Preparing for the Rule 26(f) Scheduling Conference and Other Practical Advice in the Wake of the Recent Amendments to the Rules Governing E-Discovery

The recent amendments to the Federal Rules of Civil Procedure require counsel to directly address questions relating to the preservation, discoverability, and admissibility of eletronically discoverable information. Some attorneys have been navigating these issues for years, entering into preservation agreements, designing discovery protocols, and otherwise dealing with the issues raised by electronically discoverable information. The practical advice learned from these experiences is shared and pointers are provided to help counsel better navigate these new requirements in the context of the Rule 26(f) conference.

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Legal commentators who suggest that the recent amendments to the Federal Rules of Civil Procedure that relate to electronic discovery will create dramatic and radical changes to the discovery obligations of parties in litigation are only partially correct. Litigators involved in technology-related lawsuits have been dealing with the issues presented by the new rules for years. More than 10 years have passed since the U.S. District Court for the Southern District of New York stated: "The law [is] clear that data in computerized form is discoverable even if paper 'hard copies' of the information have been produced. … [I]t is black letter law that computerized data is discoverable if relevant."[1]

Although working with electronic discovery is not new to some attorneys, many others have dealt with these issues rarely, if at all. Indeed, the new rules will make some significant changes in the way that litigators and clients alike—especially those who are not well versed in technology—prepare for and deal with litigation. Perhaps the most significant change requires litigators to make early decisions regarding electronic discovery issues. Previously, litigators would often question whether they wanted to be the first party to affirmatively introduce electronic discovery and its associated costs into the litigation. The amendments now force litigants to confront such issues, and to do so early in the litigation.

Simply put, electronic discovery is no longer optional for litigants, and the uninitiated might find the learning curve overwhelming. Depending on the complexity of the case and each party's use of technology, the challenges can be great. The explosion of cheap electronic storage and the flood of computer use in even the most common businesses have been a boon for litigators who understand the value of such information. Gone are the days when litigators searched file cabinets for documents to produce in litigation. Discovery now often involves little, if any, paper. For example, 70 to 80 percent of corporate information is now stored solely in electronic form, and e-mail usage by employees at U.S. companies is growing by 29 percent each year, with a typical 3,000-user e-mail system handling more than one terabyte of message traffic annually. This information often resides only in electronic form, which necessitates the gathering of electronic discovery.[2]

With the above in mind, it is certain that counsel will be faced with electronic discovery issues and will need to address such issues during the Rule 26(f) conference. Success begins with preparation. This article discusses some very basic information needed to consider issues for the Rule 26(f) conference and considers how electronic discovery differs from traditional hard-copy discovery. Armed with this basic knowledge regarding electronic discovery, this article describes what should be done to prepare for the discovery conference and identifies various options for addressing electronic discovery during the Rule 26(f) conference. Armed with the tools outlined in

this article, and with proper preparation, counsel will be able to achieve the Rule 26(f) goals of avoiding discovery abuses and harsh sanctions, minimizing costs, and improving the litigation process.

Definition of Electronic Discovery

Electronic discovery involves requests for and production of information that is stored electronically, including virtually anything that is stored on a computer such as e-mail, Web pages, word-processing files, and computer databases. Electronic records can be found on a wide variety of devices—desktop and laptop computers, network servers, personal digital assistants, and digital telephones. Documents and data are "electronic" if they exist in a medium that can be read only by using computers—cache memory, magnetic disks (such as computer hard drives or floppy disks), optical disks (such as DVDs or CDs), and magnetic tapes. Under the recent amendments, the above is only a partial list of discoverable storage media devices; Rule 34(a) includes "data or data compilations stored in any media."

The number of documents, the technical terminology, and—for litigators—the lack of direct control can appear daunting. However, taking advantage of experts who can help with electronic discovery issues can make the demands surmountable. Moreover, proper organization and planning, including knowing some common questions to ask and the tools that are available to facilitate electronic discovery, make electronic discovery more manageable. In fact, simply understanding the requirements of the new rules and having the ability to find a subject matter expert if all else fails can make electronic discovery manageable—even for the attorney who barely knows how to turn on a computer.

The important point to remember is that when representing parties in litigation, counsel still has the flexibility to define what electronic discovery will mean in each case. Even though the amended rules answer the initial question of whether the parties will address electronic discovery at all, the rules still provide flexibility for the parties to decide the scope and nature of what will be required by discovery. From the Rule 26(f) conference and report to educating the court during the Rule 16 conference and throughout the case, counsel can maintain some control over what electronic discovery will mean.

Rule 16 now includes provisions for the disclosure or discovery of electronically stored information. The amendment to Rule 16(b) "is designed to alert the court to the possible need to address the handling of discovery of electronically stored information early in the litigation if such discovery is expected to occur."[3] In accordance with amended Rule 26(f), during their discovery planning conference, parties are required to discuss issues relating to the preservation of discoverable information and issues relating to discovery of electronically stored information. This discussion should include the form in which electronically stored information will be produced, issues relating to claims of privilege and work product, and preservation of documents.

Issues Unique to Electronic Discovery

Armed with knowledge about the client and the nature of the dispute, counsel next needs to understand the difference between electronic discovery and traditional forms of discovery. Electronic documents present unique opportunities and special problems when the documents are produced. There are numerous ways that gathering electronic information is different from collecting and producing paper documents. These differences can be grouped into several categories.

Greater Volume and More Locations

The volume and number of locations of electronic documents are much greater than is the case with conventional paper documents. As discussed above, the number of electronic documents in existence and constantly being created is staggering. It has been estimated that one compact disk holds 550 megabytes of data, which amounts to 275,000 pages of information; one terabyte equals 50,000 trees made into printed paper, and two terabytes are equal to an academic research library.[4]

Part of the reason that the volume of electronic documents is so high is that electronic documents can be more easily duplicated than paper documents can. For example, e-mail users often send the same e-mail to numerous recipients, and the recipients forward that e-mail to others. Moreover, the locations in which one needs to search for electronic documents include far more places than the filing cabinets typically used to store paper documents. Electronic documents can be found on computer hard drives, network servers, backup tapes, and e-mail servers as well as on off-site computers, servers and backup tapes, laptop and home computers, and personal digital assistants.

Durability

In some ways, electronic documents can be difficult to maintain; in others, these documents can be almost impossible to destroy. Because computers automatically recycle and reuse memory space, overwrite backups, change file locations, and otherwise maintain themselves automatically, electronic documents can be easily damaged or altered without any human intent, intervention, or even knowledge. On the other hand, whereas a shredded paper document is basically irretrievable, "deleting" an electronic document does not necessarily mean that the document is actually destroyed. Instead of erasing the data in the disk directory, deleting the data changes them to a "not used" status, which allows the computer to write over the "deleted" data. By searching the disk itself rather than the disk"s directory, this "deleted" information can be retrieved and restored at any time until the computer writes over this data. Therefore, data are often recoverable long after the user has "deleted" the data—even if the computer user itself does not know of their existence.

Metadata and System Data

Electronic documents contain additional information that paper documents cannot provide, including metadata

and system data. Metadata, information imbedded in an electronic file, contain information about the file, such as the date of creation, author, source, and history. System data are the computer records about the computer's use, such as when a user logged on or off, what Web sites the user visited, what passwords were used, and which documents were printed or faxed.

Obsolescence

The frequent obsolescence of computer systems and software resulting from changes in technology also creates unique issues in electronic discovery that are not present in the recovery of paper documents. When turnover in computer systems and software occurs, "neither the personnel familiar with the obsolete systems nor the technological infrastructure necessary to restore the out-of-date systems may be available when this 'legacy data' needs to be accessed."[5]

Preparation for the Rule 26 Conference

The obvious place to start preparing for the conference is to think about the end game. Counsel should consider some broad questions. First, what kind of electronic discovery is required to prosecute the client's claims and defend against those of the opposing party? The answer to this question will vary depending on a number of factors, including the nature of the claims, the parties, and the amount in controversy. Second, what types of resources (both financial and human) does the case justify? For example, a dispute over the performance of software (in which the vast majority of important documents will be electronic) will require greater focus on electronic discovery from the very beginning of the case. A manufacturing dispute (in which only a few e-mail messages may be at issue) could require only minimal electronic discovery and an entirely different discovery plan. Of course, the amount in controversy can change the dynamics of both of the above examples.

With an understanding of the demands of the specific case, counsel can then begin to think through the many issues presented by electronically stored information. One good source to use for identifying the various issues for dealing with electronic discovery is "Suggested Protocol for Discovery of Electronically Stored Information" prepared by the U.S. District Court for the District of Maryland (available at www.mdd.uscourts.gov/news/news/ESIProtocol.pdf; last visited July 12, 2007).

Addressing Admissibility

Counsel should consider how electronically stored information will be used at trial. To be admitted into evidence, electronic evidence requires the same type of testimonial foundation as regular or hard-copy evidence requires. Recently, Chief U.S. Magistrate Judge Paul W. Grimm issued a 101-page detailed analysis of the various rules that must be navigated when considering the admissibility of electronically stored information.[6] For example, although the evidentiary rules require that the original writing, recording, or photograph be admitted to prove the contents, duplicates may be admitted "unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." Fed. R. Evid. 1003. Authenticity requires a showing that the evidence "is what a proponent claims." Fed. R. Evid. 901(a). Authenticity may be established through witness testimony, distinctive characteristics of the evidence, and the like. Fed. R. Evid. 901(b).

Several courts have held that testimony by a witness that he or she had printed out e-mails or Internet pages was enough to satisfy the authenticity requirements. In one case, a witness's testimony of having personally received and printed e-mails from the defendant was sufficient to prove authenticity.[7] A witness can authenticate documents attached to a declaration when the "pages [were] printed from the Internet … by [him or her] or under his [or her] direction."[8]

When considering whether electronic evidence has been authenticated, the trustworthiness of the evidence is the court's primary concern, which arises because of the ability to easily manipulate or alter electronic documents without leaving easily traceable evidence of the changes. Courts have refused to admit electronic evidence because they could not determine whether the evidence was accurate. In one such case, the Seventh Circuit affirmed the lower court's refusal to admit Internet postings by groups propounding white supremacy because of the failure to authenticate the evidence. The Seventh Circuit stated that authenticating the posting required the defendant to show that the groups, and not the defendant, had posted the statements in question.[9]

In a similar situation, a federal district court refused to admit information from the U.S. Coast Guard's online database of vessels, because there was no way to verify the authenticity of the information. Specifically, the court stated, "Anyone can put anything on the Internet. No Web-site is monitored for accuracy and *nothing* contained therein is under oath or even subject to independent verification absent underlying documentation. Moreover, the Court holds no illusions that hackers can adulterate the content of *any* Web-site from *any* location at *any* time."[10]

Electronic evidence also must satisfy hearsay requirements. Although e-mails are clearly statements made outside of court, printouts from Internet sites also have been held to be hearsay. *St. Clair*, 76 F. Supp. 2d at 775 ("[A]ny evidence procured off the Internet is adequate for almost nothing, even under the most liberal interpretation of the hearsay exception."). If the electronic evidence is offered to prove the truth of the statements found in the document or in another format, then the evidence is hearsay and must satisfy one of the exceptions in order to be admitted.[11]

Several courts have excluded electronic evidence for failing to meet the requirements of one of the hearsay exceptions. Courts have refused to admit e-mails, because they were offered for the truth of the matter asserted, did not satisfy the business records exception of Federal Rule of Evidence 803(6), and contained multiple layers of

hearsay without establishing any exceptions to the general hearsay rule.[12] A court also has excluded evidence even when an Internet service provider could access the information posted by customers, but the Web postings themselves could not be construed as business records.[13] Some exceptions to the hearsay rules have been applied to electronic data. In *Hardison v. Balboa Ins. Co.*, 4 Fed. Appx. 663 (10th Cir. 2001), the court found that Federal Rule of Civil Procedure 803(6) permits the admission of computer business records if a party introduces sufficient foundation. Courts have relied on party admissions under Federal Rule of Evidence 801(d)(2) to admit electronic evidence. In *Sea-Land Services Inc. v. Lozen International LLC*, 285 F.3d 808 (9th Cir. 2002), the appellate court determined that the trial court should have admitted, as a party admission, an e-mail from the plaintiff to the defendant that was written within the scope of the author's employment. Courts have also relied on present sense impression to admit electronic evidence, under Rule 803(1).[14] Finally, under Rule 803(8), courts have accepted the public records exception for electronic evidence.[15]

As with traditional evidence, a party seeking electronic evidence must keep in mind how that information will ultimately be admitted at trial. A sound discovery plan considers these issues in deciding how to retain information, how to collect that information from counsel's client, and how to obtain that information from the opposing party.

Understanding the Client's Electronic Information Policies

With some understanding of how electronic information may differ and a strategy for how electronic information will be used, the next step is to gain an understanding of the client's systems and the location of relevant information. A reasonable place to start is the client's policies related to electronic information. Given the current access to electronic files, many companies have adopted policies dealing with e-mail and other electronic information. Even if the client does not have written policies, counsel should understand the client's practices and procedures in three broad areas: (1) knowledge management (that is, when and how is information stored); (2) system knowledge (that is, what information is stored and where); and (3) accountability (that is, who is responsible for storing and maintaining the files).

For example, one electronic discovery problem often encountered is the use of personal computer devices to store company information. Company e-mails should never be sent from personal accounts, and company work should be performed only on the company's computers. However, many companies do not have formal policies prohibiting such conduct, and those that have such policies often fail to enforce them. As a result, data stored on an employee's device may be overlooked and subsequently destroyed. Even if the information is preserved and its existence is disclosed to counsel, the collection of the data can present serious issues involving privacy and chain of custody—for example, a mirror image of the hard drive could include personal financial data and information about how the employee used the Internet during personal time.

Counsel's inquiry should not be limited to just the use of e-mails and transmission of electronic information. Companies should also have clear policies concerning the treatment of electronic information in the possession of employees who have been terminated. For terminated employees, these policies might include rules governing the return of electronic information, telephone lines, and equipment or other sources that may contain electronic information, such as personal digital assistants and cell phones. These policies should include a clear directive as to where and how company property should be returned and should also include procedures for checking the hard drive and other electronic equipment of any departing or departed employee. Without these procedures, a company has no way of knowing if sensitive information was taken or, worse, transmitted to a competitor. Counsel must be familiar with the company's formal as well as informal procedures with respect to outgoing or departed employees' hard drives and other data storage devices.

One area that is often overlooked is customer data and related electronic information. Companies that store customer information electronically (as almost every business does today), lease hardware, or act as application service providers must have policies in place regarding such data in order to avoid violating statutes (such as the Health Insurance Portability and Accountability Act and the Gramm-Leach-Bliley Act), confidentiality and nondisclosure agreements, and privacy policies. The resolution of actions brought by the Federal Trade Commission drive home the importance of dealing with these issues.[16]

Finally, counsel must learn the client's policies regarding the preservation of documentation—for example, how long an electronic file is permitted to be retained. Counsel should find out if the client has a plan for altering these policies in order to identify relevant information and to prevent the destruction of documentation pertaining to it. Without such a plan, the company could be subject to a claim of evidence spoliation.[17]

Understanding the Client's Electronic Information Systems

Understanding the client's policies is just the beginning. As explained in *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003), a leading case relating to electronic discovery, litigation counsel has an affirmative duty to understand the client's systems. Knowledge of these systems requires an understanding of the overall system network—who has the information, where the information is located, and what kind of information exists. The answers to these questions will vary depending on the size and complexity of the client's organization.

The types of electronic information a company generates often include correspondence, accounting information, contracts, e-mails, customer service notes, presentations, and business plans; the list goes on and on. The content can range from office gossip to mission-critical documents. Sources that are often overlooked include

Web sites, electronic bulletin boards, virtual collaborative tools (such as electronic mark and wipe boards), and even voice mail. With expanded functionality, even an employee's cell phone is likely to have discoverable information—telephone lists or "to do" notes, for example.[18] The key is to learn what types of information are being generated, and by whom.

To start the process, counsel must gather information about (1) the number, types, and locations of computers currently in use and no longer in use; (2) the operating systems and application software, including the dates of use; (3) file-naming and location-saving conventions; (4) disk-labeling or tape-labeling conventions; (5) backup and archival disk or tape inventories or schedules; (6) the most likely locations of relevant electronic records; (7) backup rotation schedules and archiving procedures, including any backup programs in use at any time that is relevant to the case; (8) the identities of all current and former employees who have or had access to network administration, backup, archiving, or other system operations during the relevant period. Counsel will need to work closely, and early on, with the company's information technology staff and with management.

In gathering the information, counsel needs to be mindful of how the data will be managed during review and production and ultimately at trial. If counsel intends to use electronic litigation support tools, such as Applied Discovery Inc. (www.applieddiscovery.com) or Summation (www.summation.com), certain steps need to be taken to make sure that counsel is gaining the full potential from these applications. For example, getting the document in a tagged image file format (tiff) will not provide access to metadata, which are necessary for certain functions, such as full text searches. In addition, a tool like Robocopy (available in the Windows Resource Kit) collects the data without corrupting the metadata; other methods can change, for example, the *last date modified* metadata field.

Using Experts

Because these tasks may seem complex and still daunting to some attorneys, they should determine when it is time to call in an expert. An expert in electronic document collection may be an extremely useful and even essential addition to a litigation team when considering, seeking, or producing electronically stored information. The technical proficiency of most legal professionals has not matched the pace of the increased role that technology plays in business. Deciding whether to hire an expert involves a cost-benefit analysis. Attorneys facing this decision must first examine internal resources and decide whether they have the time and expertise to conduct electronic discovery. Since it is likely that the opposition will also request electronic discovery in retaliation, counsel must determine how complex both the client's and the opponent's systems are. An expert may not be needed for counsel's own client but may be required in order for counsel and client alike to access and understand the opposing party's systems and information.

Understanding the Opposing Party's Systems

With the knowledge of the client's systems, counsel can now turn to the opposing party's systems. All the same questions and issues that came up with the client's system should also be considered when thinking about what discovery to seek from the opposing party. Counsel should use the Rule 26(f) conference to determine what electronic evidence might exist and what computer and expert resources may be necessary in order to obtain the evidence. One approach is to have the respective parties' technical staff come to the meet-and-confer session (possibly under the cloak of an appropriate protective order to prevent the meeting from turning into a surprise deposition). This participation could eliminate confusion and expedite the process of formulating a realistic discovery plan. Another idea, if agreeable to all parties, is to have the expert informally interview the opposition's most knowledgeable information specialist.

At the end of this discussion, the parties should be prepared to define the electronic discovery needed for the case. The issues faced will vary depending on what was uncovered. Basic issues include the following:

- Will production of documents in electronic form be required at all?
- What file format (native format or imaged documents) is expected?
- What physical media will be used for producing the information?
- How will the parties "bates number" electronic information?
- Will the parties create rules for predisclosure of electronic information before depositions or hearings?
- Which party will bear the cost of production?
- Will the parties set rules regarding privilege in order to avoid document review costs?

Topics for the Rule 26 Conference

In addition to all the issues noted above, under the amendments implemented in 2006, other areas need to be discussed at the Rule 26 conference. Although counsel can be prepared before the conference, both parties will need to discuss these issues either to reach an agreement or to identify issues whose resolution may require court involvement.

Scope of Discovery

Under amended Rule 26(b)(2)(B), a party is authorized to respond to a discovery request by identifying sources of electronically stored information that are not "reasonably accessible because of undue burden or cost," rather than producing that information. If the requesting party seeks discovery from such sources, the responding party bears the burden of showing that the sources are not reasonably accessible.[19] Regardless, a court may order discovery of the information if the requesting party shows good cause and specifies the conditions for the discovery—a set of circumstances not unlike what some courts established prior to the amendments.[20]

What information is reasonably accessible will be decided on a case-by-case basis. Most courts are likely to apply the factors used in *Zubulake v. UBS Warburg*[21] to determine whether production will be required and which party should incur the cost of production. These factors include the following: "(1) The extent to which the request is specifically tailored to discover relevant information; (2) The availability of such information from other sources; (3) The total cost of production, compared to the amount in controversy; (4) The total cost of production, compared to the resources available to each party; (5) The relative ability of each party to control costs and its incentive to do so; (6) The importance of the issues at stake in the litigation; and (7) The relative benefits to the parties of obtaining the information."

Recently, courts have limited access to electronically stored information when the case does not warrant intrusive measures or the request fails to protect the producing party's privileged information. For example, in one case, the defendants sought approximately 52,000-plus potentially responsive e-mails and 4,400-plus files from six specific individuals; the court found that the requests were unduly burdensome and not tailored narrowly enough to seek information related to the defendants' affirmative defenses.[22] Courts have also refused to permit requests that were nothing more than "fishing expeditions."[23]

Other courts have refused to suppress an e-mail from a family's hard drive during divorce proceedings, stating that "rummaging through files in a computer hard drive [is] not any different than rummaging through files in an unlocked file cabinet."[24] Indeed, courts have found that "[a] discovery request aimed at the production of records retained in some electronic form is no different, in principle, from a request for documents contained in any office file cabinet."[25] Regardless, conclusory statements regarding the costs associated with providing the electronic information are not likely to satisfy the burden under Federal Rule of Civil Procedure 26(b)(2)(B) to establish that the information "is not reasonably accessible because of undue burden or cost."[26]

Privilege Issues

If a party has mistakenly produced information in discovery that it asserts is privileged or protected as a work product, Rule 26(b)(5)(B) establishes a procedure for addressing that issue. The producing party must notify the receiving party, identify the inadvertently produced information, and state the basis for the claim. After notification, the receiving party must return, sequester, or destroy the information. In addition, the receiving party may not use or disclose the information until the claim is resolved. The receiving party does have the option of directly presenting the information to the court in order to determine (1) whether the information is privileged or protected and, if so, (2) whether the disclosing party has waived these protections. During this period, the producing party must preserve the information pending the court's ruling.

Finally, the form of producing electronically stored information has been a source of dispute in discovery. Under the general provisions of Rule 34, the responding party typically must produce the discovery "in the format in which that party routinely uses or stores them, provided that electronic records shall be produced along with available technical information necessary for access or use."[27] The Rule 26(f) conference presents counsel with the opportunity to address these issues proactively and to set agreed-upon standards in an attempt to eliminate uncertainty.

Form of Production

Amended Rule 34 provides (1) a structure and procedure for the parties to identify the production form that is most appropriate for litigation; (2) guidance to the responding party if no request, order, or agreement specifies the form of production; and (3) guidance to the court if a dispute does arise. The amended rule also allows, but does not require, a requesting party to specify a form for producing electronically stored information. If the requesting party does not specify the form of production and there is no agreement requiring a particular form, Rule 34(b)(ii) specifies default forms of production: "form or forms in which it is ordinarily maintained or in a form or forms that are reasonable usable."

Of course, the amended rules do not permit unlimited access, and courts can look back to rulings made before the rule was amended for guidance. Courts have loosened the requirements when opposing parties request access to proprietary or other confidential data. For example, in one case, the 11th Circuit overturned the district court order permitting the plaintiff unfettered access to the defendant's databases that detailed all customer contacts, among other things, because the order permitted the plaintiff access to information without permitting the defendant to object prior to its disclosure.[28] Other courts have refused to grant plaintiffs unlimited access to a defendant's computer system[29] or refused to order the defendant to provide its entire source code to the plaintiff and the corresponding hard drives because of the volume and proprietary nature of the information.[30]

Preservation of Documentation

In the Rule 26(f) meeting, the parties should determine to the extent possible the scope of the duty to preserve evidence. As the reliance on electronic storage of documents and methods of communication grows, communications or drafts that individuals or companies typically did not preserve or save in the past are now preserved in e-mails and documents saved on computer hard drives, networks, or other media. This large increase in the volume of potentially discoverable information—along with the numerous locations where electronic data may be stored—results in not only more potential evidence to maintain and review but also greater risk that some evidence may be lost, altered through the general course of business, destroyed as part of an adopted retention policy, or destroyed intentionally. These greater risks equal a higher risk of sanctions for discovery violations, including spoliation.

The parties can use the Rule 26(f) conference as an opportunity to narrow the task of dealing with electronic information early on by stipulating to what electronic information must be retained and what may be ignored. The parties should consider a mechanism for identifying "key custodians," for which the information must be preserved. Time limits should be considered so that a party is not required to unnecessarily retain legacy data, end-of-life operating platforms, or backup tape vaults and needed memory stores.

Consequences of Discovery Failures

Failing to preserve or produce relevant information that has been stored electronically can result in consequences ranging from dismissal of a complaint[31] and a default judgment[32] to exclusion of witnesses[33] and payment of monetary sanctions for late production[34] costs associated with the motion for sanctions and the costs of a special master appointed by the court to oversee discovery after the defendants had replaced and destroyed a hard drive containing relevant information.[35]

One often-cited example illustrating the consequences of failing to produce electronic evidence was the ruling in a fraud case brought by New York financier Ronald Perelman against investment banking firm Morgan Stanley. Morgan Stanley repeatedly failed to turn over e-mails that were connected to a merger in 1998 between Coleman Inc., a company owned by Perelman, and Morgan Stanley's client, Sunbeam Corporation.[36] The court ruled that Morgan Stanley had been "grossly negligent" in handling its e-mails, saying that "[t]he prejudice to [Perelman] from these failings cannot be cured." As a result, the court told jurors that they could infer that Perelman was a victim of fraud. In making this ruling, the judge suggested that Morgan Stanley may have withheld information because it wanted to hide the Securities and Exchange Commission's probe into its e-mail retention policies. Just a week before this ruling, Morgan Stanley disclosed that the SEC was considering enforcement action against the firm for not properly retaining e-mails.[37]

Another recent example of the possible consequences of a failure to produce electronic evidence is the jury verdict reached in *Zubulake*.[38] On April 6, 2005, the jury ordered the defendant, UBS, to pay $29.2 million to its former sales associate, Laura Zubulake, who had sued UBS for gender discrimination.[39] The judge had instructed the jury that it could conclude that e-mails that were destroyed contained information adverse to UBS. The *Zubulake* decision set forth a preferred procedure for preserving information when required, including the following steps:

- preserving backup tapes for key employees or others who have relevant information;
- retaining both current and archived backup tapes identified as potentially relevant;
- cataloging documents created after the duty attaches in a separate file for easy collection and review; and
- taking mirror images of computer hard drives.

Indeed, following such practices and resolving issues during the Rule 26(f) conference can provide a strong argument for avoiding sanctions. A recent decision made by the Eighth Circuit in *Greyhound Lines Inc. v. Wade* reflects the current trend to require some degree of bad faith before issuing sanctions.[40] Including the safe harbor provision in the recent amendments provides support for other courts to continue this trend. Rule 37(f) ("Absent exceptional circumstances, a court may not impose sanctions … for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.").

Conclusion

The items discussed in this article do not present an exhaustive list of issues related to electronic discovery, but dealing with these issues can help structure counsel's approach. The recent amendments to the Federal Rules of Civil Procedure now require every attorney to confront these issues. With some planning and understanding of these issues, counsel can address many of the uncertainties of electronic discovery and thereby improve the quality of the discovery process and ultimately benefit their clients. **TFL**

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Endnotes

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[6]*Lorraine v. Markel American Insurance Company*,

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[7]*Kearly v. Mississippi*, 843 So. 2d 66 (Miss. Ct. App. 2002).

[8]*Perfect 10 Inc. v. Cybernet Ventures Inc.*, 213 F. Supp. 2d 1146 (C.D. Cal. 2002).

[9]*United States v. Jackson*, 208 F.3d 633 (7th Cir. 2000).

[10]*St. Clair v. Johnny's Oyster & Shrimp Inc.*, 76 F. Supp. 2d 773, 775 (S.D. Tex. 1999) (emphasis in original).

[11]*Bowe v. State*, 785 So. 2d 531 (Fla. Dist. Ct. App. 2001).

[12]*New York v. Microsoft Corp.*, No. Civ. A. 98-1233, 2002 WL 649951, 2002 U.S. Dist. LEXIS 7683 (D.D.C. Apr. 12, 2002); *Monotype Corp. v. Int'l Typeface Corp.*, 43 F.3d 443 (9th Cir. 1994).

[13]*United States v. Jackson*, 208 F.3d 633 (7th Cir. 2000).

[14]*United States v. Ferber*, 966 F. Supp. 90 (D. Mass. 1997) (although refusing to admit e-mails under the excited utterance exception, the court found the e-mails satisfied the requirements for a present-sense impression, because they explained the event in question shortly after it occurred).

[15]*Lester v. Natsios*, 290 F. Supp. 2d 11, 26 (D.D.C. 2003) (e-mails offered by the defendant federal agency were public records and "are generally admissible").

[16]*See* Ronald I. Raether Jr. and Michael Lamb, *Significant Developments in Computer and Cyberspace Law*, at 3-11 to 3-20 (June 9, 2006), ficlaw.com/newsframe.html.

[17]Ronald I. Raether Jr., *Effectively Preserving Evidence*, available at www.ficlaw.com/publications/raether/AV37510 National 36873.pdf (last visited Jan. 26, 2006).

[18]Deborah H. Juhnke, *Electronic Discovery in 2010*, at 40, available at www.forensics.com/pdf/Electronic_Discovery_2010.pdf (last visited Jan. 26, 2007).

[19]*Best Buy Stores L.P. v. Developers Diversified Realty Corp.*, 2007 WL 333987 (D. Minn. Feb. 1, 2007).

[20]*See*, for example, *In re Air Crash Disaster at Detroit Metro. Airport on Aug. 16, 1987*, 130 F.R.D. 634, 636 (E.D. Mich. 1989) (ordering the plaintiff to convert a simulation program and data on a nine-track magnetic tape if the defendant agreed to "pay all the reasonable and necessary costs that may be associated with the manufacture of the computer-readable tape").

[21]217 F.R.D. 309, 322 (S.D.N.Y. 2003).

[22]*Ameriwood Indus. Inc. v. Liberman*, 2007 U.S. Dist. LEXIS 10791 (D. Mo. Feb. 12, 2007).

[23]*Hedenburg v. Aramark Am. Food Servs.*, 2007 U.S. Dist. LEXIS 3443 (W.D. Wash. Jan. 17, 2007) (the defendant sought to search the plaintiff's home computer to identify additional statements from the plaintiff regarding the issues in question. The court refused defendant access to the plaintiff's home computer, because "[d]efendant essentially seeks a search warrant to confirm that [p]laintiff has not memorialized statements contrary to her testimony.").

[24]*White v. White*, 781 A.2d 85 (N.J. Super. Ct. Ch. Div. 2001).

[25]*Linnen v. A.H. Robins Co.*, No. 97-2307, 1999 WL 462015, 1999 Mass. Super. LEXIS 240 (Mass. Super. June 16, 1999).

[26]*Best Buy Stores L.P. v. Developers Diversified Realty Corp.* (D. Minn. Feb. 1, 2007).

[27]*Jicarilla Apache Nation v. United States*, 60 Fed. Cl. 413, 416 (Fed. Cir. 2004). Illustrative cases include *In re Verisign Sec. Litig.*, NO. C 02-02270 JW, 2004 WL 2445243, 2004 U.S. Dist. LEXIS 22467 (N.D. Cal. Mar. 10, 2004) (the trial court overruled the defendant's objections to the magistrate's order requiring documents to be produced electronically in the native format), and *United States v. First Data*, 287 F. Supp. 2d 69 (D.D.C. 2003) (the court ordered the parties to produce "electronic documents[] in the native electronic format (or a mutually agreeable format)").

[28]*In re Ford Motor Co.*, 345 F.3d 1315 (11th Cir. 2003).

[29]*Van Westrienen v. Americontinental Collection Corp.*, 189 F.R.D. 440 (D. Or. 1999).

[30]*Symantec Corp. v. McAfee Assoc. Inc.*, No. C-97-20367-JF, 1998 WL 740807, 1998 U.S. Dist. LEXIS 22591 (N.D.Cal. Aug. 14, 1998).

[31]*Covucci v. Keane Consulting Group Inc.*, 2006 Mass. Super LEXIS 313 (Mass. Sup. Ct. May 31, 2006).

[32]*QZO Inc. v. Moyer*, 594 S.E.2d 541 (S.C. Ct. App. 2004).

[33]*United States v. Phillip Morris USA Inc. f/k/a Phillip Morris Inc.*, 327 F. Supp. 2d 21 (D.D.C. July 21, 2004).

[34]*Phoenix Four Inc. v. Strategic Res. Corp.*, 2006 U.S. Dist. LEXIS 32211 (S.D.N.Y. May 23, 2006).

[35]*Padgett v. City of Monte Sereno*, 2007 U.S. Dist. LEXIS 24301 (N.D. Cal. Mar. 20, 2007).

[36]Ameet Sachdev, *E-mails Become Trial for Courts: Costly Electronic Discovery "Part of Potentially Every Case in the 21st Century,"* CHICAGO TRIBUNE, at 1 (April 10, 2005).

[37]Shira Ovide, *SEC Considers Action Against Morgan Stanley*, DOW JONES NEWSWIRES, at 1 (April 7, 2005).

[38]*Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003).

[39]Gail Appelson, *U.S. Jury Says UBS Must Pay $29.2 Million for Bias*, MSNBC, at 1 (April 6, 2005).

[40]2007 U.S. App. LEXIS 9282, at *4-5 (8th Cir. Apr. 24, 2007) (upholding the district court's decision not to impose sanctions for spoliation because "[t]he ultimate focus for imposing sanctions for spoliation of evidence is the intentional destruction of evidence indicating a desire to suppress the truth, not the prospect of litigation.").