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ELECTRONIC DISCOVERY: RULES FOR A DIGITAL AGE

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I. INTRODUCTION

Electronically stored information has become the dominant form of discovery in the litigation process. The duty to preserve and produce evidence that is discoverable in pending or anticipated litigation has led to unique problems in electronic discovery.[1] Electronically stored information is more voluminous than paper discovery and can be stored or produced in a variety of

[1] *See* The Sedona Conference Working Group on Electronic Document Retention and Production, *Commentary on Legal Hold: The Trigger and the Process* (Aug. 2007), *available at* http://www.thesedonaconference.org/content/miscFiles/Legal_holds.pdf (last visited Oct. 25, 2011) (stating that requirements of electronic discovery has led to a variety of new legal concerns).

formats. These issues have contributed to increased litigation costs. Additionally, electronic discovery has contributed to an increase in the unintentional disclosure of privileged information, which can have significant consequences to litigants.[2]

With seemingly unlimited ways to retrieve data, Congress and the Judiciary have responded to these issues by making changes to both the Federal Rules of Evidence (FRE) and Federal Rules of Civil Procedure (F.R.C.P).[3] These changes addressed the prevalence and scope of electronically stored information and its impact on the discovery process. The Amendments' design could work to control and allocate costs, address issues unique to electronic data, and protect against accidental waiver of the attorney-client privilege in electronically stored information. The ubiquitous nature of electronically stored information has increased the complexity and cost of compliance.

This article examines the differences between hard copy and electronic discovery and how electronic discovery has complicated the litigation process. It analyzes the issues that surround electronic discovery, including the preservation and production of electronic documents, whether production of metadata is required, ethical issues of metadata, the allocation of discovery costs, privilege, waiver of privilege, and spoliation. Further, this article reviews the history of electronic discovery, leading to the 2006 amendments to the F.R.C.P., and the 2008 amendment to the FRE 502.

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[2] *See* Jonathan M. Redgrave & Kristin M. Nimsger, *Electronic Discovery and Inadvertent Productions of Privileged Document*, THE FED. LAWYER, July 2002, at 37, *available at* http://www.jonesday.com/files/News/874255f9-46ad-4cbb-a538-10be28a74979/Presentation/NewsAttachment/1b5a547b-9928-4ae2-b83c-e2a07ff4a8aa/RedgraveJuly.pdf (last visited Oct. 25, 2011) (arguing electronic discovery increases risk and occurrence of unintended disclosures of protected information).

[3] *See* K&L Gates, President Bush Signs Into Law S. 2450, A Bill Adding a New Rule 502 to the New Rules of Evidence, ELECTRONIC DISCOVERY LAW, (Sept. 22, 2008), http://www.ediscoverylaw.com/2008/09/ articles/federal-rules-amendments/president-bush-signs-into-law-s-2450-a-bill-adding-new-rule-502-to-the-federal-rules-of-evidence/ ("On Friday, September 19, 2008, the President signed into law S. 2450, a bill adding new Evidence Rule 502 to the Federal Rules of Evidence."); *see* Richard Van Duizend, Conference of Chief Justices, *Guidelines for State Trial Courts Regarding Discovery of Electronically Stored Information*, *available at* http://www.ncsconline.org/WC/Publications/CS_ElDiscCCJGuidelines.pdf (last visited Oct. 25, 2011) (stating that Congress proposed new amendments to F.R.C.P in order to deal with changes in data retention systems).

II. WHAT IS DISCOVERY?

Parties to an anticipated or pending litigation have a duty to take reasonable steps to preserve documents, which could inevitably lead to discoverable evidence.[4] Discovery is a fact-finding process occurring after a lawsuit is filed that is a free exchange of information "based on the belief that a free exchange of information is more likely to help uncover the truth regarding the facts in issue."[5]

Discovery devices, such as interrogatories, request for admissions, and depositions are derived from the Rules of Equity, which give parties the right to compel an adversary to disclose material facts in order to establish a cause of action for a case.[6] The F.R.C.P. now regulate discovery in federal court proceedings. State rules govern procedure in state courts; however, many of

[4] *See* Zubulake v. UBS Warburg LLC (*Zubulake IV*), 220 F.R.D. 212, 217 (S.D.N.Y. 2003) ("While a litigant is under no duty to keep or retain every document in its possession . . . it is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request.") (quoting Turner v. Hudson Transit Lines, 142 F.R.D. 68, 72 (S.D.N.Y. 1991)). The *Zubulake* cases have set the standard for what electronic documents must be produced and when cost shifting is appropriate. In *Zubulake v. UBS Warburg*, 217 F.R.D. 309 (*Zubulake I*) (S.D.N.Y. 2003) ("*Zubulake I*"), the court determined a seven-factor test for cost-shifting and noted that accessible and relevant data should be produced, without need for cost-shifting, but cost-shifting is appropriate for inaccessible data. *See* Zubulake v. UBS Warburg, LLC, 230 F.R.D. 290 (*Zubulake II*) (S.D.N.Y. 2003) ("*Zubulake II*"), (addressing reporting obligations). *See also* Zubulake v. UBS Warburg LLC, 216 F.R.D. 280 (*Zubulake III*) (S.D.N.Y. 2003) ("*Zubulake III*") (regarding allocation of backup tape costs). In *Zubulake IV,* 220 F.R.D. at 212 (S.D.N.Y. 2003) ("*Zubulake IV*"), the court addressed the duty to preserve electronic evidence. In *Zubulake v. UBS Warburg*, 229 F.R.D. 422 (*Zubulake V*) (S.D.N.Y. July 20, 2004) ("*Zubulake V"*), the court imposed an adverse inference instruction, awarded reimbursement of costs of redeposing individuals, and awarded attorneys' fees for the sanctions motion.

[5] *Discovery Law and Legal Definition*, USLEGAL, http://definitions.uslegal.com/d/discovery/ (last visited Oct. 25, 2011) ("Discovery is a fact-finding process that takes place after a lawsuit has been filed and before trial in the matter, in order to allow the parties in the case to prepare for settlement or trial. It is based upon the belief that a free exchange of information is more likely to help uncover the truth regarding the facts in issue. Court rules and state rules of evidence govern the discovery procedure.")

[6] *See* Farlex, *Discovery*, FARLEX, http://legal-dictionary.thefreedictionary.com/discovery (last visited Oct. 25, 2011) ("Discovery devices used in civil lawsuits are derived from the practice rules of Equity, which gave a party the right to compel an adverse party to disclose material facts and documents that established a Cause of Action.").

these state rules are based on the Federal Rules.[7] Pursuant to the F.R.C.P. 26(b), discovery may be undertaken as to "any matter relevant to the subject matter involved in the action" under either a stipulation of the parties, or a court order for good cause shown.[8] Litigants must be prepared to comply with both federal court, state court, and sometimes even local rules that govern evidence and procedure.

The scope and breadth of discovery can even reach outside of the United States. On January 24, 2011, the United States Court of Appeals for the Seventh Circuit issued a decision broadly interpreting a federal statute affording parties in non-U.S. litigation access to American-style discovery.[9] The Court of Appeals for the Seventh Circuit held that a pending lawsuit in Germany could be subject to the far broader American discovery rules even though the discovery sought would not have been allowed under German discovery rules.[10] The court held that the plaintiff, a non-U.S. litigant, in a foreign dispute against the defendant, an international company with offices in the U.S., was entitled to obtain discovery in accordance with the F.R.C.P. absent a showing that the discovery was sought with an abusive motive or will produce an abusive outcome.[11]

Discovery is generally obtained by service of a notice, which is facilitated by various discovery devices prepared by either a litigant's attorney or by a court order pursuant to statutory provisions.[12] Discovery devices are designed to clarify issues in litigation, obtain evidence not readily accessible to opposing counsel, and to ascertain information that may be used at trial.[13]

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[7] *See id*. ("State laws governing the procedure for civil lawsuits, many of which are based upon the federal rules, have also replaced the equity practices.").

[8] FED. R. CIV. P. 26(b) ("For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.").

[9] *See* Heraeus Kulzer, GmbH v. Biomet, Inc., 633 F.3d 591, 594 (7th Cir. Jan. 24, 2011) (holding foreign litigants can compel discovery by U.S. litigants under American Discovery rules even in foreign courts).

[10] *See id*. (explaining U.S. rules on discovery are broader than almost any foreign rules on discovery).

[11] *See id*. (stating discovery cannot be compelled if it results from an abusive motive or would result in an abusive outcome).

[12] *See* Oppenheimer Fund v. Sanders, 437 U.S. 340, 351 (1978) (discussing the process for obtaining notice and discovery).

[13] *See id*. (indicating discovery devices can be used for a variety of reasons).

III. ELECTRONICALLY STORED INFORMATION

Prior to the digital age, non-testimonial evidence primarily consisted of paper documents, photographs and other physical evidence.[14] With the growth of the digital age, the format of discovery has changed significantly to include electronically stored information.[15] It is now estimated that over ninety-two percent of information created and stored is done electronically.[16]

Information is considered "electronic" if it exists in a medium that can only be read by a computer, including email, web pages, word processing files, audio and video files, images, computer databases, spreadsheets and virtually anything else that is stored on a computing device. These media include, but are not limited to servers, desktops, laptops, cell phones, hard drives, flash drives, PDAs and MP3 players.[17] Electronic discovery also can include a file's metadata (electronically stored information about the characteristics of the data), which can include information about the file's origin or validity.[18] The media that is used to store this information includes cache memory, magnetic disks (such as computer hard drives or floppy disks), optical disks (such as DVDs or CDs), magnetic tapes and flash memory (such as "thumb" or "flash drives").[19] A single CD-ROM has the ability to store thousands of pages and a

[14] *See* FED. R. CIV. P. 34 advisory committee's notes on 2006 Amendment.

[15] *See* Vlad J. Kroll, *Default Production of Electronically Stored Information Under the Federal Rules of Civil Procedure: The Requirements of Rule 34(b),* 59 HASTINGS L.J. 221, 221 (2007) (stating that in 1996 only 5% of discoverable information came from an electronic format).

[16] *See* David K. Isom, *Electronic Discovery Primer for Judges*, FED. CTS. L. REV. 1, 2 (Feb. 2005) (quoting Peter Lyman & Hal R. Varian, *How Much Information 2003?*, UNIV. CAL. BERKELEY (last visited Oct. 24, 2011), http://www.sims.berkeley.edu/research/projects/how-much-info-2003/ (indicating that 92% of all new data is stored and created electronically and 60% of all critical business information is stored within the corporate email system)).

[17] *See* THE SEDONA CONFERENCE, THE SEDONA PRINCIPLES, SECOND EDITION: BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 3 (Jonathan M. Redgrave et al. eds., 2d ed. 2007) (defining electronic).

[18] *See* Philip J. Favro, *A New Frontier In Electronic Discovery: Preserving and Obtaining Metadata*, 13 B.U. J. SCI. & TECH. L. 1, 4 (2007); *see also* Craig Ball, *Understanding Metadata; Knowing Metadata's Different Forms and Evidentiary Significance is Now an Essential Skill For Litigators*, 13 L. TECH. NEWS 78, 78 (2006) (explaining electronic data also includes metadata).

[19] *See* MICHAEL R. OVERLY & CHANLEY T. HOWELL, DOCUMENT RETENTION IN THE ELECTRONIC WORKPLACE 1 (2001) (describing the types of media that can store electronic information); *see also* BARBARA J. ROTHSTEIN, RONALD J. HEDGES & ELIZABETH Z.

hard drive can easily store the equivalent of hundreds of CD-ROMs.[20]

IV. DIFFERENCES BETWEEN PAPER AND ELECTRONIC DISCOVERY

A. General

Electronic discovery differs from the conventional paper discovery in many ways, all of which have consequences in litigation. However, electronically stored documents are also similar to paper documents in a variety of ways. "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 an office file cabinet. . . . [T]here is nothing about the technological aspects involved which renders documents stored in an electronic media 'undiscoverable'."[21] Paper documents produced during discovery can be destroyed, altered, or damaged; however, electronically stored information is more dynamic as it can be intentionally or negligently destroyed, altered, lost, or dispersed, by action or inaction.[22]

Electronic data discovery can be far more voluminous than paper discovery.[23] Electronic data can be stored inmore locations, in much greater volume, and with greater ease than hard-copy data (e.g. on hard drives, flash drives, portable computers, cell phones, and "cloud" locations, etc.).[24] Preservation of data has become a complex issue because over time new hardware and software is created and as systems become outdated, archives, and potentially discoverable data, may be destroyed.[25] Electronically stored

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WIGGINS, MANAGING DISCOVERY OF ELECTRONIC INFORMATION: A POCKET GUIDE FOR JUDGES 2 (2007) (explaining multiple media forms can contain electronic information), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/eldscpkt.pdf/$file/eldscpkt.pdf.

[20] *See* SHIRA A. SCHEINDLIN, *E-DISCOVERY: THE NEWLY AMENDED FEDERAL RULES OF CIVIL PROCEDURE 2* (Matthew Bender & Co. ed., 2006) (detailing how many pages of text a CD can contain).

[21] *See* Linnen v. A.H. Robins Co., 10 MASS. L. RPTR. NO. 9, 189, 192 (Mass. Super. Ct. Aug. 9, 1999) (holding there is no difference in discovery of paper documents as opposed to electronic data).

[22] *See* Salvatore J. Bauccio, *E-Discovery: Why and How E-mail Is Changing the Way Trials Are Won and Lost*, 45 DUQ. L. REV. 269, 276 (2007) (noting electronic information can be inadvertently changed without any specific actions).

[23] *See* ROTHSTEIN, *supra* note 19, at 2 (stating that discovery of electronic data can be far more voluminous that that of traditional paper discovery).

[24] *See id. at 2-3* (explaining how electronic information can be stored in multiple locations).

[25] *See* Terry Kuny, *A Digital Dark Ages? Challenges in the Preservation of Electronic*

data often contains metadata, or embedded information that traces the history of a file, which exists only for electronic documents and historically was excluded from discovery.[26] This information is now discoverable and often a significant factor in litigation.[27]

The recent FRE and F.R.C.P. rules require additional preservation and production methods, including parties' suspension of "routine or intentional purging, overwriting, re-using, deleting, or any other destruction of electronic information relevant to a lawsuit, including electronic information wherever it is stored - at a University work station, on a laptop or at an employee's home."[28] However, deleted electronic information may be recoverable and subject to discovery.[29] All of these issues have led to increased litigation and business costs, considered to be the largest problem in the electronic discovery process.[30] Discovery is no longer "just about uncovering the truth, but also about how much of the truth the parties can afford to disinter."[31] Further adding to costs, some courts have required information in its electronic form even after a responding party has produced the documents in paper form.[32]

Information, 63 INT'L FED'N LIBR. ASS'NS & INSTITUTIONS (1997) (paper from workshop held on Sept. 4, 1997), *available at* http://archive.ifla.org/IV/ifla63/63kuny1.pdf (stating that preservation of data has become difficult because technology is changing so rapidly).

[26] *See E-Discovery & Metadata,* LEXBE LITIG. UNLEASHED, http://www.lexbe.com/hp/indepth-e-discovery-rule-metadata.htm (last visited on Oct. 21, 2011) (stating that metadata was not always discoverable but electronic document retention has now made this a viable part of electronic discovery).

[27] *See id*. (asserting electronic searches for discovery requests supplements and in some cases replaces traditional discovery searches).

[28] *See Electronic Discovery Frequently Asked Questions,* TEX. A&M U., http://security.tamu.edu/Security_for_IT_Professionals/Resources/Electronic_Discovery_FAQ.php (last visited on Oct. 21, 2011) (requiring parties to suspend any actions that might destroy, alter, or damage electronic information relevant to lawsuits).

[29] *See* Simon Prop. Grp., L.P. v. MySimon, Inc., 194 F.R.D. 639, 640 (S.D. Ind. 2000) (allowing discovery access to additional computers in order to compel production of deleted documents).

[30] *See* S. REP. NO. 110-264, at 1 (2008) (stating that electronic discovery has increased litigation costs).

[31] *See* Zubulake I, 217 F.R.D. 309, 311 (S.D.N.Y. 2003) (indicating electronic discovery has increased the costs of discovery) (quoting Rowe Entm't, Inc. v. William Morris Agency, Inc., 205 F.R.D. 421, 429 (S.D.N.Y. 2002)).

[32] *See* Nat'l Union Elec. Corp. v. Matsushita Electric Indus. Co., 494 F. Supp. 1257, 1262 (E.D.Pa. 1980) (requiring the production of electronic data even after the paper documents were produced).

B. Volume and Storage

One of the unique aspects of electronically stored information is volume. Data collections now run into the gigabytes or terabytes for review.[33] A gigabyte can hold up to 677,693 pages of plain text documentation or 64,782 pages of Microsoft Word Files,[34] while a terabyte can hold up to 75 million pages.[35] Backup disks alone can hold up to 500 billion pages of plain text.[36] On average employees send and receive about 50 e-mail messages per day, which can be more than 1,200,000 messages a year for an organization of 100 employees.[37] A large company of 100,000 employees could be storing up to 1.5 billion e-mails annually.[38] Many e-mails are sent to multiple recipients, who forward it to other recipients.[39] The producing party "can be required to design a computer program to extract data from its computerized business records, subject to the court's allocation of costs."[40]

Some business applications use caching to back up data, which refers to the temporary storage of information where it can be readily accessible for future use.[41] Data is retrieved more quickly from cache than from the original storage location and using a cache allows applications to run more quickly.[42] Website

[33] *See* Anne Kershaw, Electronic Records Management and Digital Discovery: Practical Considerations for Legal, Technical, and Operational Success: Automated Document Review Proves Its Reliability, ALI-ABA Course of Study (May 17-19, 2007) (course materials available from the ALI-ABA) (stating that reviewing electronic documents for e-discovery can encompass thousands of pages).

[34] *Applied Discovery: E-Discovery in Depth - Tech Tips, How Many Pages in A Gigabyte?* LEXISNEXIS.COM, http://www.lexisnexis.com/applieddiscovery/clientResources/techTips1.asp (last visited on Oct. 21, 2011).

[35] *See* Kershaw, *supra* note 33 (stating that a terabyte can hold millions of pages of text documents).

[36] *See* MANUAL FOR COMPLEX LITIGATION (THIRD) § 11.446 (2004).

[37] *See* ROTHSTEIN, *supra* note 19, at 3 (stating how many emails are sent per day by an average employee).

[38] *See* SCHEINDLIN, *supra* note 20 (predicting that a large company can send up to 1.5 billion e-mails annually).

[39] *See* SEDONA PRINCIPLES, *supra* note 17, at 4.

[40] Anti-Monopoly, Inc. v. Hasbro, Inc., No. 94-CIV.-2120, 1995 WL 649934, at *1 (S.D.N.Y. Nov. 3, 1995).

[41] *See* Matthew Fagan, *"Can You Do a Wayback on That?" The Legal Community's Use of Cached Web Pages in and Out of Trial*, 13 B.U. J. SCI. & TECH. L. 46, 49 (2007) (defining caching).

[42] *See* THE SEDONA CONFERENCE GLOSSARY: E-DISCOVERY & DIGITAL INFORMATION

content often resides in cached storage locations on a hard drive because computers store "copies of content [that subscribers wish to see most often] at locations in the network closer to subscribers than their original sources . . . in order to provide more rapid retrieval of information."[43] Attorneys sometimes use these web-caching services to develop the merits of their case.

For example, in *Playboy Enterprises, Inc. v. Terri Welles*, Playboy brought a suit claiming trademark infringement, unfair competition, and breach of contract against Terri Welles, a former Playmate of the Year 1981, based on her use of the terms "Playmate", "Playboy" and "Playmate of the Year" on her personal website.[44] Although Playboy ultimately failed in its efforts to prove trademark infringement, the court approved a discovery order, which allowed a court appointed expert to create a mirror image of the defendant's hard drive to uncover evidence of the Playboy bunny icon.[45]

C. Preservation

The preservation of electronic data is essential for litigants to avoid problems during litigation. Litigants and their counsel have a duty to preserve any electronic documents that may be relevant or anticipated to be necessary for future litigation.[46]

> While a litigant is under no duty to keep or retain every document in its possession . . . it is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request.[47]

MANAGEMENT 7 (Conor R. Crowley & Sherry B. Harris eds., 2d ed. 2007) (describing caching).

[43] *See* Inquiry Concerning High-Speed Access to the Internet Over Cable & Other Facilities, 17 FCC Rcd. 4798, 4810 n.76 (2002).

[44] *See* Playboy Enterprises v. Welles, 60 F. Supp.2d 1050, 1051-52 (S.D. Cal. 1999).

[45] *See* Stephen Tucker & Garth W. Aubert, Electronic Discovery: A Refresher, AIRCRAFT BUILDERS COUNCIL, http://www.aircraftbuilders.com/UserFiles/File/lr2003a.pdf (last visited on Feb. 10, 2011).

[46] *See* Zubulake IV, 220 F.R.D. 212, 216 (S.D.N.Y. 2003) (describing duty of litigants to preserve electronic documents during litigation).

[47] *See* William T. Thompson Co. v. Gen. Nutrition Corp., Inc., 593 F. Supp. 1443, 1455 (C.D. Cal. 1984) (holding litigants are under a duty to preserve documents reasonably

This preservation duty can create a heavy financial burden, exemplified by ExxonMobil's in-house counsel's estimates that the company spends $1.9 million per month creating and preserving electronic information on backup tapes for litigation.[48]

Standards have now been developed to instruct litigants on how to preserve and manage electronic records. F.R.C.P. 37(f) acknowledges that if a party does not act in good faith when developing a proposed discovery plan, the court "may, after giving an opportunity to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure."[49] The good faith requirement of FRE 37(f) means that a party is not permitted to exploit the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve.[50] In *Arthur Anderson v. United S*tates, defendant Anderson was convicted of obstruction of justice after the government found that the company's document retention policy encouraged the destruction of relevant electronic data and also found "[i]t is, of course, not wrongful for a manager to instruct his employees to comply with a valid document retention policy under ordinary circumstances."[51]

Clients must be advised that failure to comply with subpoenas can lead to not only civil charges and spoliation sanction but to criminal charges, including obstruction of justice. In *United States v. Quattrone*, Mr. Quattrone was charged with interfering with probes by a grand jury and federal investigators by forwarding an e-mail from a subordinate that encouraged his colleagues to "clean up" their files at Credit Suisse First Bank Boston.[52] Mr.

related to pending discovery).

[48] *See Judicial Panelists Debate Need for Rules Covering Discovery of Electronic Data*, 22 EMPL. DISCRIM. REP. (BNA) 9, at 252 (March 3, 2004) (stating ExxonMobil spends 1.9 million per month retaining electronic documents for litigation).

[49] FED. R. CIV. P. 37(f) (2009).

[50] *See id.*

[51] *See* Arthur Andersen, LLP v. United States, 544 U.S. 696, 696, 704 (2005) (reversing the conviction of the employees who violated 18 U.S.C. §1512(b)(2)(A) which makes it a crime to "knowingly us[e] intimidation or physical force, threate[n], or corruptly persuad[e] another person . . . with intent to . . . cause" that person to "withhold" documents from, or "alter" documents for use in, an "official proceeding." The Court held that jury instructions failed to convey properly the elements of a "corrup[t] persuas[ion]" conviction under § 1512(b)).

[52] *See* United States v. Quattrone, 441 F.3d 153, 161, 166 (2d Cir. 2006) (stating Mr.

Quattrone argued that the jury instructions, similar to those given in the *Arthur Anderson* case, were erroneous, that he never knew about the SEC subpoena and knew almost nothing about the grand jury subpoena that called for documents involving hundreds of Initial Public Offerings ("IPO") transactions.[53] In its prosecution of Mr. Quattrone, the government reviewed both emails and saved drafts.[54] Mr. Quattrone successfully argued that he was not aware that the investigations involved any files that would have been kept in his investment banking unit.[55] The appeals court noted that "more is required; a defendant must know that his corrupt actions 'are likely to affect the . . . proceeding.'"[56]

In *United States v. Ruggiero,* the court held that "destroying documents in anticipation of a subpoena can constitute obstruction."[57] In *Ruggiero*, during the investigation of a deceased fugitive, the defendants took possession of the fugitive's papers and failed to provide the United States with cancelled checks, a sales contract, and the articles of incorporation of a corporation through which the fugitive had purchased property.[58] Even though "safe harbor" provisions exist for electronically stored information that was lost as a result of routine, good-faith operation, courts have made clear that the spoliation of electronic information is strictly prohibited.[59]

Courts have held that once a party reasonably anticipates litigation, it must suspend all of its "routine document retention/destruction policy and put in place a litigation hold" to ensure preservation of electronic documents.[60]

Quattrone was charged with interfering with a grand jury).

[53] *See id*. at 168 (arguing Mr. Quattrone had no knowledge of the SEC subpoena).

[54] *See id*. at 166.

[55] *See id*. at 169

[56] *See id*. at 171-73 (holding defendant must know actions are likely to affect proceeding).

[57] *See* United States v. Ruggiero, 934 F.2d 440, 450 (2d Cir. 1991) (holding destruction of documents in anticipation of subpoena is obstruction and defendants were convicted of conspiring to obstruct justice and to harbor a fugitive, and of endeavoring to obstruct justice).

[58] *Id*. at 444.

[59] *See* FED. R. CIV. P. 37(b) & (e) (stating that failure to disclose evidence leads to sanctions); *see also* David Ries, *Records Management: Current Issues in Retention, Destruction, and E-Discovery*, 78 PA. BAR ASS'N Q. 139, 145-46, 148 (2007) (stating that deleting electronic records is lawful under normal conditions, but that courts impose harsh sanctions for spoliation).

[60] *See* Zubulake V, 229 F.R.D 422, 431 (S.D.N.Y. 2004) (acknowledging the duty of counsel in electronic litigation).

Counsel must oversee the compliance of "litigation holds" through awareness of their client's system-wide backup procedures, recycling policies and they also must have direct communication with information technology personnel.[61] According to a 2006 survey, less than fifty percent of responding corporate attorneys reported that their companies have the ability to accurately and effectively initiate a hold order.[62] In 2005, the International Organization for Standardization (ISO) issued Technical Report 18492 (Long-Term Preservation of Electronic Document-Based Information).[63] This technical report establishes a general framework for strategy development to determine what types of electronic data must be preserved as long-term, usable, and trustworthy electronic records.[64] The American National Standards Institute has also developed standards for structuring information retention and records management.[65]

Because of these new standards for preservation, corporations have instituted document retention programs that periodically delete electronic documents.[66] In-house counsel typically advise clients "to be aggressive and thorough in this regard, as such a system can purge potentially embarrassing documents before a controversy arises in which they could be relevant."[67] Having a structured retention and deletion policy is crucial to the discovery

[61] *See id*. at 432 (stating that counsel must oversee compliance of litigation holds throughout litigation).

[62] *See* JORDAN LAWRENCE GROUP, SURVEY OF CORPORATE RECORDS PRACTICES 2006 11 (2006), *available at* http://www.jordanlawrencegroup.com/ (reporting that less than 50% of corporate attorneys believe their companies can effectively monitor and uphold litigation holds).

[63] INT'L ORG. FOR STANDARDIZATION, LONG-TERM PRESERVATION OF ELECTRONIC DOCUMENT-BASED INFORMATION (2005), *available at* http://www.iso.org/iso/iso_catalogue/catalogue_tc/catalogue_detail.htm?csnumber=38716.

[64] *See id*. (establishing a general framework to preserve electronic information in anticipation of litigation).

[65] *See* ASS'N OF RECORDS MANAGERS AND ADM'RS & AM. NAT'L STANDARDS INST., REQUIREMENTS FOR MANAGING ELECTRONIC MESSAGES AS RECORDS (2004), *available at* http://www.arma.org/ (listing standards for data retention programs).

[66] *See* Douglas R. Young, *Advising the Corporate Client on the Duty to Preserve Electronic Evidence*, FARELLA BRAUN & MARTEL LLP (2001), *available at* http://www.fbm.com/files/Publication/523409e0-08a9-4ca6-8699-7ac3fa6b9e29/Presentation/PublicationAttachment/64095eae-b207-4ace-963c-7adb25385948/E4C58E30-9D15-4950-9AC8-30CCB4BE9A72_document.pdf.

[67] *See id*. (reporting that in house counsels recommend deleting potentially harmful material as soon as possible).

process and many companies use deleting software similar to Electronic Evidence Discovery, Inc.'s program "TruErase," which is said to "delete the deleted" and is known "as a modern version of the paper shredder by re-programming computer systems to actually eliminate deleted files."[68]

As important as the duty to preserve data is, litigants also have a duty to guard against the spoliation of electronic data, which 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."[69] Paper documents with relevant information can be shredded to avoid discovery by opposing counsel. However, for electronic data, a deletion of a document fails to permanently remove the information as it is easily recoverable on a hard drive or back up tape.[70] For example, in *Commonwealth v. Copenhefer*, the defendant was convicted of kidnapping and murder after a state trooper noticed a computer generated sign in a bookstore that was similar to a ransom note used in connection with the case and defendant's computer was seized.[71] Even though defendant had deleted the ransom note, experts were able to recover the deleted note from the defendant's computer, an important piece of evidence in convicting the defendant.[72]

Some courts have found that intentional spoliation of electronic records is sanctionable where parties have deleted or destroyed evidence that could be found on a computer during or in anticipation of litigation.[73] For example, in *State v. Langlet*, the Iowa Supreme Court held that spoliation "involves more than destruction of evidence. Application of the concept requires an intentional act of destruction. Only intentional destruction supports the rationale of the rule that the destruction amounts to an admission by conduct of the weakness

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[68] *See id.* (explaining program's like TruErase work as electronic paper shredders).

[69] *See* Zubulake IV, 220 F.R.D. 212, 216 (S.D.N.Y. 2003) (citing West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d. Cir. 1999)) (declaring the litigants' duty to preserve electronic information for litigation).

[70] *See* ROTHSTEIN, *supra* note 19, at 4 (noting that electronic information is often recoverable from backup systems).

[71] *See* Commonwealth v. Copenhefer, 587 A.2d 1353, 1354 (Pa. 1991) (reciting defendant's charges).

[72] *See id.* at 1355-56.

[73] *See* CIV. R. ADV. COMM., 109TH CONG., REPORT OF THE CIVIL RULES ADVISORY COMMITTEE (May 2005), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV5-2005.pdf (from Honorable Lee. H. Rosenthal, Chair); *see also* Bauccio, *supra* note 22 at 276 (stating spoliation is sanctionable).

of one's case."[74] In *Langlet*, the state destroyed the recorded conversation with the defendant following his arrest pursuant to the city's policy of erasing all tapes after thirty days.[75]

Courts have dismissed or made determinations on the outcome of a case based on spoliation of evidence. For example, in Miller v. Time-Warner Communications Inc., the sanction of dismissal was imposed against the plaintiff who had erased her handwritten notes from discovery documents and falsely testified about the erasures; the sanction was imposed even though the spoliation did not prejudice the defendants.[76]

Companies that fail to comply with the new standards or restrictions for destroying or recycling electronic data risk millions of dollars or in sanctions during litigation. In some cases, courts exclude testimony of witnesses based on evidence that was destroyed. For example, in *United States v. Phillip Morris USA, Inc*., although the court had ordered preservation of all potentially relevant documents, defendants continued to delete email when after it became 60 days old.[77] The court granted: a) preclusion of any defense witness who failed to follow the prior retention Order; b) $2.75 million in monetary sanctions ($250,000 for each corporate manager that failed to comply); and c) payment of plaintiff's costs relating to the spoliation.[78]

If a jury determines that evidence was destroyed while in control of a party, the judge may instruct the jury to use an adverse inference, which allows the jury to infer that the evidence that was destroyed would have an adverse effect on the party that destroyed the it and assume the interpretation of what the destroyed document contained by the opposing party is correct.[79] Many courts require corroborating evidence of spoliation before imposing an adverse inference on negligent spoliators.[80] Courts have argued that it makes little

[74] *See* State v. Langlet, 283 N.W.2d 330, 333 (Iowa 1979) (describing spoliation of evidence).

[75] *See id*. at 332.

[76] See Miller v. Time-Warner Commc'ns, No. 97 Civ. 7286(JSM), 1999 WL 739528, at *1, *2, *3 (S.D.N.Y. Sept. 22, 1999) (imposing spoliation sanctions on defendants when destruction of evidence did not prejudice parties).

[77] *See* United States vs. Philip Morris USA, Inc., 327 F. Supp.2d 21, 23 (D.D.C. 2004) (stating defendants deleted emails in violation of court order).

[78] *See id*. at 26 (granting sanctions against defendants for spoliation).

[79] *See* Mary Kay Brown & Paul D. Weiner, *Digital Dangers: A Primer on Electronic Evidence in the Wake of Enron*, 74 PA. B. 'ASS'N Q. 1, 7 (2003) (noting juries may use adverse inferences when parties destroy evidence).

[80] *See* Turner v. Hudson Transit Lines, 142 F.R.D. 68, 77 (S.D.N.Y. 1991) (allowing adverse inferences only after corroborating evidence).

difference whether the party willfully or negligently destroyed evidence, however, a "corroboration requirement is even more necessary where the destruction was merely negligent, since in those cases it cannot be inferred from the conduct of the spoliator that the evidence would even have been harmful to him."[81]

In *Barber v. Union Pacific*, the jury, after hearing the adverse inference instruction, awarded four plaintiffs struck by a train $30.1 million dollars after evidence revealed that the defendants destroyed tapes between the conductor of the train and the dispatcher.[82] The plaintiffs' lawyer noted that the adverse inference instruction "conveyed to the jury the alleged institutionalization of spoliation in the upper echelons of rail companies and was key to cultivating large damage awards."[83]

D. Format and Metadata

Originally, the focus of the discovery disputes was on the form of production between paper and electronic.[84] Now, the dispute focuses on the particular type of electronic production, whether it is produced as a "paper printout, as a word-processing file, exported to various other computer-readable file formats, or imaged in TIFF (Tagged Image File Format) or PDF (Portable Document Format) formats."[85] The TIFF or PDF is essentially a photograph of the electronic document, thus, it can be Bates stamped, which is a "system of sequentially numbering document pages in paper or electronic form as part of litigation discovery to uniquely identify each page scanned or processed."[86] This enables the Bates stamped PDF or TIFF to be categorized,

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[81] *See id*.

[82] *See* Judgment on Verdict at 4, Barber v. Union Pac. R.R., 2002 WL 34371710 (Ark. Cir. Ct. 2002) (No. CIV-98-312).

[83] *See* James T. Killelea, Note, *Spoliation of Evidence: Proposals for New York State*, 70 BROOK. L. REV. 1045 (2005) (arguing damages were excessive because of adverse inference).

[84] *See* Kenneth Withers, *Electronically Stored Information: The December 2006 Amendments to the Federal Rules of Civil Procedure*, 4 NW. J. TECH. & INTELL. PROP. 171, 173 (2006) (noting focus of discovery disputes gravitated towards paper versus electronic).

[85] *See* Kroll, *supra* note 15 (noting the different ways electronic discovery can be stored); *see also* Carl G. Roberts, *The 2006 Discovery Amendments to the Federal Rules of Civil Procedure*, METRO. CORP. COUNS., Sept. 2006, at 45 (insisting focus of discovery shifted from paper versus electronic to what particular type of electronic will be produced).

[86] *See Bates Stamping Definition*, EXPERT GLOSSARY, http://www.expertglossary.com/ediscovery/definition/bates-numbering-or-bates-stamping (last visited Feb. 10, 2011) (defining bates stamping).

easily searched, and visually appear similar to a paper printout.[87]

Generally, a producing party cannot be compelled to create new electronic information to meet a discovery request.[88] F.R.C.P. 34(b)(1)(C) states that a discovery request "may specify the form or forms in which electronically stored information is to be produced."[89] If a party fails to specify the form for producing the electronically stored information, the responding party must produce it in the form in which it is ordinarily maintained or in a reasonably usable form.[90] The producing party may have an advantage by limiting the level of analysis of a particular electronic document.

Hard copies of a document may not be complete; a computer printout of a document would not reveal whether a document was modified or whether it was created on the date purported.[91] Electronic files are unique because the "native" file, the file in the form the information was created and is used in the normal course of operations, contains embedded data.[92] This embedded data provides information about the electronic file, such as when the document was created, the author's identity, when and by whom it was edited, all of which is known as metadata.[93] Metadata allows attorneys to easily authenticate documents under the FRE and can show whether a document has been intentionally or inadvertently modified.[94]

For instance, attorneys frequently use "track changes" because it shows recent drafts or edits to a document.[95] In *Aguilar v. Immigration & Customs*

[87] *See* ROTHSTEIN, *supra* note 19, at 10 (indicating PDF files are easily searchable).

[88] *See* Alexander v. F.B.I., 194 F.R.D. 305, 310 (D.D.C. 2000) (citing Rule 34 as requiring a party to produce only those documents that are already in existence).

[89] FED. R. CIV. P. 34(b)(1)(C).

[90] FED. R. CIV. P. 34(b)(2)(E)(ii); *see also* D'Onofrio v. SFX Sports Group, Inc., 247 F.R.D. 43, 48 (D.D.C. 2008) (denying request to produce business plan in original format with metadata finding that "if necessary" clause in Rule 34 did not state that party had to produce data in original form unless necessary to do otherwise).

[91] Richard E. Best, *E-Discovery Basics*, 18 CAL. LITIG. (2005) (analyzing electronic discovery prior to December 2006 amendments).

[92] Kroll, *supra* note 15, at 225 (recognizing unique features of electronic documents such as metadata).

[93] *See* Norman Simon, *Electronic Discovery: The Great Metadata Debate*, METROPOLITAN CORP. COUNS., May 2008, at 14 (explaining metadata).

[94] *See* Ball, *supra* note 18, at 74-75 (describing how metadata can help authenticate documents).

[95] *See* Donna Payne, *Metadata - Are You Protected?*, PAYNE CONSULTING GROUP (Feb. 10, 2011), http://www.payneconsulting.com/pub_books/articles/pdf/MidwestBarAssociationConferenc

Enforcement Division of U.S. Department of Homeland Security, the United States District Court for the Southern District of New York issued a definitive ruling providing that the F.R.C.P. require that metadata associated with emails and electronic files be preserved, maintained, and produced in the course of legal discovery, particularly where the requesting party seeks its production in its initial request.[96] Unless an attorney turns off "track changes" or removes the metadata from a document, an opposing party may have access to confidential information between an attorney and a client.[97] However, if someone prints a document and then re-scans it into an electronic format, the document does not have any metadata and production of the history of the document can be avoided.[98]

Extraction of metadata usually requires computer forensic experts due to the complexity of the various metadata standards and digital resource repositories, where metadata is saved.[99] Advances in recovery techniques, such as using automated metadata generation applications and programs, reduces the need to hire these specialized experts.[100] Automated Generation Systems ("AGS") designed a series of programs to extract metadata using a variety of algorithms, like the Support Vector Machine Algorithm, which includes specific "line" and "word" extractions.[101] Hiring experts adds to costs, but failure to produce could lead to costly sanctions for spoliation including "adverse inference instructions to juries, exclusion of evidence, imposition of directed verdicts, criminal sanctions and professional sanctions against attorneys."[102] In the

eMetadataHandout.pdf; *See also* Favro, *supra* note 18, at 7 (stating track changes is commonly used by lawyers).

[96] Aguilar v. Immigration & Customs Enforcement Div. of U.S. Dep't of Homeland Sec., 255 F.R.D. 350, 355 (S.D.N.Y. 2008) (holding metadata must be preserved in addition to original document).

[97] *See* THE SEDONA GUIDELINES: BEST PRACTICE GUIDELINES & COMMENTARY FOR MANAGING INFORMATION & RECORDS IN THE ELECTRONIC AGE, 29, 36 (2nd ed. Nov. 2007) (stating confidential information between attorney and client may be discoverable and usable by opposing parties as metadata).

[98] LEXBE LITIGATION UNLEASHED, *supra* note 26, (stating metadata can be destroyed by printing and rescanning documents).

[99] *See* Jane Greenberg et al., *Functionalities for Automated Metadata Generation Applications: A Survey of Metadata Experts' Opinions*, 1 INT. J. METADATA, SEMANTICS & ONTOLOGIES 1, 4 (2006) (stating extraction of metadata usually requires experts).

[100] *See* LEXBE LITIGATION UNLEASHED, *supra* note 26 (indicating advances in technology have made experts less necessary).

[101] Greenberg, *supra* note 99, at 4 (explaining AGS's metadata programs).

[102] LEXBE LITIGATION UNLEASHED, *supra* note 26 (listing possible spoliation sanctions).

matter *In re: Fannie Mae Securities Litigation*, the DC Appeals Court affirmed a ruling where the requesting party specified 400 keywords to search for discoverable data which the court determined "may simply indicate that most of the emails actually bear some relevance, or at least include language captured by reasonable search terms."[103] The search terms retrieved over 660,000 documents, and cost government lawyers over $6 million for the retrieval process, which was 9% of the Office of Federal Housing Enterprise Oversight's ("OFHEO") annual budget.[104]

Whether metadata, or "data about data," should be included in the production of electronically stored information has been an area of increasing litigation.[105] In *Williams v. Sprint/United Management. Co.* (*Williams*), employees claimed wrongful termination of employment based on age.[106] The plaintiffs requested production of spreadsheets from the defendant's human resources department that were used to determine who would be fired.[107] The court instructed the defendants to produce the spreadsheets "in the manner in which they were kept in the ordinary course of business."[108]

The court considered whether sanctions were necessary since the spreadsheets were "scrubbed" of metadata and certain data was locked in cells prior to the spreadsheet's production.[109] The court explained that electronically stored information must be produced with its metadata unless, "(i) the producing party timely objects to the production of metadata, (ii) the parties agree that metadata should not be produced, or (iii) the producing party requests a protective order."[110] Defendant should have been reasonably aware that locking the spreadsheets' cells and data was not complying with the spirit of the court's directive that the spreadsheets be produced as they are kept in the ordinary course of business."[111] However, the defendant has shown cause why it should not be sanctioned because the "lack of clear law on production of metadata, combined with the arguable ambiguity in the Court's prior rulings,

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[103] *In re* Fannie Mae Sec. Litig., 552 F.3d 814, 821 (D.C. Cir. 2009) (affirming use of 400 keyword search).

[104] *See id.* at 817.

[105] *See* Favro, *supra* note 18, at 4-6.

[106] Williams v. Sprint/United Mgmt. Co., 230 F.R.D. 640, 641 (D. Kan. 2005).

[107] *See id.* at 642.

[108] *Id.* at 656.

[109] *See id.* at 644.

[110] *Id.* at 652 (romanettes added).

[111] *Id.* at 655.

compels the Court to conclude that sanctions are not appropriate here."[112]

However, in *Kentucky Speedway, LLC v. National Association of Stock Car Auto Racing, Inc.* (*Kentucky Speedway*), the court found that "emerging standards of electronic discovery appear to articulate a general presumption against the production of metadata."[113] In *Kentucky Speedway*, the plaintiff brought monopolization and conspiracy antitrust claims against NASCAR.[114] The Court rejected the holding in *Williams* that metadata should be produced as "a matter of course" and instead found that to the extent that it sought metadata "where date and authorship information is unknown but relevant," to identify those documents so the defendants could apply that information.[115] This uncertainty within both the legal community and courts has only caused an increase costs and fears to litigants associated with electronic discovery.

In *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation,* both plaintiffs and defendants requested electronic data during discovery, however only the plaintiffs referred to metadata.[116] The plaintiffs produced the requested data but not as "kept in the ordinary course of business."[117] Instead, the plaintiffs printed out the electronic data requested and scanned the printed material to create "TIFF" images.[118] This had the effect of stripping all metadata from the files.

The court stated that by stripping the metadata, "[the plaintiffs] have run afoul of the Advisory Committee's provision that data ordinarily kept in electronically searchable form 'should not be produced in a form that removes or significantly degrades this feature.'"[119] However, the court denied defendants' motion for documents that had already been produced. Relying on F.R.C.P. 26(c), the court deemed that requiring the plaintiffs to re-produce the metadata on the already produced documents would unduly burden them since

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[112] *Id.* at *656.*

[113] *See* Ky. Speedway, LLC v. Nat'l Ass'n of Stock Car Auto Racing, Inc., CIV.A. 05-138-WOB 2006 WL 5097354, at *8 (E.D. Ky. Dec. 18, 2006) (quoting Wyeth v. Impax Labs., Inc., 248 F.R.D. 169 (D. Del. 2006)).

[114] *See id.* at *6.

[115] *See id.* at *9.

[116] *See In re* Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., 2007 U.S. Dist. LEXIS 2650, at *5-*6 (E.D.N.Y. Jan. 12, 2007).

[117] *See id.* at *6.

[118] *Id.* at *6-*7 (noting plaintiffs stripped the documents of metadata by printing and rescanning the documents).

[119] *Id.* at *14 (stating plaintiffs ran afoul of the rules by destroying metadata by rescanning documents).

they had produced multiple documents for months without objection by the defendants.[120] However, the court found that requiring plaintiffs to produce the documents in their native format would not unduly burden them for prospective discovery.[121] If the plaintiffs continued to scrub the data they would have "no one else but themselves to blame for incurring the additional costs of making a second production."[122]

In a more recent case, *Dahl v. Bain Capital Partners, LLC*, the plaintiffs requested that the defendants produce all of the metadata associated with the e-mails and documents produced by the defendants.[123] The defendants refused and instead offered twelve fields of metadata.[124] The court denied the plaintiff's broad request for the metadata, noting "many courts have expressed reservations about the utility of metadata, explaining that it does not lead to admissible evidence and that it can waste parties' time and money."[125] The court stated that "Rule 34 militates against the broad, open disclosure of metadata that the shareholders seek."[126] The court concluded that the plaintiffs must tailor their requests for metadata to specific documents and that this focused approach will hopefully reduce the parties' work and costs.[127]

E. Professional Responsibility and Metadata

1. Rule of Confidentiality

Rule 1.6 of the ABA Model Rules of Professional Conduct "governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client."[128] The comment section to Rule 1.6 notes that "[t]he principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine, and the rule of confidentiality established in professional ethics."[129] The rule of confidentiality is perhaps the most broad and widely applicable

[120] *See id.* at *15.

[121] *Id.*

[122] *Id.* at *16-*17.

[123] Dahl v. Bain Capital Partners, LLC, 655 F. Supp. 2d 146 (D. Mass 2009).

[124] *See id.* at 149.

[125] *Id.* (noting Courts are undecided on the usefulness of metadata).

[126] *Id.*

[127] *Id.* at 150.

[128] MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 1 (2010).

[129] MODEL RULES OF PROF'L CONDUCT R.1.6 cmt. 3 (2010).

division of client-lawyer confidentiality.[130]

"The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source."[131] The rule of confidentiality determines when a lawyer can reveal information related to a client''s representation and is not limited to judicial or other proceedings but applies in all contexts of representation.[132] It encompasses all privileged information but all information covered by the rule of confidentiality is not protected by the attorney client privilege.[133]

Rule 1.6(a), Confidentiality of Information, states that "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)."[134] Lawyers must act competently to preserve confidentiality and to "safeguard information relating to representation of a client against inadvertent or unauthorized disclosure."[135] While the ABA is not a legally binding authority, its rules have been widely adopted in some form or another by every state, with the exception of California and Texas.[136]

2. Confidential Metadata

With the expansion of technology, e-mail, electronic discovery, and metadata came an expansion of confidentiality concerns for lawyers and clients. While lawyers began communicating with clients via e-mail, a concern developed that the communications were not privileged if they were not encrypted. However, in 1999 the ABA issued an opinion that states,

> [a] lawyer may transmit information relating to the representation of a client by unencrypted e-mail sent over the Internet without violating the Model Rules of Professional

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[130] *See* Arthur Garwin, *Confidentiality and Its Relationship to the Attorney-Client Privilege*, *in* ATTORNEY-CLIENT PRIVILEGE IN CIVIL LITIGATION 31 (Vincent S. Walkowiak ed., 2004).

[131] MODEL RULES OF PROF'L CONDUCT. R. 1.6 cmt. 3 (2010).

[132] *See* Garwin, *supra* note 130 at 31-32 (explaining lawyer patient confidentiality).

[133] *See id*. at 32.

[134] MODEL RULES OF PROF'L CONDUCT. R. 1.6(a) (2010).

[135] MODEL RULES OF PROF'L CONDUCT. R. 1.6 cmt. 16 (2010).

[136] *See* ABA, *Status of Professional Conduct Rules by State, available at* http://www.abanet.org/cpr/pic/ethics_2000_status_chart.pdf (Last visited Feb. 10, 2011).

> Conduct . . . because the mode of transmission affords a reasonable expectation of privacy from a technological and legal standpoint. The same privacy accorded U.S. and commercial mail, landline telephonic transmissions, and facsimiles applies to Internet email.[137]

In addition to concerns regarding e-mail, there have been growing concerns with regards to the transmission of metadata that could potentially contain confidentially protected information.

3. ABA Official Opinion on Metadata

In 2006, the ABA provided an official opinion with regards to the transmission of metadata and a lawyer's responsibility to protect client confidentiality.[138] Many lawyers are constantly receiving e-mails and other electronic documents from their clients and other lawyers. The ABA acknowledged that many of these documents contain embedded information, metadata that is ordinarily not important during trial but in some instances could be essential to the outcome.[139] Metadata could also concern information that is confidential and privileged.[140] The ABA states that lawyers should not destroy or alter information once a document has been requested for discovery, but that lawyers must also be cognate to not send confidential or privileged information not asked for in discovery.[141]

Discovery can be an immense process where documents and inadvertent information is sent to the opposing counsel. Metadata is an area that can contain information inadvertently sent during discovery. Rule 4.4(b) does "[relate] to a lawyer's receipt of inadvertently sent information."[142] The rule states that "[a] lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender."[143] The ABA, however, has no rules preventing the receiving party from using the metadata or searching for metadata embedded in received files.[144] Metadata could be

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[137] *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 99-413 (1999).

[138] *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-442 (2006).

[139] *See id.*

[140] *See id.* at n.4.

[141] *See id.* at 5 & n.13.

[142] *Id.* at 3.

[143] MODEL RULES OF PROF'L CONDUCT. R. 4.4(b) (2010).

[144] *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-442 at 4 (2006).

inadvertently sent during discovery or earlier on in the trial. This can lead to a breach of the rule of confidentiality or attorney-client privilege and adds another wrinkle for electronic discovery.

F. Cost

1. Generally

The costs associated with the review of electronic documents have become an area of intense review not only by courts, but by Congress.[145] In discovery, "parties incur high costs in identifying and removing documents protected as privileged or as work product."[146] According to a recent study, manual review of 30 gigabytes of data would cost up to $3.3 million.[147] Liability insurers are addressing the costs of electronic discovery through electronic discovery insurance, which provides clients with training programs and document-retention policies to curb underwriting costs.[148] In a recent study, 87% of lawyers surveyed stated that electronic discovery is too costly and is driving up litigation fees.[149]

One reason for the severe cost of electronic discovery is companies are not adequately prepared to deal with electronic discovery. A study in 2008 showed that 53% of companies had no retention policy to govern e-mail deletion and retention and that 66% of companies do not have the technology to govern litigation holds and electronic discovery.[150]

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[145] *See* Zubulake I, 217 F.R.D. 309, 313 (S.D.N.Y. 2003) (estimating that the cost to comply with a Court order for electronic data production would cost up to $300,000); S. REP. NO. 110-264, at 2 (2008). (waiver of privileged information is costing corporations billions not only in sanctions but securing that inadvertent disclosure does not occur).

[146] Brian J. Levy, New Federal Rule of Evidence 502 Addresses Waiver of Privileges, MORRIS, MANNING & MARTIN, LLP, (Dec. 1, 2008), http://www.mmmlaw.com/media-room/publications/newsletter/new-federal-rule-of-evidence-502-addresses-waiver-of-privileges.

[147] *See* Chris Paskach & Vince Walden, Document Analytics Allow Attorneys to be Attorneys, DIGITAL DISCOVERY & E-EVIDENCE, Aug. 2005, at 10 (analyzing manual versus electronic document review and assessment applications).

[148] *See* Edwin M. Larkin, Insurers Are Getting in on the Act. NAT'L L.J., Aug. 20, 2007, at S7-S8.

[149] *See* Marisa Peacock, eDiscovery Drives Legal Costs Up, CMS WIRE (Sept 11, 2008), http://www.cmswire.com/cms/enterprise-cms/ediscovery-drives-legal-costs-up-003135.php.

[150] *See* Chris Preimesberger, Businesses Generally Ignoring E-Discovery Rules, EWEEK.COM (Dec. 17, 2007), http://www.eweek.com/c/a/Data-Storage/Businesses-Generally-Ignoring-EDiscovery-Rules/.

Courts traditionally have rules that each party pays their own discovery costs, however, under the amended rules and recent decisions, if a party can prove that the request for documents is an "undue burden" the court can consider "cost-shifting" and a number of other factors to determine who must bear the cost.[151]

Under the new electronic discovery rules, litigants will often argue that the costs associated with producing electronically stored information is unduly burdensome. The responding party to a discovery request must bear the cost of complying with the electronic discovery request and this cost can only be shifted when the discovery imposes "an undue burden or expense."[152] Litigants commonly complain for the need in document review to "(a) understand the scope of the review, (b) to put in place supervision and procedures for managing the reviewers and (c) to select the appropriate vendor, tools and platform for the review."[153]

In *Bratka v. Anheuser-Busch*, the defendant failed to produce highly relevant documents after repeated discovery requests and the court sanctioned the defendant by granting default judgment in favor of the plaintiff on the issue of liability.[154] The court found the defendant's attorney to be grossly negligent in giving Busch's in-house counsel the sole responsibility of obtaining documents without providing instructions and failing to ask pertinent parties for documents relating to the discovery requests.[155] In addition to entering a default judgment, the court ordered the defendant to pay plaintiff's counsel fees after finding the defendant's lawyer failed to "personally interview" an employee regarding his knowledge of records within the scope of a discovery request.[156]

In *Rowe Entertainment, Inc. v. William Morris Agency*, the defendants argued that production of e-mail information from back up media was unlikely to provide any relevant information in this racial discrimination case and would likely subject non-parties to violation of privacy.[157] The defendants

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[151] *See* Electronic Discovery: Questions and Answers, CIV. ACTION (Nat'l Ctr. State Courts, Williamsburg, Va.), Summer 2004, at 1, 5.

[152] *See* Zubulake I, 217 F.R.D. 309, 318 (S.D.N.Y. 2003).

[153] *The E-Discovery Process - Review,* CLEARWELL, http://www.clearwellsystems.com/e-discovery-central/e-discovery-process-review.php (last visited Mar. 11, 2011).

[154] *See* Bratka v. Anheuser-Busch, Inc., 164 F.R.D. 448, 463 (S.D. Ohio 1995) (issuing default judgment against defendant).

[155] *See id.* at 458-460.

[156] *See id.* at 461, 463.

[157] *See* Rowe Entm't, Inc. v. William Morris Agency, Inc., 205 F.R.D. 421, 428

requested that the plaintiffs bear the costs if production was required.[158] The court balanced eight factors, derived from previous cases:

> (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.[159]

The court determined that although the information sought by the plaintiffs was relevant, plaintiffs were required to pay for the recovery and production of the e-mail backups, except for the cost of screening for relevance and privilege.[160]

In *Zubulake I*, UBS claimed that in order to produce the electronic documents requested, it would cost up to $300,000.[161] The court in *Zubulake I* used several factors derived from case law to determine "good cause" in cost-shifting between parties:

> (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.[162]

Congress has tried to rectify some of the "good cause" and cost-shifting

(S.D.N.Y. 2002), *aff'd*, 167 F. App'x. 227 (2d Cir. 2005).

[158] *See id*. at 424.

[159] *Id*. at 429.

[160] *See id*. at 433.

[161] Zubulake I, 217 F.R.D. 309, 313 (S.D.N.Y. 2003) (restating costs associated with electronic discovery requests).

[162] *Id*. at 322.

problems under Rule 26(b)(2)(B) as this Rule now codifies a balancing test where a distinction is made between reasonably accessible data and data that is not "reasonably accessible because of an undue burden or cost" and allows the Court to consider whether "good cause" exists to override the burden of expense.[163]

2. Failure to Comply

The failure to produce documents can be equally as costly. In *Zubulake I*, the jury found that UBS deleted emails relevant to the litigation and awarded Zubulake $20.2 million in punitive damages.[164] In *Morgan Stanley & Co. v. Coleman*, the jury awarded Coleman Holdings $1.58 billion in damages after the Court added an adverse interference instruction, allowing, but not requiring, the jury to infer that the destroyed or withheld evidence would have been harmful to the spoliator's case if it had been produced.[165] The case was reversed and remanded for a new trial on the punitive damages because there was no proof presented at trial on the correct measure of damages.[166] The appeals court found that the trial court "should have granted Morgan Stanley's motion for directed verdict."[167] The court found that Morgan Stanley failed to search approximately 1,423 backup tapes for e-mails after Morgan Stanley informed the court that the search had taken place.[168] Courts have awarded sanctions in cases even when the party did not engage in conduct to thwart discovery but sanctions were imposed because of the party's "haphazard and uncoordinated approach to document retention."[169]

The costs associated with locating the privileged information, reviewing it

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

[164] Jury Verdict at 1, Zubulake v. U.B.S. Warburg LLC, 217 F.R.D. 309 (S.D.N.Y. 2001) (JVR No. 806211), 2005 WL 4256525 at *1) (Jury awarded Zubulake $29.3 million for this wrongful termination case, including $9.1 million in compensatory damages and $20.2 million in punitive damage).

[165] Morgan Stanley & Co. v. Coleman (Parent) Holdings Inc., 955 So. 2d 1124, 1126 (Fla. Dist. Ct. App. 4th Dist. 2007).

[166] *See id.* at 1140.

[167] Morgan Stanley & Co. v. Coleman Holdings Inc., 955 So. 2d. 1125, 1131 (Fla. Dist. Ct. App. 2007). (reversing the compensatory and the punitive damage awards, and remanding the cause with directions to enter judgment for the investment bank).

[168] *See* Coleman Holdings, Inc. v. Morgan Stanley & Co., No. 502003CA005045XXOCAI, 2005 WL 679071, at *2 n.6 (Fla. Cir. Ct. Mar. 1, 2005).

[169] *In re* Prudential Ins. Co. of Am. Sales Practice Litig., 169 F.R.D. 598, 615 (D.N.J. 1997).

and preparing it for production are much greater with electronic discovery than with conventional methods.[170] A data retention program successfully fulfills its litigation role only if (1) it includes provisions for suspending the expiration of retention periods and obligations to discard transient materials; (2) it is adopted for reasons of record management, not to avoid discovery obligations; and (3) it is regularly enforced, not just when it is convenient in order to eliminate "troublesome" information.[171] The absence of any one of these conditions can turn the program into evidence of spoliation. Companies are beginning to rely more on electronic document assessment software and reviewers, as studies show manual review of documents leads to finding only 51% of the relevant documents as compared to these software programs finding up to 95%.[172]

Failing to comply with court mandated electronic discovery requests can have severe consequences for litigation parties. In *Daynight, LLC v. Mobilight, Inc*., a Utah state court entered default judgment against a third party defendant for the destruction of evidence.[173] The third party defendant, KK Machinery, appealed the default judgment decision on the grounds that it was excessive and unduly harsh.[174] However, the Court of Appeals for Utah found that the third party defendant's actions of "throwing the laptop off a building; running over the laptop with a vehicle; and stating, '[If] this gets us into trouble, I hope we're prison buddies,' unquestionably demonstrate bad faith and a general disregard for the judicial process."[175] The Court of Appeals for Utah stated that courts have wide discretion to impose sanctions upon non-complying parties and upheld the entry of default judgment against the third party defendant.[176]

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[170] ROTHSTEIN, *supra* note 19, at 10.

[171] *See generally* Arthur Anderson, Inc. v. United States, 544 U.S. 696 (2005); *see also* Broccoli v. Echostar Commc'n Corp., 229 F.R.D. 506, 510 (D.Md. 2005).

[172] Kershaw, *supra* note 33, at 3 (stating that software more accurately produces discoverable documents).

[173] Daynight, LLC v. Mobilight, Inc., 248 P.3d 1010, 1012 (Utah Ct. App. 2011) (confirming default judgment entered into against third party defendant).

[174] *Id*. at 1011.

[175] *Id*. at 1012.

[176] *Id*. at 1012-13 (stating that the entering of default judgment against the third party defendant was not excessive due to the third party defendant's clear disregard to the judicial process).

3. Spoliation, Sanctions, and 'Proportionality'

Parties have a legal duty to preserve evidence it has control over and reasonably knows or reasonably foresees as material to potential or pending litigation.[177] This legal duty must be determined on a case-by-case basis because the duty to preserve evidence arises when litigation is reasonably anticipated.[178] The court in *Zubulake IV* articulated that the duty to preserve evidence arises when "'a party should have known that the evidence may be relevant to future litigation.'"[179]

"Where a party or its agents or a non-party fail to preserve or actively destroy evidence which the party/non-party has a duty to preserve, the party/non-party has committed spoliation."[180] The court in *West v. Goodyear Tire & Rubber Co.* defined "[s]poliation [as]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."[181]

Six years after *Zubulake V*, the Southern District for New York continued to recapitulate the duties of modern electronic discovery and spoliation in *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities ("Pension")*.[182] In *Pension,* ninety-six plaintiffs filed suit against Banc of America Securities to recover 550 million dollars.[183] However, following discovery the defendants moved for sanctions against the plaintiffs for spoliation of evidence.[184] Ultimately, the court found that thirteen plaintiffs were at least negligent and seven of the thirteen were grossly negligent in failing to "timely institute written litigation holds and engaged in careless and indifferent collection efforts after the duty to preserve arose."[185]

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[177] *See generally* Zubulake I, 217 F.R.D. 309 (S.D.N.Y 2003); *see also* Carole S. Gailor, *In-depth Examination of the Law Regarding Spoilation in State and Federal Courts*, 23 J. AM. ACAD. MATRIMONIAL L. 71 (2010).

[178] *Id.* at 72-73.

[179] Zubulake IV, 220 F.R.D. 212, 216 (S.D.N.Y. 2003) (quoting Fujitsu Ltd. v. Federal Express Corp., 247 F.3d 423, 436 (2d Cir. 2001)).

[180] Gailor, *supra* note 177, at 72.

[181] West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999); *see generally* BLACK'S LAW DICTIONARY 1401 (6th ed. 1990).

[182] *See* Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC, 685 F. Supp. 2d 456, 463 (S.D.N.Y. 2010).

[183] *See id.*

[184] *See id.*

[185] *See id.* at 463, 479, 486. (holding plaintiffs guilty of negligently failing to preserve litigation holds).

In *Pension,* the court imposed sanctions against six plaintiffs for gross negligence and seven plaintiffs for negligence in failing to preserve evidence.[186] The court noted that litigation has entered an era where vast amounts of information are available for discovery and that "cases ha[ve] become increasingly complex and expensive."[187] Because of these issues the court does not expect litigants to meet a "standard of perfection."[188] However, the court does expect that "litigants and counsel will take the necessary steps to ensure that relevant records are preserved when litigation is reasonably anticipated, and that such records are collected, reviewed, and produced to the opposing party."[189]

The court also stressed that by failing to maintain and properly orchestrate a litigation hold of evidence, the plaintiffs harmed the "integrity of the judicial process" and that the court must "fashion a remedy."[190] The court stressed that "[b]y now, it should be abundantly clear that the duty to preserve means what it says and that a failure to preserve records—paper or electronic - and to search in the right places for those records, will inevitably result in the spoliation of evidence."[191] In order to protect the integrity of the judicial process and to deter the spoliation of evidence, the court found that assessing monetary damages was an appropriate way to say that this type of conduct will not be tolerated.[192]

In *Rimkus Consulting Group, Inc. v. Cammarata*, the defendants were sanctioned for intentional spoliation.[193] The defendants were found to have intentionally deleted e-mails and attachments after a duty to preserve the information arose.[194] While some e-mails were recovered through other sources, much of what was deleted was not recoverable.[195] The court, when applying sanctions and determining what sanctions were reasonable, applied the doctrine and rule of proportionality.[196] "Electronic discovery burdens

[186] *See id.* at 463.

[187] *See id.*

[188] *See Pension*, 685 F. Supp. 2d at 461.

[189] *See id.*

[190] *See id.* at 462.

[191] *See id.*

[192] *See id.* at 469.

[193] *See* Rimkus Consulting Grp. v. Cammarata, 688 F. Supp. 2d 598, 607 (S.D. Texas 2010).

[194] *See id.*

[195] *See id.*

[196] *See id.* at 613.

should be proportional to the amount in controversy and the nature of the case. Otherwise, transaction costs due to electronic discovery will overwhelm the ability to resolve disputes fairly in litigation."[197] The court stated that when determining sanctions it must "consider both the spoliating party's culpability and the level of prejudice to the party seeking discovery."[198]

The *Rimkus* and *Pension* courts paid close attention to the idea of proportionate sanctions as remedies against spoliating parties. Limiting litigation costs, deterring harmful conduct, protecting the integrity of the courts, and protecting the innocent party were all factors in the courts' decisions to enforce proportionate sanctions.[199]

V. HISTORICAL VIEW OF PROTECTION AND PRODUCTION OF ELECTRONICALLY STORED INFORMATION

A. 1983 Amendments

The discovery of electronic materials was not contemplated when the F.R.C.P. were first created in 1938.[200] The F.R.C.P. were amended in 1970 to include F.R.C.P. 34, which accounts for discovery of "electronic data compilations from which information can be obtained only with the use of detection devices."[201] The F.R.C.P. accommodated mostly large companies, including banks, insurance companies, academic institutions and government agencies.[202] The mass production of computers in the 1980s created questions as to what constituted a "document" and what could be considered a "document" under the F.R.C.P.[203]

Pursuant to the Enabling Act, the United States Supreme Court promulgated the F.R.C.P., which was approved by United States Congress.[204] In 1983,

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[197] *See id.* at 613 n.8 (citing SEDONA PRINCIPLES, *supra* note 17, at 17); *see also* Medcorp, Inc. v. Pinpoint Techs., Inc., 2010 U.S. Dist. LEXIS 68532 (discussing proportionality of sanctions for spoliation).

[198] *See* Rimkus Consulting Grp., Inc., *supra* note 193, at 613.

[199] *See id.*; *see also* Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC, 685 F. Supp. 2d 456, 462 (S.D.N.Y. 2010)..

[200] Kroll, *supra* note 15, at 226 (stating Rules were created before electronic discovery available).

[201] FED. R. CIV. P. 34 advisory committee's note.

[202] Withers, *supra* note 84, at 173 (noting Rules accommodate large companies).

[203] *See* Richard L. Marcus, *Confronting the Future: Coping with Discovery of Electronic Material*, 64 LAW & CONTEMP. PROBS, 253, 258-60 (2001).

[204] *See generally* FED. R. OF CIV. P.; *see also* Rules Enabling Act § 2072, 28 U.S.C. §

Congress amended F.R.C.P. 26(b)(1) to include language that would curb costs in discovery by limiting the frequency and extent of the use of discovery methods.[205] Courts were permitted to deter discovery that was "unreasonably cumulative . . . or is obtainable from some other source that is more convenient, less burdensome or less expensive."[206] F.R.C.P. 26 allowed courts to limit discovery that was "unduly burdensome or expensive" by taking into account the needs of the case, the amount in controversy, limitations on resources and the importance of the issues at stake in the litigation.[207]

The 1983 Amendments failed to reduce costs and Congress adopted new rules in 1993 to alleviate the burdens of discovery.[208] The 1993 Amendments affirm the duty of the courts to administer the F.R.C.P. to "secure the just, speedy and inexpensive determination of every action."[209] The 1993 Amendments created automatic disclosure provisions, limits on interrogatories and depositions and required an early conference to develop a discovery plan.[210]

B. 2000 Amendments

In 2000, the Rules Committee again tried to reduce the costs associated with electronic discovery by reducing the amount of information that had to be initially disclosed to contain "over-discovery," and establishing time limits for depositions.[211] The 2000 Amendments also sought to promote national uniformity of discovery in federal courts.[212] Through F.R.C.P. 26(b)(1), the Advisory Committee created a two-tiered approach to discovery. The first tier, or "party controlled" discovery, allowed discovery of material that was essential to a party's claims or defenses.[213] The second-tier limited the

2071 (2006).

[205] *See* FED. R. CIV. P. 26(b)(2)(C).

[206] *See id*.

[207] *See id*.; *see also* FED. R. CIV. P. 26 advisory committee's note (1983 Amendment).

[208] *See* Henry S. Noyes, *Good Cause is Bad Medicine for the New E-Discovery Rules*, 21 HARV. J. LAW & TEC 49, 57 (2007) (stating Congress adopted new Rules to alleviate heavy discovery burdens).

[209] FED. R. CIV. P. 1

[210] *See* FED. R. CIV. P. 1 advisory committee's note (1993 Amendments); *see also* Elizabeth Thornburg, *Giving the "Haves" a Little More: Considering the 1998 Discovery Proposals*, 52 SMU L. REV. 229, 231 (1999).

[211] FED. R. CIV. P. 26(b)(1).

[212] FED. R. CIV. P. 26 advisory committee's note (2000 Amendment).

[213] *See id*.

discovery to a showing of good cause.[214] Thus, discovery was limited to relevant material of any party's "claims or defenses," subject to an exception for "good cause" to encompass any matter relevant to the "subject matter" involved in the action.[215]

Prior to the 2000 Amendments, discovery of this type did not require a court order or other judicial intervention.[216] However, the Committee failed to define or set parameters as to a finding of "good cause."[217] Some courts found that litigants ignored the amendments completely and determined that if litigants spent time debating between claims and defenses versus the subject matter of the action it was the "judicial equivalent to debating the number of angels that can dance on the head of a pin . . . ."[218]

C. 2006 Amendments

On April 12, 2006, the United States Supreme Court and Congress approved amendments to F.R.C.P. 16, 26, 33, 34, 37 and 45 and Form 35 of the F.R.C.P. regarding the discovery of "electronically stored information."[219] The 2006 Amendments were created to further clarify the "good cause" standard and develop rules specifically concerning electronic discovery.[220] Courts were required to limit discovery when it was unduly burdensome or the cost of the discovery outweighed the benefit.[221] Therefore, discovery is denied if it is unduly burdensome or costly, regardless of whether the information sought is relevant or not.

The 2006 Amendments established a two-tiered approach to discovery in Rule 26(b)(2)(B), which was unique to the production of electronically stored information.[222] For the first tier, a party may withhold from production sources of information that are "not reasonably accessible because of undue

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[214] *See id*.

[215] *See id*.

[216] *See* FED. R. CIV. P. 26(b)(1) (the rule prior to 2000).

[217] FED. R. CIV. P. 26(b)(1) advisory committee's note.

[218] *See* Thompson v. Dep't of Hous. & Urban Dev., 199 F.R.D. 168, 171 (D. Md. 2001); *see also*, Henry Noyes, *Good Cause is Bad Medicine for the New E-Discovery Rules*, 21 HARV. J. LAW & TECH. 49, 62 (2007).

[219] *See* 2006 Amendments to the Federal Rules of Civil Procedure, (mandating that pursuant to Rule 35, parties must jointly propose a discovery plan to the Court for approval known as the "Report of Parties' Planning Meeting").

[220] FED. R. CIV. P. 26(b)(2)(B) advisory committee's note.

[221] *See id*.

[222] *See id*.; *see also* SEDONA PRINCIPLES, *supra* note 17, at 17.

burden or cost," without resorting to a court order, provided there is an appropriate identification of the sources of electronically stored information that are not being produced.[223] In *Parkdale America LLC v. Travelers*, the producing party argued that the privilege review was overly burdensome, thus, eligible for a finding of inaccessibility.[224] The court disagreed with the argument, although if it succeeded, production could have been ordered for "good cause" taking into account the "proportionality principle, but with limitations on the scope or timing of the discovery."[225] The Committee Notes acknowledge that "it is not possible to define in a rule the different types of technological features that may affect the burdens and costs of accessing electronically stored information."[226]

Whether data is reasonably accessible or not is to be determined by the court. Courts have determined that "[w]hether electronic data is accessible or inaccessible turns largely on the media on which it is stored."[227] The "primary source" of discoverable information should be "active data and information" and that "resort[ing] to disaster recovery backup tapes and other sources of electronically stored information that are not reasonably accessible" requires proof of "need and relevance that outweigh the costs and burdens of retrieving and processing," including an assessment of "the disruption of business and information management activities."[228] In *Zubulake I*, the court identified five categories of data, from most accessible to least accessible:

> (1) active on-line data (hard drives, for example); (2) near-line data (typically, robotic storage devices such as optical disks); (3) offline storage/archives (removable optical disks or magnetic tape media which can be labeled and stored in a shelf or rack); (4) backup tapes (devices like tape recorders that read data from and write it onto a tape; they are sequential access devices which are typically not organized for retrieval of individual documents or files); and (5) erased,

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[223] *See* SEDONA PRINCIPLES, *supra* note 17, at 11.

[224] *See* Parkdale Am. v. Travelers Cas. & Sur. Of Am., No. 3:06-CV-78-R, 2007 WL 4165247, at *12 (W.D.N.C. Nov. 19, 2007).

[225] *See id.*; *see also* Thomas Y. Allman, *The "Two-Tiered" Approach to E-Discovery: Has Rule 26(b)(2)(B) Fulfilled Its Promise?*, 14 RICH J. L. & TECH. 7, 10, *available at* http://law.richmond.edu/jolt/v14i3/article7.pdf (last visited Mar. 19, 2011).

[226] FED. R. CIV. P. 26(b)(5)(B) advisory committee's note (2006).

[227] *See* Zubulake I, 217 F.R.D. 309, 318 (S.D.N.Y. 2003).

[228] *See* SEDONA PRINCIPLES, *supra* note 17, at 139.

> fragmented or damaged data (such data can only be accessed after significant processing).[229]

The Advisory Committee noted that the first three categories of data were generally considered "accessible" and the last two categories "inaccessible," but acknowledged that it is subject to amendment because advances in technology can alter media accessibility over time without requiring the rules to be repeatedly amended.[230] The court listed removable backup tapes as inaccessible sources of information because they require a burdensome restoration process before the contents of the tapes are accessible.[231] Courts have found this analysis of "accessibility" to be problematic, because the cost-shifting analysis is not a possibility unless there is a showing of inaccessibility, and parties are not relieved of their obligation to produce accessible data "merely because it may take time and effort to find what is necessary."[232]

In the second tier, a requesting party can file a motion to compel and show "good cause, considering the limitations of Rule 26(b)(2)(C)."[233] Furthermore, the rule provides that discovery methods shall be limited when "the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues."[234] To determine if good cause exists, the court must evaluate

> [(1)] the specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessible sources; (4) the likelihood of finding relevant, responsive information that cannot be obtained from

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[229] *See Zubulake I*, 217 F.R.D. at 318-19.

[230] *See* George B. Murr, *Federal Rule of Civil Procedure 26(b)(2)(B) and "Reasonable Accessibility": The Federal Courts' Experience in the Rule's First Year*, PRIVACY & DATA SECURITY L. J. (2007) *available at* http://www.bmpllp.com/files/1202334716.pdf (last visited Mar. 19, 2011); *see, e.g.*, W.E. Aubuchon v. Benefirst, 245 F.R.D. 38, 41-42 (D. Mass. 2007).

[231] *Zubulake* I, 217 F.R.D. at 316, 319-20.

[232] Murr, *supra* note 230, at 1176, 1178-79.

[233] FED. R. CIV. P. 26(b)(2) advisory committee's note (2006).

[234] Allman, *supra* note 225, at 9 (quoting FED. R. CIV. P. 26(b)(2)(C) (2006)).

> other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the party's resources.[235]

The good cause exception is still unsettled in the courts. In the case of *In re Veeco Instruments, Inc. Securities Litigation*, the court found "good cause" to order restoration of e-mail backup tapes because defendant had not demonstrated that the e-mails sought were "reasonably available from any other easily accessed source," and resources were "not an issue."[236] On the other hand, In *Best Buy Stores v. Developers Diversified Realty Corporation*, the court held that back-up tapes need not be restored and available after failing to find "good cause" for discovery when the data was not reasonably accessible.[237]

Rule 26(b)(2)(B) requires that a party identify any "unsearched sources" that are considered inaccessible.[238]

> A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.[239]

In *Parkdale America, LLC v. Travelers Casualty and Surety Company of America, Inc.*, the plaintiffs sought a declaratory judgment finding that the defendant, Travelers Casualty and Surety Company of America, Inc.,

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[235] FED. R. CIV. P. 26(b)(2) advisory committee's note (2006).

[236] *In re* Veeco Instruments, Inc. Sec. Litig., No. 05 MD 1695(CM)(GAY), 2007 WL 983987, at *1 (S.D.N.Y. Apr. 2, 2007).

[237] Best Buy Stores v. Developers Diversified Realty Corp., 247 F.R.D. 567, 567, 569-71 (D. Minn. 2007).

[238] Allman, *supra* note 225, at 18.

[239] FED. R. CIV. P. 26 (2006).

was obligated to defend and indemnify the plantiffs in ten underlying antitrust suits.[240] Travelers moved to compel Parkdale to produce e-mails that Travelers alleged were related to various issues, including whether Parkdale's Vice-President had knowledge of price-fixing activities.[241] The court granted in part Travelers' motion to compel discovery finding that the plaintiffs did not prove that the emails were not reasonably accessible, and the cost of the production of the emails was reasonable ($20,000) considering the amount in controversy ($3 million) and importance of the discovery to the case.[242] The plaintiffs did not meet "their burden of establishing that these emails are 'not reasonably accessible because of undue burden or cost,' particularly in light of the Court's ability to apportion costs between the parties in appropriate cases."[243] The plaintiffs motion was denied in part with regard to confidential documents and the court did not require defendant's production of those documents.[244]

Parties are required to make initial disclosures of potential sources of electronic information.[245]

> A party that has received allegedly privileged information is required, upon receipt of a notice of a claim of privilege, to "promptly return, sequester, or destroy the specified information and any copies it has" and "take reasonable steps to retrieve" any information it has already distributed. The receiving party "may not use or disclose the information until the claim is resolved."[246]

Although this disclosure of electronic documents only extends to what is "reasonably believed to contain discoverable information," the F.R.C.P. do not specify when or how sources of electronic information should be identified.[247] F.R.C.P. 26 (b)(5)(B) was designed to encourage litigants to exchange

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[240] Parkdale, *supra* note 224, at *1.

[241] *See id*. at *1, *8.

[242] *See id*. at *1, *8-9, *12-14.

[243] *See id*. at *12 (quoting Zubulake I, 217 F.R.D. 309, 316 (S.D.N.Y. 2003)).

[244] *See id*.

[245] FED. R. CIV. P. 26(a)(1)(B).

[246] Carl G. Roberts, *Compliance Readiness – Law Firms: The 2006 Amendments to the Federal Rules of Civil Procedure*, THE METROPOLITAN CORP. COUNS., Sept. 1, 2006, at 45 (quoting FED. R. CIV. P. 26(b)(2)(B) (2006)).

[247] *See* Allman, *supra* note 225 at 18.

information where sources could be found that provide relevant evidence to the case and "provide enough detail to enable the requesting party to evaluate the burdens and costs of providing the discovery."[248] Although, providing an adversary with sources where discoverable information can be found could arguably lead to challenges in arguing whether or not documents are privileged.[249]

VI. SPECIFIC PROTECTIONS FOR PRIVILEGED INFORMATION UNDER THE FEDERAL RULES

A. Generally

Protection of the attorney-client privilege and work-product is an essential part of the discovery process. The attorney-client privilege exists to protect communications made between a client and attorney in confidence for the purpose of seeking, obtaining or providing legal advice.[250] The attorney-client privilege grants clients the right "to refuse to disclose confidential communications with their lawyers, or to allow their lawyers to disclose them."[251] Work product protects documents and tangible things prepared in anticipation of litigation or trial by or for another party, that party's representative (including attorney or consultant).[252] The volume of electronic information, its different formats and other complexities has not only increased the cost of conducting privilege review, but has also increased the likelihood of the disclosure of the privileged information.[253]

Even the most diligent review is likely to result in some inadvertent production of privileged information. Courts have taken a variety of approaches towards resolving the issues surrounding waiver of attorney-client

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[248] *See* FED. R. CIV. P. 26(b)(2), advisory committee's note (2006).

[249] *See* SEDONA PRINCIPLES, *supra* note 17.

[250] *See* Upjohn Co. v. United States, 449 U.S. 383, 389-90 (1981) (holding attorney-client privilege applies not only to individuals but to corporations and their employees for matters within scope of employee's duties).

[251] *See* American Bar Association, *Answers to Questions about Attorney-Client Privilege*, *available at* http://www.abanet.org/media/issues/acprivilegeqa.html (last viewed on Mar. 19, 2011).

[252] *See* FED. R. CIV. P. 26(b)(3) (2009) (for civil cases); *see also* FED. R. CRIM. P. 16(b)(2) (2009) (for criminal cases).

[253] *See* Sasha K. Danna, *The Impact of Electronic Discovery on Privilege and the Applicability of the Electronic Communications Privacy Act*, 38 LOY. L.A. L. REV. 1683, 1729 (2005).

privilege including a strict waiver of privilege if any document is disclosed, balancing tests weighing the impact on both parties, and no waiver of a document produced without the client's consent.[254] Congress wanted to alleviate some of these concerns, in particular the costs, associated with waiver of privilege.[255] The 2006 Amendments to the F.R.C.P. 26(b), 26(f), and 16(b) and the 2008 FRE 502 were designed to protect parties who disclose the information and curb the costs associated with inadvertent disclosure.[256]

B. Rule 26(b)(5) Generally

Litigants must preserve electronically stored information while minimizing the costs associated with producing responsive and relevant documents in litigation.[257] Courts now face the challenge of "overseeing discovery that is virtually limitless and when the costs and burdens associated with full discovery could be more outcome determinative, as a practical matter, than the facts and substantive law."[258] F.R.C.P. 26(b)(5), which applies to all discovery, both paper and electronic, provides procedures for making a claim for attorney-client privilege or work product by notifying the opposing party and providing a basis for the privilege.[259] Parties are instructed to "return, sequester, or destroy" the information and any copies a party obtained.[260] The Advisory Committee Notes state that the option to either sequester or destroy was enacted because the receiving party may have incorporated the information in protected trial materials.[261] In providing information to the

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[254] *See* EDNA SELAN EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE 209-316 (American Bar Association, 4th ed. Supp., 2004).

[255] *See*, *e.g.*, Rowe Entm't, Inc. v. William Morris Agency, Inc. 205 F.R.D. 421, 425-26 (S.D.N.Y. 2002) (noting production of e-mail and cost of pre-production review for privileged and work product material would cost one defendant $120,000 and another defendant $247,000).

[256] *See* FED. R. CIV. P. (On April 12, 2006, the U.S. Supreme Court approved the amendments to the Federal Rules of Civil Procedure, which includes revisions and additions to Rules 16, 26, 33, 34, 37, and 45, as well as Form 35); *see also* COMM. ON RULES OF PRACTICE & PROCEDURE, REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, 3 (2005), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2005.pdf.

[257] *See* Murr, *supra* note 230.

[258] *See* Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc., 244 F.R.D. 614, 620 (D. Colo. 2007).

[259] *See* FED. R. CIV. P. 26(b)(5)(B).

[260] *See id.*

[261] *See* FED. R. CIV. P. 26(b)(5) advisory committee's note (2006).

court as to the reasons why an item may be privileged, parties may use the content of the information to the extent the law of privilege, protection of trial materials and professional responsibility apply.[262]

C. Rule 26(b)(5) "Claw Back" Versus "Quick Peek" Agreements

Lawmakers found that the current laws regarding inadvertent disclosure made it "too easy to inadvertently lose or waive the privilege."[263] F.R.C.P. 16 and F.R.C.P. 26 were enacted to reduce the risk of inadvertent disclosure by reducing costs associated with the disclosure and to protect the risk of waiver of the privilege when responding to the discovery requests.[264] F.R.C.P. 16(b) provides that after parties "meet and confer" under F.R.C.P. 26(f), they may enter into an agreement asserting claims of privilege or of protection as trial preparation material after production.[265] Congress also enacted F.R.C.P. 26(b)(5), which created a "snap back" or a "claw back" provision enabling a party who inadvertently produced privileged information to retrieve it.[266]

Rule 26(b)(5)(B) works in tandem with F.R.C.P. 26(f)(4), which was amended to direct the parties to discuss issues relating to claims of privilege or protection for attorney work product when developing a proposed discovery plan.[267] F.R.C.P. 26(b)(5)(B) states:

> If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that

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[262] *See id.*

[263] *See* S. Rep. No. 110-264, at 2 (2008). (This is the report on the bill that later amended the Federal Rules of Evidence to Address the Waiver of Attorney Client Privilege and the Work Product Doctrine).

[264] *See* Letter from Lee H. Rosenthal, Chair, Comm. on Rules of Practice & Procedure of the Judicial Conference of the U.S., to Patrick J. Leahy, Chairman, Comm. on the Judiciary, U.S. Senate (Sept. 26, 2007) (urging Congress to adopt proposed Rule of Evidence 502 by acknowledging the costs associated with inadvertent disclosure and the risks associated with the waiver of privileged information).

[265] *See* Rothstein et al., *supra* note 19, at 5.

[266] *See* Kindall C. James, *Electronic Discovery: Substantially Increasing the Risk of Inadvertent Disclosure and the Costs of Privilege Review-Do the Proposed Amendments to the Federal Rules of Civil Procedure Help?*, 52 LOY. L. REV. 839, 853-54 (2006) (discussing how the proposed Federal Rules 16 and 26 address the issues with the costs, the inadvertent disclosure of privileged information and the increased risk of waiving privilege that are associated with electronic discovery); *see also* FED. R. CIV. P. 26(b)(5)(B).

[267] *See* FED. R. CIV. P. 26(f) advisory committee's note.

> 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 and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.[268]

Congress amended the F.R.C.P. to require an early conference between the parties under F.R.C.P. 26(f), where parties can discuss the need for an agreement to govern the treatment of a post-production privilege claim.[269] Amended F.R.C.P. 26(f) and 16 respond to the privilege-waiver problem by directing parties to discuss approaches to asserting claims of privilege or work-product protection after production. The Advisory Committee acknowledges that, in order to avoid disclosure of privileged documents, extensive review is necessary because "failure to withhold even one such item may result in an argument that there has been a waiver of privilege as to all other privileged materials on that subject matter,"[270] which can only exacerbate discovery problems in litigation.[271] In an explanatory note, the Advisory Committee also notes that under F.R.C.P. 26(b)(5)(B), a party does not have to review documents as they were produced to determine whether an inadvertent production occurred, but should review only to follow up if there are "obvious indications" that privileged documents were disclosed.[272]

F.R.C.P. 26(b)(5)(B) is designed to avoid waiver of privileged documents.[273] According to the rule, if a party produces information that is privileged, they must promptly notify the receiving party and state the basis for

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[268] *See* FED. R. CIV. P. 26(b)(5)(B).

[269] *See* FED. R. CIV. P. 26(f); *see also* SEDONA PRINCIPLES, *supra* note 17, at 15.

[270] *See* FED. R. CIV. P. 26(f) advisory committee's note.

[271] *See* Levy, *supra* note 146.

[272] *See* Amy Longo, *The Federal E-Discovery Rules: New Federal Rule of Evidence 502*, O'MELVENY & MYERS LLP (Sept. 23, 2008), http://www.omm.com/the-federal-e-discovery-rules-09-23-2008 (reviewing Federal Rule of Evidence 502 and the Advisory Committee's Note for the rule).

[273] FED. R. CIV. P. 26(b)(5)(B) advisory committee's note.

their assertion.[274] The receiving party must either (a) submit the alleged privileged document to the court for the judge to decide whether the information is privileged or not or if a waiver has occurred, or (b) destroy all copies made and return the document to the producing party.[275] Regardless of the choice made, the receiving party must return, sequester or destroy the information (including any copies made) until the claim of privilege is resolved.[276] The producing party must preserve the information pending the court's ruling on whether the information is privileged or whether privilege was waived or forfeited by the production.[277]

Parties are encouraged under F.R.C.P. 26(b)(5)(B) to "meet and confer," and parties must negotiate a case management order pursuant to Amended F.R.C.P. 16(b), which preserves how the parties will conduct their discovery, preserve electronic evidence, identify sources of electronic information, agree on forms of production and determine cost shifting amongst the parties.[278] The Rule, however, does not authorize the court to require the parties to enter into such an arrangement, absent their agreement.[279] Courts may find that perseveration of certain electronic data that was agreed upon in a case management plan may be overly burdensome as discovery continues.[280] The Rule fails to address whether the privilege or work-product protection has been waived or forfeited with the disclosure of the information.[281] "Agreements reached under F.R.C.P. 26(f)(4) and orders including such agreements entered under Rule 16(b)(6), may be considered when a court determines whether a waiver has occurred."[282]

Parties may minimize costs and reduce the risk of waiving privilege by agreeing to provide requested materials without waiving any privilege protection, known as "quick peek" agreements.[283] "Quick peek" agreements

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[274] FED. R. CIV. P. 26(b)(5)(B).

[275] *See id*.

[276] *See id*.

[277] *See id*.

[278] *See* Rothstein et al., *supra* note 19, at 5.

[279] *Cf*. FED. R. CIV. P. 26(b)(5)(B).

[280] *See* Carolyn Southerland & Jake Frazier, *Top Ten Considerations When Negotiating an E-Discovery Case Management Order*, DIGITAL DISCOVERY AND E-EVIDENCE, Oct. 2005, at 12, *available at* http://www.renewdata.com/pdf/Best-Practices-1005.pdf.

[281] FED. R. CIV. P. 26(b)(5) advisory committee note (2006) (emphasizing that the Committee did not want to address the substantive issue of whether privilege was waived by this Rule).

[282] *See id*.

[283] *See* Withers, *supra* note 84, at 202.

are made between the parties and allow them to share documents without engaging in privilege review.[284] This gives the opposing side a "peek" at the data without waiving privilege.[285] The parties must agree to an "'open file' review of each other's data collections prior to formal discovery, reserving all rights to assert privilege when responding to the actual document request."[286]

There are numerous steps parties must adhere to in order to abide by a quick peek agreement. A party must first make a request for documents under F.R.C.P. 34 and state which data and file sources are relevant.[287] Then, pursuant to F.R.C.P. 26(b)(5)(A), a party that has withheld information on the basis of privilege or protection as trial-preparation material is enabled to make their claim so that the requesting party can decide whether to contest the claim and the court can resolve the dispute.[288] If the party has disclosed the information before being notified of the inadvertent disclosure, the party must make "reasonable steps" to retrieve the information. [289] Finally, the receiving party may promptly return the information to the court under seal for immediate determination of privilege.[290]

Instead, parties could choose to enter into a "claw back" agreement.[291] Usually a "claw back" agreement will "provide that if a privileged or protected document is inadvertently produced, the producing party informs the receiving party, who is obliged to return the document and prohibited from using it in the litigation."[292] This agreement would allow production of documents without intent to waive privilege or protection and thus is not a waiver. Thus, if a responding party identifies the documents mistakenly produced, the receiving party must send the documents to the judge who seals the documents, and

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[284] *See id.*

[285] *See id.*

[286] *See id.*

[287] FED. R. CIV. P. 34.

[288] *See* Joseph Gallagher, *E-Ethics: The Ethical Dimension of the Electronic Discovery Amendments to the Federal Rules of Civil Procedure*, 20 GEO. J. LEGAL ETHICS 613, 623 (2007).

[289] Rothstein, *supra* note 19, at 16.

[290] *See id.*

[291] *See* Ronald J. Hedges, *U.S. Federal Rule of Evidence 502*, SLAW (Dec. 2, 2008), *available at* http://www.slaw.ca/2008/12/02/us-federal-rule-of-evidence-502/) (last visited Mar. 19, 2011).

[292] *See* Gregory D. Shelton and Taryn M. Darling Hill, *Protecting Against Attorney-Client Privilege or Work-Product Protection Due to Inadvertent Disclosure*, WASHINGTON STATE BAR ASSOCIATION BAR NEWS, June 2007, at 12, 15.

determines if the documents should be returned to the producing party.[293]

VII. FEDERAL RULES OF EVIDENCE 502

Congress has responded to increased costs associated with the growing need to protect against accidental waiver of attorney-client privilege by amending the FRE.[294] On September 19, 2008, President Bush signed a new FRE 502, which amended the attorney-client privilege and work-product provisions of the FRE.[295] Under FRE 502, disclosure of electronically stored information, otherwise covered by the privilege, does not operate as a waiver if the disclosure was inadvertent and the holder of the privilege or protection took reasonable steps to prevent the disclosure pursuant to F.R.C.P. 26(b)(5)(B).[296] The Advisory Committee Notes suggest that a number of factors are considered to determine whether a party has taken reasonable steps to avoid disclosure, such as the scope of discovery, the number of documents to be reviewed, the reasonableness of the precautions to prevent disclosure, the time constraints for production, the extent of disclosure, the time to rectify the error, and the overriding issue of fairness.[297] FRE 502 seeks to provide a uniform set of standards for attorney-client privilege so "parties can determine the consequences of a disclosure of a communication or information covered by the attorney-client privilege or work-product protection."[298]

FRE 502 provides for a subject matter waiver of the attorney-client privilege.[299] When there has been an intentional disclosure in a federal proceeding that waives the attorney-client privilege or work product

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[293] *See* FED. R. CIV. P. 26(b)(5)(A) advisory committee notes (2006).

[294] *See* Hopson v. Mayor and City Council of Balt., 232 F.R.D. 228, 244 (D. Md. 2005) (noting electronic discovery may encompass "millions of documents" and to insist upon "record-by-record pre-production privilege review, on pain of subject matter waiver, would impose upon parties costs of production that bear no proportionality to what is at stake in the litigation").

[295] *See* Press Release, The White House, President Bush Signs H.R. 6456 and S. 2450 Into Law (Sept. 20, 2008) (on file with author), *available at* http://federalevidence.com/pdf/2008/09-Sept/WhiteHouse200809201.pdf (last visited Mar. 19, 2011).

[296] *See* FED. R. EVID. 502 advisory committee's note (explaining that the purpose behind Rule 502 is to address the specific concerns of electronic discovery on work product and attorney-client privilege).

[297] *See id.*

[298] *Id.*

[299] *See* FED. R. EVID. 502 (stating the waiver must be made intentionally).

protection, FRE 502(a) provides that the waiver extends to undisclosed privileged or protected communications on the "same subject matter" only if "they ought in fairness to be considered together."[300] Thus, the subject matter waiver is limited to situations in which a party "intentionally puts protected information into the litigation in a selective, misleading and unfair manner."[301] The rule provides that, "if a party intentionally waives the privilege attaching to a document, that does not create a broader waiver of all other documents and information on the same subject, unless the non-disclosed, privileged documents 'ought in fairness to be considered' with the material that was turned over."[302] It follows that an inadvertent disclosure of protected information can never result in a subject matter waiver.[303] For example, if a party defends itself by asserting that it relied on the advice of its counsel, then it will likely have waived the privilege over its communications with its attorney regarding that subject-matter.[304] FRE 502 serves two functions: "1) to create more clarity regarding when a waiver of privilege may occur; and 2) to lower the costs of discovery, especially electronic discovery."[305]

FRE 502 also prevents some unintentional productions of privileged and protected documents from resulting in a waiver.[306] In this respect, FRE 502(b) further protects the disclosure of discovery in federal proceedings and would not be considered a waiver "1) if 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 F.R.C.P. 26(b)(5)(B)."[307] Thus, most courts only consider that a waiver occurred when a disclosing party acted carelessly when the communication was disclosed or the party failed to request its return in a

[300] *See* FED. R. EVID. 502(a).

[301] *See* 154 CONG. REC. S1317-19 (2008).

[302] *See* John S. Summers & Michael D. Gadarian, *502: The Scope of Attorney-Client Privilege Waivers*, LAW TECH. NEWS (ONLINE), Jan. 12, 2009, http://www.law.com/jsp/legaltechnology/pubArticleLT.jsp?id =120242 7339553 (last visited Feb. 10, 2011).

[303] *See* FED. R. EVID. 502(a) advisory committee's note.

[304] *See* 154 CONG. REC. H7818-9 (2008).

[305] *See* Longo, *supra* note 272.

[306] *See* Jones Day, *New Federal Rules of Evidence 502 and Possible Litigation Document Review Cost Savings*, JONES DAY, (Sept. 2008), *available at* http://www.jonesday.com/pubs/pubs_detail.aspx?pubID=S5487 (last visited Feb. 10, 2011).

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

reasonable and prompt manner.[308]

In limited circumstances, such as inadvertent or unintentional disclosure, courts have used a "selective waiver," holding that waiver of privileged or protected information to a government agency constitutes a waiver for all purposes and to all parties.[309] The Committee on Rules of Practice and Procedure noted that "if a confidentiality agreement were nonetheless required to trigger the protection of selective waiver, the policy of furthering cooperation with and efficiency in government investigations would be undermined."[310]

In *V. Main Fils S.A. v. International Flavors and Fragrances, Inc.*, the court held that a patent infringement defendant's disclosure of patent counsel opinion letters to potential customers waived the attorney-client privilege for all documents surrounding the opinions.[311] Defendant solicited potential customers using an opinion letter to entice them to switch from the plaintiff's product to the defendant's product.[312] The defendant argued "that the Court should not permit discovery on whether defendant subjectively believed they committed infringement until after there has been a showing that defendant objectively committed infringement."[313] The court rejected the defendant's *Seagate* argument, finding that although there is a waiver of the attorney-client privilege if a defendant relied on advice of counsel, the court must determine if the conduct was "objectively reckless" before engaging in discovery with respect to the defendant's subjective knowledge.[314] Thus, the principles set forth in *Seagate* were inapplicable to this case.[315] The court held that there was

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[308] *See* FED. R. EVID. 502(a) advisory committee's note; *see e.g.*, Zapata v. IBP, Inc., 175 F.R.D. 574, 576-77 (D. Kan. 1997) (explaining work product); Hydraflow, Inc. v. Enidine, Inc., 145 F.R.D. 626, 637 (W.D.N.Y. 1993) (addressing attorney-client privilege and waiver).

[309] *See* Letter from Hon. David F. Levi, Chair, Chair Standing Committee on Rules of Practice and Procedure, to Hon. Jerry E. Smith, Chair Advisory Committee on Evidence Rules, (May 15, 2006), *Proposed Rule 502 on Waiver of Attorney-Client Privilege and Work Product,* Report of the Advisory Committee on Evidence Rules (revised June 30, 2006).

[310] *Id.*

[311] *See* V. Main Fils S.A. v. Int'l Flavors & Fragrances, Inc., 249 F.R.D. 152, 155 (D.N.J. 2008).

[312] *See id. at 156.*

[313] *See id.*

[314] *See id.*

[315] *See id.*; *see also In re* Seagate Technology, LLC, 497 F.3d 1360, 1371 (Fed. Cir. 2007) (discussing the differences between counsel for legal opinion only and trial counsel,

a subject matter waiver.[316]

The rule now clarifies that when protected information is disclosed to a federal government agency exercising their regulatory, investigative or enforcement authority, there is no waiver of attorney-client privilege or work-product protection as to non-governmental entities.[317] Although this rule does not require a party to engage in post-production review to determine if information was disclosed in error, the rule requires a producing party to follow up on any obvious indications that protected information was produced inadvertently.[318]

FRE 502(c) extends the protections of disclosure to state proceedings. Disclosure in state court will not result in a waiver for purposes of federal proceedings if the disclosure "1) would not have been a waiver under Rule 502 had it been made in Federal proceedings; or 2) is not a waiver under the laws of the State in which it occurred."[319] If the state court and federal court waivers are in conflict, the federal court should "apply the law that is most protective of privilege and work product."[320] The Committee notes caution that FRE 502(c) does not address the enforceability of a state court confidentiality order in a federal proceeding, "as that question is covered both by statutory law and principles of federalism and comity."[321] The Senate Committee Notes explain that applying a more protective federal law could "impair the state objective of preserving the privilege or work-product protection for disclosures made in state proceedings."[322] In testimony given before Congress prior to the adoption of the Rule 502, Paul Neale, an Executive at DOAR Litigation Consulting, explained that parties who responded to state issued subpoenas would risk this information being produced in criminal proceedings; there was no assurance of protection for any privileged documents initially produced to a state regulator, thus, the voluntary waiver is extremely risky.[323] This does not encourage companies to cooperate

asserting there are compelling reasons to not extend waiver to trial counsel that would apply to opinion counsel).

[316] *See id*. at 152.

[317] *See* FED. R. EVID. 502(a) advisory committee's note.

[318] *See* 154 CONG. REC. S1317-19 (2008).

[319] FED. R. EVID. 502(c)..

[320] *See* FED. R. EVID. 502(a) advisory committee's note.

[321] *See id*.

[322] *See* 154 CONG. REC. S1317-19 (2008).

[323] *See Testimony Before the Advisory Committee on Evidence Rules Regarding FRE 502 Given by Paule J. Neale on January 29, 2007*, DOAR LITIG. CONSULTING,

with regulatory or government agencies in fear of waivers of privileged information.[324]

FRE 502(d) is an acknowledgment of the effectiveness of "quick peek," "clawback" and "non-waiver agreements" similar to those designed pursuant to F.R.C.P. 26(b)(5)(B).[325] FRE 502(d) states that a "[f]ederal 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."[326] Thus, a federal court may enter into a confidentiality order as long as privilege is not waived pursuant to the litigation pending before the court. If a federal court grants a non-waiver order to litigants, the party may "(a) produce privileged and protected documents in federal proceedings with no pre- or post-production privilege review, yet (b) retain otherwise applicable attorney-client privilege and work product claims and (c) assert them when the adversary attempts to use the documents."[327]

Some litigants believe that FRE 502(d) destroys confidentiality because although the work product and privilege assertions can be claimed, the other party now knows the substance of the privileged information.[328] This provision allows courts to enforce "claw-back" and "quick peek" arrangements ordered in federal court for an inadvertent disclosure will apply in a subsequent case regardless of whether it is a state or federal proceeding.[329] Therefore, under the rule, a confidentiality order is enforceable "whether or not it memorializes an agreement among the parties to the litigation" and a "party agreement should not be a condition of enforceability of a federal court's order."[330]

FRE 502(e) addresses agreements between parties, such as claw-back agreements, regarding discovery and the effects certain disclosures will have on their ability to assert privilege over documents.[331] FRE 502(e) reminds parties that such agreements are effective only as between themselves, and

http://www.doar.com/FRE502/FRE502_Testimony_PJN.pdf (last visited on Mar. 11, 2011).

[324] *See id*.

[325] *See* FED. R. EVID. 502(a) advisory committee's note; s*ee also* FED. R. CIV. P. 26.

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

[327] *See* Day, *supra* note 306.

[328] *See id*.

[329] *See* Longo, *supra* note 272.

[330] *See* 154 CONG. REC. S1318 (2008).

[331] FED. R. EVID. 502(e).

third parties, including future litigants, may subsequently assert that a disclosure which was covered by a claw-back agreement in one proceeding is no longer privileged in another matter.[332] According to FRE 502(e), the only way for parties to ensure that such agreements will be enforced in future proceedings is to have their content incorporated into a court order.[333]

FRE 502(f) was designed to resolve the tensions between FRE 502, which applies to state proceedings and the possible limitations on the applicability of the FRE otherwise provided by Rule 101, which describes the scope of the FRE and F.R.C.P. 1101, regarding the general applicability of the Rule.[334] FRE 502(f) states that the waiver is applicable when the information disclosed in federal proceedings is subsequently offered in state proceedings.[335] Additionally, FRE 502 is applied to all federal court proceedings, including court-annexed and court-ordered arbitrations, without regard to any possible limitations of Rules 101 and 1101.[336]

VIII. APPLICABILITY OF THE RULES

The applicability of these FRE and F.R.C.P. rules is not without confusion. Courts are deciphering the process by which litigants need to adhere in order to comply with the Rules and avoid inadvertent disclosure. In *Rhoads Industries, Inc. v. Building Materials Corp. of America,* the Eastern District of Pennsylvania addressed whether a litigant took the proper steps to avoid an inadvertent disclosure.[337] The court first determined whether or not the plaintiff, who claimed to inadvertently disclose over 800 emails, complied with FRE 502(b).[338] First, the court reviewed whether or not the plaintiff, at least minimally, complied with the three requirements of FRE 502.[339] Second, if the requirements were met and "reasonableness" was in dispute, the court must look to the multi-factor test and the *Fidelity* test to identify whether an inadvertent disclosure of privileged material was reasonable on an "objective

[332] *See* Longo, *supra* note 272.

[333] *See* FED. R. EVID. 502(e).

[334] *See* FED. R. EVID. 502(a) advisory committee's notes.

[335] *See* 154 CONG. REC. S1318 (2008).

[336] *See id.* at S1317-19.

[337] Rhoads Indus., Inc. v. Bldg. Materials Corp. of Am., 254 F.R.D. 216, 218-19 (E.D. Pa. 2008).

[338] *See id.*

[339] *See id.* at 226 (stating that a complying party must show at least a minimal compliance with Rule 502 before resolving the issue of reasonableness).

basis." [340] The plaintiffs failed to adequately prepare for the inevitable volume of discovery, in particular the privileged documents in their control.[341] The court found the fifth factor, interest of justice, to be persuasive in favor of the plaintiff because the "loss of attorney-client privilege in a high-stakes, hard-fought litigation is a severe sanction and can lead to serious prejudice."[342] The court held that denial of the documents did not prejudice the defendants because they had no "right or expectation" to the privileged communications.[343]

In *Victor Stanley, Inc. v. Creative Pipeline, Inc.*, the district court found a waiver for the inadvertent production of 165 privileged documents, out of tens of thousands reviewed, because the producing party failed to satisfy the burden that their search methods were "reasonable."[344] The court determined the defendant's actions were unreasonable because they failed to identify the seventy keywords used to determine whether or not a document was privileged, what the qualifications were of the attorneys reviewing the documents, whether the search was simple or contained Boolean operators, or whether the results were analyzed and reviewed for quality assurance.[345]

The court in *Victor Stanley* found that "[a]ll keyword searches are not created equal."[346] The defendant claimed they did not have enough time to review the electronically stored information and asked for a "clawback," an agreement between the parties, agreeing not to use any inadvertently produced privileged documents.[347] After extending the deadline for four months, the

[340] *See* FED. R. EVID. 502 advisory committee's note; Fid. & Deposit Co. of Md. v. McCulloch, 168 F.R.D. 516, 522 (E.D. Pa. 1996) (the following factors are used to determine if the disclosure is considered inadvertent: (1) The reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of the document production. (2) The number of inadvertent disclosures. (3) The extent of the disclosure. (4) Any delay and measures taken to rectify the disclosure. (5) Whether the overriding interests of justice would or would not be served by relieving the party of its errors); Rhoads Indus., *supra* note 337, at 226 (using the standard of "reasonable objectiveness" based on the civil litigation Curley v. Klem, 499 F.3d 199).

[341] *Id.* at 226 (determining plaintiff failed to prepare for the segregation and review of voluminous discovery).

[342] *Id.* at 227.

[343] *See id.* at 220 (noting that defendants failed to meet their burden of proof regarding the June 30, 2008 privileged log).

[344] *See* Victor Stanley, Inc. v. Creative Pipe, Inc., 250 F.R.D. 251, 267-68 (D. Md. 2008).

[345] *Id.* at 259-60.

[346] *Id.* at 256-57.

[347] *Id.* at 255.

defendants withdrew their "clawback" request.[348] Defendants failed to explain why "choosing certain search terms or defend the qualifications of the people who did the searching."[349] The court found that the "only prudent way to test the reliability of the keyword search . . . is to perform some appropriate sampling of the documents determined to be privileged and those determined not to be."[350] The court noted that the production of documents was not "an instance of a single document slipping through the cracks"[351] but instead it was the plaintiff that identified the potentially privileged electronic documents.[352] FRE 502 does not provide an exact measure of how long is too long before a party can be considered unduly delaying litigation and burdening the opposing party. FRE 502 also fails to provide guidance as to what is a reasonable method to extract electronic discovery that parties must abide by in order to comply with FRE 502.

Following another motion by the plaintiff, in *Victor Stanley, Inc. v. Creative Pipeline, Inc.,* (*Victor Stanley II*), the court recommended a default judgment and sanctions against the defendant.[353] In addition, the defendant's acts of spoliation were considered so extensive that the court treated the acts as contempt.[354] The plaintiff raised eight discrete electronic discovery failures by the defendant.[355] The eight preservation failures consisted of (1) failure to implement a litigation hold; (2) deletions of electronically stored information ("ESI") after suit was filed; (3) failure to preserve external hard drive after Plaintiff demanded preservation of ESI; (4) failure to preserve files and emails after Plaintiff demanded their preservation; (5) deletion of ESI after the Court issued its first preservation order; (6) continued deletion of ESI and use of programs to permanently remove files after the Court admonished the parties of their duty to preserve evidence; (7) failure to preserve ESI when business server replaced; and (8) use of programs to permanently delete ESI after Court issued multiple production orders.[356]

The *Victor Stanley II* court found that the defendants conduct caused the

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[348] *Id.*

[349] *See* Christopher Danzig, et al., *The Year in Review*, INSIDE COUNSEL, Dec. 2008, at 60.

[350] *See Victor Stanley, Inc.,* 250 F.R.D. at 253.

[351] *See id.* at 263.

[352] *See id.*

[353] *See* Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497, 500 (D. Md. 2010)

[354] *See id.*

[355] *See id.*

[356] *See id.* at 501.

spoliation of relevant electronic information and that this spoliation prejudiced the plaintiff.[357] In addition, the defendants did not demonstrate that their actions were reasonable, nor that they exhibited the effort and expense warranted by the stakes present in litigation.[358] Because of the seriousness of the defendant's actions, the court recommended that the spoliation be treated as contempt and that as a sanction, the defendant "be imprisoned for a period not to exceed two years, unless and until he pays to Plaintiff the attorney's fees and costs."[359]

On January 24, 2011, Magistrate Judge Grimm entered an order requiring the payment of $1,049,850.04 in attorney's fees and costs against the defendant in *Victor Stanley II*.[360] The order included $901,553.00 in general attorney's fees and $148,297.04 in consulting fees related to the defendant's spoliation.[361] The court found that because the spoliation occurred from the start of litigation, any fees that related back to this time would be covered by the sanctions.[362]

IX. CONCLUSION

Electronic discovery has made a significant impact on the litigation process. There is substantially more electronically stored information than paper documents, and electronically stored data is replicated and created at higher rates than its paper equivalent.[363] Preservation of electronic data, and production in a format desirable to the opposing party has greatly increased expenses to litigants engaged in discovery. Keyword and name searches are frequently used as a "quick search" to avoid costs but often privileged communications are contained in "email chains," "forwards" and "reply."[364] However "keyword searches have long been recognized as appropriate and helpful for [electronically-stored information] search and retrieval," but that "proper selection and implementation" is required because of the grave consequences at stake, namely the unintended "disclosure of

[357] *See id*. at 516.

[358] *See id*. at 516-17.

[359] *See id*. at 540; *see also* Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 541 (allowing and approving Magistrate Judge's recommended sanctions).

[360] *See* Court Order at 2, Victor Stanley, Inc. v. Creative Pipe, Inc., No. MJG-06-2662 (D. Md. Jan. 24, 2011).

[361] *See id*.

[362] *See id*.

[363] *See* Isom, *supra* note 16.

[364] *See* Rhoades Industries, Inc., 254 F.R.D. at 220.

privileged/protected information to an adverse party . . . ."[365] In addition, lawyers spend significant time and money in order to preserve work-product and the attorney-client privilege for electronically stored information.

The amended F.R.C.P. 16, 26, 33, 34, 37 and 45 and Form 35 and the new FRE 502 were designed to curb the issues created by electronically stored information, particularly cost. FRE 502 attempts to curtail the costs of litigation. [366] Under the new rule, an actual waiver "would not automatically be deemed a subject-matter waiver", and [i]nformation other than that specifically waived would be produced only if it 'ought in fairness' be considered together."[367] Furthermore, FRE 502 was designed to compliment F.R.C.P. 26(b)(5)(B) by enforcing court orders permitting procedures like the "quick peek," which allows requesting parties to assess the producing party's electronically stored information before more definitively delineating the scope of production, and "claw-backs" allowing the return of inadvertent disclosures without claim of waiver.[368] As such, the new rule further encourages parties to make agreements before litigation begins, thus reducing respective costs associated with potential discovery disputes. Unfortunately, the new FRE 502 fails to state a reasonable timeframe in which a party must attempt to recapture any privileged documents inadvertently produced.[369] In turn, FRE 502 does not absolve litigants from having procedures in place to deal with document retention, costs, and volume associated with electronic discovery.[370] While some litigants feel like the new FRE 502 is designed as a "do over,"[371] others believe it will only be cost-effective if "litigants that are willing to make potentially significant trade-offs."[372]

The new FRE 502 does not intend to resolve all the problems associated

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[365] Victor Stanley, Inc. v. Creative Pipe, Inc., 250 F.R.D. 251, 260-62 (D. Md. 2008)..

[366] Alvin F. Lindsay, *New Rule 502 to Protect Against Privilege Waiver*, NAT'L L.J., Aug. 25, 2008, at S2.

[367] *Id.*

[368] Hedges, *supra* note 291.

[369] *See* James E. Kurack Jr., *Proposed Rule of Evidence 502-Does It Mean Fewer Costs to You?*, THE LEGAL INTELLIGENCER (Sept. 30, 2008), http://www.obermayer.com/publications.php?action=view&id=164.

[370] *Id.*

[371] *See Litigation Alert: New Law to Reduce Litigation Expenses*, MINTZ, LEVIN, COHN, FERRIS, GLOVSKY, AND POPPO, LLC, (Sept. 23, 2008), http://mintz.com/publications.php?PublicationID=1560.

[372] David B. Alden & Ted S. Hiser, *Commentary: New Federal Rule of Evidence and Possible Litigation Document Review Cost Savings*, JONES DAY (Sept. 2008), http://www.jonesday.com/pubs/pubs_detail.aspx?pubID=S5487.

with the inadvertent disclosure of attorney client privilege and work product documents, and inconsistent application of the Rule in the federal courts suggests that it has instead fostered uncertainty.[373] If anything, the new rules are designed to encourage parties to "show their work" but whether or not this allows parties to rely on automated computer search systems is uncertain.[374] One question still remains: should parties enter into quick peek agreements and not focus on doing an effective privilege review?[375]

Some litigants believe that the "selective waiver" provision in FRE 502 is also problematic. "Selective waivers between government agencies and parties being investigated are attempts to agree that the party under investigation will produce privileged material to the government, while still preserving no-waiver status as to nonparties."[376] Litigants feel that the rule "fails to define how courts should evaluate the factors in subsection (b) which determine whether the inadvertent disclosure of a document will result in a subject matter waiver."[377] Most courts have found that "selective waivers" are ineffective and rejected their usefulness in litigation.[378] Litigants have found that the new FRE 502 shows "a tacit approval of regulatory-agency belief that waiver is the touchstone of the level of cooperation necessary to secure better treatment by the government."[379] Overall, the new FRE 502 is not perfect or all-encompassing, but is a step in the right direction towards further protections against disclosure of documents that should be protected by attorney-client privilege and the work-product doctrine.

The issues surrounding electronically stored information and the amended Rules indicate the necessity of organizations to establish a document retention program. After the *Arthur Anderson* and *Merrill Lynch* matters, companies should proactively protect their electronic data instead of waiting until

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[373] *Compare* Victor Stanley, Inc. v. Creative Pipe, Inc., 250 F.R.D. 251, 253-54 (D. Md. 2008) (holding privilege waiver applied to 165 electronic documents inadvertently disclosed), *with* Rhoads Indus., Inc. v. Building Materials Corp. of Am., 254 F.R.D. 216, 216-18 (E.D. Pa. 2008) (holding waiver did not apply to 800 privileged electronic documents inadvertently disclosed).

[374] *See generally The E-Discovery Process—Production*, CLEARWELL (last visited Oct. 25, 2011), http://www.clearwellsystems.com/e-discovery-101/e-discovery-process-production.php.

[375] *See* Hedges, *supra* note 291.

[376] Lindsay, *supra* note 366.

[377] Kurack, *supra* note 369.

[378] *In re* Qwest Commc'ns Int'l, 450 F.3d 1179, 1186-87 (10th Cir. 2006).

[379] Lindsay, *supra* note 366.

litigation ensues. Depending on the size of the firm, it is recommended that companies charge an individual or set of individuals to review and create logs of daily record purging and back-up filing. Companies must consider all sources of electronic data, not only the computers at the office, but laptop computers of those employees who travel or work from home, as well as those employees who have access to company files from their home computers. Additionally, data and other information may be electronically stored on other portable devices. Organizations need to ensure that software or hardware no longer used is accessible if documents from those systems are needed in litigation. Document retention policies are a necessity. These policies assist organizations by preserving data in the ordinary course of business, such that all of the relevant information is preserved and retrievable when litigation does occur.