opportunity there is to develop the case law and create an established, expected set of rules and practices. Those left to litigate in the court system will face even higher costs and continued uncertainty. Many of our advisors fear that if this vicious cycle is allowed to proliferate unchecked and uncontrolled, it could precipitously degrade the usefulness and value of America's public civil justice system. We are troubled by the prospect that the public could lose faith in something so fundamental to our constitutional structure of government as our public courts.

Complaints about e-discovery generate many different calls for reform, but among them is a near-unanimous call for change in the way litigants, judges and lawyers think about discovery in general. Craig Ball, for instance, believes an across-the-board shift in thinking is required. He believes that businesses must re-think the way they manage their data and educate their workers on the front-end handling of ESI and that lawyers must embrace technology to make the review and

There is an overwhelming sense that the problems with e-discovery are but a subset —albeit a major one—of bigger issues surrounding civil litigation in general.

production of ESI more efficient. He also contends that courts must re-examine their approach to e-discovery and start facilitating a more cooperative e-discovery environment. Others, like Judge Krieger, believe that the discovery process has long generated an excess of information, some of which is only marginally relevant to any single case. Lawyers tend to introduce too much evidence at trial, making trials costly, long and confusing to juries. E-discovery only increases the volume of information available and should serve as a wake-up call. Judge Krieger says that “to avoid unnecessary costs and confusion in the trial process, it is ever more important that lawyers use their analytical skills and technology to separate the wheat from the chaff—to identify what evidence is most meaningful to a case and to have the courage to abandon the rest.” Still others, like Virginia trial lawyer Craig Merritt, believe the solution lies in early, meaningful judicial case management that considers the amount in dispute and the resources of the parties against the likelihood that discovery will reveal significant, outcome-determinative evidence. Some suggest that the Federal Rules should further and more explicitly require full transparency and disclosure of the ESI possessed by each side and what ESI each side will seek in the case. A majority of our advisors believe that courts must show leadership

in exercising restraint and control over the amount of electronic discovery permitted.

Some, including Judge Bredar, propose a scaled, proportional system of discovery, where the amount of discovery permitted is dictated by the amount in controversy. Other advisors note that for decades, courts have largely refused to exercise the discretion to limit discovery afforded them under the Federal Rules.⁸⁸ With the advent of the new rules, they hope that courts will finally use that discretion to prevent e-discovery explosions and keep costs down for all parties. One advisor suggests significantly liberalizing existing cost-shifting provisions to keep e-discovery even-handed and efficient. The common theme of these proposals, however varied, is that the great risks of e-discovery now require Americans to revisit the way litigants, courts and lawyers handle civil disputes.

We have concluded that the e-discovery problem is akin to a low-grade fever—an early symptom of an illness that is undermining the general health of our civil justice system. The cure to the fever is a proportional civil justice system, where the costs of the process serve and do not interfere with access. We are dedicated to exploring these issues and developing solutions. But changes ultimately will need the leadership of courts, lawyers, businesses and ordinary citizens.

TEXT NOTES

1. See, e.g., Alan Cohen, *Data, Data Everywhere*, CORP. COUNSEL, July 2007, at 78. According to this article, a midsize case will generate at least this much ESI.
2. This calculation is an example and assumes 500 GB of printed emails without attachments (100,099 pages per GB). The number of actual printed pages depends on the file type included in the dataset and can vary widely—from as few as 15,477 pages per GB to 677,963 pages per GB. Fact Sheet, Lexis/Nexis Discovery Services, *How Many Pages in a Gigabyte?*, https://www.lexisnexis.com/applieddiscovery/lawlibrary/whitePapers/ADI_FS_PagesInAGigabyte.pdf; see also THE MANUAL FOR COMPLEX LITIGATION (Fourth) § 11.446 (2004) (stating that 1 GB of data is the equivalent of 500,000 pages of type-written text). The \$3.5 million estimate is based on benchmarks described at page 5.
3. Peter Lyman & Hal R. Varian, *How Much Information?* 2003(Paper) 1, http://www2.sims.berkeley.edu/research/projects/how-much-info-2003/printable_report.pdf.
4. George L. Paul & Jason R. Baron, *Information Inflation: Can the Legal System Adapt?*, RICH. J.L. & TECH., Spring 2007, at 9, available at <http://law.richmond.edu/jolt/v13i3/article10.pdf>.
5. Press Release, LiveOffice Survey Reveals Organizations are Unprepared for E-Discovery Requests, June 25, 2007, http://www.marketwire.com/mw/rel_us_print.jsp?id=745509.
6. Peter Lyman & Hal R. Varian, *How Much Information?* 2003 (Executive Summary) 2, http://www2.sims.berkeley.edu/research/projects/how-much-info-2003/printable_execsum.pdf.
7. *Id.*
8. *Id.*
9. See Cohen, *supra* note 1.
10. Fact Sheet, Lexis/Nexis Discovery Services, *supra* note 2. It is important to note that not all of the data that is processed, reviewed and produced consists of e-mails. One study by the Enterprise Strategy Group (ESG), however, shows that 77% of e-discovery requests are for e-mails and their attachments. ESG Lab Review™: IBM System Storage DR550 and Zantaz EAS: Enabling Scalable, High Performance E-mail Archiving 3, May 2007, http://www-03.ibm.com/systems/storage/disk/dr/pdf/esg_lab_review_03072007.pdf. Under the conversion guidelines provided in the Manual for Complex Litigation, 5GB of data could equal 2.5 million pages of printed documents. THE MANUAL FOR COMPLEX LITIGATION (Fourth) § 11.446 (2004). Note, however, that paper equivalency methods may differ among e-discovery service providers and that there is disagreement about the accuracy of the conversion numbers found in the Manual for Complex Litigation. See David D. Cross, *10 Steps for Conducting E-Discovery Involving Dynamic Databases*, 9 A.B.A. SEC. COMM. & BUS. LIT. 9 (Spring 2008).
11. Cohen, *supra* note 1.
12. JAMES N. DERTOUZOS ET AL., RAND INSTITUTE FOR CIVIL JUSTICE, THE LEGAL AND ECONOMIC IMPLICATIONS OF ELECTRONIC DISCOVERY: OPTIONS FOR FUTURE RESEARCH 3 (2008), available at http://www.rand.org/pubs/occasional_papers/2008/RAND_OP183.pdf.
13. In 2004, the Sedona Conference Working Group on Electronic Document Retention and Production released the Sedona Principles, a set of fourteen guidelines for discovery and retention of ESI. THE SEDONA CONFERENCE, *The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production*, <http://www.thesedonaconference.org/content/miscFiles/SedonaPrinciples200401.pdf>. The Sedona Principles continue to be highly influential guidelines for the practice of e-discovery, and many of those principles were incorporated into the Federal Rules of Civil Procedure on December 1, 2006.
14. FED. R. CIV. P. 26(f)(3).
15. FED. R. CIV. P. 26(b)(2)(B).
16. FED. R. CIV. P. 26(b)(2)(B).

17. FED. R. CIV. P. 37(e).

18. FED. R. CIV. P. 26(b)(5)(B).

19. See NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, UNIF. RULES RELATING TO THE DISCOVERY OF ELECTRONICALLY STORED INFORMATION, Aug. 3, 2007, available at http://www.law.upenn.edu/bll/archives/ulc/udoera/2007_final.pdf.

20. CONFERENCE OF CHIEF JUSTICES, GUIDELINES FOR STATE TRIAL COURTS REGARDING DISCOVERY OF ELECTRONICALLY-STORED INFORMATION, Aug. 2006. Individual states have begun inserting specific e-discovery measures into their own court rules. As of January 2008, nine states joined Texas and Mississippi in enacting their own e-discovery rules (many of which mirror the federal e-discovery rules). At least thirteen other states are in the process of enacting specific e-discovery rules and several other states are at the beginning stages of considering new rules. It seems that it will not be long before every state court has rules specifically concerning electronic discovery. It remains to be seen whether differences between states and federal rules will lead parties to "forum shop"—that is, decide to file a lawsuit in a specific court precisely because the court's e-discovery rules are considered to be favorable.

21. Paul & Baron, *supra* note 4, at 3.

22. Press Release, Robert Half Legal, Legal Field to Be Most Affected by E-Discovery, Globalization in Next Five Years, Survey Shows, Dec. 13, 2007, <http://www.roberthalflegal.com> (follow "About Us" hyperlink; then follow "Press Room" hyperlink; then follow "Press Releases" hyperlink; then follow "2007" hyperlink).

23. LEXIS/NEXIS, 2007 ANNUAL CORPORATE COUNSEL SURVEY (on file with the Institute for the Advancement of the American Legal System).

24. Karl Schieneman, *Project: Corporate Counsel Part II (Compliance Readiness)—Legal Service Providers Process Managing Electronic Discovery*, THE METROPOLITAN CORPORATE COUNSEL, Apr.

2008, <http://www.metrocorpcounsel.com/current.php?artType=view&artMonth=April&artYear=2008&EntryNo=3470>.

25. 2005 WL 679071 (Fla. Cir. Ct. Mar. 1, 2005). Because of its discovery misconduct, the court entered a partial default against Morgan Stanley and gave the jury an adverse inference instruction. The award however, was reversed on appeal, but for reasons unrelated to e-discovery; rather, the court held that the plaintiff failed to meet its burden in proving compensatory damages and was, therefore, not entitled to what ultimately became a \$1.5 billion verdict. *Morgan Stanley & Co. Inc. v. Coleman (Parent) Holdings Inc.*, 995 So.2d 1124, 1131-32 (Fla. App. 2007), *cert. denied*, 973 So.2d 1120 (Fla. 2007).

26. The growth of e-discovery at the turn of the twenty-first century led to the formation of the Sedona Conference Working Group on Electronic Document Retention and Production, a collection of attorneys and consultants with e-discovery experience. In March 2003, the Working Group issued its draft set of fourteen electronic discovery guidelines known as the Sedona Principles. As the Working Group explained, it had become evident that all electronically saved data may be saved and available for litigation, and "[i]t seemed doubtful to us that the normal development of case law would yield, in a timely manner, best practices for organizations to follow in the production of electronic documents." The Sedona Principles have been revised and refined several times since 2003, but the fourteen principles remain largely the same, and their mere presence has informed the discussion at the federal level.

27. DERTOUZOS, ET AL., *supra* note 12, at 9.

28. *Id.* at 7.

29. James E. Powell, *IT Dangerously Unprepared for E-Discovery*, Survey Shows, Mar. 20, 2007, <http://www1.esj.com/enterprise/article.aspx?EditorialsID=2494>.

30. See, e.g., MERRILL LEGAL SOLUTIONS, THE FOUR CRITICAL STEPS TO PREPARE FOR THE NEW FEDERAL RULES CHANGES . . . AND WHY YOU SHOULD ACT

- Now 2, <http://www.merrill-legal.com/landing.asp?src=126>. (sign-on required, copy on file with the Institute for the Advancement of the American Legal System).
31. FULBRIGHT & JAWORSKI L.L.P. THIRD ANNUAL LITIGATION TRENDS SURVEY FINDINGS 18, 2006, available at <http://www.fulbright.com/mediaroom/files/2006/FulbrightsThirdAnnualLitigationTrendsSurveyFindings.pdf>.
32. Press Release, One Year Later—Forty-four Percent of Corporate Counsel Report Companies Being Unprepared for Onset of Revised Federal Rules for E-Discovery, <http://www.lexisnexis.com/media/press-release.aspx?id=1022.asp>.
33. Beth Pariseau, *One Year After FRCP, Struggles Continue with e-discovery*, STORAGE TECHNOLOGY NEWS, Dec. 19 2007, http://searchstorage.techtarget.com/news/article/0,289142,sid5_gci1286772,00.html (reporting that 82% of respondents “had not yet started to address the challenges introduced by the amendments to the [Federal Rules]”); Press Release, New Survey Finds Over Half of Businesses Lack a Clear Email Retention Policy, Dec. 17, 2007, <http://www.messageone.com/news/nws-2007-12-17-1> (reporting that 65% of U.S. businesses remain unprepared to meet e-discovery requirements); Press Release, New E-Discovery Survey Reveals Many Firms’ IT and Legal Departments Not Litigation Ready, Jul. 25, 2007, <http://www.contoural.com/pdf/Osterman-FINAL.7.25.07.doc.pdf> (69% of Survey respondents not litigation-ready); Powell, *supra* note 29 (94% of persons responsible for e-mail policy reported not being prepared to meet Federal Rules requirements).
34. FED. R. CIV. P. 16(b); FED. R. CIV. P. 26(f).
35. BARBARA J. ROTHSTEIN ET AL., MANAGING DISCOVERY OF ELECTRONIC INFORMATION: A POCKET GUIDE FOR JUDGES 4-5 (Federal Judicial Center 2007).
36. FED. R. CIV. P. 26(f) and advisory committee’s note; FED. R. CIV. P. 16(b); ROTHSTEIN ET AL., *supra* note 35, at 4-5; *see also Phoenix Four, Inc. v. Strategic Res. Corp.*, 2006 WL 1409413, at *3 (S.D.N.Y. May 23, 2006) (characterizing the then pre-codified mandate as a duty to “conduct a methodical survey of [the client’s] sources of information”); *In re: Electronically Stored Information, Suggested Protocol for Discovery of Electronically Stored Information* (D. Md.), <http://www.mdd.uscourts.gov/news/news/ESIProtocol.pdf>.
37. *Id.*
38. NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS, *supra* note 19, Rule 3.
39. *See* ROTHSTEIN ET AL., *supra* note 34, at 5; Arthur L. Smith, *Responding to the “E-Discovery Alarm,”* ABA BUSINESS LAW TODAY, September/October 2007, at 27-29; *see also* Carolyn Southerland, *Ignorance of IT Minutiae No Excuse for Litigators*, NAT’L L.J., Jul. 17, 2006, at S3, Col. 1.
40. Leigh Jones, *E-Discovery Zero Hour Approaching*, NAT’L L.J., Aug. 21, 2006, at 1, col. 3.
41. It is worth reiterating here that the early meeting is designed to flesh out the scope of ESI to be exchanged during discovery, not the information that should have been preserved during a litigation hold. Litigation holds generally include all potentially relevant information and are instituted no later than the initiation of the lawsuit—or sooner, if litigation is anticipated earlier.
42. *See, e.g.,* Moze Cowper & John Rosenthal, *Not Your Mother’s Rule 26(f) Conference Anymore*, 8 SEDONA CONF. J. 261, 262 (2007).
43. LEXISNEXIS, *supra* note 23.
44. *See supra* notes 34 through 36.
45. AM. BAR ASS’N, Law Practice Today, Electronic Discovery, Jul. 2004, http://www.abanet.org/lpm/lpt/articles/nosearch/ft07041_print.html (last visited Apr. 30, 2008).
46. *E.g.,* Ann G. Fort, *Mandatory E-Discovery: Compliance Can Create David and Goliath Issues, Reminiscent of the Early Days of Sarbanes-Oxley*, FULTON COUNTY DAILY REPORT, Mar. 19, 2007, at 13.

47. Monica Bay, *An Undercurrent of Fear*, L. TECH. News, Oct. 2007, at 1, Col. 1 (quoting DLA Piper partner Browning Marean).
48. 2005 WL 679071.
49. *Id.* at *2.
50. GEORGE SOCHA & THOMAS GELBMANN, 2003 ELECTRONIC DISCOVERY SURVEY REPORT, <http://www.sochaconsulting.com/Publications/DDEE%2005.03.pdf> (public report); GEORGE SOCHA & THOMAS GELBMANN, FIFTH ANNUAL SOCHA-GELBMANN ELECTRONIC DISCOVERY SURVEY REPORT 2006, http://www.sochaconsulting.com/2007_Socha-Gelbmann_ED_Survey_Public_Report.pdf (public report). E-discovery vendor revenues account for nearly \$1.6 billion—the balance of industry revenues is traced to e-discovery work being formed in-house by law firms and other organizations, as well as e-discovery software purchases.
51. SOCHA & GELBMANN, FIFTH ANNUAL SOCHA-GELBMANN ELECTRONIC DISCOVERY SURVEY REPORT, *supra* note 50.
52. *Id.*; SOCHA & GELBMANN, 2003 ELECTRONIC DISCOVERY SURVEY REPORT, *supra* note 50.
53. IDC, WORLDWIDE LEGAL DISCOVERY AND LITIGATION SUPPORT INFRASTRUCTURE 2007-2011 FORECAST: LEGAL MATTER AND COMPLIANCE RECORDS REPOSITORIES ARE THE EARLY USE CASES OF ACTIVE ARCHIVING ARCHITECTURE, Doc. #207155, June 2007 (copy available for purchase through <http://www.internationaldatacorp.com>).
54. John F. McCarrick, *Implications of Electronic Data Discovery for Insurers* 14 (2006), available at <http://www.eapdlaw.com> (follow “Newsstand” link, then follow “Search Newsstand” box and, using “Articles/White Papers” option, search by “Professionals” (McCarrick, John F) and Year (2006)) (citing to E-Discovery Information Exchange, (<http://www.EDDixllc.com>)<<http://www.eddixllc.com/>>) “EDiscovery Supplier Landscape” Survey; October 28, 2004: Survey found at http://www.EDDixllc.com/sa_supplier_landscape.asp).
55. 2006 WL 1409413, at **2-3 (S.D.N.Y. May 23, 2006).
56. *In re Seroquel Prods. Liab. Litig.*, 244 F.R.D. 650, 664 (M.D. Fla. 2007) (citing to the Sedona Principles).
57. 2007 WL 2687670 (N.D.N.Y. Sep. 7, 2007).
58. The defendant’s own estimates were considerably lower.
59. Complaint, *Sullivan & Cromwell LLP v. Electronic Evidence Discovery Incorporated*, 07CV11616 ¶¶ 3, 18, 19-30 (S.D.N.Y.); Anthony Lin, *Sullivan & Cromwell Suit Against Vendor Highlights Problems with E-Discovery*, N.Y. L. J., Jan. 7, 2008, at 1, col. 4.
60. FULBRIGHT & JAWORSKI L.L.P., FOURTH ANNUAL LITIGATION TRENDS SURVEY FINDINGS 22, available at <http://www.fulbright.com/mediaroom/files/2007/FJ6438-LitTrends-v13.pdf> (sign-on required, on file with the Institute for the Advancement of the American Legal System).
61. 2007 INTERNATIONAL LEGAL TECHNOLOGY ASSOCIATION TECHNOLOGY ASSOCIATION TECHNOLOGY PURCHASING SURVEY, 3 available at <http://www.iltanet.org/pdf/2007PurchasingSurvey.pdf>.
62. Paul & Baron, *supra* note 4, at 16.
63. See Richard L. Marcus, *E-Discovery & Beyond: Toward Brave New World or 1984?* 25 REV. LITIG. 633, 646 (2006) (noting that at least one such firm had been established by 2006).
64. GARTNER RESEARCH, THE COSTS AND RISKS OF E-DISCOVERY IN LITIGATION, 2, Dec. 1, 2005 (copy available for purchase at http://www.gartner.com/DisplayDocument?id=487318&ref=g_sitelink).
65. *Id.* at 4.
66. GARTNER RESEARCH, E-DISCOVERY: DEFINITIONS, ADVICE AND VENDORS, Dec. 2, 2005 http://www.gartner.com/resources/136300/136366/edisccovery_definitions_advic_136366.pdf; ROBERT F. WILLIAMS & LORI J. ASHLEY, 2007 ELECTRONIC RECORDS

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67. Fort, *supra* note 46.
68. DERTOUZOS ET AL., *supra* note 12, at 3.
69. BRIAN BABINEAU, WHITE PAPER: LEVERAGING ANALYTICS TO LOWER eDISCOVERY COSTS: A STUDY OF CLEARWELL SYTEMS' CUSTOMERS 4 (March 2007).
70. See FED. R. CIV. P. 26(b)(5)(B).
71. Proposed amendments to Federal Rule of Evidence 502 may relax some of these malpractice fears in federal court (by giving some substantive teeth to the "clawback" provision of the new e-discovery rules and allowing inadvertently disclosed privileged documents to be retracted).
72. In *Garcia v. Berkshire Life Ins. Co. of Am.*, 2007 WL 3407376, at *1 (D. Colo. Nov. 13, 2007), the plaintiff produced only 10 e-mails (identifying 135 others in a privilege log) from a DVD containing over 5,000 of her own e-mails. Initially, the plaintiff's attorney claimed not to know how to access the thousands of other e-mails on the disk, but later refused production on burdensomeness grounds. The court compelled production of the DVD. *Id.* at **3-6, 8.
73. Arthur L. Smith, *Responding to the "E-Discovery Alarm,"* ABA BUSINESS LAW TODAY, September/October 2007, at 27-29.
74. 244 F.R.D. 650 (M. D. Fla. 2007).
75. *Id.* at 659-60.
76. *Id.* at 660.
77. *Id.* at 664-66 (finding that sanctions were warranted but not making a determination as to the nature or amount of sanctions).
78. 2008 WL 66932, at *1 (S.D. Cal. Jan. 7, 2008), *vacated in part* by 2008 WL 638108 (S.D. Cal. Mar. 5, 2008) (allowing Qualcomm's outside attorneys to defend themselves, despite the attorney-client privilege, on the issue of assessing responsibility for discovery failures).
79. *Id.* at *6.
80. 2008 WL 66932, at *21 n.6.
81. *Id.*
82. 229 F.R.D. 422, 424 (S.D.N.Y. 2004).
83. See *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 281-83, 291 (S.D.N.Y. 2003).
84. *Zubulake*, 229 F.R.D. at 426. The case ended in a \$29.3 million verdict for the plaintiff, which award included \$20.2 million in punitive damages. T. Ellis, *Evidentiary Issues in Employment Cases*, ALI-ABA COURSE OF STUDY 1260-61 (July 26-27, 2007).
85. See, e.g., *Treppel v. Biovail Corp.*, 2008 WL 866594, at *12 (S.D.N.Y. Apr. 2, 2008) (after the close of discovery and following several motions and opinions involving e-discovery disputes, ordering the defendant to restore and search six e-mail backup tapes and allowing a forensic inspection of its CEO's laptop).
86. See, e.g., *Petcou v. C.H. Robinson Worldwide, Inc.*, 2008 WL 542684, at ** 1-3 (N.D. Ga. Feb. 25, 2008) (in employment discrimination case, applying FED. R. CIV. P. 26(b)(2)(B) & (C) to deny plaintiff's motion to compel a search for all e-mails containing sexual content where the company had thousands of employees and costs of e-mail retrieval reached almost \$80,000 per employee).
87. *Rowe Entm't, Inc. v. William Morris Agency, Inc.* 205 F.R.D. 421, 423 (S.D.N.Y. 2002).
88. See FED. R. CIV. P. 26(b)(2)(C).

SIDEBAR NOTES

1. Joseph Bauccio Salvatore, *E-Discovery: Why and How E-Mail is Changing the Way Trials Are Won and Lost*, 45 DUQ. L. REV. 269, 291 (2007).
2. David Ashenfelter, et al., *8 Felony Counts for Detroit Mayor, Pair Charged with Perjury, Conspiracy in Wake of Affair*, CHICAGO TRIBUNE, Mar. 25, 2008, at 1.
3. *Ranta v. Ranta*, 2004 WL 504588, at *1 (Conn. Super. Feb. 25, 2004).
4. *Id.*
5. Thomas B. Scheffey, *Lockdown Ordered for Laptop*, CONN. LAW TRIBUNE, Mar. 15 2004, at 1.
6. Richard L. Marcus, *E-Discovery & Beyond: Toward Brave New World or 1984?* 25 REV. LITIG. 633, 664 (2006).
7. George L. Paul & Jason R. Baron, *Information Inflation: Can the Legal System Adapt?*, RICH. J.L. & TECH. Spring 2007 at 9, available at <http://law.richmond.edu/jolt/v13i3/article10.pdf>.
8. Quoted in Kathleen Hickey, *E-discovery Adds Twist to Litigation*, GOV'T COMPUTER NEWS, Apr. 2, 2008, http://www.gcn.com/cgi-bin/udt/im.display.printable?client.id=gcn_daily&story.id=46055.
9. Open Text, *Government Agencies Face New Challenges in Preparing for E-discovery Requests*, Oct. 1, 2007, <http://technology.findlaw.com/articles/01180/010989.html>.
10. 449 F. Supp. 2d 1 (D.D.C. 2006); George L. Paul & Jason R. Baron, *supra* note 7, at 11-12; Jason R. Baron, *Toward a Federal Benchmarking Standard for Evaluating Information Retrieval Products Used in E-Discovery*, 6 SEDONA CONF. J. 237, 239 (2005).
11. David Johnston, *E-Mail Shows Racial Jokes by Secret Service Supervisors*, N.Y. TIMES, May 10, 2008, at A1.
12. NASCI Releases Brief on Starting Points for E-Discovery, Nov. 28, 2007, <http://www.govtech.com/gt/211518>.
13. See *Wingnut Films, Ltd. v. Katja Motion Pictures Corp.*, 2007 WL 2758571, at *21 (C.D. Cal. Sept. 18, 2007).
14. *Advanced Micro Devices, Inc. v. Intel Corp.*, 1:05-CV-00441-JJF (D. Del. Mar. 5, 2007) (Docket No. 293).
15. *Id.* at 2-4.
16. FED. R. CIV. P. 37(e).
17. See Thomas Y. Allman, et al., *The Forgotten Cousin: State Rulemaking & Electronic Discovery*, 766 PRACTISING L. INST., LITIG. & ADMIN. PRACTICE COURT HANDBOOK SERIES 317, 323 (2007).
Most published cases have instead relied on traditional principles for determining whether to impose sanctions—Was the loss intentional? Was it in bad faith? Was the party who lost the information under an obligation to keep it at the time of the loss? Was the destroyed information relevant to the case? At least at this point in time, most courts are still turning first to these questions, not whether the specific terms of the “safe harbor” provision were met. In fact, of the eighty-two spoliation and sanction cases surveyed between December 1, 2006, and May 5, 2008, only eleven of them make explicit reference to the “safe harbor” provision now found in Federal Rule of Civil Procedure 37(e).
18. See Thomas Y. Allman, *Managing Preservation Obligations After the 2006 Federal E-Discovery Amendments*, RICH. J.L. & TECH., Spring 2007, at 21, available at <http://law.richmond.edu/jolt/v13i3/article9.pdf> (citing to *In re Napster, Inc.*, 2006 WL 3050864, at *12 n.4 (N.D. Cal. Oct. 25, 2006) (“Sanctions imposed pursuant to a court’s inherent powers is [sic] governed by a different set of principles than sanctions under Rule 37.”)).
19. James E. Powell, *IT Dangerously Unprepared for E-Discovery*, SURVEY SHOWS, Mar. 20, 2007, <http://www1.esj.com/enterprise/article.aspx?EditorialsID=2494>.
20. It should be noted here that the term “destruction

policy,” as used by Kleeger, is interchangeable with the term “retention policy”—that is, a policy that governs what ESI is kept and for how long.

21. *Advanced Micro Devices, Inc.*, *supra* note 14.

22. *Advanced Micro Devices, Inc. v. Intel Corp.*, 2008 WL 2310288, at *14 (D. Del. June 4, 2008) (noting that “the parties and the Special Master have spent and will continue to spend a significant amount of time and resources focused on the question of spoliation and, if appropriate, sanctions”).

23. See, e.g., *In re ATM Fee Antitrust Litig.*, 2007 WL 1827635 (N.D. Cal. Jun. 25, 2007) (holding that the December 2006 amendments to Federal Rule of Civil Procedure 34 did not require the production of ESI in a form inconsistent with the parties’ prior agreement).

24. See *Kentucky Speedway, LLC v. Nat’l Ass’n of Stock Car Auto Racing*, 2006 WL 5097354 (E.D. Ky. Dec. 18, 2006).

25. See *Scotts Co. LLC v. Liberty Mut. Ins. Co.*, 2007 WL 1723509 (S.D. Ohio Jun. 12, 2007); *Williams v. Sprint/United Mgmt. Co.*, 2006 WL 3691604 (D. Kan. Dec. 12, 2006).

26. See, e.g., *Calyon v. Mizuho Sec. USA Inc.*, 2007 WL 1468889 (S.D.N.Y. May 18, 2007) (denying a *carte blanche* search of a hard drive); *Balfour Beatty Rail, Inc. v. Vaccarello*, 2007 WL 169628 (M.D. Fla. Jan. 18, 2007) (denying search of a hard drive where requesting party failed to specify what it was looking for or allege that any specific information was not already provided); cf. *Ameriwood Indus., Inc. v. Liberman*, 2006 WL 3825291 (E.D. Mo. Dec. 27, 2006) (allowing the search of a mirror image of a hard drive, subject to an explicit procedure set out by the court, where relevant information was likely to be found and the requesting party offered to pay the cost of the search).

27. See FED. R. CIV. P. 34(b)(ii).

28. Ben W. Heineman, Jr. & David B. Wilkins, *The Lost Generation?*, AM. LAW, Mar. 2008, at 85.

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