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E-Discovery: Addressing The Information Logjam Without Getting Rolled

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I. Introduction

The years 2005 through early 2008 saw a "revolution" in e-discovery during which courts, the legislature, and litigants worked hard to establish the ground rules for e-discovery. In 2005 and 2006, the focus was on the duty to preserve and the consequences of spoliation of electronically stored information ("ESI"), as well as the management of ESI-related discovery under newly-enacted Federal Rules of Civil Procedure. In 2007 and early 2008, courts and commentators helped establish best practices for the component parts that make up the management of an e-discovery project. The development of e-discovery has now shifted from "revolution" to "evolution." The focus of recent court decisions, legislative activity, and commentary has been to build on the ground rules for e-discovery. For instance, in September 2008, new Federal Rule of Evidence 502 went into effect, allowing parties to agree that the inadvertent disclosure of privileged materials produced under an agreed discovery protocol would not amount to a waiver of a privilege. Importantly, non-waiver orders under Rule 502 are binding in other federal and state court actions. One of the new Rule's primary purposes is to reduce the often burdensome discovery costs associated with conducting a privilege review of extensive ESI prior to production in discovery. Also in 2008, federal courts began to examine the methodologies by which parties search for relevant ESI to preserve and produce. Those decisions are significant because they are the first steps in the evolution of conduct standards that will hopefully help make the search, retrieval, production, and management of ESI simpler, more accurate, and more cost effective. The result is that parties now have a clearer idea of how to manage the challenges and mitigate the risks associated with e-discovery.

This paper first briefly discusses the Federal Rules of Civil Procedure related to e-discovery in order to provide a baseline understanding of the federal e-discovery framework. The paper also reviews the continuing developments regarding e-discovery and anticipates their impact going forward. Finally, the paper offers practical advice concerning litigation hold processes that limit interference with a company's document retention program, the selection of third-party vendors, and the ways to use the required scheduling conferences to limit discovery costs.

II. Federal Rules Of Civil Procedure Related To E-Discovery

Several revisions to the Federal Rules of Civil Procedure in 2006 and 2007, and the enactment of Rule 502 of the Federal Rules of Evidence in 2008 concern e-discovery issues. A familiarity with these rules is essential to an understanding of the various issues companies face when managing the retention and production of what can often become a "logjam" of ESI.

A. Rule 26

1. Rule 26(a)(1)(A)(ii): Initial Disclosures

Rule 26(a)(1) governs parties' initial disclosures of relevant information. Under Rule 26(a)(1)(A)(ii), required disclosures include among the types of information a litigant must provide to its opponent "a copy—or a description by category and location —of all documents,

electronically stored information and tangible things that the disclosing party has in its possession, custody or control and may use to support its claims or defenses, unless the use would be solely for impeachment."[1] "The term 'electronically stored information' has the same broad meaning … as in Rule 34(a)."[2]

2. Rule 26(b)(2)(B)–(C): Accessibility Of Data

Rule 26(b)(2)(B) provides:

> A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.[3]

Rule 26(b)(2)(B), however, "has been criticized for giving the parties to a lawsuit too much leeway in determining whether data is accessible."[4]

Further, Rule 26(b)(2)(C) provides:

> On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:
>
> (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
>
> (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
>
> (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.[5]

3. Rule 26(b)(5)(B): The Claw-Back Provision

Rule 26(b)(5) provides a method by which counsel can retrieve inadvertently produced material that is privileged or work-product. Rule 26(b)(5)(B) describes what has been called the 'claw-back' agreement:

> [i]f information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.[6]

"Quick-peek" agreements are similar to "claw-back" agreements. Because of the potential high cost of the initial review for privileged materials, "[p]arties may attempt to minimize ... costs and delays by agreeing to protocols that minimize the risk of waiver. They may agree that the responding party will provide certain requested materials for initial examination without waiving any privilege or protection – sometimes known as a 'quick peek.'"[7] Before the enactment of Rule 502 of the Federal Rules of Evidence (see *infra*), "claw-back" and "quick-peek" agreements were risky because they "did not bind those who were nonparties, thus providing no protection against the risk that a third party could seek to obtain and use the documents in another proceeding."[8]

4. Rule 502 Of The Federal Rules Of Evidence

Rule 502 of the Federal Rules of Evidence[9], which became effective on September 19, 2008, is related to Rule 26(b)(5)(B) and addresses the consequences of inadvertently disclosing privileged material. The most significant aspect of the rule is that it allows Federal courts to issue orders that a privilege has not been waived and makes those orders binding on non-parties, as well as on other Federal and State courts. The operative sections of Rule 502 are summarized below, but for a thorough discussion of the new Rule, see Section II. A. of this paper.

a. Subject-Matter Waiver

Federal Rule of Evidence 502(a) provides that: "When the disclosure is made in a Federal proceeding or to a Federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a Federal or State proceeding only if: (1) the waiver is intentional; (2) the disclosed and undisclosed communications or information concern the same subject matter; and (3) they ought in fairness to be considered together."[10] "In effect, an inadvertent disclosure, even if it constitutes a waiver, will act as a waiver only as to the materials disclosed, not to other materials regarding the same subject matter."[11]

b. Requirements For Avoiding Waiver Of Privilege In Context Of Inadvertent Disclosure

Rule 502(b) addresses the potential effect of an inadvertent disclosure of privileged or work-product material on a claim of privilege: "(b) Inadvertent disclosure.- - When made in a

Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if: (1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B)."[12] The rule defines "'attorney-client privilege'" as "the protection that applicable law provides for confidential attorney-client communications," and "'work-product protection'" as "the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial."[13] Rule 502 "applies to previously filed cases, in the discretion of the trial judge, and to all cases filed on and after September 19, 2008, without exception."[14]

5. Rule 26(c): Cost-Shifting

Retrieving and producing ESI raises cost concerns. While the presumption "is that the responding party must bear the expense of complying with discovery requests ... it may invoke the district court's discretion under Rule 26(c) to grant orders protecting it from undue burden or expense in doing so, including orders conditioning discovery on the requesting party's payment of the costs of discovery."[15] Rule 26(c)(1) provides in pertinent part: "[t]he court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense ...."[16]

The United States District Court for the Southern District of New York in *Rowe Entertainment, Inc. v. The William Morris Agency*[17] noted "courts have adopted a balancing approach," and apply the following eight-factor cost-shifting test:

> (1) the specificity of the discovery requests; (2) the likelihood of discovering critical information; (3) the availability of such information from other sources; (4) the purposes for which the responding party maintains the requested data[;] (5) the relative benefit to the parties of obtaining the information; (6) the total cost associated with production; (7) the relative ability of each party to control costs and its incentive to do so; and (8) the resources available to each party.[18]

In a widely followed case, the same court in *Zubulake v. UBS Warburg LLC*[19] concluded courts should consider shifting the costs of production to requesting parties when the requested information is "inaccessible" - when it must be restored or reconstructed before it can be used or reviewed.[20] Moreover, the *Zubulake* court noted:

> [i]f information is inaccessible, the court must weigh seven factors to determine whether it is appropriate to shift the costs of producing the requested information to the requesting party. Those factors are:
>
> a. The extent to which the request is specifically tailored to discover relevant information;
> b. The availability of such information from other sources;

c. The total cost of production, compared to the amount in controversy;
d. The total cost of production, compared to the resources available to each party;
e. The relative ability of each party to control costs and its incentive to do so;
f. The importance of the issues at stake in the litigation; and
g. The relative benefits to the parties of obtaining the information.[21]

6. Rule 26(f)(2): E-Discovery At The Initial Attorneys' Conference

Rule 26(f)(2) expressly requires parties to "discuss any issues relating to preserving discoverable information" at the initial conference.[22] Specifically, the Rule requires the parties to "develop a proposed discovery plan"[23] that states "the parties' views and proposals on ... any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced ... [and] any issues about claims of privilege or of protection as trial-preparation materials, including—if the parties agree on a procedure to assert such claims after production—whether to ask the court to include their agreement in an order ...."[24] "The Advisory Committee Note expressly discourages courts from entering blanket preservation orders and suggests that any preservation order be narrowly tailored."[25] For a more detailed discussion, see Section III.A., *infra*.

B. Rule 16(b)(3)(B): Discussing E-Discovery At The Outset Of Litigation

Scheduling orders courts enter often follow the parties' initial conference scheduling agreements. Accordingly, Rule 16(b)(3)(B) provides, in pertinent part, "[t]he scheduling order may . . . provide for disclosure or discovery of electronically stored information . . . [and] include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced ...."[26]

C. Rule 33(d): Interrogatories And The Production Of ESI

Rule 33(d) provides in pertinent part: "[i]f the answer to an interrogatory may be determined by examining, auditing, compiling, abstracting, or summarizing a party's business records (including electronically stored information), and if the burden of deriving or ascertaining the answer will be substantially the same for either party, the responding party may answer by ... specifying the records that must be reviewed ...."[27] Thus, under the Rule, a party has the option of specifying ESI in response to a written interrogatory.

D. Rule 34: Document Requests And The Production Of ESI

Similarly, Rule 34(a)(1)(A) provides a party may request "any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs,

sound recordings, images, and other data or data compilations – stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form ..."[28] Rule 34(a)(1) also allows parties to "inspect, copy, test or sample" the documents, ESI, and tangible things covered by that Rule.[29]

Further, Rule 34(b)(1)(C) allows the requesting party to "specify the form or forms in which electronically stored information is to be produced."[30] "The response may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form—or if no form was specified in the request—the party must state the form or forms it intends to use."[31] Also, "[i]f a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms ...."[32]

E. Rule 37(e): A "Safe Harbor" For Routine Destruction

Rule 37(e) provides: "[a]bsent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system."[33] "Good faith is generally understood to be the absence of bad faith, so if a spoliating party can show that its actions were not in bad faith, it will have met the state of mind standard required by Rule 37(e)."[34]

This rule has been described as providing a "safe harbor" for litigants, who destroy documents in the routine course of electronic data management.[35] Rule 37(e) has also been described as providing "a very shallow harbor."[36] Further, "courts will likely assess the intent of a producing party (culpable state of mind) that is unable to produce relevant information because it was not maintained, as well as the prejudice to the requesting party from the inability to obtain such data."[37]

F. Rule 45: Subpoenas For ESI

Rule 45(a)(1)(C) provides in pertinent part: "[a] command to produce documents, electronically stored information, or tangible things or to permit the inspection of premises may be included in a subpoena commanding attendance at a deposition, hearing, or trial, or may be set out in a separate subpoena. A subpoena may specify the form or forms in which electronically stored information is to be produced."[38] Also, Rule 45(a)(1)(D) provides, "[a] command in a subpoena to produce documents, electronically stored information, or tangible things requires the responding party to permit inspection, copying, testing, or sampling of the materials."[39]

G. Rule 53: The Use Of Special Masters And E-Discovery

Rule 53(a) provides that:

> [u]nless a statute provides otherwise, a court may appoint a master only to: (A) perform duties consented to by the parties; (B) hold trial proceedings and make or recommend findings of fact on issues to be decided without a jury if appointment is warranted by: (i) some exceptional condition; or (ii) the need to perform an accounting or resolve a difficult computation of damages; or (C) address pretrial and posttrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district.[40]

Also, "[u]nless the appointing order directs otherwise, a master may: (A) regulate all proceedings; (B) take all appropriate measures to perform the assigned duties fairly and efficiently; and (C) if conducting an evidentiary hearing, exercise the appointing court's power to compel, take, and record evidence."[41] "Courts are appointing special masters to address electronic discovery issues with increasing frequency, although the number of reported appointments is still relatively small."[42] Special masters serve various roles regarding electronic discovery: "(1) facilitating the electronic discovery process; (2) monitoring discovery compliance related to ESI; (3) adjudicating legal disputes related to ESI; and (4) adjudicating technical disputes and assisting with compliance on technical matters, such as conducting computer/system inspections."[43]

III. Issues Confronting Corporate Law Departments Regarding The Management And Production Of ESI In Discovery

A. New Federal Rule Of Evidence 502 Protects Parties From The Waiver Of Privileged Information Due To Inadvertent Disclosure

Before Rule 502 was enacted, Federal courts generally protected parties from waiving a privilege regarding inadvertently disclosed material, "unless the disclosing party was negligent in producing the information or failed to take reasonable steps seeking its return."[44] Some courts, however, held that any inadvertent disclosure of privileged material constituted a waiver of the privilege.[45] Others required that the disclosure be intentional in order to result in a waiver.[46] As stated in the Explanatory Note, Rule 502(b) "opts for the middle ground: inadvertent disclosure of protected communications or information in connection with a federal proceeding or to a federal office or agency does not constitute a waiver if the holder took reasonable steps to prevent disclosure and also promptly took reasonable steps to rectify the error. This position is in accord with the majority view on whether inadvertent disclosure is a waiver."[47]

1. Reasonable Steps To Prevent Disclosure And To Rectify The Error

Counsel must not assume that all inadvertent disclosures of material will be exempt from a waiver of privilege. Satisfying the court that a party has taken reasonable steps both to avoid

the disclosure and to correct the mistake is crucial. Rule 502(b) does not define what the "reasonable steps" are, but "[b]ecause the reasonableness test adopted in Rule 502 is taken from the majority rule developed over many years, many courts have already addressed whether a party took reasonable steps to avoid inadvertent waivers."[48] The Advisory Committee Notes provide only a limited list of reasonableness factors, such as "'the number of documents to be reviewed and the time constraints for production,'" using "'software applications and linguistic tools in screening for privilege,'" and "'an efficient system of records management.'"[49]

In any event, some common-sense approaches during the search for and production of materials will help to avoid inadvertent production of privileged materials in the first place. An obvious reasonable step to take is to carefully review *all* documents and materials before producing them. In one case, for example, a party produced a privileged document from a database it thought contained only non-privileged materials. Despite an applicable "claw-back" provision, the court held the party waived the privilege because it did not review the database for privilege before producing the material.[50] The most cautious (and perhaps most costly) approach is to make sure attorneys review all materials for privilege. "Even relatively tolerant courts have demonstrated their disapproval of nonlawyers handling privileged documents."[51] Further, as one commentator asserted, especially when outside vendors handle the copying of materials, "there must be a final review of documents before they are produced to opposing counsel … consist[ing] of a face check of each document to make sure that counsel is not producing privileged material."[52] In addition, "all privileged documents [including electronically produced documents] should be clearly labeled and adequately separated from nonprivileged responsive documents."[53]

The type of search conducted and the legibility of the material are other important factors. Parties must also pay close attention to the effectiveness of their keyword searches for privileged material.[54]

An additional factor to consider is the time within which a party seeks to rectify the error after discovering it. For example, one court agreed the privilege was not waived where attorneys took steps to correct the inadvertent disclosure "immediately" after realizing the disclosure.[55] Another court found that the plaintiff's delay in reacting after learning of the inadvertent disclosure, including taking two weeks to determine how the disclosure occurred, was not reasonable.[56]

The parties may also define the "reasonable steps" during the Rule 26(f) conference.[57] For example, the parties could agree to specific time periods within which they could seek to recover inadvertently disclosed materials. In addition to removing as much ambiguity as possible, doing so would provide a "checklist" of reasonable steps that could be circulated to the individuals involved in the search for and production of materials.

2. Rule 502 And The Relationship Between Federal And State Courts

The orders entered under Rule 502 bind non-parties and other courts, including State courts. Some commentators have noted that Rule 502 may face constitutional challenges with

respect to this binding effect on State courts.[58] Accordingly, until the constitutionality of the binding effect on State courts has been resolved, parties should still do as much as possible to avoid the inadvertent production of privileged material in the first place.

The interplay among Rule 502 and other Federal Rules of Evidence and the Constitution reveals a potential constitutional pitfall. Specifically, Rule 502(c) provides that:

> [w]hen the disclosure is made in a State proceeding and is not the subject of a State-court order concerning waiver, the disclosure does not operate as a waiver in a Federal proceeding if the disclosure:
>
> (1) would not be a waiver under this rule if it had been made in a Federal proceeding; or
> (2) is not a waiver under the law of the State where the disclosure occurred.[59]

"In effect, the new rule [502] requires the federal court to apply the law that is most protective of the attorney-client privilege and work-product protection."[60] At the same time, however, Section (f) provides that "[n]otwithstanding Rules 101[61] and 1101[62], this rule applies to State proceedings and to Federal court-annexed and Federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501[63], this rule applies even if State law provides the rule of decision."[64] Rule 502(e) provides that "[a]n agreement on the effect of disclosure in a Federal proceeding is binding only on the parties to the agreement, *unless it is incorporated into a court order*."[65] Section (d) of the rule provides, however, that "[a] Federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other Federal or State proceeding."[66] This has been described as "the 'most critical piece' of the legislation," because the contemplated court orders "bind[] all other courts, as well as nonparties."[67]

Accordingly, as one commentator noted:

> There may be serious constitutional questions as to the ability of Congress to enact such a law merely by asserting that the interest in the federal objective of limiting the costs of production requires such a rule. In *Erie Railroad Co. v. Tompkins*, Justice Brandeis wrote, 'Congress has no power to declare substantive rules of common law applicable in a state .... And no clause in the Constitution purports to confer such a power upon the federal courts.' ... To the extent that Rule 502 may overrule the *Erie* doctrine by encroaching on substantive privilege law that has traditionally been left to the states, the rule as drafted poses difficult constitutional questions ....[68]

Further, "[t]he legitimacy of a rule that would bind states or federal agencies in a subsequent litigation may ultimately depend on Congress's power under the Commerce Clause."[69] This paper raises the constitutional issue to illustrate that even with the enactment of Rule 502, parties

should not become complacent and assume that inadvertent disclosures of privileged materials will not have any damaging effects.

B. Limiting Discovery Costs At The Outset Through Rule 26(f) Conferences

Fully addressing the preservation and production of ESI in a Rule 26(f) conference has a direct bearing on e-discovery costs. Parties understand how expensive it is to preserve, produce, and review ESI. Defendants know that broad litigation hold notices can be disruptive to their businesses and expensive to maintain.[70] Plaintiffs understand that if they propound (or are forced to respond to) overly broad discovery for ESI, they are likely to be cursed with an ESI production that is difficult to manage and expensive to review.[71] The Rule 26(f) conference gives parties an opportunity to limit the scope of their preservation and production obligations and, thereby limit their exposure to exorbitant discovery costs.

Rule 26(f)(2) directs the parties to "discuss any issues about preserving discoverable information" and to "develop a proposed discovery plan."[72] Parties should use the opportunity to agree to the scope of their preservation obligations. Depending on the case, parties might agree to limitations on: (a) date ranges; (b) the systems containing ESI to which the preservation obligation will or will not apply; and (c) search terms and/or methodologies to be used in identifying ESI that must be preserved.[73]

Agreeing to date ranges on the parties' preservation obligations is an important part of limiting the costs related to ESI. A party's preservation obligation is typically broader than its production obligation. Thus, limiting the scope of the duty to preserve will also limit the scope of the party's obligation to search for and produce ESI in discovery. Limiting the preservation obligation to ESI that falls within a defined range of dates can substantially reduce preservation and collection costs because the party will only have to identify and collect the ESI one time.[74] Due to the nature of the dispute or the availability of information, parties are typically able to agree to limit the preservation obligation based on a so-called "front-end" date, *i.e.*, the date after which all relevant ESI must be preserved, but an agreed upon "back-end" date can be more elusive. As one author noted, the inability to agree on a back-end cut-off date "places a great burden on a corporation because its employees must preserve documents as they are created, sent or received during the pendency of the litigation."[75] In the event a back-end date cannot be negotiated, the parties should at least attempt to otherwise narrow the scope of the documents that must be preserved going forward.[76]

Another way to limit e-discovery costs and exposure to spoliation is to agree that the parties are only required to preserve, search, and produce information from specified network systems.[77] For example, parties might agree to limit their preservation obligations to ESI located on their e-mail systems, core office document systems, and databases that store certain types of ESI relevant to the parties' particular dispute.[78] If a party hopes to limit its obligations in this way, it has to be prepared to exchange with the other parties the technical details of its information and network systems so all parties can evaluate a proposed limit on the scope of their preservation obligations.[79]

Obviously, parties need not and cannot agree on all of the issues mentioned above at one meeting. Given the number and complexity of the topics the parties are called on to address in their Rule 26(f) conference, they will likely have to meet more than once (and possibly several times) before they are able to agree on ways to define their preservation obligations and to search for and limit discovery of ESI. Reaching an early consensus on those issues, however, "has the potential to minimize the overall time, cost, and resources spent on [ESI searches], as well as minimizing the risk of collateral litigation" challenging the reasonableness of the scope of a parties' litigation hold and its searches for ESI.[80]

C. Establishing A Litigation Or Legal Hold

Virtually all e-discovery risk is concentrated in the litigation-hold process.[81] Identifying the individuals with knowledge of the dispute, conducting reasonable searches of a party's ESI and paper documents to identify materials that must be preserved, and communicating the hold requirements to others in an organization are critical to ensuring a party is protected against liability or even sanctions for spoliation. The failure to sufficiently create, apply, and enforce a litigation hold can lead to claims of spoliation of evidence and severe sanctions.

"Spoliation is the 'destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation.'"[82] Potential sanctions for spoliation of evidence include the dismissal of a claim or the granting of summary judgment in favor of the party who is prejudiced, an adverse inference jury instruction, fines, and attorney's fees and costs.[83] The following cases illustrate the consequences to parties who fail to preserve ESI. The most serious sanctions imposed therein could have been avoided with a more established, reasonable litigation hold protocol, diligent compliance, and accurate representations to opposing counsel and he court as to what information was accessible and inaccessible.

Certain notable cases involving sanctions endure. For example, in *Zubulake v. UBS Warburg LLC*,[84] one in a line of landmark electronic discovery decisions, the court found that the defendant negligently failed to preserve relevant information on certain backup tapes and recklessly failed to preserve relevant information on others. The defendant advised, however, that it discovered new evidence that contained some of the information that it negligently and/or recklessly destroyed. The court held that an adverse inference against the defendant in connection with the destroyed evidence was not appropriate unless the plaintiff could "demonstrate not only that [the defendant] destroyed relevant evidence as that term is ordinarily understood, but also that the destroyed evidence would have been favorable to [the plaintiff]." Absent such a showing, the court held that an adverse inference would *only* be appropriate if the defendant's destruction of evidence were *willful*.[85] The court, however, required the defendant to pay for the plaintiff's re-depositions of individuals in connection with the destruction of evidence and the issues raised by the newly discovered information.

The *Zubulake* discovery disputes continued after the plaintiff re-deposed certain witnesses. The depositions revealed that the defendant deleted more e-mails than previously believed and that some of the e-mails thought to have been destroyed were, in fact, preserved on