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Dr. StrangeRule, Or How I Learned To Stop Worrying And Love E-Discovery

Elizabeth G. Doolin, Esq.
Joseph R. Jeffery, Esq.
Chittenden, Murday & Novotny, LLC
303 W. Madison Street, Suite 1400
Chicago, Illinois 60606
(312) 281-3600
edoolin@cmn-law.com
jjeffery@cmn-law.com

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"YOU'RE GONNA NEED A BIGGER BOAT."

I. Why Worry About E-Discovery?

There are plenty of reasons to worry about e-discovery. To begin with, most companies generate **a lot** of electronically stored information ("ESI"). One CD holds the equivalent of 35,000 pages or 15 boxes of documents.[1] The desktop or laptop hard drive for one employee can hold 1.5 million pages or 600 boxes of documents.[2] One company server can hold 100 million pages or 43 semi-truck loads of documents.[3] Even a mid-sized company typically has 1.625 *billion* pages of documents; enough to reach from the Earth to the Moon.[4] Another challenge is locating all of the ESI relevant to a lawsuit or other dispute. There are so many types of media on which ESI can be stored that it would be easy to overlook some of it. Obvious sources of information include documents contained in file cabinets and e-mails in computer servers.[5] Other less obvious sources include "thumb drives and PDAs used by employees."[6] Information may also be in the possession or control of third parties, such as "outsourced service providers, storage facilities operators, and Application Service Providers."[7]

Once located, the databases on which ESI resides must be searched for relevant information. Computer software can help with this but, as this paper explains, it is no silver bullet as the search results are usually over- or under-inclusive, adding time and expense to the privilege and relevance review of the documents identified by the software search.

Another concern is production. Documents often contain hidden information in the form of "metadata," some of which can be privileged or at least embarrassing to its authors if disclosed. Consider what happened when documents containing "metadata" were produced and/or made public. Metadata in a 2004 complaint against DaimlerChrysler not only disclosed attorney work product concerning jurisdiction and venue issues,[8] it also showed that the plaintiff originally trained its sights on a completely different defendant – Bank of America – thereby undermining the moral force of its complaints against DaimlerChrysler.[9] More embarrassing was the disclosure in a United Nations report on Syria's ties to the assassination of a former Lebanese Prime Minister. Prior to the release of the U.N.'s report on Syrian involvement in the assassination of former Lebanese Prime Minister Rafik Hariri, U.N. Secretary General Kofi Annan promised not alter the report before giving it to the U.N. Security Council.[10] The electronic version of the report, however, showed that he did just that, scrubbing the names of four members of the Syrian president's inner circle and replacing them with the euphemistic "Senior Lebanese and Syrian officials."[11]

Compounding these challenges are the consequences of failing, in the context of a lawsuit, to properly preserve, search for, retrieve, review, and produce relevant information. A party that fails in one or more of those tasks risks having sanctions imposed against it. The sanctions available can be harsh, ranging from fines and having to pay the costs of an opponents' discovery to judgment or dismissal in favor of an opposing party.

So, why should companies, their employees, and lawyers stop worrying? They probably shouldn't stop completely, but they can at least lighten up a bit. The past couple of years have seen Congress, courts, and commentators set standards of conduct for e-discovery, bringing

needed clarity to this intersection of technology and the law. Congress, for instance, revised the Federal Rules of Civil Procedure and the Federal Rules of Evidence to address concerns created by the increasing significance of e-discovery in litigation. As courts have had to address more e-discovery disputes, standards of conduct related to e-discovery have begun to emerge providing needed guidance to the parties and their attorneys. Commentators, too, have helped conceive of new approaches to the mechanics of dealing with e-discovery.

This paper first discusses the ground rules for e-discovery as established by the Federal Rules of Civil Procedure and Federal Rules of Evidence to provide a baseline understanding of the federal e-discovery framework. Next, the paper discusses the importance of the litigation hold and case law that both illustrates the dangers of spoliation and provides guidance for managing e-discovery going forward. Finally, the paper offers practical advice concerning a company's management of e-discovery and the integration of e-discovery obligations with a document retention program.

II. Ground Rules: The Federal Rules Of Civil Procedure And The Federal Rules Of Evidence Address E-Discovery Concerns.

The Federal Rules of Civil Procedure were revised in 2006 and 2007 to establish a framework for managing the discovery of ESI. In 2008, Rule 502 of the Federal Rules of Evidence was added to alleviate some of the privilege issues that arise in connection with the production and review of electronically stored information.

"YOU WANT THE IMPOSSIBLE!"

A. Addressing E-Discovery Issues Early On

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), a litigant must provide "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."[12] "The term 'electronically stored information' has the same broad meaning … as in Rule 34(a)."[13]

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

Rule 26(f)(2) requires parties to "discuss any issues relating to preserving discoverable information" at their initial conference.[14] Specifically, the Rule requires the parties to "develop a proposed discovery plan"[15] 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 …."[16] To encourage thoughtful consideration of issues and development of a discovery plan, the Advisory Committee "discourage[d] courts from entering blanket preservation orders and suggest[ed] that any preservation order be narrowly tailored."[17]

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

Scheduling orders typically follow the initial conference discussed immediately above. Rule 16(b)(3)(B) accounts for the party agreements Rule 26(f)(2) was intended to promote by confirming that a "scheduling order may … provide for disclosure or discovery of electronically stored information … [and may] include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced …."[18]

"I'LL BE TAKING THESE HUGGIES AND WHATEVER CASH YOU GOT."

B. Discovery Requests

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

Rule 33 has long permitted parties to produce records containing information sought in an interrogatory in lieu of supplying a written answer. Rule 33(d) specifically extends that practice to ESI. The Rule 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 …."[19] Thus, a party has the option of specifying ESI in response to a written interrogatory.

2. 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 ...."[20] Rule 34(a)(1) also allows parties to "inspect, copy, test or sample" the documents, ESI, and tangible things covered by that Rule.[21]

Notably Rule 34(b)(1)(C) allows the requesting party to "specify the form or forms in which electronically stored information is to be produced."[22] "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."[23] 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 …."[24]

3. Rule 45: Subpoenas For ESI

Rule 45(a)(1)(C), like Rule 34 provides that ESI may be subpoenaed from third parties. "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."[25] 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."[26]

"COME OUT, COME OUT WHEREVER YOU ARE!"

C. Discovery Collection & Production

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

Under Rule 26(b)(2)(B), "[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."[27] Discovery of inaccessible ESI may be had, however, where good cause is shown.

> 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.[28]

Rule 26(b)(2)(C)(iii) provides that discovery meets the "undue burden or cost" standard and must be limited when "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"[29]

2. Rule 26(c): Cost-Shifting

A court can under Rule 26(c)(1), issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense ...."[30] Retrieving and producing ESI has obvious cost implications for the producing party. While the presumption "is that the responding party must bear the expense of complying with discovery requests" a party can seek an order protecting it from undue burden or expense (as described above) "conditioning [it] on the requesting party's payment of the costs of [the] discovery."[31]

The United States District Court for the Southern District of New York in *Rowe Entertainment, Inc. v. The William Morris Agency*[32] noted "courts have adopted a balancing approach," and apply the following test to requests to shift the costs of discovery.

> (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.[33]

In the watershed *Zubulake v. UBS Warburg LLC*[34] case, the court drew a distinction

between the relative accessibility and/or inaccessibility of information sought in discovery. It concluded courts should consider shifting the costs of production to requesting parties when the requested information is "inaccessible" and it used the term to describe information that must be restored or reconstructed before it can be used or reviewed.[35] Once a court determines that the information sought is inaccessible, it must, for cost-shifting purposes weigh the following seven factors to determine whether it is appropriate to shift the costs of producing the requested information to the requesting party:

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.[36]

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

A common question for companies is how to manage all of the documents and data that their employees create and receive on a daily basis. Acutely aware of the sanctions that can accompany the destruction of relevant evidence, some companies have adopted a "keep everything" approach to their documents and ESI. Others have adopted the same policy by default; *i.e.*, they do not have a policy for destroying documents that no longer serve a business purpose. A major problem with this approach is that the costs of storing so many documents and ESI can be enormous. The practice can also affect litigation costs. If a company saves literally everything, it can be asked to search every possible source for documents or information relevant to any pending litigation or "reasonably calculated to lead to the discovery of admissible evidence."[37] For these reasons, companies need document retention policies that allow them to destroy paper documents and ESI that no longer serve the company's business needs. Rule 37 of the Federal Rules of Civil Procedure seeks to balance those needs against litigants' duties to preserve relevant information.

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."[38] "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)."[39] This rule has been described as providing a "safe harbor" for litigants, who destroy documents in the routine course of electronic data management.[40] But a document retention program that is the product of evolution of informal company practices rather than intentional

design that addresses legitimate business needs is likely not a "good-faith" electronic information system.[41] Consequently, parties who destroy relevant documents pursuant to such a "system" may not be entitled to Rule 37's safe harbor.

"SIR, YOU CAN'T LET HIM IN HERE. HE'LL SEE EVERYTHING. HE'LL SEE THE BIG BOARD!"

D. Addressing Privilege Concerns

One major component of the cost of e-discovery is the review a party must undertake before production to ensure it is not disclosing privileged documents or information. The Federal Rules seek to limit those costs by endorsing what are commonly known as "claw-back" and "quick peek" arrangements. In theory, a producing party can skip the privilege review (and its attendant costs) and produce documents to an opposing party without waiving the privilege associated with any of the documents produced.

1. Rule 26(b)(5)(B): The Claw-Back and Quick Peek Provisions

"Claw-back" and "Quick-peek" agreements are similar. Rule 26(b)(5)(B) describes what is typically referred to as 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.[42]

In a "quick peek" agreement, parties "agree that the responding party will provide certain requested materials for initial examination without waiving any privilege or protection," thus, the quick peek.[43] Claw back and quick peek agreements did not gain much traction as parties were concerned that the non-waiver agreements would not apply as to third parties in the same or later litigation.[44] In response to that concern, Congress enacted Federal Rule of Evidence 502.

2. Federal Rule of Evidence 502

Rule 502 of the Federal Rules of Evidence[45] makes orders directing that a privilege has not been waived binding on non-parties as well as other federal and state courts. The operative sections of Rule 502 are summarized below.

a. Subject-Matter Waiver.

Federal Rule of Evidence 502(a) provides that the disclosure and resulting waiver of an attorney-client privilege or work-product protection will only result in a waiver of all such privileges and protections concerning the same subject matter in certain circumstances. Thus, "[i]n 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."[46]

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

Rule 502(b) limits 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).[47]

Rule 502(e) also tries to clear the way for claw-back and quick-peek agreements by making them binding on other parties and courts when made part of a court order. "An 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*."[48] Thus, to enjoy the benefits of Rule 502, parties who enter into non-waiver agreements should ask the court to memorialize their agreement in a Rule 16(b) scheduling order.

Before Rule 502 was enacted, federal courts generally protected parties from waiving a privilege due to an inadvertent disclosure "unless the disclosing party was negligent in producing the information or failed to take reasonable steps seeking its return."[49] Some courts, however, held that any inadvertent disclosure of privileged material constituted a waiver of the privilege.[50] Others required that the disclosure be intentional in order to result in a waiver.[51] 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."[52]

c. Reasonable Steps To Prevent Inadvertent Disclosure

Not 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."[53] 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.'"[54]

In any event, some common-sense approaches during the search for and production of documents will help to avoid the inadvertent production of privileged materials in the first place. An obvious step 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.[55] 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."[56] One commentator asserted, "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."[57] In addition, the review process should require that "all privileged documents [including electronically produced documents] be clearly labeled and adequately separated from nonprivileged responsive documents."[58] The type and reliability of the search conducted are other important factors. For instance, parties must pay close attention to the effectiveness of their keyword searches for privileged material.[59] *See Section III., E. below.*

An additional factor to consider is the time within which a party seeks to rectify its error after discovering it. One court agreed the privilege was not waived where attorneys took steps to correct the inadvertent disclosure "immediately" after realizing the disclosure.[60] 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.[61]

The parties may define for themselves at their Rule 26(f) conference what conduct constitutes "reasonable steps."[62] 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, defining "reasonableness" for these purposes would provide a "checklist" of steps that counsel could circulate to the individuals involved in the search for and production of materials, helping ensure the parties do not inadvertently waive their privileges by acting "unreasonably."

d. Federalism and Rule 502

The orders entered under Rule 502 bind non-parties and other courts, including state courts. Section (d) of the rule provides 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."[63] 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."[64] Some commentators have noted, however, that Rule 502's attempt to bind state courts is ripe for a constitutional challenge.

> 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 ....[65]

Further, "[t]he legitimacy of a rule that would bind states or federal agencies in subsequent litigation may ultimately depend on Congress's power under the Commerce Clause."[66] A full examination of these issues is well beyond the scope of this paper. We simply note them 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 adversely affect them in subsequent litigation.

"WHAT JEFFERSON WAS SAYING WAS, HEY! YOU KNOW, WE LEFT THIS ENGLAND PLACE 'CAUSE IT WAS BOGUS; SO IF WE DON'T GET SOME COOL RULES OURSELVES – PRONTO – WE'LL JUST BE BOGUS TOO."

E. State Laws Addressing E-Discovery Concerns

States have begun to address e-discovery as well. This paper focuses on federal e-discovery rules and case law largely because state law has not developed as quickly as federal law. In October 2007, the National Conference of Commissioners on Uniform State Laws issued its draft of uniform rules relating to the discovery of ESI.[67] Rather than "reinvent the wheel," the Committee's proposal "mirrors the spirit and direction of the ... Federal Rules of Civil Procedure," and "freely adopted, often verbatim, language from both the Federal Rules and comments it deemed valuable." Thus, federal law provides the clearest guidance on what the present state of the law is or should be concerning e-discovery. Indeed, federal law is strongly influencing the development of state law in this area as thirty-two states have now enacted e-discovery rules, many of which are patterned after the e-discovery provisions in the Federal Rules of Civil Procedure.[68]

"ALL RIGHT, MR. DEMILLE, I'M READY FOR MY CLOSE UP."

III. Courts And Commentators Take A Closer Look At E-Discovery Issues

"HOLD ... HOLD ... HOLD!"

A. Establishing a Litigation or Legal Hold.

Virtually all e-discovery risk is concentrated in the litigation-hold process.[69] 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. As discussed below, the failure to sufficiently create, apply, and enforce a litigation hold can lead to claims of spoliation of evidence and severe sanctions.

"HOUSTON, WE HAVE A PROBLEM."

1. What Triggers the Need for a Litigation Hold?

The litigation hold is triggered by a party's duty to preserve relevant evidence once "litigation is reasonably anticipated, threatened or pending against" a party. The evidence that a party is required to preserve includes information that is: (i) relevant to the action/anticipated action; (ii) reasonably calculated to lead to the discovery of admissible evidence; and (iii) reasonably likely to be requested during discovery. As part of the duty to preserve, a party must "suspend, as to documents that may be relevant to anticipated litigation, any routine document purging system that might be in effect."[70] The failure to suspend destruction of that evidence constitutes spoliation.[71] This, of course, means "routine email and e-document destruction is required to cease,"[72] and, generally, that "relevant … databases, spreadsheets, hard drive data, and data on a server, including all metadata" must be preserved.[73]

Precisely when the duty to preserve is triggered is not always obvious. Generally, "[t]he duty to preserve commences when litigation is likely or probable, not when litigation is merely possible."[74] One clear trigger of the duty to preserve is the "receipt of a demand letter."[75] Informal complaints, especially in employment cases, can also trigger the duty to preserve evidence, but the "receipt of a letter merely addressing a dispute without threatening litigation may not" signal that litigation is sufficiently likely to trigger the duty to preserve.[76]

Other factors, like the type of threat or complaint made, the position of the party making the threat or complaint, the parties' business relationship, the specificity of the threat or complaint, and whether the other party has a litigious reputation all bear on whether the duty to preserve has arisen.[77] Some courts "have found a duty to preserve if 'lawsuits or complaints have been filed frequently concerning the type of records at issue' and questioned the reasonableness of applying routine destruction policies to those records, even in the absence of a specific litigation threat."[78] In one case, the court found a defendant's duty to preserve

information concerning the development of software was triggered five years before suit was filed based on the existence of litigation in the defendant's industry concerning the same or similar issues.[79] As with any test that depends on "reasonableness," determining whether the duty to preserve has been triggered is a judgment call. Companies, therefore, must be vigilant in monitoring their business transactions for any potential indicators of anticipated litigation.

"ROUND UP THE USUAL SUSPECTS."

2. Identify and Interview Key Players in the Dispute

Oftentimes, the best place to start looking for information is with the "key players" in the dispute; *i.e.*, those persons likely to have information the party will rely on to support its claims or defenses.[80] Depending on the nature of the case, the "key players" could include, for example, claims examiners, underwriting department employees, various department managers and IT employees. One commentator has suggested five "areas of responsibility; the Internal Corporate Counsel, the legal department Paralegal or Litigation Specialist, the IT department[,] … the employee [and] … depending on your company culture … the employee's manager."[81] concerning electronically stored information, in particular, a litigation hold notice should be communicated to data users, records management personnel, IT personnel, and other potentially knowledgeable personnel, as well as those identified as document custodians.[82]

Counsel should interview the key players to identify: (i) an information timeline for the dispute; (ii) what type of relevant information is likely to exist; (iii) where the person stored the information she created and/or received; (iv) what her information and data storage habits are, *e.g.*, whether she stores information on the company's servers, a laptop, thumb drive, home computer, PDA, or one or more of the foregoing; (v) what other types of relevant information might exist concerning the dispute; (vi) who else might be a key player; and (vii) what types of information those individuals might have.[83]

"YOU ARE NOW INSIDE WHAT I LIKE TO CALL 'THE BYRNES FAMILY CIRCLE OF TRUST.' I KEEP NOTHING FROM YOU, YOU KEEP NOTHING FROM ME."

3. Communicate The Litigation Hold To The Circle Of Employees And Third Parties Likely To Posses ESI

In order to be most effective, the litigation hold notice should be written, "conspicuously labeled and dated," and clearly describe its purpose, as well as the lawsuit or investigation involved.[84] The notice (and later notices and reminders) should be given to each person or entity believed to have documents and ESI that the company is required to preserve. The notice must further "inform recipients of their legal obligations, including the potential penalties for noncompliance."[85] The notices and reminders should provide guidelines for the types of materials to preserve and "describe the actual steps that a recipient must take to verify preservation of materials.[86] Further, they should provide the name and contact information of the person "overseeing the litigation or investigation" and request that the recipients inform the contact person of other individuals who might have relevant materials.[87] "Companies should

resist the temptation to craft a 'form' letter to be used in all circumstances with a mere modification of the subject line. The letters must be read and understood not only by employees but perhaps adversaries and the court when the matter evolves into litigation. … The litigation hold letter itself, while arguably a privileged document, may itself be discoverable."[88]

Counsel must do more than "instruct a client to preserve email and other relevant evidence once litigation is reasonably anticipated."[89] One commentator has noted that "[s]ome corporate legal departments treat a litigation hold as a one-time communication (usually an email) to employees, requesting that all information relating to specific content be held and protected for possible production in an anticipated or pending legal case. Many companies wrongly believe an email message to the employee base removes responsibility from the company."[90] With an eye toward being able to prove the litigation hold was properly distributed, a hard copy should be delivered to the recipients.[91] If, however, "email is used to disseminate the litigation-hold notice, then counsel must ensure that all of the intended recipients … have email accounts," and "[r]ecipients of hold notices via email should be advised to file the notice so that it is protected from automatic deletion in their inbox."[92] Requiring each email recipient to send a response email acknowledging receipt of the notice and his duty to preserve the relevant information is an easy way to ensure proper distribution of the litigation hold.

Counsel must also keep track of the receipt and implementation of the litigation hold.[93] One court, for example, "found fault with counsel's failure to 'request retained information from one key employee' and 'safeguard backup tapes that might have contained some of the deleted emails, and which would have mitigated the damage done by [the client's] destruction of those emails.'"[94] That court also found the attorney's "duty extended to supplemental responses under" Rule 26, noting that counsel "'must periodically recheck all interrogatories and canvass all new information.'"[95]

Finally, a litigation hold should clearly communicate how the relevant ESI should be preserved. An understanding of how electronic information is stored and preserved is crucial because miscommunications between counsel, "key players," and IT personnel can result in additional search and retrieval costs. As one commentator has noted, "[c]ounsel must fully understand what is requested and question how the IT personnel will go about meeting that request."[96] The following examples show the importance of such an understanding.

> Suppose counsel requests a 'mirror image backup' of an employee's hard drive. Counsel's intention is to have an exact copy (a mirror image) of the hard drive made in order to ensure the integrity of the data – but that intention is never communicated to the IT personnel who is working on the project. Instead of making a mirror image copy of the hard drive, the IT personnel preserve the data by placing it on backup tape media. When the technicians heard 'backup,' they assumed the attorney meant a backup tape. Since backup tapes can be difficult to read, the actions of the IT personnel will inevitably increase the costs of extracting and producing the responsive dat[a] and could lead to claims that counsel was trying to hide evidence on inaccessible media.[97]

Similarly,

> suppose that counsel notifies the IT department to preserve the company's emails and other electronic data for a legal matter. The IT department, having received no input from counsel, copies the native files to an external hard disk drive (thus changing the metadata), places the company's emails and databases on backup tapes (making the data inaccessible) and fails to segregate and protect the original data. As a result of this miscommunication and lack of understanding, the preserved data resides on separate media formats, increasing the search and retrieval costs, and the original data is still exposed to change or deletion.[98]

"OVER? DID YOU SAY 'OVER?' NOTHING IS OVER UNTIL WE DECIDE IT IS! WAS IT OVER WHEN THE GERMANS BOMBED PEARL HARBOR?"

4. Terminating A Litigation Hold Notice.

Best practices require that "litigation-hold notices should remain in effect until a matter is ultimately concluded."[99] Accordingly, a "Release of Hold" notice is appropriate when "a final settlement agreement and release" has been executed, the court enters an order dismissing the case with prejudice, or when all appeals have been exhausted and the judgment is final.[100] Heeding a termination notice is as important as complying with a litigation hold notice because the unnecessary retention of documents and electronically stored information can create additional costs and waste resources.[101]

"ONE MILLION DOLLARS!"

B. Sanctions Due To Spoliation Of Evidence.

An incomplete litigation hold or an ineffective hold process can result in the spoliation of relevant evidence and a variety of different sanctions against a party. "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.'"[102] 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.[103] The following cases are examples of what awaits parties who fail to preserve ESI.

"WHAT WE'VE GOT HERE IS FAILURE TO COMMUNICATE."

1. The *Zubulake* Decisions: Backup Tapes and Litigation Holds

The United Stated District Court for the Southern District of New York issued five decisions in one case that, collectively, served as a wake-up call to parties and practitioners concerning the dangers of lax oversight of the preservation and production of electronic

discovery. In *Zubulake v. UBS Warburg LLC,*[104] 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 court held that an adverse inference instruction would only be appropriate in cases of negligence and/or recklessness if 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]." If, however, the defendant's destruction of evidence were *willful*, an adverse inference instruction would be appropriate as the relevance and prejudice to the plaintiff could be presumed.[105] Rather than issuing an adverse inference instruction, the court required the defendant to pay for the plaintiff's re-deposition of certain individuals in connection with the destruction of evidence and the issues raised by the newly discovered information.

The parties' discovery disputes continued after the second round of depositions. The depositions revealed that the defendant deleted more emails than previously believed and that some of the emails thought to have been destroyed were, in fact, preserved on the defendant's active servers but never produced.[106] Ruling on the plaintiff's motion for sanctions, the court found that the defendant's attorneys failed to effectively communicate the litigation hold to all "key players" and failed to ascertain each of their document management habits.[107] The court also found that some of the key players defied the retention instructions they received. The court concluded that the defendant acted *willfully* in destroying potentially relevant information, which resulted either in the absence of such information or its tardy production.[108] Further, because the spoliation was willful, the lost information was presumed relevant.[109] Accordingly, the court ordered the defendant to pay the costs of re-deposing the personnel who revealed the newly-discovered emails and to pay all costs and attorneys' fees associated with the plaintiff's motion for sanctions.

"WEEELLLLL ... WE'RE WAITING!"

2. Failure To Timely Search For And Produce Relevant ESI

A case known for its harsh sanctions is *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.*[110] The sanctions the court imposed in the *Coleman* case were not due to a failure to *preserve* relevant ESI. Rather, the sanctions were due to the defendant's failure to adequately *search for* and timely *produce* information requested in discovery and required by court order.

The plaintiff, Coleman (Parent) Holdings, Inc., sued Morgan Stanley & Co., Inc. for fraud and sought over $485 million in damages. To establish Morgan Stanley's knowledge of the fraud, the plaintiff requested Morgan Stanley review certain backup tapes and produce certain emails stored on those tapes. The court ordered Morgan Stanley to comply with the request and further ordered it to certify that its production complied with the court's order.

Morgan Stanley produced 1,300 emails and certified that its production was complete. Morgan Stanley knew, however, that its certification was false. In fact, Morgan Stanley was aware of an additional 2,161 backup tapes that had not been reviewed and from which no emails

were produced. Morgan Stanley waited five months to inform the court and opposing counsel that its earlier certification was not accurate and, ultimately, produced an additional 8,000 pages of emails to the plaintiff. Two months later, Morgan Stanley notified the court and the plaintiff that it found an additional 169 backup tapes. One month later, on the eve of a hearing on the plaintiff's motion for an adverse inference instruction, Morgan Stanley informed the court that: (i) it neglected to produce some of the attachments to the emails it earlier produced; (ii) it located another 200 backup tapes that it believed were relevant but which had not yet been reviewed; (iii) a flaw in Morgan Stanley's earlier search for email erroneously omitted at least 7,000 additional email messages that fell within the scope of the court's production order; and (iv) it found 73 bankers boxes of backup tapes but did not know how many of the tapes fell within the scope of the court's production order. The court found that Morgan Stanley lied about its efforts to retrieve electronic documents and "deliberately and contumaciously violated numerous discovery orders." The court also found that Morgan Stanley wrote over emails, "contrary to its legal obligation to maintain them in readily accessible form for two years and with knowledge that legal action was threatened."

The court ordered that an extensive statement of *conclusive facts* be read to the jury describing Sunbeam and Morgan Stanley's fraudulent scheme. The statement read in part that "Morgan Stanley conspired with [Sunbeam] to conceal the truth about Sunbeam's financial performance and business operations," and that "Morgan Stanley committed overt acts in furtherance of the conspiracy." The court further ordered that the jury be instructed that those facts were deemed established for all purposes in the action, and that the jury could consider those facts when determining whether Morgan Stanley "sought to conceal its offensive conduct when determining whether an award of punitive damages is appropriate." Finally, the court switched the burden of proof in the case. Thus, in order to prevail in its defense, Morgan Stanley had to prove "by the greater weight of the evidence, that it lacked knowledge of the Sunbeam fraud and did not aid and abet or conspire with Sunbeam" to defraud the plaintiff.

3. Intentional Spoliation Of Evidence

"LEAVE THE GUN. TAKE THE CANOLIS"

a. Police Destroy Evidence Related To Their Shooting Of Plaintiff

After shooting the plaintiff seven times while he was on his own property, the defendant in *Swofford v. Eslinger* (the Seminole County Sheriff's Office) completely failed to preserve evidence relevant to the shooting.[111] Among the evidence the Sheriff's Office failed to preserve were: the guns used to shoot the plaintiff, the uniforms the Sheriff's deputies who shot him were wearing as well as the radios they were using at the time of the shooting, the laptop computer issued to one of the deputies, the emails in the accounts of the deputies and the Sheriff's Office generally.[112] Despite two letters from the plaintiff's attorney demanding the Sheriff's Office preserve materials relevant to the shooting and specifically listing many of the items that were later destroyed, the Sheriff's Office issued no litigation hold, in writing or otherwise, and made no effort whatsoever to preserve evidence related to the shooting.[113] In light of this, the court concluded the Sheriff's Office acted in bad faith.[114]

> [T]his is not a circumstance of inadvertent destruction of evidence or negligence in the loss of material data from which the Court is being asked to infer bad faith. Rather, it is a case of knowing and willful disregard of the clear obligation to preserve evidence that was solely within the possession and control of the Defendants and whose contents have no other source than that which has now been spoliated. Thus, the bad faith is clear, and the prejudice to the Plaintiffs is substantial.[115]

As a result of the defendants' bad faith spoliation, the court imposed monetary sanctions against them, awarded the plaintiff some of his attorneys' fees and costs, and issued adverse inference instructions with respect to several of the evidentiary items destroyed by the defendants.[116]

"YEAH BABY!"

b. Spoliation By An International Man Of Mystery

In describing the defendant in *TR Investors, LLC v. Genger*, who was also the founder and former CEO of the plaintiff, the court observed: "Although Mike Myers may have made millions by bringing to the big screen his take on what it is like to be an 'international man of mystery,' Arie Genger, as it turns out, is such a man."[117] Mr. Genger "apparently ha[d] high level contacts within the Israeli government for whom he performed sensitive tasks relating to Israel's national security" and "used TRI's computer system to create and receive documents implicating Israel's national security."[118]

The underlying dispute involved a struggle for control of TR Investors LLC ("TRI"). The other plaintiffs insisted they had the power to remove Mr. Genger from TRI's board of directors.[119] After the plaintiffs filed suit, Mr. Genger along with TRI's counsel and a computer consultant it hired, spent a weekend attempting to separate Mr. Genger's personal documents from TRI's documents.[120] The process involved, *inter alia*, opening and reviewing TRI's electronically stored files to determine whether they were purely personal.[121] After everyone else left, Mr. Genger's computer consultant advised that the "unallocated space" on Mr. Genger's computer and TRI's server could possibly contain copies of the documents opened and reviewed over the course of the weekend, including copies of Mr. Genger's personal information.[122] Mr. Genger, who was at the time still in control of TRI, instructed the consultant to run a "wiping software program" on the hard drive of Mr. Genger's computer and then on TRI's server.[123] The wiping software destroyed not only the personal information that resided in the unallocated space of Mr. Genger's computer and TRI's server, it also destroyed evidence concerning TRI.[124] The court concluded Mr. Genger's spoliation was intentional or, at the very least, reckless and imposed three sanctions on Mr. Genger designed to deprive him of any advantages he may have enjoyed as a result of the evidentiary gaps his conduct caused.[125] First, Mr. Genger was required to produce certain privileged documents to the plaintiffs.[126] Next, the burden of proof for Mr. Genger's counterclaims and affirmative defenses was raised one level. Thus, if Mr. Genger normally would have to show he was entitled to relief under a counterclaim

based on a preponderance of the evidence standard, because of the sanctions he would have demonstrate his entitlement to relief by clear and convincing evidence.[127] Finally, the court awarded the plaintiffs their attorney's fees in connection with their motions for contempt and spoliation.[128]

"FOLLOW THE MONEY."

c. Large Monetary Sanctions For Failure To Comply With Court's Preservation Order

In *U.S. v. Philip Morris USA Inc.*,[129] the United States filed a Motion for Evidentiary and Monetary Sanctions against Defendants Philip Morris USA and Altria Group, due to spoliation of evidence. The United States District Court for the District of Columbia granted the motion in part and denied it in part.

The court ordered the preservation of all relevant documents and records. Despite that order, the defendants deleted e-mail from a time period covered by the court's order. The defendants later realized they failed to comply with the order, but waited four months to notify the court. The court found it "astounding that employees at the highest corporate level in Philip Morris, with significant responsibilities pertaining to issues in this lawsuit, failed to follow" the order. Granting the plaintiff's motion in part, the court ordered that: (1) the defendants were precluded from calling as fact or expert witnesses at trial any individual who failed to comply with Philip Morris' internal document retention program; (2) the defendants were jointly required to pay a $2.75 million monetary sanction; and (3) the defendants were to pay costs in the amount of $5,027.48.

"GENTLEMEN! YOU CAN'T FIGHT IN HERE; THIS IS THE WAR ROOM!"

D. Recent Guidance For Analyzing Spoliation Claims.

If the *Zubulake* decisions were a wake-up call for parties and counsel, the decision in *Pension Cmtee. of Univ. of Montreal Pension Plan v. Banc of America Securities*[130] is the morning coffee. While the *Zubulake* decisions illustrated in a new and unnerving way the consequences of ESI-spoliation, like most wake-up calls they left parties and practitioners a little disoriented and confused about what types of conduct would be sufficient to satisfy a parties' preservation and production duties and what types of sanctions would be appropriate for what types of conduct. The *UM Pension Plan* decision takes an authoritative look at how spoliation and sanctions issues have "settled out" since the last *Zubulake* decision in 2004 and creates a framework for analyzing sanctions requests due to ESI spoliation.

The plaintiffs in *UM Pension Plan* were investors in two hedge funds that had been liquidated in bankruptcy.[131] The defendants brought motions for sanctions against thirteen of the ninety-six plaintiffs asserting they failed to preserve and produce relevant paper and electronically stored documents, and that they submitted allegedly false and misleading declarations concerning their collection and preservation efforts.[132] Each plaintiff's discovery

failures differed in scope and severity. Deciding the defendants' sanctions motions, therefore, required the court to evaluate a broad range of conduct resulting in the spoliation of evidence and forced it to define more clearly the comparative culpability of that conduct and to draw lines between what sanctions were appropriate for what types of conduct.

"I'M NOT BAD. I'M JUST DRAWN THAT WAY."

1. How Egregious Is The Spoliator's Conduct?

The first step in deciding whether sanctions are warranted for spoliation is to determine whether a party's spoliation resulted from negligent, grossly negligent, or willful behavior.[133] According to the court:

> [Negligence] is conduct "which falls below the standard established by law for the protection of others against unreasonable risk of harm." [Negligence] is caused by heedlessness or inadvertence, by which the negligent party is unaware of the results which may follow from [its] act. But it may also arise where the negligent party has considered the possible consequences carefully, and has exercised [its] own best judgment.[134]

The court added that:

> The standard of acceptable conduct is determined through experience. In the discovery context, the standards have been set by years of judicial decisions analyzing allegations of misconduct and reaching a determination as to what a party must do to meet its obligation to participate meaningfully and fairly in the discovery phase of a judicial proceeding. A failure to conform to this standard is negligent even if it results from a pure heart and an empty head.[135]

Gross negligence, according to the court, is "a failure to exercise even that care which a careless person would use" and "differs from ordinary negligence only in degree and not in kind."[136]

Finally, where a party has intentionally acted in "disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences," the party's conduct is "willful, wanton, and reckless."[137]

The court found that seven of the thirteen plaintiffs acted negligently.[138] Those plaintiffs:

- Failed to issue a written litigation hold until 2007, which was three years after they filed the lawsuit;
- Failed to clearly instruct employees to preserve and collect all relevant records;
- At least one of the plaintiffs failed to search a key player's PDA for relevant information, including emails.[139]

The court concluded that the six remaining plaintiffs were grossly negligent in their discovery efforts.[140] Each of the plaintiffs was guilty of some combination of the following conduct:

- Failed to timely issue a written litigation hold;
- Failed to conduct a reasonable search for relevant documents – electronically stored and otherwise;
- Failed to collect or preserve *any* electronically stored information prior to 2007, which was three years after the lawsuit was filed;
- Failed to cease destruction of electronically stored information after the duty to preserve arose;
- Failed to request documents from key players;
- Destroyed backup data potentially containing responsive documents from key players;
- Delegated search efforts to inexperienced personnel and did not provide proper supervision of search and collection efforts;
- Allowed individual employees to decide what documents must be preserved rather than providing uniform criterion for preservation of documents;
- Submitted misleading and/or inaccurate declarations concerning discovery efforts.[141]

The court noted that determinations of negligence, gross negligence, and willfulness are fact-intensive inquiries and observed that "[e]ach case will turn on its own facts and the varieties of efforts and failures is infinite."[142] Still, the court recognized the need for guidance as to what the relevant standards of conduct are concerning the duty to preserve, collect, and produce evidence in discovery. To that end, the court pointed to the following examples compiled from the authorities cited in the body of its opinion. The court characterized the following conduct as negligent in the discovery context:

- Issuing a litigation hold that is unduly limited in scope.[143]
- Failure to preserve records of non-key employees; *e.g.*, those employees who had only a passing encounter with the issues in the litigation.[144]
- Failure to assess the accuracy and validity of selected key-word search terms.[145]

The court characterized the following conduct as grossly negligent:

- Failure to issue a written litigation hold.[146]
- Failure to identify the key players and to ensure their electronic and paper records are preserved.[147]
- Failure to stay the destruction and/or to preserve the records of former employees that are in a party's possession, custody, or control.[148]
- Failure by the employee responsible for preserving evidence to familiarize herself with her company's record-keeping policy.[149]
- Failure to preserve backup tapes when they are the sole source of relevant information or relate to key players.[150]

The court characterized the following conduct as willful and/or constituting bad faith:

- Intentionally deleting files.[151]
- Depending on the circumstances, the failure to collect paper and/or electronically stored records from key players.[152]
- Depending on the circumstances, the destruction of email or backup data containing key players' information.[153]

"SHOW ME THE MONEY!"

2. What Sanctions Can The Moving Party Recover?

The court specifically stressed that "at the end of the day the judgment call of whether to award sanctions is inherently subjective" and is based on the court's "gut reaction" to the conduct at issue.[154] Running from least severe to most severe, the list of sanctions available to remedy spoliation includes: (i) further discovery; (ii) shifting the costs of discovery to the spoliating party; (iii) fines; (iv) special jury instructions; (v) precluding the spoliating party from introducing evidence on an issue at trial; and (vi) the entry of a default judgment or dismissal against the spoliating party.[155] Whether a party is entitled to an order imposing any of those sanctions depends on whether the party seeking sanctions has carried its burden of proof and whether the sanctions sought are appropriate.

The degree of wrongdoing a party must prove differs depending on the severity of the sanctions sought.[156] Where additional discovery, fines, and cost-shifting are sought, the focus is on the spoliating party's actions; *e.g.*, whether it issued an appropriate litigation hold, identified the key players, and acted to preserve their records.[157] Where a party seeks judgment or dismissal, a special jury instruction, or to preclude a spoliating party from introducing certain evidence at trial, the moving party must prove that the spoliating party: (1) had control over the evidence and an obligation to preserve it at the time of its destruction or loss; (2) acted in a negligent, grossly negligent, or willful manner in destroying the evidence; and (3) the missing evidence is not only relevant to the moving party's claims or defenses, but the absence of that evidence is prejudicial to those claims or defenses.[158]

The third element – relevance and prejudice – will usually be the most difficult to prove. How, for instance, can a party prove that evidence it has not seen and cannot obtain would have been helpful in proving its claims or defenses? The answer, according to the court, depends in part on the degree of the spoliating party's culpability in the destruction of the evidence. Where the spoliating party acted in bad faith or in a grossly negligent manner, relevance and prejudice may be presumed.[159] And while the presumption can be rebutted, the burden falls to the spoliating party to prove that the missing evidence would not have helped the moving party.[160] One way to prove this, the court observed, would be to show that the moving party had access to the evidence allegedly destroyed, or that the evidence would not have supported the moving party's claims or defenses.[161]

Where, however, "the spoliating party was merely negligent, the [moving] party must prove both relevance and prejudice in order to justify the imposition of a severe sanction."[162] The court observed that the moving party "may do so by adducing sufficient evidence from which a reasonable trier of fact could infer that the destroyed or unavailable evidence would have been" helpful to the moving party's claims or defenses.[163] The court further observed, however, that "[c]ourts must take care not to hold the prejudiced party to too strict a standard of proof regarding the likely contents of the destroyed or unavailable evidence, because doing so would allow parties who have destroyed evidence to profit from that destruction."[164]

"DON'T MESS WITH THE BULL, YOUNG MAN. YOU'LL GET THE HORNS!"

3. The Court's Application Of Its Spoliation Framework.

The defendants in *UM Pension Plan* were seeking dismissal of the plaintiffs' case. The court rejected that request finding that "a terminating sanction is justified in only the most egregious cases, such as where a party has engaged in perjury, tampering with evidence, or intentionally destroying evidence by burning, shredding, or wiping out computer hard drives."[165] When deciding whether and what type of sanction is appropriate for a particular case, the court observed "[i]t is well accepted that a court should always impose the least harsh sanction that can provide an adequate remedy."[166] Moreover, "[a]ppropriate sanctions should (1) deter the parties from engaging in spoliation; (2) place the risk of an erroneous judgment on the party who wrongfully created the risk; and (3) restore the prejudiced party to the same position [it] would have been in absent the wrongful destruction of evidence by the opposing party."[167]

The court concluded the appropriate sanctions for the plaintiffs' misconduct were a combination of monetary sanctions and adverse inference instructions. The court observed that monetary sanctions "are appropriate to punish the offending party for its actions and to deter the litigant's conduct, sending the message that egregious conduct will not be tolerated."[168] The court imposed monetary sanctions to compensate the defendants for the costs associated with uncovering the plaintiffs' spoliation.[169]

The adverse inference instructions imposed by the court differed depending on whether the court concluded the party was negligent or grossly negligent. The court explained there are three types of adverse inference instructions. The most severe – which is saved for spoliating parties who act in bad faith to destroy evidence – instructs the jury "that certain facts are deemed admitted and must be accepted as true."[170] The next most severe instruction creates a mandatory (but rebuttable) *presumption* that the spoliated evidence was relevant and that it would have been helpful to the moving party's claims or defenses.[171] That instruction is reserved for parties that act willfully.[172] The least severe instruction "*permits* (but does not require) the jury to *presume* that the lost evidence is both relevant and favorable to the [moving] party."[173] The court referred to this instruction as a "spoliation charge" to distinguish it from the more severe sanctions where the jury is directed to *presume* the missing evidence would have helped the moving party prove its claims or defenses, and those where the jury is directed to *deem* certain facts admitted.[174]

For the plaintiffs who were grossly negligent, the court concluded a "spoliation charge"

was appropriate.[175] For the plaintiffs who were negligent, the court concluded the defendants "carried their limited burden of demonstrating that the lost documents would have been relevant" to their claims and defenses, but they did not establish that they were prejudiced by the negligent spoliation.[176] That is, the defendants failed to demonstrate "through extrinsic evidence that the loss of the documents has prejudiced their ability to defend the case."[177] The court made clear that unless the defendants can make that showing, the defendants will not be entitled to a "spoliation charge" like the one issued against the plaintiffs whose conduct was grossly negligent.[178]

The *UM Pension Plan* decision is a positive development in e-discovery case law. It provides an up-to-date and comprehensive analysis of the current state of the law concerning spoliation and sanctions, helping to establish standards of conduct for parties and practitioners. Moreover, it is well-researched and authoritative. For all these reasons, we expect the decision and reasoning in the *UM Pension Plan* decision will be widely followed by other courts forced to address the spoliation of ESI.

"EXCUSE ME WHILE I WHIP THIS OUT."

E. Information Search and Retrieval

Following counsel's interviews of the "key players" in a dispute, counsel will need to work with the client's IT personnel to prepare a "data map" of where the relevant ESI is believed to be stored. After that, the company's databases will have to be searched for relevant ESI. "Keyword searches" are by far the most commonly used methodology for locating potentially relevant ESI.[179] The legal profession is familiar with that methodology through its use and searches of on-line legal databases.[180] A keyword search is a method for searching data using simple words or word combinations.[181] Such searches often use commands called "Boolean operators"[182] to expand the a search beyond the keyword root, exclude other words to limit the scope of a search, and join keywords with other terms in a way that provides added focus to a keyword search.[183]

Keyword searches are most often used to identify information that is responsive to discovery requests, identify privileged information, and for large-scale culling and filtering of ESI.[184] Keyword searches work best when the inquiry is focused on finding particular documents and the language used in those documents is relatively predictable.[185] In other cases, however, the vagaries of human language limit the value of keyword searches.[186] As one author noted, "words are living, elastic aspects of human behavior subject to constant change and only have meaning in their use."[187] For instance, people in different divisions of a company or different geographic regions of a country may use different words to describe the same thing, just as people of different generations or those who are otherwise demographically distinct can essentially have their own vocabulary for discussing the same topic. Furthermore, people may make up new acronyms, words, and codes that function as a language within a language, making the task of searching for information by use of keywords especially challenging.[188]

The ambiguity and indeterminacy of human language means the results of a keyword

search tend to be either over- or under-inclusive.[189] Keyword searches produce over-inclusive results when one or more of the keywords used has multiple meanings depending on the context in which the words are used. A search using the term "strike," for example, might return documents discussing "a labor union tactic, a military action, options trading, or baseball, to name just a few."[190] The problem with an over-inclusive search result is that additional time and labor will need to be expended to search the documents found for documents that are truly relevant to the issues that gave rise to the search.[191]

Keyword searches can return under-inclusive results when the keywords identified have overlooked synonyms or other closely-related words that are not included among the keywords used in the search. Relying on a keyword search essentially requires the parties directing the search to guess what words the authors of every document in the database to be searched would have used to express the same thought or to describe the same object or reality. For instance, "there are more than 120 words that could be used in place of the word 'think' (*e.g.*, guess, surmise, anticipate)."[192] A keyword search might also be under-inclusive due to spelling errors, alternative ways of spelling the same word (*e.g.*, Madeline, Madeleine, or Madelyn), or tense variations on the keyword (*e.g.*, sing, sang, song, singing).[193] Finally, keyword searches that search information gathered from texts through an optical scanning process ("OCR") are particularly likely to be under-inclusive because even the most reliable OCR processes have an error rate, meaning keywords might not be identified by the search.[194]

The results of a 1985 study illustrate the limits of attorneys' abilities to effectively search and retrieve relevant documents using keywords. The study examined the effectiveness of a document production in a lawsuit involving a computerized San Francisco Bay Area Rapid Transit ("BART") train that failed to stop at the end of the line.[195] The parties produced approximately 350,000 pages of documents in the case. Working with paralegals, the attorneys estimated they identified more than 75% of the relevant documents in the case. The study, however, revealed the attorneys and paralegals only found about 20% of the relevant documents. Perhaps not surprisingly, the parties used different words to search the database. For instance, the parties on the BART side of the case referred to "the unfortunate incident" whereas the parties on the victims' side of the case used the words "accident" and "disaster" to describe the event at issue. Bolstering the premise that it is extremely difficult for attorneys to identify all keywords necessary to find all relevant documents in a case, the authors noted that for one issue the attorneys identified three keywords they believed would adequately capture the database's relevant documents. The authors, however, discovered 26 more. Finally, the authors discovered that the terms used to discuss one of the train's faulty parts varied depending on where in the country a document was written. The authors spent 40 hours searching for all the different terms that might be used to describe the part and gave up. As one reviewer put it, "[t]hey did not run out of alternatives, they ran out of time."[196]

"YOU'VE GOT TO ASK YOURSELF ONE QUESTION: 'DO I FEEL LUCKY?' WELL, DO YA, PUNK?"

1. It May No Longer Be Reasonable To Rely On Keyword Searches Alone To Identify ESI That Must Be Preserved

Though it seems relying on key word searches to identify all relevant documents depends as much on luck as anything, courts not long ago considered them a reasonable and acceptable method for identifying ESI subject to a litigation hold.[197] Judge Sheindlin, author of the seminal *Zubulake* line of decisions and more recently the *UM Pension Plan* decision, endorsed keyword searches developed by counsel as a reasonable means of fulfilling a party's obligation to preserve relevant ESI.

> To the extent that it may not be feasible for counsel to speak with every key player, given the size of a company or the scope of the lawsuit, counsel must be more creative. It may be possible to run a system-wide *keyword search*; counsel could then preserve a copy of each "hit." … Counsel does not have to review these documents, only see that they are retained. For example, counsel could create a broad list of search terms, run a search for a limited time frame, and then segregate responsive documents … The initial broad cut merely guarantees that relevant documents are not lost.[198]

Times appear to be changing. Recent federal court decisions cast doubt on whether it is reasonable for a party to rely on a keyword search, particularly one developed by counsel alone, to identify and preserve relevant information when the results of that search are not tested for under-inclusiveness through further keyword searches, sampling, or other search methods.

The court in *United States v. O'Keefe*[199] questioned the position endorsed by Judge Sheindlin concerning the use of keyword searches. Facing a dispute over whether the government's keyword search for ESI was reasonable, the court observed that evaluating a party's search methodology "is a complicated question involving the interplay, at least, of the sciences of computer technology, statistics and linguistics."[200] Consequently, "for lawyers and judges to dare opine that a certain search term or terms would be more likely to produce information than the terms that were used is truly to go where angels fear to tread."[201] The court concluded that making those determinations "is clearly beyond the ken of a layman" and, therefore, parties seeking to challenge an adversary's search methodology would need to present expert testimony to address the dispute.[202] As another court observed, the opinion in *O'Keefe* merely confirms that "*ipse dixit* pronouncements from lawyers unsupported by an affidavit or other showing that [a] search methodology was effective for its intended purpose are of little value to a trial judge who must decide a discovery motion aimed at either compelling a more comprehensive search or preventing one."[203]

In a May 2008 decision, the court in *Victor Stanley, Inc. v. Creative Pipe, Inc.*[204] considered the reasonableness of the defendants' use of a keyword search to conduct a privilege

review of large volumes of ESI. The court was called on to determine whether the defendants' disclosure of privileged ESI following a keyword search for privileged materials was inadvertent. The issue turned on whether the defendants' decision to use a keyword search alone for their privilege review was reasonable. If it was reasonable, the disclosure could be considered inadvertent and the privilege would be preserved, but if it was unreasonable, the disclosure could not be considered inadvertent and the privilege would be deemed waived.

The parties agreed to a protocol for conducting searches for relevant ESI.[205] After the defendants conducted their relevancy searches, they used 70 keywords that were intended to flag all privileged materials from the ESI retrieved under the agreed search protocol.[206] The keywords were developed by one of the individual defendants along with defendants' counsel.[207] Once the keyword search was completed, the defendants produced to the plaintiff all files not flagged as a result of the keyword search.[208] The plaintiff discovered potentially privileged information in the materials the defendants produced and notified the defendants.[209] The defendants asserted that 165 of the documents produced were privileged and insisted their production of those documents was inadvertent.[210]

The court noted that keyword searches can be useful tools for search and retrieval of ESI but found that the results of such a search must be subjected to quality control checks to account for the limitations of that search methodology; namely, the likelihood that the search will return over- or under-inclusive results.

> Common sense suggests that even a properly designed and executed keyword search may prove to be over-inclusive or under-inclusive, resulting in the identification of documents as privileged which are not, and non-privileged which, in fact, are. The only prudent way to test the reliability of the keyword search is to perform appropriate sampling of the documents determined to be privileged and those determined not to be in order to arrive at a comfort level that the categories are neither over-inclusive nor under-inclusive.[211]

Citing the decision in *O'Keefe*, the court also found that a party must be able to demonstrate that its keyword search was properly constructed by persons with expertise in ESI search and retrieval endeavors.[212] Finally, the court warned parties to be prepared to justify their chosen methodology with expert affidavits and reports demonstrating that the searches were properly implemented in the event their searches are challenged by an adversary.[213]

The court concluded the defendants failed to show that their keyword search was reasonable.[214] To begin with, the defendants did not demonstrate that the individuals who selected the keywords for the search were qualified to design an appropriate search for ESI.[215] The defendants further failed to show that they conducted any quality assurance testing on the results of their keyword search.[216] And, when the plaintiff challenged their search methodology, the defendants were wholly unprepared to explain what they had done and why it was sufficient.[217] As a result, the court concluded the defendants failed to show they acted reasonably to protect against the disclosure of their privileged materials. Consequently, their disclosure was deemed voluntary and the privilege waived.[218]

There are two implications of the court's decision. First, keyword searches developed by counsel alone are probably not reasonable unless counsel has demonstrable expertise in computer sciences, statistics, and linguistics. Second, parties will need to make sure they document the searches they undertake and that the searches are defensible under the standards set by the relevant disciplines and, finally, provable in court. One author suggested living by the accounting axiom "if it isn't recorded, it didn't happen" when it comes to documenting e-discovery searches,[219] and suggested attorneys consider the following questions when deciding how to document their efforts:

- How will counsel show, if challenged, that reasonable efforts were undertaken and performed?
- Who will tell the story of how the work was done?
- What part of that story will be considered privileged, and what part available for public consideration?

The point of these questions is to avoid having to address them for the first time in the middle of a project, when it may be too late to go back and document the work.[220]

"YOU KNOW THE DIFFERENCE BETWEEN YOU AND ME?
I MAKE THIS LOOK GOOD."

2. Some Search Methodologies Look Good Compared to Keyword Searches

The court in *Victor Stanley, Inc.* briefly touched on different types of search and retrieval methodologies that parties might use to search their ESI.[221] While a full discussion of the differing methodologies is beyond the scope of this paper, it is worth identifying some of the more prevalent methodologies and how they differ from keyword searches.

The following are specific types of searches to consider:

a. Fuzzy Search Models

So-called "fuzzy searches" look for variations of keywords by measuring the similarity of a word to the keyword. The searches score words in the set of data searched. If the word's score meets the benchmark set by the particular test, the document in which the word is found will be retrieved. This approach can help account for common misspellings of keywords. It can also, however, produce results that are over-inclusive. For instance, a search for "Tivoli" might produce a result that includes "ravioli."[222]

b. Concept Search Models

There are several types of common concept search models. These searches rely on sophisticated algorithms to evaluate whether a set of documents matches a defined concept. The

algorithms "essentially treat each word in a document as a number and each pattern of words as a unique series of numbers" allowing the systems to perform statistical analyses of the documents based on the definitions, frequency, and context of the words they contain.[223]

i. Latent Semantic Analysis

This concept search model starts with keywords and looks for other words that have a high rate of co-occurrence with other words in the data searched. This model assumes that a high rate of co-occurrence means the words are related and can be used to retrieve documents containing the co-occurring words even if it does not contain the designated keyword. For instance, in a lawsuit involving a motorcycle crash, this search method might conclude that the words brakes, wheels, and helmet are related to the keyword "motorcycle" and retrieve documents containing those terms.[224]

ii. Text Clustering

This search process uses statistical models to group together documents with similar content and displays them on a visual aid of some kind. The closer in proximity two documents are to one another on the display, the more likely they are related. Being able to review a group of related documents together makes the review more efficient. In addition, clustering can help identify documents that are not relevant to issues driving the review.[225]

iii. Bayesian Classifier

This search methodology categorizes the documents in a database by taking words in a sample category and applying that rule to the other documents in the database. The process starts with a "training set" of relevant documents that serve as representative documents for the search system to look for during its search. Whether a document belongs in a particular category is a function of each word in the document and the frequency with which it appears. This search process can help to quickly identify and categorize documents as confidential, privileged, and responsive based on the training documents.[226]

Suffice it to say "[t]here is no one best system for all situations."[227] To assist parties in evaluating and selecting the appropriate search methodology for a particular dispute, a Working Group of the Sedona Conference published the following guidelines:

Practice Point 1: In many settings involving electronically stored information, reliance solely on a manual search process for the purpose of finding responsive documents may be infeasible or unwarranted. In such cases, the use of automated search methods should be viewed as reasonable, valuable, and even necessary.

Practice Point 2: Success in using any automated search method or technology will be enhanced by a well-thought out process

with substantial human input on the front end.

Practice Point 3: The choice of a specific search and retrieval method will be highly dependent on the specific legal context in which it is to be employed.

Practice Point 4: Parties should perform due diligence in choosing a particular information retrieval product or service from a vendor.

Practice Point 5: The use of search and information retrieval tools does not guarantee that all responsive documents will be identified in large data collections, due to characteristics of human language. Moreover, differing search methods may produce differing results, subject to a measure of statistical variation inherent in the science of information retrieval.

Practice Point 6: Parties should make a good faith attempt to collaborate on the use of particular search and information retrieval methods, tools and protocols (including as to keywords, concepts, and other types of search parameters).

Practice Point 7: Parties should expect that their choice of search methodology will need to be explained, either formally or informally, in subsequent legal contexts (including in depositions, evidentiary proceedings, and trials).

Practice Point 8: Parties and the courts should be alert to new and evolving search and information retrieval methods.[228]

"AN ARMY WITHOUT LEADERS IS LIKE A FOOT WITHOUT A BIG TOE."

F. Managing E-Discovery Using A Litigation Response Team

The tasks of preserving relevant documents and responding to discovery requests work best when a party's efforts are supervised and directed by a formal litigation response team ("LRT"). An LRT is comprised of employees from the various disciplines that are relevant to the different stages of the discovery process.[229] The teams can either be established on an as-needed basis or as a standing committee, depending on the company's litigation and discovery needs. The idea behind the LRT is that a team comprised of people who are knowledgeable about the legal issues involved in a dispute and people who are familiar with the company's information storage and business practices will more efficiently identify, preserve, and collect relevant information than if its members had performed those tasks independently.[230]

The core members of an LRT are typically the in-house and outside counsel handling the matter, representatives from the company's IT, records management, and human resources departments, and an employee from the business division out of which the litigation arose.[231] Each LRT member contributes differently. In-house and outside counsel identify the legal issues in the case and define the scope and nature of the information that must be located and preserved.[232] The business division representative (whether claims personnel or other) can help identify what types of information exist relevant to the dispute and how the unit creates and stores that information. The IT and records management personnel can then identify where the relevant information is stored, the current custodian of the information, how to preserve the relevant information, and, if necessary, how to retrieve it.[233] Representatives from other parts of the company can be added to the team depending on the nature of the proceeding or the request for information.[234] For example, if a request for information relates to a government compliance issue, it may be appropriate to add a representative from the compliance department with experience responding to government compliance requests, as a compliance officer may have a better sense of what types of information will need to be preserved and produced than the other LRT members.

Once in place, a LRT would operate as follows: when a company's duty to preserve arises or a lawsuit is initiated against it, the LRT would identify what type of information is subject to a litigation hold and determine where it is stored on the company's system.[235] This is where having parties from the different disciplines at the same table is truly beneficial to a company. In-house and outside counsel start by briefing all team members on the nature of the lawsuit, the company's preservation and production obligations, and defining the nature and scope of the information required.[236] The representatives of the company's other departments can then work together to identify where within the company the relevant information resides.[237] Next, the LRT determines the best way to preserve that geographically dispersed information and create procedures for the same.[238] It must then notify all information custodians of the company's preservation obligations.[239] Thereafter, the LRT is responsible for monitoring and enforcing compliance with the hold.[240] Finally, the LRT is responsible for collecting responsive information and preparing it to send to outside counsel for review.

One of the most significant benefits to establishing a LRT is the promotion of a consistent approach to common discovery issues.[241] One example is the question of whether relevant information is "accessible" or "inaccessible." Typically, "inaccessible" information is not discoverable. A company that takes an inconsistent approach on what information is "inaccessible" risks having a court declare it accessible.[242] For instance, if an opponent discovers in the deposition of the company's IT representative that the company has a history of identifying and retrieving such information when it is beneficial to the company, it becomes much harder for the company to argue that the information is not reasonably accessible because of the costs involved.[243] Having a team of individuals who are familiar with how a similar issue has been handled in the past helps ensure continuity in the company's approach, which helps strengthen the company's arguments anytime opposing counsel challenges the company's position on a particular discovery issue.[244]

"I'M GOING TO MAKE HIM AN OFFER HE CAN'T REFUSE."

G. Commentators Offer A List Of Best Practices For Creating A Document Retention Policy

Creating a document retention policy, particularly in the age of electronic discovery, is complex and requires consideration of a number of factors usually affecting several departments within a company including legal, information systems, and records management. Commentator Roland C. Goss recommends the following factors for consideration when creating or evaluating electronic information retention policies:

(1) the business need for information and the costs of retention;
(2) any legal or regulatory information retention requirements that are applicable to the organization or business at issue;
(3) best practices for electronic information retention;
(4) the current hardware and software alternatives that support retention strategies;
(5) litigation issues such as discovery rules and the legal obligation to institute legal holds to preserve data for litigation;
(6) the desire to control the amount of information available for litigation; and
(7) advice of outside counsel.[245]

These factors apply to retention policies for paper documents and ESI alike. The first and second factors emphasize that the type of business that the company conducts will dictate the appropriate type of retention policy. Every company has unique needs for information depending on its business strategies and most industries have to comply with statutory, regulatory, and other legal requirements that will affect its retention policies.[246] The fourth factor suggests that a company's retention policy will, to some extent, be driven by the type of computer systems, hardware, and software it has or it is willing to obtain.

The third recommended factor -- that companies consider the "best practices" of electronic information retention -- refers to the following guidelines offered by the Sedona Conference.[247]

(1) An organization should have reasonable policies and procedures for managing its information and records;
(2) An organization's information and records management policies and procedures should be realistic, practical and tailored to the circumstances of the organization;
(3) An organization need not retain all electronic information ever generated or received;
(4) An organization adopting an information and records management policy should also develop procedures that address the creation, identification, retention, retrieval and ultimate disposition or destruction of information and records; and
(5) An organization's policies and procedures must mandate the suspension of ordinary destruction practices and procedures as necessary to comply with

> preservation obligations related to actual or reasonably anticipated litigation, government investigation or audit.[248]

The Sedona Conference's best practices also insists that a document retention program be enforced. "[A]bsent extraordinary circumstances, if an organization has implemented a clearly defined records management program specifying what information and records should be kept for legal, financial, operational or knowledge value reasons and has set appropriate retention systems or periods, then information not meeting these retention guidelines can, and should be, destroyed."[249]

The United States Supreme Court discussed that issue with approval in *Arthur Andersen LLP v. United States*.[250] In addressing obstruction of justice charges related to Arthur Andersen's directive to its employees to destroy Enron-related documents pursuant to its document retention policy, the Court stated: "'Document retention policies,' which are created in part to keep certain information from getting into the hands of others, including the Government, are common in business. It is, of course, not wrongful for a manager to instruct his employees to comply with a valid document retention policy under ordinary circumstances."[251]

Finally, a retention policy must be reasonable. Some courts have found that to be reasonable the policy must be based on the content of the documents to be retained or destroyed, since not all documents or data are equally significant.[252] Rather, some materials will be more important than others, and, therefore, should likely be retained for longer periods of time.[253] Key considerations in determining whether a company's document retention program is reasonable are whether the company considered litigation and legal concerns, including the ability to implement litigation holds, when it created and implemented its retention policies.[254] Moreover, once established, the policy only insulates the company from sanctions and spoliation charges if it is consistently enforced. Uniform enforcement of a retention policy protects the party from charges that it selectively destroyed damaging documents or information.

"WHAT IS YOUR MAJOR MALFUNCTION?!"

H. A Proposed Plan For Preventing Litigation Holds From Eclipsing A Company's Document Retention Policy

One common problem for companies is that litigation holds can bring document retention policies to a halt. This problem arises where a company's document retention program identifies hundreds of thousands of pages of documents and ESI for destruction but requires someone, whether it is the records management department or the department from which the documents and information originated, to certify before destruction that none of the identified documents and information is subject to a litigation hold. This review wastes resources and impedes document destruction. A better way to ensure documents and information subject to a litigation hold are not destroyed is to thoroughly investigate, capture and segregate all the information the company determines is subject to a litigation hold at the beginning of a case. Accordingly, when a company identifies documents and information to be destroyed, the individual responsible for identifying and preserving the segregated information can certify that none of the documents and

information needs to be preserved pursuant to a litigation hold.

This approach might require some changes to a company's document retention policy. First, the policy shifts responsibility for certifying that documents and information eligible for destruction are not covered by a litigation hold to the individual in charge of preserving the relevant case materials. Second, the policy should state that the company is not required to keep copies of documents or information. This is important because the materials already segregated for the litigation hold will have preserved all relevant information. Presumably, therefore, any case-relevant documents or information scheduled for destruction are copies of what has already been segregated. Confirming in the retention policy that copies can be destroyed better ensures that the document retention program works as intended.

Of course, a company electing this approach will need to adopt standard protocols to ensure that its investigation and segregation of relevant material is complete. A company will also have to develop a way to capture and preserve all relevant documents and information created after it completes its investigation and segregation of relevant materials. Finding a way to identify that new information is not unique to this proposal; companies must always do this. The difference under this proposed approach is that the companies must segregate the information so that the document retention process can continue unabated while the litigation hold is in effect.

One potential concern with this proposal is that companies adopting this approach might not be preserving all of the information required under the Federal Rules of Civil Procedure and case law. Opposing counsel might argue, for instance, that a company cannot be certain it is fulfilling its preservation obligations when it destroys records without first going through them. That argument, however, misses the point of the proposed approach. The idea is *not* to ensure that *no* records subject to a hold are destroyed. Instead, the approach is designed to ensure that *if* relevant records are being destroyed, they are only copies of what the company has already preserved and, therefore, such destruction does not violate the company's preservation obligations.

An approach that requires a company to review and certify that every record eligible for destruction is not subject to a litigation hold is incredibly inefficient. The inefficiencies compound when one considers that such an approach means the review and certification process is not a one-time event. Rather, it must be repeated every time the company identifies records under its retention policies that are ready to be destroyed and will continue for the life of every lawsuit or informal dispute for which there is a reasonable anticipation of litigation.

Even if some documents or information were missed during the initial investigation, a party has not violated its preservation obligation as long as the steps it took to identify and preserve the relevant (albeit incomplete) information were reasonable. Generally, a party is only required to preserve the information that it reasonably anticipates will be discoverable in a lawsuit.[255] In other words, it is required to preserve data that it "knows, or reasonably should know, [might] reasonably lead[] to the discovery of admissible evidence, is reasonably likely to be requested during discovery, or [is] the subject of a pending discovery request."[256] A party is

not required to take extraordinary measures to preserve all potential evidence.[257] A company's exhaustive review of hundreds of thousands of documents and electronically stored files scheduled for destruction when it has already undertaken a thorough effort to preserve all required materials is the type of extraordinary measure that courts do not require.

Whether a company can in fact adopt the approach suggested here will obviously be dictated by the technical capabilities of the company's systems and, thus, will have to be determined on an individual basis. As a process, however, this proposal is intended to help companies find a way for the litigation hold process and a company's document retention program to work together and to loosen the stranglehold that litigation too often has on companies' document retention policies.

IV. CONCLUSION

There is a lot to worry about when it comes to e-discovery but there is less than there used to be. Developments in the federal rules and case law concerning e-discovery are providing much needed guidance for parties and counsel. As time goes on, we expect developments in law and technology to further clarify standards of conduct and make the search, review, and production of ESI easier and more reliable. In short, we may never love e-discovery, but we are optimistic that we will eventually be able to stop worrying about it.

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[1] Alison Silverstein & Daniel J. Zollner, Retention, Destruction, Preservation: Minimizing Risk in the Electronic Age, Seminar by TrialGraphix and Ross, Dixon & Bell, LLP (Sept. 27, 2006).

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] Memorandum, Sedona Conference, Commentary on Legal Holds: The Trigger and Process 12 (Aug. 2007) (*quoting* Memorandum, Sedona Conference, The Sedona Principles, Principle 5 (2d ed. 2007), *available at* http://www.thesedonaconference.org/dltForm?did=TSC_PRINCP_2nd_ed_607.pdf).

[6] *Id.*

[7] *Id.*

[8] Stephen Shankland, "*Hidden Text Shows SCO Prepped Lawsuit Against B of A*" (c/net 3/18/04), http://news.com.com/2102-7344_3-5170073.html?tag=st.util.print.

[9] *Id.*

[10] James Bone and Nicholas Blanford, "*UN Office Doctored Report On Murder Of Hariri*" (Times Online 10/22/05), http://www.timesonline.co.uk/article/0,,251-1837848,00.html.

[11] *Id.*; Tom Zeller, Jr., "*Beware Your Trail of Digital Fingerprints*" (NYT 11/7/05), http://Metadata-NYT-11-7-05.notlong.com.

[12] FED. R. CIV. P. 26(a)(1)(A)(ii)(emphasis added); *see also* FED. R. CIV. P. 26(a)(1)(B) (setting forth the types of proceedings that are exempted from initial disclosure).

[13] FED. R. CIV. P. 26 advisory committee notes, 2006 amdt., Subdivision (a).

[14] FED. R. CIV. P. 26(f)(2)(C)–(D).

[15] *Id.*

[16] FED. R. CIV. P. 26(f)(3)–(4).

[17] Judge Shira A. Scheindlin & Jonathan Redgrave, *Special Masters and E-Discovery: The Intersection of Two Recent Revisions to the Federal Rules of Civil Procedure*, 30 CARDOZO L. REV. 347, 357 (2008).

[18] FED. R. CIV. P. 16(b)(iii)–(iv).

[19] FED. R. CIV. P. 33(d)(1)(emphasis added).

[20] FED. R. CIV. P. 34(emphasis added); *see also* Memorandum from the Advisory Comm. on Fed. Rules of Civil Procedure to the Standing Comm. on Rules of Practice and Procedure of the Judicial Conference of the United States 15 (revised Aug. 3, 2004), *available at* http://www.uscourts.gov/rules/comment2005/CVAug04.pdf (last visited March 20, 2009).

[21] FED. R. CIV. P. 34(a)(1).

[22] FED. R. CIV. P. 34(b)(1)(C); *see also* FED. R. CIV. P. 33 advisory committee notes, 2006 amdt.

[23] FED. R. CIV. P. 34(b)(2)(D).

[24] FED. R. CIV. P. 34(b)(2)(E)(ii).

[25] FED. R. CIV. P. 45 (a)(1)(C).

[26] FED. R. CIV. P. 45 (a)(1)(D); *see also* Stephen F. McKinney & Elizabeth H. Black, *The Unsignaled Intersection at 26 & 45: How to Safely Guide Third Parties Across the E-Discovery Superhighway*, 75 DEF. COUNS. J. 228, 231 (2008) (noting "Rule 45 provides that a nonparty subject to an order compelling production *must* be protected from significant expense," unlike the parties under Rule 26).

[27] FED. R. CIV. P. 26(b)(2)(B).

[28] FED. R. CIV. P. 26(b)(2)(B).

[29] FED. R. CIV. P. 26(b)(2)(C)(i)–(iii).

[30] FED. R. CIV. P. 26(c)(1).

[31] *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 316 (S.D.N.Y. 2003) (*quoting Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978)).

[32] *Rowe Entm't, Inc. v. The William Morris Agency,* 205 F.R.D. 421 (S.D.N.Y. 2002).

[33] *Id.* at 429.

[34] 217 F.R.D. 309 (S.D.N.Y. 2003).

[35] *Id.* at 316; *see also* Mohammad Iqbal, *The New Paradigms of E-Discovery and Cost-Shifting*, 72 DEF. COUNS. J. 283, 287 (2005) (noting that the court in *Zubulake* was "highly critical of the eight-factor test" because "the Rowe decision undercut the presumption that a responding party usually must bear the expense of complying with discovery requests, unless a court finds 'undue burden or expense' in so complying").

[36] *Zubulake,* 217 F.R.D. at 322; *see also Sec. & Exch. Comm'n v. Collins & Aikman Corp.*, No. 07 Civ. 2419(SAS), 2009 WL 94311, at *11 (S.D.N.Y. Jan. 13, 2009) ("In considering requests for cost-shifting with respect to expensive and burdensome discovery, this Court has noted that the most important consideration is '[t]he extent to which the request is specifically tailored to discover relevant information'") (*quoting Zubulake,* 217 F.R.D. at 322).

[37] FED. R. CIV. P. 26(b).

[38] FED. R. CIV. P. 37(e).

[39] Andrew Hebl, *Spoliation of Electronically Stored Information, Good Faith, and Rule 37(e)*, 29 N. ILL. U. L. REV. 79, 96, 112–66 (2008) (asserting that some courts have misapplied the rule in the electronic discovery context by failing to focus on whether "reckless or intentional conduct" exists, and proposing a framework for proper application of the rule).

[40] *See In re Krause*, 367 B.R. 740, 767 (D. Kan. 2007) ("With the 2006 amendments to the Federal Rules of Civil Procedure, a party enjoys a safe harbor from sanctions where electronic evidence is 'lost as a result of the routine, good-faith operation of an electronic information system'").

[41] *Phillip M. Adams & Assoc., L.L.C. v. Dell, Inc.*, 621 F.Supp.2d 1173, 1193-94 (D. Utah 2009).

[42] FED. R. CIV. P. 26(b)(5)(B). *See also* John Cord, *Minding Your Ps and Qs ... and Your @s and *s*, TRIAL, Jan. 2009, at 38 ("most states require attorneys to immediately notify the sending lawyer upon receipt of materials that were likely inadvertently disclosed," and a lawyer who receives such materials "should refrain from examining the materials, notify the sending lawyer, and abide the instructions of the lawyer who sent them") (*quoting* Am. Bar Ass'n Comm. on Ethics and Prof'l Responsibility, Formal Opinion 92-368 (1992)); *see also* Ashish S. Joshi, *Clawback Agreements in Commercial Litigation Can You Unring a Bell?*, MICH. B.J., Dec. 2008, at 35 (providing sample clawback agreement language).

[43] FED. R. CIV. P. 26 advisory committee notes, 2006 amdt. Subdivision (f); *see also In re Delphi Corp.*, MDL No. 1725, Master Case No. 05-md-1725, 2007 WL 518626, at *8 n.17 (E.D. Mich. Feb. 15, 2007) (court urged parties to consider using the "quick-peek" protocol).

[44] Jonathan M. Redgrave & Jennifer J. Kehoe, *New Federal Rule of Evidence 502: Privileges, Obligations, and Opportunities*, FED. LAW, Jan. 2009, at 34.

[45] FED. R. EVID. 502.

[46] Donald R. Lundberg, *Top 10 Professional Responsibility Stories of 2008*, RES GESTAE, Jan./Feb. 2009, at 27 (noting that, in any event, Indiana "Rule of Professional Conduct 4.4(b) imposes a duty on counsel in receipt of inadvertently sent information to promptly notify the sending party").

[47] FED. R. EVID. 502(b).

[48] FED. R. EVID. 502(e) (emphasis added).

[49] Redgrave & Kehoe, *supra* note 44, at 36; *see also Koch Foods of Ala., LLC v. Gen. Elec. Capital Corp.*, No. 08-12090, 2008 WL 5264672, at *3 (11th Cir. Dec. 18, 2008) (applying a "totality-of-the-circumstances test," which considers the reasonableness of preventive steps, the amount of time to correct the mistake, "the scope of discovery," "the extent of the disclosure," and "the overriding issue of fairness").

[50] *Id.* at 36 n.21 (*citing In re Sealed Case*, 877 F.2d 976 (D.C. Cir. 1989) ("The courts will grant no greater protection to those who assert the privilege than their own precautions warrant. We therefore agree with those courts which have held that the privilege is lost 'even if the disclosure is inadvertent.'") (internal citations omitted)).

[51] *Id.* at 36 n.22 (*citing Gray v. Bicknell*, 86 F.3d 1472, 1483 (8th Cir. 1996) ("Under the lenient approach, attorney-client privilege must be knowingly waived. Here, the determination of inadvertence is the end of the analysis. The attorney-client privilege exists for the benefit of the client and cannot be waived except by an intentional and knowing relinquishment.")).

[52] FED. R. EVID. 502, explanatory note, Subdivision (b); *see also Relion, Inc. v. Hydra Fuel Cell Corp.*, No. CV006-607-HU, 2008 WL 5122828, at *2–3 (D. Or. Dec. 4, 2008) (applying Rule 502(b), court held the plaintiff did not meet its burden of disproving waiver because it "did not pursue all reasonable means of preserving the confidentiality of the documents produced to" the defendant").

[53] Kristine L. Roberts & Mary S. Diemer, *Rule of Evidence 502 Impact on Protective Orders and Subject Matter Waiver*, A.B.A. SECTION ON LITIG. LITIG. NEWS, Winter 2009, at 9; *see also* Emily Burns et al., *E-Discovery: One Year of the Amended Federal Rules of Civil Procedure*, 64 N.Y.U. AM. SURVEY AM. L. 201, 211–12 (2008) (due to the "fact-intensive inquiry into the reasonableness of a party's efforts to prevent disclosure and the promptness of its corrective action," litigation regarding this area is likely to continue).

[54] Julie Cohen, *Look Before You Leap: A Guide to the Law of Inadvertent Disclosure of Privileged Information in the Era of E-Discovery*, 93 IOWA L. REV. 627, 655 (2008) (*quoting* FED. R. EVID. 502(b) (proposed 2007) explanatory note, *available at* http://www.uscourts.gov/rules/Hill_Letter_re_EV_502.pdf (last visited March 20, 2009).

[55] *Ciba-Geigy Corp. v. Sandoz Ltd.*, 916 F. Supp. 404 (D.N.J. 1995).

[56] Cohen, *supra* note 54, at 661.

[57] *Id.*

[58] *Id.* at 662.

[59] *See* Burns et al., *supra* note 53, at 211–12 (*citing Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 262 (D. Md. 2008) ("Use of search and information retrieval methodology, for the purpose of identifying and withholding privileged or work-product protected information from production, requires the utmost care in selecting methodology that is appropriate …")).

[60] *Judson Atkinson Candies, Inc. v. Latini-Hohberger Dhimantec*, 529 F. 3d 371, 388–89 (7th Cir. 2008); *see also Reckley v. City of Springfield, Ohio*, No. 3:05-cv-249, 2008 WL 5234356, at *3 (S.D. Ohio Dec. 12, 2008) (applying Rule 502 and holding that documents retained their privileged status, court noted some of the emails at issue were labeled "attorney-client privileged" and counsel "took prompt steps to claim the privilege and seek return of the emails after they were disclosed").

[61] *Harmony Gold U.S.A., Inc. v. FASA Corp.*, 169 F.R.D. 113 (N.D. Ill. 1996) (finding plaintiff's delay in reacting after learning of disclosure, including taking two weeks to determine how the inadvertent disclosure was made, was not reasonable).

[62] Roberts & Diemer, *supra* note 53, at 9.

[63] FED. R. EVID. 502(d).

[64] Roberts & Diemer, *supra* note 53, at 9; *see also* FED. R. EVID. 502(e) ("An 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"); FED. R. EVID. 502(f) ("Notwithstanding Rules 101 and 1101, 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 not withstanding Rule 501, this rule applies even if State law provides the rule of decision").

[65] Cohen, *supra* note 54, at 656–57 (emphasis added).

[66] *Id.* at 662 (*citing* Kenneth S. Broun & Daniel J. Capra, *Getting Control of Waiver of Privilege in the Federal Courts: A Proposal for Federal Rule of Evidence 502*, 58 S.C. L. REV. 211, 240 (2006)); *see also* U.S. CONST. art. I § 8, cl. 3 (enumerating Congress's power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

[67] National Conference of Commissioners On Uniform State Laws, Uniform Rules Relating To The Discovery Of Electronically Stored Information (Oct. 2007), http://www.law.upenn.edu/bll/archives/ulc/udoera/2007_final.htm

[68] ediscoverylaw.com, Current Listing of States That Have Enacted E-Discovery Rules (Oct. 10, 2008), http://www.ediscoverylaw.com/2008/10/articles/resources/current-listing-of-states-that-have-enacted-ediscovery-rules/print.html, (last visited February 3, 2010).

[69] Huron Consulting Group & GCOC, *Benchmark Survey on Prevailing Practices for Legal Holds in Global 1000 Companies* 4 (2008), *available at* http://www.huronconsultinggroup.com/library/ CGOC_Huron_Benchmarks_Final.pdf (last visited March 20, 2009).

[70] 10A Fed. Proc., L. Ed. § 26:849 (West 2008) (*citing Rambus, Inc. v. Infineon Techs. AG*, 222 F.R.D. 280 (E.D. Va. 2004); *E*Trade Sec. LLC v. Deutsche Bank AG*, 230 F.R.D. 582 (D. Minn. 2005)).

[71] *Id.*

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[72] Andrew R. Lee, *Keep or Toss? Document Retention Policies in the Digital Era*, 55 LA. B.J. 240, 244 (Dec. 2007/Jan. 2008).

[73] Clayton L. Barker & Philip W. Goodin, *Discovery of Electronically Stored Information*, 64 J. MO. B. 12, 19 (2008).

[74] *Id.* (*citing Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc.*, 244 F.R.D. 614, 621 (D. Colo. 2007) ("While a party should not be permitted to destroy potential evidence after receiving unequivocal notice of impending litigation, the duty to preserve relevant documents should require than a mere possibility of litigation")).

[75] *Id.*

[76] *Id.*

[77] Memorandum, Sedona Conference, Commentary on Legal Holds: The Trigger and the Process, *supra* note 5 at 9.

[78] Barker & Goodin, *supra* note 73 at 19 (*citing E*Trade Securities LLC*, 230 F.R.D. at 589; *Lewy v. Remington Arms Co.*, 836 F.2d 1104, 1112 (8th Cir. 1988)).

[79] *Phillip M. Adams & Assoc., L.L.C. v. Dell, Inc.*, 621 F.Supp.2d at1191.

[80] *See Zubulake IV*, 220 F.R.D. at 217–18.

[81] R. Jeffrey Graham, *Litigation Holds: Best Practices for Protecting Your Company's Email Data from Inadvertent Loss and Spoliation*, LAW PRAC. TODAY (August 2007), *available at* http://www.abanet.org/lpm/lpt/articles/tch08071.shtml.

[82] Memorandum, Sedona Conference, Commentary on Legal Holds: The Trigger and the Process, *supra* note 5 at 1.

[83] *See Benchmark Survey on Prevailing Practices for Legal Holds in Global 1000 Companies*, *supra* note 69, at 4.

[84] Alan M. Anderson, *Issuing and Managing Litigation-Hold Notices*, 64 BENCH & B. MINN. 20, 23 (2007).

[85] Memorandum, Sedona Conference, Commentary on Legal Holds: The Trigger and the Process, *supra* note 5 at 15.

[86] Anderson, *supra* note 84, at 23.

[87] *Id.*

[88] Mark S. Sidoti & Renee L. Monteyne, *The Effective Internal Litigation Hold Letter*, IN-HOUSE Q., Winter 2007, at 11 (*citing Rambus Inc. v. Infineon Techs. AG*, 220 F.R.D. 264, 270-71, 280-91 (E.D. Va. Mar. 17, 2004); *Kingsway Fin. Servs., Inc. v. Pricewaterhouse-Coopers LLP*, 2006 WL 1295409 (S.D.N.Y. May 10, 2006)).

[89] Anderson, *supra* note 84, at 23.

[90] R. Jeffrey Graham, *Litigation Holds: Best Practices for Protecting Your Company's Email Data from Inadvertent Loss and Spoliation*, LAW PRAC. TODAY (Aug. 2007), *available at* *http://www.abanet.org/lpm/lpt/articles/tch08071.hthml*.

[91] Anderson, *supra* note 84, at 23.

[92] *Id.*

[93] *Id.*

[94] *Id.* (*quoting Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 424 (S.D.N.Y. 2004)).

[95] Anderson, *supra* note 84, at 23.

[96] Bradley C. Nahrstadt, Partner, Williams, Montgomery & John Ltd. & Mark Sidoti, Director, Gibbons P.C., Presentation: What's the Deal with Litigation Hold Letters? The Legal Duty to Identify & Preserve Electronic Data (Sept. 26, 2007) (audio recording available through ALI-ABA).

[97] *Id.*

[98] *Id.*

[99] Nahrstadt and Sidoti, *supra* note 96.

[100] *Id.*

[101] *Id.*

[102] *Mosaid Techs. Inc. v. Samsung Elecs. Co., Ltd.,* 348 F. Supp. 2d 332 (D.N.J. 2004).

[103] *Id.*

[104] 220 F.R.D. 212, 221 (S.D.N.Y. Oct. 22, 2003).
[105] *Id.*
[106] *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 427 (S.D.N.Y. Oct. 22, 2003) ("*Zubulake V*").
[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] No. 502003CA005045XXOCAI, 2005 WL 679071 (Fla. Cir. Ct. March 1, 2005); No. CA 03-5045 AI, 2005 WL 674885 (Fla. Cir. Ct. March 23, 2005).
[111] *Swofford v. Eslinger*, -- F. Supp.2d --, 2009 WL 3818593 *1, Case No. 6:08-cv-00066 (M.D. Fla. Sept. 28, 2009).
[112] *Id.* at *7-10.
[113] *Id.* at *2.
[114] *Id.* at *4.
[115] *Id.* at *5.
[116] *Id.* at 7-10.
[117] *TR Investors, LLC v. Genger*, 2009 WL 4696062 *5, Civil Action No. 3994 (Del. Ch. Dec. 9, 2009).
[118] *Id.* at *5.
[119] *Id.* at *3-4.
[120] *Id.* at *5.
[121] *Id.*
[122] *Id.* at *7.
[123] *Id.*
[124] *Id.* at *19.
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] *U.S. v. Philip Morris USA, Inc.*, 327 F. Supp. 2d 21 (D.D.C. 2004).
[130] -- F.R.D. --, 2010 WL 184312, Case No. 05 C 9016, (S.D.N.Y. Jan. 15, 2010).
[131] *Id.* at 1.
[132] *Id.* at 1 n.3.
[133] *Pension Cmtee. of Univ. of Montreal Pension Plan v. Banc of America Securities*, -- F.R.D. --, 2010 WL 184312, Case No. 05 C 9016 at 2.
[134] *Id.* at 3.
[135] *Id.*
[136] *Id.*
[137] *Id.*
[138] *Id.* at 18.
[139] *Id.* at 20.
[140] *Id.* at 12.
[141] *Id.*
[142] *Id.* at 3.
[143] *Id.* at n.18.
[144] *Id.* at 3.
[145] *Id.*
[146] *Id.*
[147] *Id.*
[148] *Id.*
[149] *Id.* at n.14.
[150] *Id.* at 3 n.18 and 7.
[151] *Id.* at 3 n.15.
[152] *Id.* at 3.
[153] *Id.*

[154] *Pension Cmtee. of Univ. of Montreal Pension Plan v. Banc of America Securities*, -- F.R.D. --, 2010 WL 184312, Case No. 05 C 9016 at 7.
[155] *Id.* at 6.
[156] *Id.* at 4.
[157] *Id.*
[158] *Id.* at 5.
[159] *Id.* at 5. The court made special mention of the fact that the presumption is not required. "Although many courts in this district presume relevance where there is a finding of gross negligence, application of the presumption is not required." *Id.*
[160] *Id.* at 6.
[161] *Id.*
[162] *Id.* at 5.
[163] *Id.* (internal quotations omitted).
[164] *Id.* (internal quotations omitted).
[165] *Id.* at 6; *see also Phillip M. Adams & Assoc., L.L.C. v. Dell, Inc.*, 621 F.Supp.2d at 1193 (stating the factors to consider when terminating sanctions are sought are: "(1) the degree of actual prejudice to the opposing party; (2) the degree of interference with the judicial process; (3) the litigant's culpability; (4) whether the litigant was warned in advance that dismissal was a likely sanction; and (5) whether a lesser sanction would be effective.")(quoting *LaFleur v. Teen Help*, 342 F.3d 1145, 1151 (10th Cir. 2003)).
[166] *Id.*
[167] *Id.*
[168] *Id.* at 7 (internal quotations omitted).
[169] *Id.*
[170] *Id.* at 6.
[171] *Id.*
[172] *Id.*
[173] *Id.* at 7.
[174] *Id.*
[175] *Id.* at 11.
[176] *Id.*
[177] *Id.*
[178] *Id.*
[179] *Sedona Conference Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery*, 8 SEDONA CONF. J. 189, 200 (2007); *see also Electronic Discovery Reference Model*, ERDM Search Guide, Draft v. 1.14, at §§ 5.2–5.4 (Jan. 20, 2009), *available at* http://edrm.net/files/EDRM-Search-Guide%20v1.14.pdf (last visited March 20, 2009); George L. Paul & Jason R. Baron, *Information Inflation: Can the Legal System Adapt?*, 13 RICH. J.L. & TECH. 10, 37 (2007).
[180] Paul & Baron, *supra* note 179, at 37.
[181] *Id.* at 32–36.
[182] *Id.* at 36. "Boolean operators" include the use of words such as "and," "or," and "not" to narrow searches.
[183] *Sedona Conference Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery*, *supra* note 179, at 200; *see also Electronic Discovery Reference Model*, *supra* note 179, at 32–36.
[184] *Electronic Discovery Reference Model*, *supra* note 179, at 32.
[185] *Sedona Conference Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery*, *supra* note 179, at 201.
[186] Paul & Baron, *supra* note 179, at 38.
[187] *Id.* at 37 (*citing* LUDWIG WITTGENSTEIN, THE PHILOSOPHICAL INVESTIGATIONS, §§ 19, 23 (G.E.M. Anscombe trans., 1953)).
[188] Paul & Baron, *supra* note 179, at 37.
[189] *Sedona Conference Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery*, *supra* note 179, at 201.
[190] *Id.*
[191] *Id.*

[192] *Id.* at 208.
[193] *Id.* at 202; *see also Electronic Discovery Reference Model*, *supra* note 179, at 35.
[194] *Sedona Conference Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery*, *supra* note 179, at 202; *see also* Paul & Baron, *supra* note 179, at 39.
[195] Herbert L. Roitblat, *Search And Information Retrieval Science*, 8 SEDONA CONF. J. 225, 231 (2007) (*citing* David C. Blair & M.E. Maron, *An Evaluation of Retrieval Effectiveness for a Full-Text Document-Retrieval System*, COMMS. OF THE ACM, March 1985, at 289–99).
[196] *Id.* (*citing* Blair & Maron, *supra* note 195, at 289–99).
[197] *Sedona Conference Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery*, *supra* note 179, at 201; *see also Electronic Discovery Reference Model*, *supra* note 179, at §§ 5.2–5.4.
[198] *Zubulake V*, 229 F.R.D. at 432 (emphasis added).
[199] 537 F. Supp.2d 14 (D.D.C. 2008).
[200] *Id.* at 24.
[201] *Id.*
[202] *Id.*
[203] *Id.*
[204] *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251 (D. Md. 2008).
[205] *Id.* at 254.
[206] *Id.* at 256. Not all of the ESI retrieved under the agreed protocol could be searched using keywords. Accordingly, the defendants conducted a limited manual review of those documents, expanding the review when it appeared likely a file might contain privileged information.
[207] *Id.*
[208] *Id.* at 257.
[209] *Id.* at 255.
[210] *Id.*
[211] *Id.* at 257.
[212] *Id.* at 261 n.10, 262.
[213] *Id.*
[214] *Id.*
[215] *Id.*
[216] *Id.*
[217] *Id.*
[218] *Id.* at 254.
[219] Steven C. Bennett & Marla S.K. Bergman, *E-Discovery*, N.Y.L.J., March 16, 2009, *available at* http://www.law.com/jsp/legaltechnology/pubArticleLT.jsp?id=1202429060007 (last visited March 20, 2009).
[220] *Id.*
[221] *Victor Stanley*, 250 F.R.D. at 261 n.9.
[222] *Sedona Conference Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery*, *supra* note 179, at 219; *see also Electronic Discovery Reference Model*, *supra* note 179, at 35.
[223] *Electronic Discovery Reference Model*, *supra* note 179, at 39; *see also* Memorandum, Nicolas Croce, What is Discovery Analytics?: An In-Depth Perspective Analysis on Analytical Search Techniques and their Application in the eDiscovery Workflow 4 (2009), *available at* http://www.inferencedata.com/pdf/what-is-discovery-analytics.pdf (last visited March 20, 2009).
[224] *Sedona Conference Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery*, *supra* note 179, at 219; *see also Electronic Discovery Reference Model*, *supra* note 179, at 39.
[225] *Sedona Conference Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery*, *supra* note 179, at 219; *see also Electronic Discovery Reference Model*, *supra* note 179, at 40; Croce, *supra* note 223, at 6.
[226] *Sedona Conference Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery*, *supra* note 179, at 218–19; *see also Electronic Discovery Reference Model*, *supra* note 179, at 40.
[227] *Sedona Conference Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery*, *supra* note 179, at 207.
[228] *Id.* at 208–12.

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[229] Lisa Spinelli, Legal Consultant, Kroll Ontrack Inc., and Theodore Tsekerides, Counsel, Weil, Gotschal & Manges LLP, E-Discovery Litigation Preparedness, West Legalworks presentation 9 (May 24, 2007) (audio recording available through West Legalworks).

[230] *Id.*

[231] *Id.*; *see also* Memorandum, Eric Friedberg, New Electronic Discovery Teams, Roles & Functions (March 2008), *available at* http://www.strozllc.com/publications/xprPubSearch.aspx?xpST=PubSearch (click on article title under Recent Publications).

[232] Friedberg, *supra* note 231.

[233] *Id.*

[234] Spinelli and Tsekerides, *supra* note 229.

[235] Spinelli and Tsekerides, *supra* note 229.

[236] Friedberg, *supra* note 231.

[237] Spinelli and Tsekerides, *supra* note 229.

[238] *Id.*

[239] Friedberg, *supra* note 231.

[240] Spinelli and Tsekerides, *supra* note 229.

[241] Friedberg, *supra* note 231.

[242] *Id.*

[243] *Id.*.

[244] *Id.*.

[245] Roland C. Goss, *Hot Issues in Electronic Discovery: Information Retention Programs and Preservation*, 42 TORT TRIAL & INS. PRAC. L.J. 797, 801 (2007).

[246] *Id.* at 802–803.

[247] Memorandum, Sedona Conference, The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age (Sept. 2005), *available at* http://www.sedonaconference.com/dltForm?did=TSG9_05.pdf (last visited March 20, 2009)

[248] *Id.* at iv–v.

[249] *Id.* at 24–30.

[250] *Arthur Andersen LLP v. United States*, 544 U.S. 696, 704 (2005).

[251] *Id.*

[252] *See Lewy v. Remington Arms Co.*, 836 F.2d 1104, 1112 (8th Cir. 1988).

[253] *See id.* ("A three-year retention policy may be sufficient for documents such as appointment books or telephone messages, but inadequate for documents such as customer complaints."); *see also* Joseph P. Messina & Daniel B. Trinkle, *Document Retention Policies After Andersen*, B. B.J., Sept./Oct. 2002, at 19 (*citing Linnen v. A.H. Robbins Co., Inc.*, No. 97-2307, 1999 WL 462015 (Mass. Super. June 16, 1999) for the principle that the "widely accepted business practice" of retaining backup tapes for three months before reusing or recycling them means that such a retention timeframe is reasonable).

[254] *Bd. of Regents Of Univ. of Neb. v. BASF Corp.*, No. 4:04CV3356, 2007 WL 3342423, at *5 (D. Neb. Nov. 5, 2007) ("When litigation is imminent or has already commenced, a corporation cannot blindly destroy documents and expect to be shielded by a seemingly innocuous document retention policy.") (citation omitted).

[255] Goss, *supra* note 245, at 818.

[256] *Id.* (*citing Wiginton v. Ellis*, No. 02 C 6832, 2003 WL 22439865, at *4 (N.D. Ill. Oct. 27, 2003)).

[257] Goss, *supra* note 245, at 818 (citation omitted).