

Navigating A Case Through E-discovery

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I. SCOPE NOTE

Since the amendments to the Federal Rules of Civil Procedure were enacted on December 1, 2006, the law in the area of electronic discovery has exploded. Many lawyers find it hard to keep up with this emerging area of the law. The failure to follow the law can lead to extreme consequences, including sanctions to the lawyers and their clients. Sanctions, however, tend to involve extreme circumstances and counsel should be careful not to let those cases scare them into over-preserving and collecting, which can substantially drive up costs. This article is intended to highlight five core areas that every lawyer should consider while navigating a case through e-discovery. It is also intended to give practical advice regarding the development of a defensible, cost effective ESI plan while not falling into e-discovery traps. To do this, counsel should: 1) begin preparing for electronic discovery as soon as litigation is anticipated; 2) take immediate reasonable steps to ensure the preservation of relevant data; 3) prepare well for the meet and confer and be transparent and cooperative with opposing counsel; 4) continue throughout the process to weigh the benefit versus the burden of the discovery and devise a defensible collection and production plan that reduces the cost burden on the client; and 5) document the process every step of the way.

II. BEGIN PREPARING FOR ELECTRONIC DISCOVERY EARLY

Gone are the days in which counsel can sit back and wait to receive discovery requests before beginning to investigate what documents the client may have that respond to the requests. Instead, counsel must begin preparing for discovery the moment he or she becomes aware of potential litigation. This requires an enormous amount of work up front to learn about the issues in the case, predict what documents the other side may need or request in the lawsuit, and identify the core people involved in the matter in order to find and preserve the documents related to the case before they disappear. It should not require in most cases, however, extreme measures to suspend deletion practices or notices to every employee in the company to cease deleting all data. Instead, it requires a measured approach of learning quickly the key issues and players involved and preserving the sources likely to contain documents related to the matter before they

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may be automatically deleted. It also requires an understanding of the company's deletion practices or size limits to e-mail so that you have an understanding of which data may be at risk to disappear quickly without taking additional steps to preserve it. The massive increase in the volume of electronic documents and the institution of automatic deletion policies by most companies makes this a very challenging task, but it is one that is not insurmountable. Counsel can meet the challenges by jumping into the meat of the case early, interviewing custodians and doing some leg work to understand how the client organizes its data and the roles of each of the key custodians.

III. PRESERVE THE RELEVANT DATA

A. *Get to Know Your Client*

One of counsel's earliest obligations in litigation matter is to advise the client on how and when the client must identify and preserve documents that may be relevant to the litigation or potential litigation¹. A party "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." *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003) ("*Zubulake IV*") (internal citations omitted). The duty to preserve arises as soon as a party reasonably anticipates litigation and includes all relevant documents in existence at that time, as well as relevant documents created thereafter. *Id.* at 216-17. *See also*, Fed. R. Civ. Pro. 26(e); *Jones v. Bremen High School Dist.* 228, 2010 U.S. Dist. LEXIS 51312, at *8 (N.D. Ill. May 25, 2010). The point when a party reasonably should know that litigation is likely is a case-specific inquiry and may arise before a complaint is actually filed. *See, e.g., Jones*, 2010 U.S. Dist. LEXIS 51312, at *9 (duty to preserve arose when defendant received notice of plaintiff's EEOC charge), *but see Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc.*, 244 F.R.D. 614, 621 (D. Colo. 2007) (duty to preserve arose upon filing of complaint despite earlier communications between counsel regarding a negotiated settlement). The duty to preserve may also arise at an earlier point for plaintiffs than for defendants, given the plaintiffs' control over the timing of litigation. *Pension Comm. Of the Univ. of Montreal Pension Plan v. Banc of America Securities, LLC*, 2010 U.S. Dist. LEXIS 4546, at *15 (S.D.N.Y. Jan. 15, 2010); *see also, Apple, Inc. v. Samsung Elec. Co., Ltd., et al*, 2012 U.S. Dist. LEXIS 118426, at *72 (N.D.Ca., August 21, 2012) ("[Plaintiff] Apple was on even greater notice than was Samsung of the reasonable likelihood of this litigation.").

The duty to preserve relevant documents does not require parties to save "every shred of paper, every e-mail or electronic document, and every backup tape." *Zubulake IV*, 220 F.R.D. at 217. Rather, parties must take reasonable steps not to destroy "unique, relevant evidence that might be useful to an adversary." *Id.* The analysis of what is "unique" and "relevant" should not be done without the assistance of counsel. *See, e.g., Pension Comm.*, 2010 U.S. Dist. LEXIS 4546, at *39; *Jones*, 2010 U.S. Dist. LEXIS 51312, at *9. Indeed, depending on the nature of the case, it may be unreasonable, even sanctionable, to allow a party's representatives to make the decision regarding relevance. *Id.* However, "[w]hether preservation or discovery conduct is ac-

¹ Throughout this article, the terms documents or data are used to include any type of electronically stored information ("ESI") and should be read interchangeably with that term.

ceptable in a case depends on what is *reasonable*, and that in turn depends on whether what was done—or not done—was *proportional* to that case and consistent with clearly established applicable standards.” *Rimkus Consulting Group, Inc. v. Nickie Cammarata*, 688 F. Supp. 2d 598, 613 (S.D.Tex. 2010). *See also, Victor Stanley, Inc. v. Creative pipe, Inc. et al.*, 269 F.R.D. 497, 522-23 (D. Md. 2010) (“[A]ssessment of reasonableness and proportionality should be at the forefront of all inquiries into whether a party has fulfilled its duty to preserve relevant evidence.”). *But see, e.g., Orbit One Communications, Inc., et al., v. Numerex, et al.*, 271 F.R.D. 429, 436 (S.D.N.Y. 2010) (finding that guiding preservation efforts by a standard of what is reasonable and proportional may “prove too amorphous” to provide a party comfort that its preservation obligations have been met and “cannot be assumed to create a safe harbor for a party” that fails to preserve evidence it is obligated to preserve).

The trick is how to determine at the beginning of the case (before counsel knows exactly what the opposing party’s ‘hot button’ issues might be) how to preserve and collect just the right amount of data. Essentially, counsel must determine how to preserve and collect the perfect proportion of materials – balanced by the core issues in the case, the amount at stake and the burden to collect and review it -- without missing anything key to the case or overburdening the client. To do this, counsel has an affirmative duty to acquire a basic (and accurate) understanding of: (1) how and where the client and/or its representatives store documents, (2) how to retrieve data from those sources; (3) the client’s document retention and destruction practices and policies; and (4) the person or persons most likely to have information relevant to the litigation. *See, e.g., Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 432 (S.D.N.Y. 2004) (“*Zubulake V*”); *Maggette v. BL Development Corp. et al*, 2010 U.S. Dist. LEXIS 56334 (D. Miss. May 17, 2010). This can be very challenging for lawyers, who may not have a good understanding of the technology that houses the data. In many cases, outside counsel will simply rely on his or her in-house counterpart to assure them that the data is being preserved. The problem is that in-house counsel is often juggling a large case load and/or may not be well-versed with the company’s information technology systems and may think that data is being preserved when it is not. Further, in-house counsel face pressures to view the issue from a business rather than legal perspective and not to go overboard in tasking employees with searching and saving huge volumes of electronic documents that may be marginally relevant to the issues the case but involve a huge burden to find and save.

So how can both in-house and external counsel comply with their obligations while not unreasonably overburdening the business? The first step is to interview people with knowledge of the facts relevant to the case to get an understanding of where data related to those facts may exist and how the data is organized. Most e-discovery collections are “custodian based,” meaning that rather than attempt to run an electronic search across all of the client’s systems (which is almost always impossible, as the data is not usually indexed in a manner that allows searching across entire servers and is usually located in multiple locations), counsel will need to start with the people with knowledge of the matter. This often involves telephone interviews with the core people involved in the matter at issue and with one or more of the client’s IT personnel to understand whether and when data is being deleted and from which sources. *See, e.g., 3M Innovative Properties Co. et al v. Tomar Electronics, Inc.*, 2006 U.S. Dist. LEXIS 80571, at *17 (D. Minn. July 21, 2006) (“a reasonable investigation by a company would include an inquiry of the company’s employees for relevant information.”) In large cases it may also involve e-mail surveys,

which ask employees questions regarding data they may have related to the matters in the lawsuit, where that potentially relevant data is stored and which other employees may have knowledge of the matter. Surveys, however, are a poor substitute for conversations with the core people involved in the matter. If practical, a short 30 minute to 1 hour interview with the top five employees involved in the matter will usually very quickly inform counsel who the key people are, where the core documents are likely to be housed and some of the roadblocks counsel may face in attempting to collect and cull the data. It is also important for counsel to focus not just on the people involved, but other sources of documents that may be in central locations such as databases and shared drives and to understand how those databases or data “warehouses” store data and are maintained and indexed. Also, it is necessary to get a handle on the total volume of documents and sources that may contain relevant materials because it will help the company show the burden of collecting and reviewing everything.

B. *Issue a Litigation Hold Notice*

As soon as the duty to preserve arises, counsel should promptly issue a written litigation hold putting the client on notice of its duty to preserve and not destroy any relevant documents that currently exist (whether in paper or electronic form) or that may be created in the future. *See, e.g., Pension Comm.*, 2010 U.S. Dist. LEXIS 4546, at *15. Within the last two years, courts have grappled with the question of whether the failure to issue a timely written litigation hold, in and of itself, may be sufficient evidence of gross negligence to support a claim for sanctions. *See, e.g., Pension Comm.*, 2010 U.S. Dist. LEXIS 4546 at 6; *Chin, et al., v. Port Authority of New York & New Jersey*, 2012 U.S. Dist. LEXIS 14088, at *68 (2nd Cir., July 10, 2012).

The hold itself is not difficult to draft or send. The difficulty lies in identifying *who* must receive the litigation hold and whether it is necessary to actually *collect* the documents from the key players quickly in order to avoid any automatic, inadvertent or even willful deletion. Generally speaking, the litigation hold should be distributed to the persons identified by the client, in the pleadings or as a result of the interview process described above as having relevant information. As described in more detail below, while it is safer to be over-inclusive, it also can cause problems if too many people are included on the hold, thus counsel should consider the list of custodians carefully.

When drafting the hold, counsel should not include anything that he or she does not want the opposing party to see. While a litigation hold notice is considered work product, it may in some circumstances need to be produced in order to show what the client has done to preserve documents. *See, e.g., Major Tours, Inc. v. Colorel*, 2009 U.S. Dist. LEXIS 68128, at *6-7 (D.N.J. 2009) (holding that while litigation hold letters are generally privileged and not discoverable, the court may order production of a litigation hold letter upon a preliminary showing of spoliation.)

The hold should be simple, to the point and describe the case in a way that a non-lawyer would understand. It should:

- Describe the case briefly

- Define what constitutes “relevant information” in a comprehensive way that is as simple as possible
- Clearly state that the recipients must ensure the preservation of electronic data as well as hard copy data
- In some cases, it may give instructions on how to save documents in order to prevent automatic deletion by the system
- In many cases, it will provide a contact or link for confirming receipt of the notice and a person to whom questions should be directed

Counsel should take care to craft the litigation hold notice to fit the facts of a particular case.² Counsel should also consider the impact of the litigation hold notice in certain types of actions involving current employees. For example, a litigation hold notice that identifies a current employee who has raised a discrimination complaint may be seen as retaliatory or aimed at discouraging additional complaints. While a litigation hold notice may be required in such circumstances, counsel should carefully consider how widely the notice should be distributed and the level of detail provided to its recipients. Also, distributing the hold too widely can result in numerous side e-mail correspondence between employees asking what the matter is about and may generate more discoverable e-mail. Thus, counsel should think carefully about the list of names on the notice and not include entire groups within the company if people within those groups are not likely to have relevant information. Counsel should also consider whether a separate litigation notice should be sent to a client’s IT personnel, who may be maintaining databases that house data that the custodians may not control. It may be important, especially in companies that do not face frequent litigation, to discuss the hold with IT personnel prior to sending it to avoid confusion in IT and potential over or under-preservation and collection. Counsel should also send periodic reminders to hold recipients and update the recipient list where necessary throughout the life of the case.

Judge Scheindlin, of the famed *Zubulake* opinions, revisited the import of the litigation hold in the case of *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of America Securities, LLC*, 2010 U.S. Dist. LEXIS 4546, at *15. In *Pension Committee*, Judge Scheindlin admonished counsel for failing to issue a proper litigation hold at the outset of the case. *Id.*, at *8. Judge Scheindlin’s opinion is instructive in that it described both counsel’s efforts and why she believed those efforts to be insufficient, warranting the imposition of sanctions. Specifically, Judge Scheindlin acknowledged that counsel for the plaintiffs had: (1) contacted the plaintiffs shortly after being retained to begin preservation and collection efforts, (2) phoned and emailed plaintiffs and distributed memoranda instructing the plaintiffs to be over-inclusive in their collection efforts, (3) sent plaintiffs a monthly case status report, which included requests for additional documents, and (4) issued a new litigation hold following a stay in the case. *Id.* Judge Scheindlin found that these efforts fell short, however, because they did not expressly direct employees to preserve all relevant records (paper and electronic). *Id.* Moreover, the hold placed “total reliance on the employee to search and select what the employee believed to be responsive records without any supervision from Counsel.” *Id.* For this and other negligent conduct, Judge Scheindlin granted the defendant’s request for an adverse inference, monetary sanctions and additional discovery. *Id.* at *24.

² For reference, a sample litigation hold notice is attached.

Judge Scheindlin's admonition regarding the role of counsel in discovery is hardly new. *Id.* at n. 68. Nevertheless, it fails to fully recognize the complexity of preserving documents in large litigation involving massive organizations where the litigation may encompass huge volumes of documents and thousands of employees. In fact, a number of courts have distinguished *Pension Committee*, recognizing the difficulties inherent in the e-discovery process and that the scope of preservation and collection in any given case is often far from clear. *See, e.g., Rimkus Consulting Group, Inc. v. Nickie Cammarata*, 688 F. Supp. 2d 598, 615 (S.D.Tex. 2010) (distinguishing *Pension Committee* and holding that bad faith is required to impose an adverse inference due to spoliation). The *Rimkus* court said that while the general rules regarding the duty to preserve documents are "not controversial," "applying them to determine when a duty to preserve arises in a particular case and the extent of that duty requires careful analysis of the specific facts and circumstances." *Id.* at 613. The court recognized that "[i]t can be difficult to draw bright-line distinctions between acceptable and unacceptable conduct in preserving information and in conducting discovery, either prospectively or with the benefit (and distortion) of hindsight." *Id.* Also, because large clients often prefer to investigate discovery issues using their in-house counsel and staff, it is often difficult for outside counsel to maintain heavy involvement in the process. The decision, however, serves as a reminder that counsel must maintain adequate control over the process to ensure relevant documents are available when the inevitable discovery requests are received. In-house and outside counsel should be involved in interviews of key witnesses early in the process to ensure that those witnesses understand the hold order and counsel fully understands where key documents are housed and how the documents are maintained and organized. *See, e.g., Coquina Investments v. Rothstein, et al.*, 2012 U.S. Dist. LEXIS 108712 (S.D. Fla., August 3, 2012). This knowledge is crucial to developing a reasonable collection and review plan and negotiating that plan with opposing counsel.

C. *Guide the Process*

Counsel's obligation to guide a client through the discovery process does not end once the litigation hold notice is issued. Courts have repeatedly emphasized that outside counsel must also assist the client in: (1) determining what documents may be relevant and, thus, need to be preserved; (2) ensuring the key players to the litigation understand the litigation hold and that the client disrupts any routine destruction of relevant documents (including destruction in accordance with a company's policy or practice); (3) reminding the client as needed throughout the litigation of its obligation to preserve documents. *See, e.g., Zubulake V*, 229 F.R.D. at 432-33. (while "a lawyer cannot be obliged to monitor her client like a parent watching a child...a party cannot reasonably be trusted to receive the 'litigation hold' instruction once and to fully comply with it without the active supervision of counsel.") *See also, Cache La Poudre Feeds*, 244 F.R.D. at 630; *Jones*, 2010 U.S. Dist. LEXIS 51312, at *9; *E.I. Dupont De Nemours and Co. v. Kolon Industries, Inc.*, 2011 U.S. Dist. LEXIS 45888, at *47 (E.D.Va., April 27, 2011).

These rules, however, are often difficult to follow in large companies where data and systems are scattered, deletion policies need to stay in place to avoid bringing the company to a standstill, and it can take time to determine where the potentially relevant data exists. Outside counsel often attempt to protect themselves from sanctions by issuing broad hold letters or e-mails to the client warning that the client must keep every shred of evidence and ensure that

nothing is deleted. The client, however, often needs real world advice on how to accomplish this in a reasonable manner. This involves an in-depth understanding of the client, its systems, the case, the burden certain preservation and collection practices impose in the IT department and the potential for agreement with the opposing party. During this process, counsel often must help the client set reasonable limits in the preserving and collecting of documents. If the preservation and collection net is thrown too broadly, the client may balk, arguing that the suit is baseless and the cost to preserve and collect huge amounts of data may bring its business to a grinding halt. Part of counsel's job, therefore, is to understand the risk of not collecting all of the documents (i.e., understanding the clients' systems and what is being deleted in the background) and this may involve limiting the custodian list to a core group of people. This decision involves taking some risk and making decisions that you believe you can defend in court, given the volume of data involved, the issues in the case and the amount at stake. At the end of the day, very few of the thousands or even millions of documents preserved will be used in the case. Thus, the trick is making sure that those important documents – key to the case – do not disappear and that counsel has made a reasonable effort to preserve the documents that are truly relevant to the claims and defenses asserted in the case.

IV. The Meet and Confer: Be Well Prepared, Transparent and Cooperative

As litigators, we are sworn to represent our clients zealously. Traditionally, this has been interpreted to mean acting in an adversarial and sometimes confrontational manner. Revisions to federal and state court rules along with the reality of the potential burden of e-discovery have forced counsel to rethink this posture and, at times, assume an unfamiliar and sometimes uncomfortable role as collaborator. In fact, counsel are finding more battles (both in and out of the courtroom) are won through cooperation and transparency. *See, e.g., Mancia v. Mayflower Textile Servs. Co.*, 2008 U.S. Dist. LEXIS 83740 at *13 (D. Md. 2008)(compliance with the 'spirit and purposes' of discovery rules requires "requires cooperation rather than contrariety, communication rather than confrontation.")

A. Be Prepared

One of the biggest changes to occur recently in the litigation process is the timeline for discovery. Counsel used to be able to sit back and wait to be served with discovery requests before delving into the documents the client may have relevant to the matter. The initial Rule 26 discovery conference, also known as the "meet and confer," was often a hypothetical discussion of what counsel expected may occur during the course of litigation.³ No longer.

Rule 26 of the Federal Rules of Civil Procedure generally addresses a party's obligation to confer with opposing counsel and exchange certain relevant information. Fed. R. Civ. Proc. 26(a), 26(f). In addition, some federal district courts, state courts and local judges have adopted their own rules governing the scope of e-discovery and a party's conduct regarding the same. *See, e.g., In re: Standing Order on Protocol for Discovery of Electronically Stored Information in Civil Cases Before the Honorable Frank D. Whitney*, 3:07-mc-00047 (filed May 14, 2007); Texas R. Civ. Pro. 196.4; California Electronic Discovery Act, A.B. 5 (filed June 29, 2009); *In*

³ The Rule 26 conference is required by the Federal Rules of Civil Procedure. Similar types of discussions may also be required under applicable state court rules and local court orders. *See, e.g., California Rules of Court 3.724.*

re: Amendments to the Florida Rules of Civil Procedure – Electronic Discovery, No. SC11-1542, (filed July 5, 2012). These rules and orders collectively set forth various topics that a court will presume counsel has knowledge of before walking into a meet and confer or addressing the court. (See, e.g., Judge Whitney’s Order, section 6(a) stating, “A reasonable request for prior exchange of information may include information relating to network design, the types of databases, database dictionaries, the access control list and security access logs and rights of individuals to access the system and specific files and applications, the ESI document retention policy, organizational chart for information systems personnel, or the backup and systems recovery routines, including, but not limited to, tape rotation and destruction/overwrite policy.”) By being aware of the rules and prepared to respond to questions about the topics addressed therein, a practitioner can gain credibility with the court and opposing counsel. North Carolina, for example, enacted changes to its Rule 26 of the North Carolina Rules of Civil Procedure, including provisions addressing electronic discovery. While North Carolina’s rule 26(f) does not require an ESI conference, it does allow one of the parties to request a 26(f) conference on the subject of discovery, including electronic discovery. N.C. R. Civ. Pro. 26(f).

B. *Make a Reasonable Proposal*

Discovery is scalable and should take into account the particular facts of the case including a plaintiff’s potential recovery, the size and resources of the parties and the reasonableness of the discovery requests. Fed. R. Civ. Pro. 26(b)(2)(C). By preparing early in investigating the potential sources and volume of data and identifying key custodians, you can set realistic expectations for opposing counsel and the court regarding what discovery is reasonable. In preparing a proposal for discovery consider:

- The volume of data reasonable to review both in the time frame allotted by the court and your client’s financial restrictions
- The number of and sources from whom your client may need to collect data if the opposing party issues broad discovery requests and the client’s in-house capabilities to complete that collection
- Arguments you may have for limiting the custodian list to certain core people based on level of involvement in the matter or the likelihood additional, proposed custodians would likely duplicate the core employees’ documents
- Methods the parties might use to limit or phase discovery and focus the discovery on core issues in the case
- Methods that may be used to cull the data, including date restrictions, search terms and “deduplicating” the data
- The timing and format for document production(s)
- The timing, if different, for exchange of privilege logs
- The necessity of a protective order to protect confidential data
- The inclusion of a “clawback” agreement in the protective order providing procedures for returning privileged documents that may be inadvertently produced⁴

⁴ Agreements regarding the retrieval or “claw-back” of inadvertently produced privileged documents have become more significant following revisions to Rule 502 of the Federal Rules of Evidence and should be included in an overall plan for discovery sanctioned by the court. See, e.g., *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D.

A discovery plan is more likely to be adopted if a practitioner is able to demonstrate to the court and opposing counsel that it is supported by actual facts regarding the volume and potential cost of the review. Mere assertions of counsel that requested discovery is too burdensome or costly is generally not enough to impress the courts or win a motion. *See, e.g., Kleen Products LLC, et al., v. Packaging Corporation of America*, 2012 U.S. Dist. LEXIS 139632, at *48 (N.D.Ill., September 28, 2012); *EEOC v. Aaron Bros., Inc.*, 620 F.Supp.2d 1102, 1108 (C.D. Cal. 2009); *Moore v. Napolitano*, 2009 U.S. Dist. LEXIS 69319, at *13, 21-25 (Aug. 7, 2009 D.D.C.). In addition, although increasingly unlikely, you may find that your proposal on topics such as form and timing of production is the only one before the court. In such circumstances, a court will be inclined to accept your proposal over the objections of an ill-prepared opposing counsel. *See, e.g., Helmert v. Butterball, LLC*, 2010 U.S. Dist. LEXIS 28964 (E.D. Ark. May 27, 2010) (in the absence of evidence to the contrary, the court accepted counsel's assertion that the plaintiffs could not conduct proximity searches and such terms were therefore eliminated from defendant's proposed search list).

A good way to prepare for the multiple discovery conferences you will have with opposing counsel is to create a chart with the document requests coupled with proposed sources for responding to each based on interviews with the client's custodians and IT personnel. This will help you more easily identify where core documents responsive to particular document requests are located when developing a collection plan and prepare you to discuss the key people and sources of data responsive to the document requests at the conferences. You likely won't be prepared to do this at the first 26(f) conference because this takes time. The sooner you are prepared to do this, however, the more likely you will be able to come to agreement with opposing counsel. Also, it is helpful to think about e-mail data separately because e-mail is almost always the most voluminous source of information. Thus, you need to begin thinking about which requests require e-mail data to respond fully and which you may respond to with more targeted (usually less voluminous) sources, such as policies.

Also, where e-mail data must be collected, counsel should consider which precise issues in the case implicate e-mail data and which custodians are the core custodians to those precise issues. Courts recently have recognized the need to limit e-mail data and the Federal Circuit and Eastern District of Texas have, in fact, issued model orders in patent cases limiting the collection of e-mail data to a small group of custodians unless the parties agree to increase the limit. *See Model Order Regarding E-discovery in Patent Cases*, Appendix P, <http://www.txed.uscourts.gov/page1.shtml?location=rules> (requiring each requesting party to limit its request of e-mail data to eight custodians); *See also* <http://www.cafc.uscourts.gov/2011/model-e-discovery-order-adopted-by-the-federal-circuit-advisory-counsel.html> (requiring in patent cases that e-mail requests be propounded only for specific issues and not be included in the general requests and the requesting party must limit e-mail requests to five custodians).

C. Be Prepared to Defend Your Client's Position

251, 262-263 (D. Md. 2008); *Mt. Hawley Ins. Co. v. Felman Production, Inc.*, 2010 U.S. Dist. LEXIS 49083 (S.D. W.Va., May 18, 2010).

If you cannot reach agreement with opposing counsel, and competing proposals are before the court, you should be prepared to respond and defend your client's position on such topics as:

- Arguments you may have for limiting the custodian list to certain core people and eliminating alternative search term lists
- Arguments you may have that e-mail data should only be collected for certain issues and certain custodians due to volume and burden and the low benefit to collecting large amounts of e-mail data
- The volume and cost of retrieving the data and which sources may be deemed "not reasonably accessible" due to the technology involved or the cost to retrieve and review the data
- Custody/control issues regarding data from former employees, affiliated companies or other third parties
- Preservation or spoliation concerns

You may be faced with a court that has difficulty understanding the technical issues. It is very important that *you* fully understand your client's systems and the difficulties entailed in collecting and reviewing the documents so that you can explain those issues to the court. This will help you achieve, up front, reasonable timelines and expectations regarding discovery. It is often very challenging to get this information quickly – a large company often cannot give you concrete numbers regarding volumes of data and where the data is all housed quickly. Your job is to work diligently to find this information, however, and to convince the court and opposing counsel that you are acting reasonably and diligently to track down the information. It often requires taking a sampling of data and forming estimates based on that sampling. For example, if you collect data for five custodians and the initial collection yielded 100,000 total e-mails, you can assume an average of 20,000 e-mails per custodian. You can then use those numbers to estimate the cost and burden to collect additional custodians.

V. Reducing the Burden

Searching, preserving, and collecting documents – whether in response to discovery requests, a subpoena or as part of a party's own internal investigation – is expensive. Federal and state courts are sensitive to the need to contain discovery so that the potential costs of litigation do not swallow a party's motivation to properly vindicate his/her rights before the court. *See, e.g., Mancia v. Mayflower Textile Services, Co. et al*, 253 F.R.D. 354 (D. Md. 2008); *Cache La Poudre Feeds*, 244 F.R.D. at 620; *Analog Devices, Inc. v. Michalski et al*, 2006 N.C.B.C. 14 (2006). As noted, however, the courts need to understand the burden and it is counsel's job to understand the burden so that he or she can inform the court and the opposing party.

Rule 26 of the Federal Rules of Civil Procedure addresses the burden of electronic discovery by limiting discovery if the court determines (among other things) that the discovery sought is unreasonably cumulative or duplicative, can be obtained from another source that is more convenient, less burdensome or less expensive, or "the burden or expense of the proposed

discovery outweighs its benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues." Fed. R. Civ. Pro. 26(b)(2); *see also*, *Mancia*, 253 F.R.D. 354 (the requirement that discovery be proportional to what is at stake in the litigation is also required by Fed. R. Civ. Pro. 26(g)(1)(B)(iii)). State courts follow a similar analysis. *See, e.g.*, *Analog Devices, Inc. v. Michalski et al*, 2006 N.C.B.C. 14; *Ex parte Cooper Tire & Rubber Co.*, 987 S. 2d 1090, 1105-1107 (Ala. 2007). *See also*, N.C. R. Civ. Pro. 26(b)(1). Therefore, parties must constantly strive to achieve that careful balance between seeking and providing helpful documents and the costs incurred in such efforts.

Following the process set forth above, you will already have a good sense of the potential volume of data and cost of review. You will also have a good sense of your client's financial or other limitations in conducting discovery. The following list sets forth strategies for reducing costs of a review while still maintaining a high likelihood of providing or obtaining key relevant documents.

A. *Maintain a Collaborative Approach*

Conferring with opposing counsel can minimize costs "because if the method is approved, there will be no dispute regarding its sufficiency, and doing it right the first time is always cheaper than doing it over if ordered to do so by the court." *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 261 (D. Md. 2008). *See also*, *Mancia*, 2008 U.S. Dist. LEXIS 83740 at *41 (engaging in the discovery process cooperatively "will almost certainly result in having to produce less discovery, at lower cost.") While this may seem overly simplistic, a client does not have to pay for disputes that do not occur, motions that are never filed and hearings that are never held because counsel have already reached an agreement on the subject. Responding to an unreasonable proposal by opposing counsel with an equally unreasonable proposal is a surefire way to draw the ire of both the court and your client. *See, e.g.*, *Mirbeau of Geneva Lake LLC, v. City of Lake Geneva et al.*, 2009 U.S. Dist. LEXIS 101104, at *8-9 (E.D.Wis. October 15, 2009).

B. *Create a Defensible Plan for Culling Data Prior to Review*

In many cases, the volume of data in the case may be appropriately limited with the use of keyword or concept searches or the application of a computer-assisted review tool. Although often an effective means of identifying responsive documents and lessening the overall burden of the review, courts have recognized that the use of search terms can lead to under-inclusive or over-inclusive results and must be employed cautiously. *Victor Stanley*, 250 F.R.D. at 256-57. To that end, courts may investigate whether a party proposing search terms has engaged in any sort of search term validation or quality assurance process to ensure the terms they have selected bear a reasonable relationship to the opposing party's desired results. *Id.* at 257, 259-60 ("the only prudent way to test the reliability of the keyword search is to perform some appropriate sampling of the documents..."). *See also*, *Kleen Products*, US Dist. LEXIS 139632 at *17 (observing sampling procedures were used to evaluate the effectiveness and reliability of search terms); *In re Seroquel Labs*, 244 F.R.D. 650, 660 n.6, 662 (M.D. Fla. 2007) ("Common sense dictates that sampling and other quality assurance techniques must be employed to meet re-

quirements of completeness.”) Thus, before proposing search terms, it is helpful to test them on at least a sampling of the data and performing tests to “validate” the terms. This may involve using analytics technology to cluster the data, perform concept searches and get information from the tool about misspellings of terms within the data sets or other terms that might be relevant. It may also involve reviewing sample sets of data, tagging them as responsive or nonresponsive, and then using those results to perform further testing of the terms or other culling methods.

Courts have also begun to investigate and even endorse use of analytics technology to identify potentially relevant information – i.e., “predictive” or “automated” coding. *See, e.g., National Day Laborer Organizing Network v. U.S. Immigration and Customs Enforcement Agency*, 2012 WL 2878130, at *12 (S.D.N.Y., July 13, 2012) (“[P]arties can (and frequently should) rely on...machine learning tools to find responsive documents.”); *Da Silva Moore, et al., v. Publicis Groupe, et al.*, 2012 U.S. Dist. LEXIS 23350 at *3 (S.D.N.Y., February 24, 2012) (“This judicial opinion now recognizes that computer-assisted review is an acceptable way to search for relevant ESI in appropriate cases.”); *Global Aerospace Inc. v. Landow Aviation, L.P.*, 2012 Va. Cir. LEXIS 50, at *2 (“Defendants shall be allowed to proceed with the use of predictive coding....”). This new interest stems from a growing distrust of the accuracy and completeness of keyword searches and human review, coupled with greater confidence in the accuracy of computer review and the assumption that computer review will reduce costs. *See, e.g., National Day Laborer Organizing Network*, 2012 WL 2878130 at *11. As with keyword searches, courts have emphasized proper use of the tools hinges on the development of an acceptable process, which may require validation and/or agreement with opposing counsel. *See, e.g., Da Silva Moore*, 2012 U.S. Dist. LEXIS 23350 at *7, 40. Regardless of the tools used, however, it is still very important to interview custodians, reduce the number of custodians collected, and determine which core custodians’ e-mail data really must be collected and reviewed – whether it be by a computer or attorneys. If the collection is large and the discovery requests broad, any method used will be expensive, and the parties still need to focus on limiting the core data set collected.

Failure to obtain agreement with opposing counsel on the method by which data may be culled or, absent agreement, the failure to take reasonable steps to collect and produce core relevant data can lead to sanctions, including monetary sanctions, adverse inference instructions, a finding privilege has been waived and/or additional discovery based on opposing counsel’s desired search term list. *See, e.g., Victor Stanley*, 250 F.R.D. at 267-268 (finding waiver of privilege), *Jones*, 2010 U.S. Dist. LEXIS 51312 (N.D. Ill., May 25, 2010) (awarding monetary sanctions, imposing an adverse inference and requiring additional discovery); *Maggette v. BL Dvlpt. Corp.*, 2009 U.S. Dist. LEXIS 116789 (N.D. Miss. Nov. 24, 2009) (adverse inference following earlier monetary sanctions).

C. Limit Custodians and Data Sources

Determining the identity of key players and the sources of potentially relevant documents can be a monumental undertaking in cases involving large corporations and/or particular types of

litigation. Courts have recognized and accepted this limitation. *See, e.g., 3M Innovative Properties Co*, 2006 U.S. Dist. LEXIS 80571, at *17 (“A company need not question all employees, but must question those that would reasonably have relevant information.”) However, a party, with the assistance of counsel, is still required to conduct a reasonable inquiry to locate and preserve relevant, non-duplicative sources of information. *See Coquina Investments*, 2012 U.S. Dist. LEXIS 108712; *Phoenix Four, Inc. v. Strategic Resources Corporation*, 2006 U.S. Dist. LEXIS 32211 (S.D.N.Y. May 23, 2006).

As previously discussed, counsel should work with the client in large cases and interview key players in order to identify a reasonable subset of custodians and data sources and prioritize discovery to focus on those key players and data sources. Counsel should be transparent in this process, attempt to obtain agreement with opposing counsel and be prepared to defend his or her decisions by showing the volume and burden of collecting from sources and custodians outside counsel’s reasonable subset.

D. *Employ Date Limitations*

One key area in which counsel may be able to reach agreement is on date limitations. By restricting a review to documents that fall within a certain date range, parties may eliminate extraneous files and impact the review in two key ways. First, a date restriction may focus a review on more relevant documents. Second, it can lessen the burden of parties to identify and/or log privileged documents that were created at a point in time that counsel agrees would likely subject the documents to attorney-client privilege and/or work product protections. In identifying appropriate date restrictions, counsel should examine the applicable statute(s) of limitations, the client’s document retention policy/practices and any temporal guides identified in the pleadings. Sometimes the date restrictions may be different depending on the custodian – i.e., custodians may have been involved in the relevant issues at different times. Counsel should focus on the time period of the custodian’s involvement in the witness interviews and consider different date limitations for different custodians.

Counsel should be cautioned to consider a party’s preservation efforts when selecting the date after which documents may be considered work product. Alleging work product protection necessarily implies that a party anticipated litigation. If a party claims work product protection well before a litigation hold was issued or other preservation efforts undertaken, it may lead to a finding of spoliation.

E. *Eliminate File Types Unlikely to be Relevant*

Another possible means of culling data is to identify file types that are unlikely to contain relevant information. For example, if your client’s representatives regularly attach contact information to emails through use of an electronic or v-card, you may determine that this information can be eliminated from a review completely rather than reviewed as individual documents. Similarly system files, jpg, gif or other types of files may be culled out if unlikely to contain relevant information saving time and money in processing and review costs.

F. *Use the Right Technology*

One of the most important decisions a practitioner can make is selecting technology to assist in the collection, processing, review and/or production of documents. The technology selection should be guided both by the volume of data to be reviewed and the needs of the particular case. Just as there is no “one size fits all” approach to discovery, you will likely find there is no “one size fits all” technology solution. Rather, this inquiry must be made for each individual case. In evaluating what type of software to use, cost is often a primary consideration. It should not, however, be the only one. Better technology may cost more, but can save the client hundreds of thousands of dollars in review costs, thereby justifying the larger, up-front cost. There are numerous factors to consider when evaluating culling technology and the review platform. Some of these factors include:

- The reputation and size of the vendor offering the technology
- Whether the vendor developed the technology themselves or is a pass-through for the technology, which was developed and is supported by another company
- The ease of use by the review team and the “merits” litigation team (if different) and the different features available for the differing needs of each team
- Average review speeds using the technology for first pass review
- The review platform’s reporting capabilities
- Features the review platform has to cull documents prior to the review and to assist you in analyzing the data and developing search terms (i.e., “analytics”) and whether the use of those features can be used in the review or, in the case of automated coding, supplant some or all of the human review
- The review platform’s handling of duplicates, searching capabilities, comparison of “near dupes”, e-mail threading and other features and whether all of the “analytics” features are included as part of the review platform (some vendors divide the features in separate tools)
- The pricing structure for the review platform and the up front costs vs. the ongoing hosting costs
- The review platform’s ability and the cost to produce in the appropriate format
- The review platform’s ability to limit access to certain fields/documents for use by experts, more limited use by reviewers vs. quality control personnel, etc.
- The printing capabilities of the review platform, including whether documents that have been Bates stamped have to be reloaded into the platform in order to print the produced versions and the associated costs
- Availability of technical support
- The review platform’s ability to “batch out” documents for assignment alleviating the burden on the supervising staff

The choice of a platform to process the data and, if separate, review documents is crucial to the success of a large document review and to the bottom line cost of the review and production to the client. If counsel is unfamiliar with the technology available, he or she should consult with colleagues who have more technical experience and/or the vendors that offer that technology.

G. *Avoid the Cost of Retrieving Data from Less Readily Accessible Sources*

Rule 26 of the Federal Rules of Civil Procedure limits a party's ability to obtain discovery from sources that are not reasonably accessible because of undue burden or cost. Fed. R. Civ. Pro. 26(b)(2)(B). Courts frequently employ this provision to limit discovery from backup tapes, which can be difficult and costly to restore to a useable format. *Helmert*, 2010 U.S. Dist. LEXIS 28964, at *10. However, a court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). Fed. R. Civ. Pro. 26(b)(2)(B). In addition, while routine searching of backup tapes is not often required, even such inaccessible sources "should be searched when it has been shown that relevant material existed but was not produced, or relevant material *should have* existed but was not produced." *Pension Comm.*, 2010 U.S. Dist. LEXIS 4546, at *91 (emphasis in original). To avoid these potential costs, clients should take steps to ensure the preservation of documents early in the case when they are still available from accessible sources.

H. Know Your Limits

This area of the law is still developing as the volume of data continues to increase and the types of technologies that house the data continue to evolve. While you may be very familiar with the requirements for a litigation hold notice or topics for discussion in a meet and confer, you may be less comfortable with, for example, search term validation or review platform selection. Counsel must be prepared to confront his/her limits and seek help when necessary to ensure a complete, defensible approach to discovery. To that end, you should utilize all available resources including your client's IT personnel, experts within your own firm, separate discovery counsel, or colleagues or vendors experienced in this area to help guide you through the process.

VI. Document Your Process Every Step of the Way

As discussed above, courts are placing an increasing emphasis on counsel's role in guiding and tracking the discovery process. Absent a legitimate argument that all relevant documents have been produced, a party's best defense against motion to compel is a transparent roadmap documenting and illustrating the reasonableness of the strategic decisions made in discovery. *See, e.g., Victor Stanley*, 250 F.R.D. at 261 (parties need to be prepared to back up their positions with reliable information "from someone with the qualifications to produce helpful opinions, not conclusory argument by counsel."); *see also In re Seroquel Labs*, 244 F.R.D. at 660. Counsel's failure to support arguments regarding burden and/or benefit with concrete numbers or expert opinions can influence a court's resolution of the dispute in favor of an opposing party. *See, e.g., Kleen Products LLC, et al., v. Packaging Corporation of America*, 2012 U.S. Dist. LEXIS 139632, at *48.

Counsel's efforts to create a clear record should begin with the discovery responses, particularly taking care to properly preserve all applicable objections to discovery requests. A court may find that a party who asserts only blanket objections and/or fails to assert a potentially meritorious objection in a timely manner has waived any objection to the request. *See, e.g., Mancina*, 2008 U.S. Dist. LEXIS 83740 at *17 (counsel should properly preserve objections by making a reasonable inquiry into the burdensomeness or cost of responding rather than making a blanket objection.); Fed. R. Civ. Pro. 33(b)(4).

Other key items to document include:

- The litigation hold notice, the names of the people who received the hold and the dates the hold and reminders were sent
- The process followed to identify recipients of the hold
- Confirmation that the litigation hold notice was received and/or understood, if not too burdensome for the company to do (some companies have automated confirmation processes)
- Efforts to validate search terms, unless agreed upon between counsel
- Witness interviews and/or how custodians were identified
- What data was collected from custodians and centralized sources and why certain sources may have been ruled out
- Discussions with opposing counsel on ESI issues, including Meet and Confers, proposed discovery plans and letters exchanged documenting the parties efforts
- Information regarding volumes of data and inaccessibility of certain data, where applicable

It should be noted that much, if not all, of the items above could be considered counsel's work product. However, a party may not maintain that its conduct was reasonable in discovery without providing the supporting evidence. Therefore, counsel should always be mindful that your efforts to guide a client through discovery may ultimately need to be disclosed.

VII. Conclusion

E-discovery is a fairly new area of law and it is still continuing to develop. Thanks in large part to changes in federal and state court rules, however, counsel may no longer bluff his/her way through this process. By preparing yourself early and educating yourself about your clients' systems, key employees and the potential volume of ESI in the case, you will be more prepared to advise your client on a reasonable discovery plan. You will likely find that the more transparent you are with opposing counsel and the court about your process, the smoother the ride will be.

SAMPLE HOLD ORDER

PRESERVATION NOTIFICATION

ACTION REQUIRED!

ATTORNEY-CLIENT PRIVILEGED/ATTORNEY WORK PRODUCT

FOR INTERNAL PURPOSES ONLY - DO NOT FORWARD OR DISTRIBUTE

[INSERT CLIENT NAME] recently received notice of a lawsuit filed by *[INSERT PLAINTIFF NAME]* alleging *[insert allegations]* (the "Lawsuit"). In connection with the Lawsuit, you and your staff must ensure that all documents and electronically stored information in the following categories are retained and not destroyed:

- *[INSERT THE BROAD CATEGORIES OF DOCUMENTS/INFORMATION THAT MAY BE POTENTIALLY RELEVANT TO THE SUIT IN NON-LEGAL TERMS. TRY TO MAKE THIS SECTION SHORT, EASY TO UNDERSTAND AND INCLUDE ALL CATEGORIES OF DOCUMENTS THAT ARE IN SCOPE]*

Please ensure that all electronically stored information and hard copy documents in the above categories are preserved until this Hold Notice is lifted.

With respect to all electronically stored or hard copy documents that you have related to the categories outlined above, it is imperative that you **save, preserve and do not destroy, modify, overwrite or delete** any of these documents.

For the purpose of complying with your obligations pursuant to this e-mail, the term "documents" is defined as broadly as possible and includes all written, printed, typed, photographic or recorded matter of any kind and electronic documents and information, including but not limited to e-mails, Word documents, PowerPoints, information in databases and any other electronic or hard copy materials. It also includes documents that may be on your home computers related to this matter, removal media such as thumb drives, CDs or DVDs, documents stored on shared drives, your laptop or other computers maintained by you, as well as hard copy documents stored in central filing locations and archived locations.

YOUR DUTY TO RESPOND TO THIS NOTICE

ALL recipients of this email are required to read this preservation notification and **after reading it, acknowledge that you have read, understand and agree to comply with the obligations explained in the Notice**. You must provide this acknowledgement within five (5) business days by replying by e-mail to *[INSERT NAME]* and confirming that you have read and understand this notice. *[Or insert radio button if client can do that]*

[Insert Client name] takes very seriously its responsibilities to preserve documents and other information in connection with this matter. Failure to preserve such documents and other information can result in significant penalties being imposed against the company or individual employees.

The Legal Department may need to search for and collect or copy your materials that relate to this matter. In that event, we will contact you.

If you leave the company, get a new computer, have a leave of absence or transfer jobs, please notify _____ immediately so that we can ensure that relevant information is preserved.

Thank you in advance for your cooperation.