Appendix A14

Electronic Discovery: Being Prepared for Litigation

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I. Introduction

As the amount of electronically stored information (ESI) being created and received by corporations continues to grow, corporate legal departments are being challenged to address e-discovery obligations in cost-effective and efficient ways. Corporations are developing more and more systems and programs to run their operations. Additionally, corporate use of social media has added another complicating wrinkle to managing a legal department's e-discovery obligations.

There was a time when corporate attorneys might have relied on information technology (IT) staff to manage their e-discovery obligations. That is not so today. Attorneys are expected and obligated to understand the technology that affects their practice. The Sedona Conference, an organization that has provided guidance on e-discovery issues to attorneys and the judiciary, has issued a set of guidelines noting that the "ultimate responsibility for ensuring the preservation, collection, processing and production of electronically stored information rests with the party and its counsel."[1] Just last year, the ABA

1. The Sedona Principles: Second Edition Best Practices Recommendations & Principles for Addressing Electronic Document Production, comment 6d (June 2007) *available at* https://thesedonaconference.org/publication/The%20Sedona%20Principles.

revised its Model Rules of Professional Conduct to state that "[t]o maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology."[2]

Counsel need to understand their company's document management situation and they need to be prepared to preserve documents when there is a reasonable expectation that litigation or a regulatory investigation will be commenced. In-house counsel who educate themselves and become knowledgeable about their company's technology infrastructure can be an asset to an organization and work with their teams to streamline the collection and review process and implement e-discovery in an efficient manner.

II. Document Management

In order to be prepared for a possible litigation, it is crucial for a company to have in place sound document management practices. This ensures that when litigation or the threat of litigation arises, the company will know where to find relevant documents and may be better equipped to manage the cost of identifying and collecting such data. It is estimated that the amount of ESI will be forty-four times larger in 2020 than it was in 2009 (35 zettabytes compared to 800,000 petabytes).[3] It is essential for counsel to know where and how information is stored and for a company to have comprehensive document retention policies. Counsel must also be able to identify and understand data from their corporate proprietary systems and be able to identify live and archived data sources. In a document management plan, it is also crucial to understand that policy for data sources of former employees.

One of the best ways to manage a company's documents is to create a data map of all ESI that is being maintained at a company. Especially in light of the increased obligations of counsel to be abreast of the latest technology affecting their practice, in-house counsel responsible for document management should know where and how their company's ESI is stored and should have detailed summaries of all of the networks, systems, programs, and databases. There should be an understanding of the types of ESI that exist (emails, Word documents, Excel spreadsheets, PDFs, etc.), where such data is located (laptops, desktops, servers, backup tapes, iPads, smartphones, etc.), and how and where it is backed up.

If federal litigation is commenced, companies may, within weeks, find themselves in the midst of a meet-and-confer conference under

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2. MODEL RULE OF PROFESSIONAL CONDUCT 1.1, cmt. 8.
3. IDC, *The Digital Universe Decade–Are You Ready?*, May 2010.

Rule 26(f) of the Federal Rules of Civil Procedure. In the comments to Rule 26(f), the committee notes that "[i]t may be important for the parties to discuss [the clients' information] systems and accordingly important for counsel to become familiar with those systems before the conference."[4] It is therefore critical that in-house counsel, outside counsel, and any third party e-discovery vendors or consultants all have a clear understanding of the company's electronic data and internal document retention policies early on in a case so that they can understand how best to preserve and collect data for that particular matter.

In developing a data map and preparing for eventual litigation, it is important to involve the corporation's IT department; cooperation between the legal and IT departments should be encouraged during this process. As has been noted in recent case law, failure to properly communicate and coordinate with the company's IT department can be a supporting factor for a judge's imposition of sanctions.[5]

III. Document Retention Policy

In addition to understanding where and how the data is stored, it is also important to have in place a retention policy that governs the retention and automatic deletion of data being kept by a company. Having a retention policy in place is important for a variety of reasons. In fact, the first guideline of the Sedona Conference's *Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age* states: "An organization should have reasonable policies and procedures for managing its information and records."[6] It used to be more feasible for companies to save all of their ESI if they wanted to, but that option is becoming more and more untenable as the amount of data being created and stored on a daily basis continues to grow exponentially. That being said, unless a company takes proactive action, often the default measure is to retain all data. It has become clear in e-discovery circles that organizations have been over-retaining ESI even after it is no longer needed for business or legal reasons.

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4. FED. R. CIV. P. 26(f) Committee Notes.
5. *See In re* A & M Fla. Props. II, LLC, No. 09-01162 (AJG), 2010 WL 1418861 (Bankr. S.D.N.Y. 2010) (sanctioning outside counsel for failing to communicate with the client's IT department, failing to become familiar with the client's document retention policies, and failing to "gain a sufficient understanding [of] plaintiff's computer systems resulting in significantly delayed production of relevant documents").
6. The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age (Nov. 2007), *available at* https://thesedonaconference.org/publication/Managing%20Information%20%2526%20Records.

A well-planned retention policy will reduce the data that is being saved, as the company and its employees will know what they can and cannot delete. Reducing the amount of ESI can make collecting documents and complying with discovery requests much more manageable. Additionally, policies that require employees to retain certain types of documents, or all documents for a certain period of time, ensure that important documents will be available for investigation when a corporation realizes that it has a claim against another party and wants to initiate litigation.

It is also critical to understand that there is no one-size-fits-all document retention policy. Rather, a company or its consultant must tailor a document retention policy that fits that particular company. Some factors to consider include the legal requirements of the different jurisdictions where a company has employees and stores data, any industry-specific document retention requirements that might be in place, and whether there is certain data that a company might not want subject to deletion under a retention policy. Some of the industries that have detailed retention requirements include finance and health care. Broker-dealers have requirements put in place by Dodd-Frank[7] and Sarbanes-Oxley[8] that must be addressed in any retention policy. In addition, health care companies have specific retention requirements under the Health Insurance Portability and Accountability Act (HIPAA)[9] and must be aware of the various statutes of limitations affecting their industry.

For document retention policies to work and have their intended effects, implementation of the policies is as important, if not more important, than their creation. Many companies spend money and time putting in place a retention policy, only to neglect enforcement. A recent survey by Kahn Consulting of corporate employees found that only 21% of respondents had a good idea of what information needed to be retained or deleted.[10] Once they are in place, it is important for retention policies to be enforced and followed.

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7. U.S. Securities and Exchange Commission, Implementing Dodd-Frank Wall Street Reform and Consumer Protection Act, *available at* www.sec.gov/spotlight/dodd-frank/dfactivity-upcoming.shtml.
8. Ernst & Young, *The Sarbanes-Oxley Act at 10: Enhancing the Reliability of Financial Reporting and Audit Quality* (2012), *available at* www.ey.com/Publication/vwLUAssets/The_Sarbanes-Oxley_Act_at_10_-_Enhancing_the_reliability_of_financial_reporting_and_audit_quality/$FILE/JJ0003.pdf.
9. 45 C.F.R. § 160.310(a).
10. Kahn Consulting in association with ARMA International, BNA Digital Discovery and E-Evidence, *GRC, E-Discovery, and RIM: State of the Industry* – Business Trends Quarterly, and the Society of Corporate and Compliance Ethics (2012) *available at* www.kahnconsultinginc.com/images/pdfs/How_do_you_scale_an_information_Mt_Everest.pdf.

IV. Document Preservation

A. Litigation Holds

Corporate legal departments should also have in place an effective litigation hold policy, as failure to properly implement and comply with a litigation hold can subject a party and its attorneys to significant sanctions. A litigation hold is merely a communication within a company that requires that all information, both in paper and electronic form, that relates to the subject of a pending litigation be preserved for possible production.

The necessity of a litigation hold derives from the common-law duty to preserve evidence as soon as litigation is reasonably anticipated, threatened, or pending. This duty often arises before a complaint is filed, particularly for the plaintiff. Once this duty arises, a litigation hold should be issued and put into effect immediately. The task of issuing the hold typically falls on in-house counsel, as outside counsel have often not yet been retained. The requirement of a litigation hold applies whether the corporation is going to be the initiator of the litigation or is the potential defendant. Whether litigation is reasonably anticipated is based on a good faith and reasonable evaluation of facts known at the time.[11] The "reasonably anticipated" standard is an objective one, meaning the duty arises when a reasonable party would reasonably anticipate litigation, whether or not the party actually did.

It may make sense to designate a team, including an IT person, to be responsible for all litigation holds. The team should be prepared to initiate the legal hold process when needed and work with key personnel to identify the custodians of relevant records. This team should also be aware of the places where relevant evidence may exist, including employee files and workspaces, employee homes, emails, company servers, desktop and laptop hard drives, backup tapes, tablets, and smartphones. The scope of the litigation hold—that is, the subject matter of the hold and the employees who must comply with it—depends upon the facts of the case. Therefore, it is important to determine what claims and defenses will be at issue as soon as possible so that the parameters of the litigation hold can accurately reflect the issues in the litigation. It is also important to identify the key personnel in the company affected by the litigation hold.

To effect a litigation hold, counsel should send a written document hold notice to all employees in all departments who are reasonably

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11. The Sedona Conference, *The Sedona Conference Commentary on Legal Holds: The Trigger & the Process*, 11 SEDONA CONF. J. 265, 271 (2010).

likely to have relevant documents. While courts have disagreed on the appropriateness of an oral litigation hold, it is advisable to always issue a litigation hold in writing.[12] The hold should direct employees to cease the deletion of email and preserve all records of former employees that are in the company's possession, custody, or control. Employees must comply with the litigation hold even if it contradicts the company's ordinary retention policy. Corporations should also preserve backup tapes if they are the only source of relevant information or if the relevant information is not available from other more readily accessible sources.

Large companies that face significant litigation may want to consider technology, such as automated legal hold programs, to assist in the document retention process. They may also wish to consider standardizing hold orders and document collection by having written materials already in place. This makes the process quicker and also helps to avoid taking inconsistent positions in different litigations.

Once a litigation hold is in place, counsel then has a duty to monitor compliance with the hold. During this period, it is vital that counsel continue to play an active role and take "affirmative steps to monitor compliance."[13] For example, counsel should reissue the litigation hold as a reminder to employees. As discussed in *Zubulake v. UBS Warburg LLC*, counsel is expected to communicate with the client, including its IT department, and "become fully familiar with [the] client's document retention policies, as well as [the] client's data retention architecture."[14] As previously discussed, in-house counsel should already be familiar with the document retention policies and architecture of the company. It will be expected that in-house counsel can accurately convey all of this information to outside counsel.

Litigation holds must preserve all forms of electronic data. In today's world, it is important for litigation holds to take into account information created and stored on different forms of social media. Social media has become more widely used by companies in recent years, and as a result, it is becoming the subject of the ESI preservation and collection process as well. The 2012 Social Media Marketing Industry Report found that 94% of all businesses with a marketing

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12. *Compare* Scentsy, Inc. v. B.R. Chase, LLC, 2012 WL 4523112 (D. Idaho Oct. 2, 2012) ("Generally . . . orally requesting certain employees to preserve relevant documents . . . is completely inadequate."), *with* Centrifugal Force v. Softnet Commc'n Inc., 2011 WL 1792047 (S.D.N.Y. May 11, 2011) (holding that an oral instruction is sufficient).
13. Zubulake v. UBS Warburg LLC, 229 F.R.D. 422, 435 (S.D.N.Y. 2004).
14. *Id.* at 432.

department used social media as a part of their marketing platform.[15] It is estimated that nearly half of all companies will have been asked to produce information from social media for discovery.[16] Therefore, the litigation hold must take into account these less traditional sources of information, such as Facebook and Twitter and internal social media platforms. Courts are beginning to treat social media the same as other sources of ESI and will apply sanctions when social media data is not preserved the same way as other forms of ESI for purposes of a litigation hold.[17]

B. Sanctions Risk

Failure to issue and effectuate a litigation hold can lead to spoliation—the loss or destruction of potentially relevant evidence at a time when the party was under a duty to preserve. Model Rule 3.4 states that a lawyer shall not "unlawfully obstruct another's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do such an act."[18] In addition, it is well-established that a court has the authority to sanction parties for discovery misconduct under "its inherent power to manage its own affairs or under Rule 37 of the Federal Rules of Civil Procedure."[19] Rule 37 explicitly provides courts the authority to issue sanctions to parties who fail to comply with court-ordered discovery.[20] Thus, attorneys must be prepared to defend the process used to preserve relevant documents.

While other circuits have not all enunciated a standard for spoliation claims, the Second Circuit's three-part test is widely followed in

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15. Charlton College of Business Center for Marketing Research at the University of Massachusetts Dartmouth, *Social Media Surge by the 2012 Fortune 500: Increase Use of Blogs, Facebook, Twitter and More* (Sept. 2012).
16. Gartner Report, *Social Media Governance: An Ounce of Prevention* (Dec. 2010), *available at* www.gartner.com/id=1498916.
17. Arteria Property Pty Ltd. v. Universal Funding V.T.O., Inc., No. 05-4896 (PGS), 2008 WL 4513696, at *5 (D.N.J. Oct. 1, 2008) (court saw "no reason to treat websites differently than other electronic files"); Lester v. Allied Concrete Co., Nos. CL.08-150, CL09-223 (Va. Cir. Ct. Sept. 1, 2011) (attorney sanctioned $522,000 for having instructed his client to remove photos from the client's Facebook profile, while client was ordered to pay an additional $180,000 for having obeyed the instruction).
18. MODEL RULES OF PROFESSIONAL PRACTICE, Rule 3.4.
19. *In re* A & M Fla. Props. II, LLC, No. 09-01162 (AJG), 2010 WL 1418861 (S.D.N.Y. Bankr. Apr. 7, 2010) (citing Phoenix Four, Inc. v. Strategic Resources Corp., No. 05 Civ. 4837(HB), 2006 WL 14094313 at *3 (S.D.N.Y. May 23, 2006)).
20. FED. R. CIV. P. 37(b).

district courts around the country.[21] Under this test, the moving party must prove (1) that the party with control over the evidence had an obligation to preserve it at the time when it was destroyed; (2) that the records were destroyed with a "culpable state of mind"; and (3) that the destroyed evidence was relevant to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.[22]

Sanctions can come in a variety of forms and in various degrees of severity. The determination of the sanction is a matter of judicial discretion that depends on the facts of the case. Sanctions have included monetary fines, cost-shifting, exclusion of evidence, adverse inference instructions, default judgments, striking of pleadings, stay or dismissal of the action, and contempt sanctions. The harsher sanctions, such as adverse inference instructions and default judgments, are less common and require a greater degree of culpability. For example, to obtain an adverse inference instruction some courts require evidence that the destroyed documents would have been favorable to the party moving for sanctions.[23] Some courts allow a presumption that the documents were relevant where the party at fault acted with bad faith or gross negligence.[24] The Ninth Circuit is even more lenient; a mere finding of spoliation raises the presumption that the destroyed evidence was relevant and that it was adverse to the party who destroyed it.[25] In considering what spoliation sanction to

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21. *See* Apple Inc. v. Samsung Electronics Co., Ltd., No. 11-CV-01846-LHK, 2012 WL 3627731, *9 (Aug. 21, 2012).
22. *Id.* at *9.
23. Zubulake v. UBS Warburg, 220 F.R.D. 212 (S.D.N.Y. 2003). Other courts require that the party seeking the adverse inference instruction prove that the documents were destroyed in bad faith. *See* Brigham Young Univ. v. Pfizer, Inc., 282 F.R.D. 566 (D. Utah 2012).
24. *See e.g.*, Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC, No. 05-CIV-9016 (SAS), 2010 WL 184312, at *6 (S.D.N.Y. Jan. 15, 2010) ("I am employing the following burden shifting test: When the spoliating party's conduct is sufficiently egregious to justify a court's *imposition* of a presumption of relevance and prejudice, or when the spoliating party's conduct warrants *permitting* the jury to make such a presumption, the burden then shifts to the spoliating party to rebut that presumption.").
25. Phoceene Sous-Marine, S.A. v. U.S. Phosmarine, Inc., 682 F.2d 802, 806 (9th Cir. 1982); *see also* Hynix Semiconductor, Inc. v. Rambus Inc., 591 F. Supp. 2d 1038, 1060 (N.D. Cal. 2006) ("[I]f spoliation is shown, the burden of proof logically shifts to the guilty party to show that no prejudice resulted from the spoliation," as that party "is in a much better position to show what was destroyed and should not be able to benefit from its wrongdoing.").

impose, courts in the Ninth Circuit typically consider three factors: (1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party.[26]

The case law on spoliation sanctions is vast.[27] Several memorable e-discovery opinions were issued in 2004 in *Zubulake v. UBS Warburg LLC*, which established many of the basic principles previously discussed. Six years later, those principles were revisited in *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC*, where the court defined the standards for negligence and gross negligence in the discovery context.[28] The court explained that "failure to issue a *written* litigation hold constitutes gross negligence."[29] In addition, the failure to collect records "from key players constitutes gross negligence or willfulness . . . by contrast, the failure to obtain records from *all* employees . . . likely constitutes negligence as opposed to a higher degree of culpability."[30] The court also noted that the failure to collect information from the files of former employees that remain in a party's possession, custody, or control after the duty to preserve has attached, and the failure to preserve backup tapes when they are the sole source of relevant information or relate to key players, is gross negligence. However, while the court held that these failures warranted a finding of gross negligence per se, it also recognized that other action (or nonaction) may suffice, and the inquiry is case-specific.[31]

In *Chin v. Port Authority of New York & New Jersey*, the Second Circuit recently rejected the bright-line rules set out in *Pension Committee*, in lieu of a more holistic approach.[32] Specifically, the Second Circuit disagreed that failure to issue a written litigation hold was, in and of itself, gross negligence. Rather, the court held that culpability should be decided by the totality of the circumstances, with

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26. *See* Apple Inc. v. Samsung Electronics Co., Ltd., No. 11-CV-01846-LHK, 2012 WL 3627731, *9 (N.D. Cal. Aug. 21, 2012).
27. *See e.g.*, Green v. Blitz USA, Inc., No. 07-CV-372 (TJW), 2011 WL 806011 (E.D. Tex. Mar. 1, 2011) (awarding sanctions where company failed to "institute a litigation-hold of documents, do any electronic word searches for emails, or talk with the IT department regarding how to search for electronic documents.").
28. Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC, No. 05-CIV-9016 (SAS), 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010).
29. *Id.*, 2010 WL 184312, at *3.
30. *Id*.
31. *Id.* at *5.
32. Chin v. Port Auth. of N.Y. & N.J., 685 F.3d 135 (2d Cir. 2012).

failing to issue a litigation hold being a factor, and that the district court did not abuse its discretion in failing to order an adverse inference instruction.[33] Although the *Chin* opinion abrogated *Pension Committee*, the latter's guidelines are nevertheless relevant in deciding whether the facts of a case support a finding of gross negligence.

Qualcomm v. Broadcomm presents another example of the dangers of not properly executing a litigation hold. The history of this case is extensive and complicated; in sum, the case involved massive discovery abuses, including the withholding of tens of thousands of relevant documents. The court sanctioned both the company and its outside lawyers, though the sanctions against Qualcomm's attorneys were eventually lifted. The judge noted that "the lack of meaningful communication permeated all of the relationships amongst Qualcomm employees (including between Qualcomm engineers and in-house legal staff),"[34] reiterating the importance of in-house counsel having a strong relationship with the employees of the corporation, including IT personnel. The judge also took issue with the fact that "no attorney took supervisory responsibility for verifying that the necessary discovery had been conducted . . . and that the resulting discovery supported the important legal arguments, claims, and defenses being presented to the court."[35]

Rule 37(e) of the Federal Rules of Civil Procedure provides a safe harbor from sanctions in certain instances. The Rule provides that "[a]bsent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system."[36] It must be noted that this safe harbor applies only to electronic information, and once a litigation hold is in place, the routine operation of the electronic information system may not be used to destroy information that the company is required to preserve.[37] In certain circumstances, this rule protects companies that have document retention policies calling for periodic deletion of electronic data in the ordinary course of business.

However, the Civil Rules Advisory Committee is currently discussing revising Rule 37(e). Although the Committee's intent is to create uniform standards for when sanctions are appropriate in spoliation

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33. *Id.*
34. Qualcomm Inc. v. Broadcom Corp., 2010 U.S. Dist. LEXIS 33889, *10 (S.D. Cal. Apr. 2, 2010)
35. *Id.* at *11.
36. FED. R. CIV. P. 37(e).
37. *See* FED. R. CIV. P. 37(e) cmts.

cases, it is unclear if the Rule will have this intended effect.[38] Where a party has failed to preserve discoverable information, the new rule affirmatively grants district courts the power to permit additional discovery, impose sanctions, or give adverse-inference jury instructions.[39] However, under the new rule, sanctions are permitted only where the failure to preserve caused "substantial prejudice" *and* was "willful or in bad faith" *or* if it "irreparably deprived a party of any meaningful opportunity to present a claim or defense."[40] The Rule continues to list five factors that should be considered in determining if the failure to preserve was willful or in bad faith.[41] It is still not clear how and when Rule 37(e) will be revised, and there is some concern by commentators that the revision will not go far enough in lessening the likelihood of a company's being sanctioned for making a mistake regarding its retention of data.[42]

C. Proportionality

Proportionality has been a term used to describe litigation for many years. The principle of proportionality has existed since the Federal Rules of Civil Procedure were amended in 1983. Since that time, courts have had the authority to limit or disallow discovery when "the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues."[43] However, in recent years as the amount of ESI has grown, the lack of proportionality and the incredible amounts spent by parties

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38. *See* Robert D. Owen, *Skating Along the eDiscovery Cliff: Will Newly Proposed Civil Rules Amendments Help to Refocus Litigation on the Merits?* (Part I) (Feb. 11, 2013) (BNA) *available at* www.bna.com/skating-along-ediscovery-n17179872291/.
39. Proposed FED. R. CIV. P. 37(e).
40. Proposed FED. R. CIV. P. 37(e).
41. Proposed FED. R. CIV. P. 37(e). The factors are (a) the extent to which the party was on notice that litigation was likely and that the information would be discoverable; (b) the reasonableness of the party's efforts to preserve the information; (c) whether the party received a request to preserve information, whether the request was clear and reasonable, and whether the person who made it and the party engaged in good-faith consultation about the scope of preservation; (d) the proportionality of the preservation efforts to any anticipated or ongoing litigation; and (e) whether the party timely sought the court's guidance on any unresolved disputes about preserving discoverable information.
42. *See* Owen, *supra* note 38.
43. *See* FED. R. CIV. P. 26(b)(2)(C)(iii) and FED. R. CIV. P. 26 advisory committee notes.

on e-discovery and preservation costs has led to a backlash. Now, proportionality is coming up more and more in opinions and rules, as a way to rein in runaway e-discovery costs. In-house counsel need to be aware of this concept and how it might help them during the course of litigation.

The Northern District of California's E-Discovery Guidelines were put into place in 2012[44] and include guidelines for the discovery of electronically stored information, a checklist for lawyers to utilize during their Rule 26(f) meet-and-confer conference, and a model stipulated order about e-discovery. The Northern District's guidelines also emphasize the importance of proportionality. In keeping with Rules 26(b)(2)(C) and 26(g)(1)(B)(iii), the parties are told to consider the burden or expense of proposed electronic discovery compared with its likely benefit, its significance to the merits, the parties' resources, and other factors.[45] The guidelines also hold that discovery requests for production of ESI and related responses should be reasonably targeted, clear, and as specific as practicable.

The concept of proportionality is also being embraced by some states. Utah recently revised its rules to make proportionality the touchstone for civil discovery in that state. The Civil Rules Advisory Committee is now considering multiple amendments to the Federal Rules that would spotlight the role of proportionality in federal discovery practice.

The concept of proportionality is increasingly being cited in case law as well, in particular in conjunction with the concept of cost shifting.[46] As more courts write the concept of proportionality into their local rules and the Civil Rules Advisory Committee moves toward amending the Federal Rules of Civil Procedure, companies will gain increased ability to control the cost of e-discovery. Defendants would be well advised to raise concepts of proportionality when feasible in discovery battles.

D. Cost Shifting

In addition, when seeking to keep the cost of e-discovery at bay, it is also important to consider cost-shifting options. Courts will take into consideration the burdens placed upon a party when it is asked to identify, review, and produce ESI. By way of Rule 26(b)(2)(B), it has

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44. Northern District of California Guidelines for the Discovery of Electronically Stored Information (Nov. 27, 2012), www.cand.uscourts.gov/eDiscoveryGuidelines.
45. *Id.* at Guideline 1.03.
46. *See* Eisai Inc. v. Sanofi-Aventis U.S., LLC, No. 08-4168 (MLC), 2012 WL 1299379, at *6 (D.N.J. Apr. 16, 2012) (invoking proportionality standards in denying most of plaintiff's production requests).

become more common for courts to enforce or even suggest cost shifting by the parties as a method of keeping down the cost of discovery. Corporate counsel needs to be aware of times when cost shifting is appropriate and should be demanded from the opposition and also recognize situations where cost shifting is not likely to be ordered by the court. Using Rule 26(b)(2)(C), a court will weigh "the burden or expense of the proposed discovery" against "its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues."[47]

Rule 26(b)(2)(C) also provides that "[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."[48] Rule 26(b)(2)(B) states that "[t]he court may specify conditions for the discovery" of ESI from not reasonably accessible sources. Many judges have relied on this rule to require cost-shifting or cost-sharing in lieu of "limit[ing] the frequency or extent" of discovery.[49] Some judges have limited cost-shifting or cost-sharing to production of ESI from not reasonably accessible sources[50] while others have extended it to other situations.[51] When seeking to oppose or limit a request for a voluminous amount of e-discovery, counsel should consider that moving or even suggesting to shift the costs of production to the requesting party can prove to be a powerful tool to control e-discovery costs.

V. Document Collection

Once a litigation has actually been filed or an investigation is being commenced internally or by a regulator, it will become possible for a company to start collecting relevant data to be reviewed and eventually produced to the opposing party. ESI can be collected by the client or with the assistance of a vendor. Collection should be prioritized by the most relevant time periods and custodians. An important aspect of data collection involves preserving the metadata located within the

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47. FED. R. CIV. P. 26(b)(2)(B).
48. *Id.*
49. The Sedona Conference Cooperation Proclamation: Resources for the Judiciary (Oct. 2012), *available at* https://thesedonaconference.org/judicial_resources.
50. *See In re* Weekley Homes, L.P., Relator, 295 S.W.3d 309 (Tex. 2009); W.E. Aubuchon Co. v. Benefirst, LLC, 245 F.R.D. 38 (D. Mass. 2007).
51. *See* Adair v. EQT Production Co., 2012 U.S. Dist. LEXIS 75132, at *11 (W.D. Va. May 31, 2012); *see also* Adkins v. EQT Production Co., 2012 U.S. Dist. LEXIS 75133, at *9 (W.D. Va. May 31, 2012).

documents, which is the data about the data (fields such as to, from, cc, created date, modified date, etc.). During the course of collecting ESI, it is all too easy to permanently alter or delete important metadata fields. Whatever collection plan is put in place, counsel must ensure that the relevant metadata associated with a particular electronic document is collected. Legal departments should be cautious to properly collect what is needed to make or defend their case and to meet their discovery obligations, but they should also be careful not to over collect.

A. Self-Collection/Self-Preservation

Self-collection is the situation where a party collects data for a case by itself and without the assistance of any outside party, such as an e-discovery vendor. Self-preservation is often referred to as the situation where the custodians are the ones preserving and collecting the data at issue. Companies that perform self-collections may be large corporate or financial institutions that have an in-house forensic team to collect and search data for all litigations and investigations, or much smaller companies just trying to keep down costs. A majority of organizations still practice some form of self-collection and do not utilize an outside vendor.[52] While self-collection is a method that should be considered, especially for companies with regular litigation, there are some risks entailed.

When employees are asked to collect their own documents, there is the potential that documents will be destroyed or not collected because the insider has a vested interest in the litigation. Judge Shira Scheindlin recently acknowledged that "most custodians cannot be 'trusted' to run effective searches because designing legally sufficient electronic searches in [the discovery context] is not part of their daily responsibilities."[53] Custodians of information may have too *little* interest in the litigation to spend the time conducting a thorough search through all of their electronic and nonelectronic data. Relying on litigants to find and turn over responsive ESI can be problematic, especially when surveys find that only 15% of corporate employees are comfortable with their litigation hold responsibilities.[54]

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52. Fulbright & Jaworski LLP, *9th Annual Litigation Trends Survey Report* (2013).
53. Nat'l Day Laborer Organizing Network v. U.S. Immigration & Customs Enforcement Agency, 2012 WL 2878130 (S.D.N.Y., July 13, 2012).
54. Kahn Consulting, *GRP, E-Discovery, and RIM: State of the Industry–A Kahn Consulting, Inc. Survey in Association with ARMA International, BNA Digital Discovery and E-Evidence, Business Trends Quarterly, and the Society of Corporate and Compliance Ethics* (2012), *available at* www.kahnconsultinginc.com/images/pdfs/How_do_you_scale_an_information_Mt_Everest.pdf.

In recent years, courts have specifically taken aim at self-preservation, especially in the context of asking individual custodians to head up their collection efforts. Courts have criticized such self-collection as inadequate and consider it as a factor when deciding whether to impose sanctions for spoliation.[55] In *Green v. Blitz*, for example, the court ordered sanctions where a single employee of Blitz was in charge of the entire collection process.[56] Not only was the employee neither a lawyer nor IT personnel, he worked in the department that was at issue in the litigation. He also never consulted with the IT department and did not make any efforts to search electronic sources. The court ordered Blitz to pay $250,000 to the plaintiff as a civil contempt sanction and $500,000 "civil purging sanction" unless it provided a copy of the court's order to every plaintiff who sued Blitz in the previous two years.

When there is one central IT person or a team that organizes the collection internally, it becomes important for the team to have in place processes and practices that are defensible in court should there be a discovery dispute. Spoliation due to mishandled collection procedures is as much of a concern as spoliation deriving from failed preservation efforts. For example, in *Magana v. Hyundai Motor America*, Hyundai was sanctioned for failing to produce certain key documents because it collected documents only from its legal department and told the court that "no effort was made to search beyond the legal department, as this would have taken an extensive computer search."[57] In imposing sanctions for spoliation, the Washington Supreme Court noted that "a sophisticated multinational corporation, experienced in litigation" has an obligation to maintain a "document retrieval system that would enable the corporation to respond to plaintiff's requests."[58] One way to prepare for defending collection processes is to document all acts taken and processes used to collect data. It is also important for companies to know their capabilities when it comes to collecting and searching documents on their own. If the proper resources are not in place, it is often advisable to seek the assistance of an e-discovery vendor on collections.

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55. *See* Roffe v. Eagle Rock Energy GP, C.A. No. 5258-VCL (Del. Ch. Apr. 8, 2010) (finding unsatisfactory the defendants' self-selection of which files were relevant; stating that "we don't rely on people who are defendants to decide what documents are responsive").
56. Green v. Blitz U.S.A., Inc., No. 2:07-CV-372 (TJW), 2011 WL 806011 (E.D. Tex. Mar. 3, 2011).
57. Magana v. Hyundai Motor Am., 167 Wash. 2d 570, 586 (2009).
58. *National Day Laborer*, 2012 WL 2878130, at *11.

B. Vendor Collection

Vendors can be great assets when it comes to collecting, but depending upon the relationship with a vendor, there should be close oversight to determine what data actually needs to be collected. The cost of a vendor collection is often rather minimal when viewed in the context of the total e-discovery or litigation cost. However, if there is no oversight, a vendor could choose to collect more data than needed for a given case and process the data at a high cost to the client. It is important to have in place, or at least have knowledge of, your vendor pricing at the time of collection. It may be in a company's interest to have a more tailored collection, if possible, if it is paying a flat per-GB rate for the data that it will eventually host with a vendor, but if it is paying a smaller per-GB price for data collected and sent to the vendor and another per-GB amount for the data that is being sent out to the review platform and hosted, it could prove beneficial and cost-effective to allow for a broader collection.

Additionally, vendors have begun to offer a "remote collection" option for certain cases. This will allow for an IT person to come into a computer remotely to collect the data that is needed. Kits can also be sent to IT personnel to effect the collection process while preserving the appropriate metadata.

It is becoming more common for companies to rely upon vendors for collection of ESI, but even in such instances, it is important for in-house counsel and outside counsel to remember that courts will often ultimately hold the party and/or its attorneys responsible for any spoliation problems.[59] Therefore, counsel must always remain engaged and have an understanding of the technical issues at play in the preservation, identification, collection, review, and eventual production of documents in a given case.

VI. Managing and Implementing E-Discovery

The reality is that much of the cost of e-discovery is incurred after the collection stage when data is hosted on a platform, whether it be hosted by a vendor, by outside counsel, or internally by the company. It is during this stage that companies must remain proactive and work

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59. Franklin Zemel & Brett Duker, *E-Discovery: You Can't Blame Third Parties for E-Discovery Errors*, INSIDECOUNSEL, Feb. 26, 2013; *see, e.g.*, Berge Helene, Ltd v. GE Oil & Gas, Inc., 2011 U.S. Dist. LEXIS 19865 (S.D. Tex. Mar. 1, 2011) (Imposing cost shifting sanction and holding counsel responsible for certain deposition expenses as a result of the late production of approximately 70,000 pages of documents which the defendant attributed to an e-vendor error).

with their outside counsel to efficiently handle the e-discovery required for a given case. Having a team in place throughout the course of a litigation, including someone from the in-house counsel department, the in-house IT department, the outside counsel, and the vendor can be invaluable.

A. Handling Discovery and Review

If a company is large and has ongoing and frequent litigation and regulatory investigations that require significant e-discovery services, it should consider retaining one or two e-discovery vendors to ensure consistency and competitive pricing for its e-discovery services, or it should consider bringing in-house some portion of the e-discovery process.

Some large corporations will handle all portions of e-discovery internally, including collection, culling, hosting, review, and production. However, that takes significant resources and involves more risk. It is more common for companies to put in place internal collection and culling tools so that the data that is sent out for review has been significantly culled, which would result in lower processing and hosting fees. However, even the cost to bring in house early-case-assessment software or predictive-coding software would be significant and would require frequent use to justify the investment.

Another option that many companies have pursued is outsourcing their e-discovery and document review needs to a small number of "preferred vendors." The benefit of this option is that a company can potentially reduce its e-discovery costs by sending most of its work to a small number of vendors and can also put in place processes with those vendors that can be repeated from case to case.

Yet another option is designating one of the company's outside counsel as its e-discovery counsel and enabling them to manage the e-discovery process throughout its cases nationwide, providing some consistency in how e-discovery is handled in all cases. Finally, many companies allow each of their outside counsel to individually handle e-discovery themselves on each case, whether it be hosting the data themselves or with a third-party vendor. This situation can work as well, but in order to keep costs in check, it is important for in-house counsel to be a part of the vendor selection process and to monitor the case throughout and ensure that the most efficient and cost-effective methods are being used.

With regard to document reviews, the options can also run the gamut. Some large corporations host reviews internally; other companies work with one vendor to handle all e-discovery and document review; other companies work with a separate document review or managed review company that will handle the review in consultation with outside counsel; and many companies allow outside counsel to

manage the review process either with their internal review team or with personnel from a managed review company. It is also possible for review teams to be onsite at the client, onsite with the law firm, in a low-cost city to save on costs, or based off-shore to further save on costs. There are costs and benefits with each of these options as well as some ethical concerns[60] that should be considered before deciding the best choice for a given company or case.

B. Technology-Assisted Review; Predictive Coding

Companies are also increasingly making use of technology assisted review (TAR) and predictive coding to assist in culling down the incredibly large number of electronic documents that are initially collected for larger matters. Most companies make use of predictive coding through a vendor, but there are some particularly large companies that have installed this software behind the firewall. The technology has been in place for several years, but starting in 2012 courts began to approve the use of predictive coding technology to search through ESI during the course of discovery.[61]

The benefit of TAR is that it limits the data to be collected and reviewed, greatly reducing the time and cost of large discovery projects. Predictive coding software uses the intelligence gained from an initial review to understand the types of documents that are relevant to that particular matter. Then, using mathematical algorithms, the software propagates the responsiveness determinations based on what was learned from the seed set review to the full document population. This iterative process is repeated until the algorithm is perfected and the seed set can be expanded as needed. Once the software is satisfied that the algorithm is perfected, a manual review can commence.[62] Counsel must determine what percentage or groupings of documents

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60. *See, e.g.*, NYC Bar Committee on Professional and Judicial Ethics, Formal Opinion 2006-3 (approving delegation of document review work to overseas personnel so long as the attorney "at every step shoulder[s] complete responsibility for the non-lawyer's work").

61. *See, e.g.*, Moore v. Publicis Groupe, 287 F.R.D. 182 (S.D.N.Y. 2012), *adopted*, 2012 WL 1446534 (S.D.N.Y. Apr. 26, 2012) ("[C]omputer-assisted review is an available tool and should be seriously considered for use in large-data-volume cases where it may save the producing party (or both parties) significant amounts of legal fees in document review."); *see also* Global Aerospace Inc. v. Landow Aviation, L. P., Con. Case No. CL 61040 (Va. Cir. Ct. Apr. 23, 2012), (rejecting plaintiffs' objections and issuing an order allowing defendants use of predictive coding).

62. Tania Mabrey, *Conquering Post-Indictment Discovery in the Digital Age*, 27 A.B.A. CRIM. JUST. 51 (Apr. 2012).

will be reviewed manually to comply with their discovery obligations.[63] Despite its many benefits, there are also risks associated with predictive coding, and counsel should be prepared to defend using it by being able to explain the methodology used and the rationale for selecting the particular method.[64] There are other variations of TAR that can be utilized to further streamline reviews, including concept clustering (grouping documents based on content), concept search (or "find more like this"), and email threading.

Proponents of TAR believe that it saves parties time and money and is often as accurate as or more accurate than manual review.[65] TAR is definitely a tool that counsel should consider using in certain matters.

C. Budgeting for E-Discovery

As the amount of ESI that the average company hosts has grown exponentially, so have the costs of discovery. It is estimated that Fortune 500 companies each spend between $20 million and $200 million a year on legal expenses.[66] Thus, it is important to budget for these expenses and to attempt to keep costs down.

Typical e-discovery costs include the cost of collection, forensic analysis of technology, processing and filtering the data, loading the data onto a review database, hosting the data for review, and the review itself. Document review is typically the most expensive part of the process, sometimes amounting to three-quarters of the entire cost. While budgeting for e-discovery can be difficult, a few things should be kept in mind. Counsel should try to budget as early as possible, and, if possible, use similar past cases as a guideline. Still, the budget must be crafted specifically for the case at hand. For example, document-intensive cases will require more review and counsel may want to budget more money toward technology that will cull and limit the data that will need to be reviewed. Additionally, counsel should look at the e-discovery budget in relation to the entire litigation budget and proportion it accordingly.

Once an e-discovery budget has been created, counsel must work with all parties involved, including outside counsel and the vendors, to

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63. *See Moore*, 2012 WL 607412 (holding that "counsel must design an appropriate process, including use of available technology, with appropriate quality control testing, to review and produce relevant ESI").
64. *See* Victor Stanley, Inc. v. Creative Pipe, Inc., 250 F.R.D. 251 (D. Md. 2008).
65. Hayes Hunt & Jillian Thornton, *Predicting the Future of Predictive Coding*, LEGAL INTELLIGENCER, July 3, 2012.
66. Patrick G. Lee, *Pricing Tactic Spooks Lawyers*, WALL ST. J. (Aug. 2, 2011).

try to stay under budget by keeping close track of costs on a monthly basis. Adding value by putting in place such budgeting capability and being able to predict future costs based upon former cases can prove invaluable to the legal department and the entire organization.

VII. Conclusion

With the volume of data being created and stored at corporations increasing year after year, in-house counsel needs to keep up with the best practices and methods to keep the costs of e-discovery in check. As the amount of data that is subject to holds and collections continues to grow, it will become more and more important to take advantage of all of the tools at one's disposal and to properly manage the discovery team. Counsel must understand how and where data is stored, the benefits of document retention policies, and the most effective ways of collecting data when needed. It is most important that corporate counsel understand the importance of complying with e-discovery case law and guidelines and to be able to explain to colleagues and management the importance of investing in and putting in place the proper support and protocols to be able to handle e-discovery that a company may have to deal with on a regular basis. In-house counsel must invest time and resources and convince others to do the same to avoid sanctions and ending up on the front page of the paper for the wrong reasons. When a company has in place good document management policies, effective retention polices, and smooth e-discovery processes, it has taken needed steps to be prepared for litigation.

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