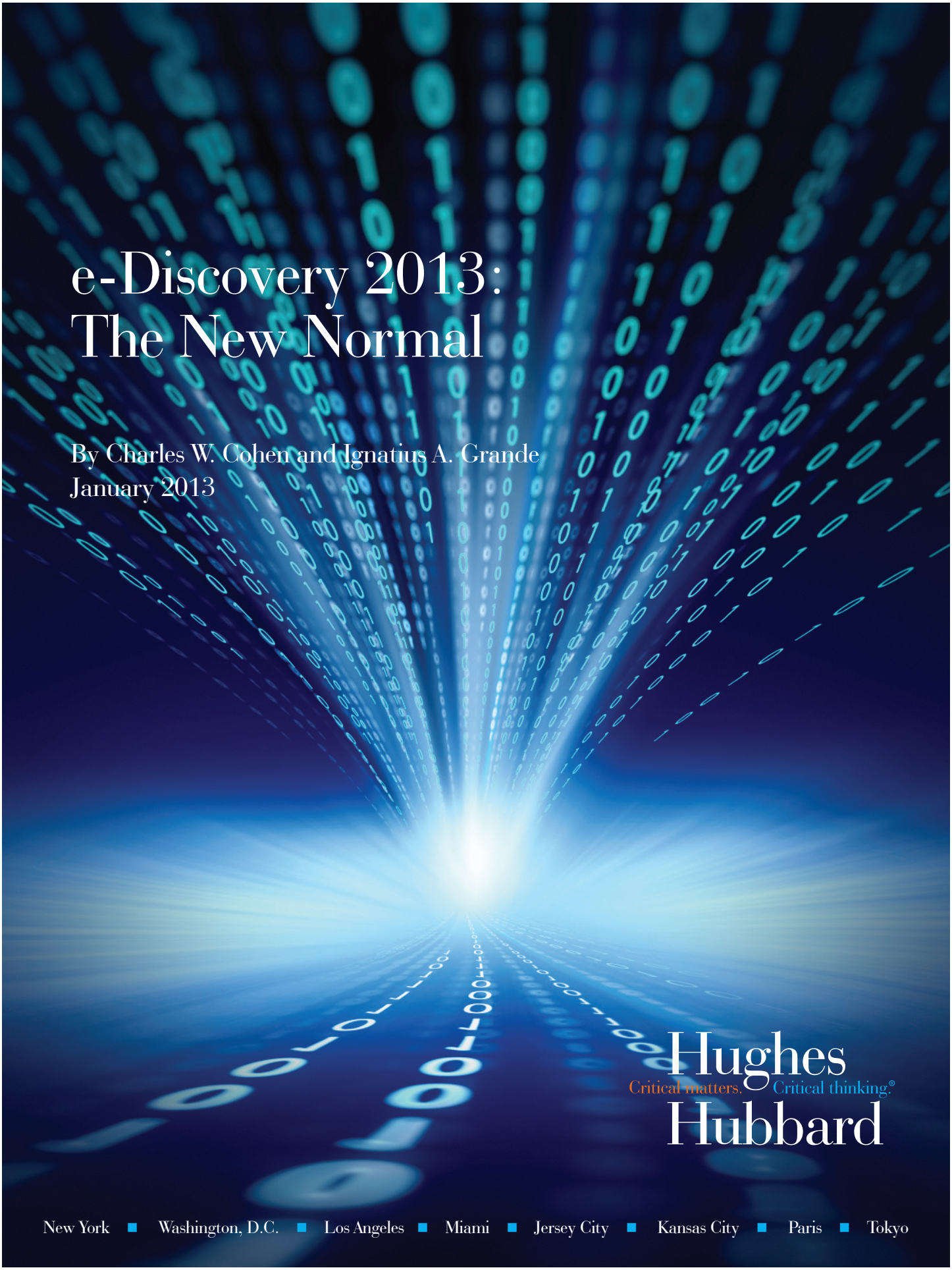

e-Discovery 2013: The New Normal

By Charles W. Cohen and Ignatius A. Grande

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For years e-discovery has been seen as "something new and different." Indeed, even the name "e-discovery" was coined to show that it is different from "discovery." But today, there is no difference. While there may still be some paper record discovery (especially in cases involving time periods from long ago), virtually all of the materials being collected, reviewed and produced in discovery today were created electronically, stored electronically, and consumed electronically. For litigators, e-discovery is the new normal.

In the world of the new normal, there are new constants. This paper focuses on two that every litigator needs to know. First, we review the issue of social media, which is a discovery source that must be considered. In some instances it is a game-changer. For example, many types of litigation (such as products liability suits) were considered "asymmetrical" because one side would have a large volume of information subject to discovery and the other side had little to none. But with virtually every plaintiff (or his or her family members) having social media materials that must be preserved and produced, discovery is again a two-way street. Second, we review the fact that the rules have changed --literally. While many know the federal rules were amended several years ago, the number of states and individual courts promulgating rules governing e-discovery is skyrocketing. And this will continue. These two areas are firmly part of our new normal.

Social Media

The way in which we communicate has fundamentally changed. Social media is now a key method of communication used by not only students and small businesses, but by the largest corporations. In fact, the 2012 Social Media Marketing Industry Report recently found that 94% of all businesses with a marketing department used social media as a part of their marketing platform.[1] Even the largest corporations have seen the benefits of social media, with 73% of Fortune 500 companies holding an active corporate Twitter account, and 66% of Fortune 500 companies running a Facebook account.[2] Social media has increasingly become part of doing business and is ingrained in the way in which we use the internet and communicate with each other. Given this reality, it is

[1] Michael Stelzner, *2012 Social Media Marketing Industry Report*, by Social Media Examiner (April 2012), http://www.socialmediaexaminer.com/social-media-marketing-industry-report-2012.

[2] *Social Media Surge by the 2012 Fortune 500: Increase Use of Blogs, Facebook, Twitter and More*, by Charlton College of Business Center for Marketing Research at the University of Massachusetts Dartmouth (Sept. 2012) (the 2012 report found that all of the top 10 companies (Exxon, Wal-Mart, Chevron, ConocoPhillips, General Motors, General Electric, Berkshire Hathaway, Fannie Mae, Ford Motors and Hewlett-Packard) consistently post on their Twitter accounts).

more important than ever before for attorneys to understand the importance of social media and other developing technologies.

Social media presents new and challenging issues in the information management portion of the document lifecycle. As companies increasingly use social media to market themselves, and their employees use it as a method of communication, it is critical for document retention policies to account for this new source of data. Many companies not only allow their employees to use social media, but even encourage its use during the workday.[3] Companies that support a social media site or network for their employees should include these information sources in their document retention policies.

Attorneys must also consider social media when they issue litigation holds. By the end of this coming year, it is likely that nearly half of all companies will have been asked to produce material from social media websites for e-discovery.[4] Courts are treating social media just like any other location where information subject to preservation obligations might be stored. For example, in Arteria Prop. Pty Ltd. v. Universal Funding V.T.O., Inc., the court stated that it could see "no reason to treat websites differently than other electronic files."[5] And when parties do not preserve social media materials, courts are issuing sanctions like they do when parties fail to preserve email or other more established sources of discovery information. For example, in Lester v. Allied Concrete Co, an attorney was sanctioned $522,000 for having instructed his client to remove photos from the client's Facebook profile, while the client was ordered to pay an additional $180,000 for having obeyed the instruction.[6] The court referred the attorney's misconduct to the Virginia State Bar and the allegations of the client's perjury to the local prosecutor. The attorney had advised the client via e-mail to "clean up" his Facebook page because "we do NOT want blow ups of other pics at trial so please, please clean up your facebook and myspace."[7] He also advised there were "other pics that should be deleted."[8] The attorney had the client deactivate the client's Facebook account so the attorney could "truthfully" represent to defense counsel that on the date the answer to the discovery was signed the client had no Facebook page.[9]

Preserving social media information may be more challenging than preserving many other sorts of electronic data. First, the data is more likely to be maintained by third party service providers such as Facebook, Twitter, and Google. This always presents an extra challenge. Second,

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[3] JD Rucker, *Should Businesses Ban or Encourage Workplace Social Media*, Business Insider (Aug. 15, 2011), http://articles.businessinsider.com/2011-08-15/strategy/30070338_1_social-media-employees-tweet.
[4] Gartner Report, "Social Media Governance: An Ounce of Prevention" (December 2010), *available at* http://www.gartner.com/id=1498916.
[5] *Arteria Property Pty Ltd. v. Universal Funding V.T.O., Inc.*, No. 05-4896 (PGS), 2008 WL 4513696, (D.N.J. Oct. 1, 2008) at *5; see also, *German v. Micro Electronics Inc.*, No. 2:12-cv-292, (S.D.Ohio Jan. 11, 2013) at 23 (finding that production of social media and blog excerpts pasted into an email was not "in a reasonably usable form," because the production stripped "the entries of their original and complete text, formatting, images, and likely the source)."
[6] *Lester v. Allied Concrete Co.,* Nos. CL.08-150, CL09-223 (Va. Cir. Ct. Sept. 1, 2011).
[7] Id. at 11.
[8] Id. at 11.
[9] Id. at 11.

the tools available to preserve the data (and associated metadata) in a sound, defensible way are in their infancy.[10] While these days it is pretty well established how to preserve, collect and produce office email and other common file types, it is close to the Wild West when it comes to social media. As e-discovery service providers continue to develop new technologies to efficiently collect this data, courts will weigh in on the scope of the attorney's and client's duties to properly preserve social media.

Social media is obviously a consideration for "defensive discovery" (responding to the discovery requests of the other side). But it is also crucial to consider social media in "affirmative discovery" (requesting information from the other side). Social media can provide a wealth of information about opposing parties, especially since many users tend to share data on a continuous basis. The importance of the impact of social media on litigation cannot be overstated. A survey recently reported that social media played a significant role in nearly 700 cases in the past two years alone.[11] And this number will only increase, and quickly.

In their zeal to find helpful information from social media, however, attorneys can run into ethical problems. It is certainly appropriate to conduct sweeping web searches for public social media sites of adverse parties or adverse witnesses. Many individuals do not lock profiles or use privacy settings on their social media, making all postings, photos, messages, and comments, etc. available to anyone on the internet. But trying to obtain "private" data other than through formal discovery requests in the litigation can be playing with fire. Many jurisdictions have held that attorneys may not "friend" people to gain access to their private social media content, though the ethics opinions are not always consistent. For example, the New York City Bar Association concluded that "an attorney or her agent may use her real name and profile to send a 'friend request' to obtain information from an unrepresented person's social networking website without also disclosing the reasons for making the request."[12] By contrast, the Philadelphia Bar Association concluded that it would be deceptive for a lawyer to ask a third party to request access to a potential witness' social networking site without first revealing the connection to the lawyer or the true purposes for seeking access.[13] The lesson is to proceed carefully, after first examining the ethics rules in place in the applicable jurisdiction or jurisdictions. But do proceed. When conducted correctly, social media discovery can be a goldmine.

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[10] Social media collection solutions that purport to be cutting edge include X1 Social Discovery (http://www.x1discovery.com/social_discovery.html), PageFreezer (http://www.pagefreezer.com) and NextPoint (http://www.cloudpreservation.nextpoint.com/solutions/social-media-discovery/).

[11] John Patzakis , *689 Published Cases Involving Social Media Evidence (with full case listing)*, Forensics Focus Blog (April 16, 2012), http://articles.forensicfocus.com/2012/04/16/689-published-cases-involving-social-media-evidence-with-full-case-listing/.

[12] New York City Bar Assoc. Formal Ethics Opinion 2010-2 (Sept. 2010).

[13] Philadelphia Bar Assoc. Professional Guidance Committee Opinion 2009-02 (March 2009).

New E-Discovery Rules and Guidelines

In 2006, the Federal Rules of Civil Procedure were amended to address e-discovery specifically. Since that time, states and individual courts have been implementing their own e-discovery rules. As of mid-2012, almost 40 states had enacted significant e-discovery rules[14] including Delaware and New York's Commercial Division and well over 40 individual federal courts have followed suit.

Some of the most influential individual rules and programs have been the Northern District of California's newly adopted E-Discovery Guidelines, the Southern District of New York E-Discovery Pilot Program and the 7th Circuit's Pilot Program.

The Northern District of California's E-Discovery Guidelines ("N.D.Cal. Guidelines") were put into place in 2012 and emphasize cooperation between the parties.[15] The Northern District of California has made available 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 intent of the N.D.Cal. Guidelines was to provide attorneys with tools "to focus them on what's important and head off unnecessary disputes," said U.S. Magistrate Judge Elizabeth Laporte of San Francisco, who chaired the bench-bar committee that developed the guidelines.[16] The N.D.Cal. Guidelines encourage parties to prioritize and phase their discovery requests and to balance the cost and burden of requests against factors like the amount in controversy, the parties' resources, the issues at stake in the litigation and the importance of the discovery to resolving the case.

The N.D.Cal. Guidelines emphasize cooperation. Under Guideline 1.02, the parties are expressly directed to cooperate "on issues relating to the preservation, collection, search, review and production of ESI.[17] The Guidelines note that an attorney can still be cooperative and at the same time zealously represent its client.[18] Cooperation in reasonably limiting ESI discovery requests on the one hand, and in reasonably responding to ESI discovery requests on the other hand, tends to reduce litigation costs and delay. The Court also stresses the importance of cooperatively exchanging information at the earliest possible stage of discovery, including during the parties' Fed. R. Civ. P. 26(f) conference.[19]

It is also noteworthy that the N.D.Cal. Guidelines emphasize the importance of proportionality. In keeping with Rules 26(b)(2)(C) and 26(g)(1)(B)(iii), the parties are told to

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[14] See Thomas Y. Allman, *E-Discovery in Federal and State Courts: The Impact of the 2006 Federal Amendments*, (June 1, 2012)
[15] Northern District of California Guidelines for the Discovery of Electronically Stored Information, Nov. 27, 2012 (http://www.cand.uscourts.gov/eDiscoveryGuidelines)
[16] Vanessa Blum, *Northern District Unveils E-Discovery Guidelines*, The Recorder (November 27, 2012).
[17] N.D.Cal. Guidelines, Guideline 1.02
[18] Id.
[19] Id.

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.[20] 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 U.S. District Court for the Southern District of New York implemented a similar pilot program in November 2011 (the "SDNY Program").[21] Like the Northern District of California Guidelines, the SDNY Program requires parties to discuss e-discovery during the initial case management conference. At the moment, the SDNY Program is currently limited to "complex civil cases," which includes class actions, multi-district litigation, or cases involving certain areas of law specified in the court's standing order.

The SDNY Program reduces motion practice and flags issues requiring judicial intervention at an earlier stage in the litigation. It requires a very detailed "Joint Electronic Discovery Submission" for complex civil cases that involve ESI that will govern the management of e-discovery in the matter. Counsel must certify they are "sufficiently knowledgeable in matters relating to their clients' technological systems to discuss competently issues relating to electronic discovery."[22] Also, the submission must include the date(s) of meet and confer(s), provide detailed information on the areas of agreement, and list issues unresolved after the meet-and-confer process is completed. Under the order, parties must discuss the identification of potentially relevant data, the parties' computer systems and programs, and data maintenance, and to exchange keyword lists, hit reports, and responsiveness rates. The program was recently renewed for an additional 18 month period.

The Seventh Circuit Electronic Discovery Pilot Program ("7th Circuit Program") has attempted to clarify the scope of ESI preservation and production of electronic data by providing a list of presumptive preservation obligations. The 7th Circuit program was put in place in 2009 and is a multi-phase, multi-year program "to develop, implement, evaluate, and improve pretrial litigation procedures that would provide fairness and justice to all parties while seeking to reduce the cost and burden of electronic discovery consistent with Rule 1 of the Federal Rules of Civil Procedure."[23] The Program focuses on the development of "Principles Relating to the Discovery of Electronically Stored Information" and a Proposed Standing Order.

Phase One of the 7th Circuit Program ran from October 2009 through March 2010, and involved 13 judges from the Northern District of Illinois implementing the principles set forth in the program ("Principles") in 93 civil cases. At the end of this phase, a survey was completed by program participants and, based on lessons learned in Phase One, modifications were made to the

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[20] N.D.Cal. Guidelines, Guideline 1.03
[21] Pilot Project Regarding Case Management Techniques for Complex Civil Cases in the Southern District of New York (October 2011) (http://www.nysd.uscourts.gov/cases/show.php?db=notice_bar&id=261)
[22] Id.
[23] Seventh Circuit Electronic Discovery Pilot Program Committee website, *available at* http://www.discoverypilot.com/about-us.

Principles prior to Phase Two. Phase Two of the Program ran from May 2010 through May 2012, with 40 participating judges and 296 cases from across the Seventh Circuit. The Final Report on Phase Two, noted that much was accomplished and found that "[b]oth Phase One and Phase Two surveys' results show in those cases in which the Principles had a perceived effect, those effects were overwhelmingly positive with respect to assisting attorneys' cooperation and enhancing their ability to resolve disputes amicably, their ability to obtain relevant documents, and their ability to zealously represent their clients, as well as providing fairness to the process."[24]

Some of the relevant principles of the 7th Circuit Program include Principle 2.04 (Scope of Preservation), which spells out what goes into the duty to preserve information and lists the types of ephemeral and other ESI which are presumptively not required to be preserved. Principle 2.01, puts a duty on counsel to meet and confer regarding e-discovery-related issues and to identify disputes for early resolution. Prior to the Rule 26(f) meet and confer conference, attorneys for each party are required to "review and understand" their client's IT systems.[25] Courts are empowered to impose sanctions if counsel or a party has failed to cooperate or participate in the conference in good faith. Principle 2.01 further requires that counsel discuss the identification of ESI related to a given case as well as the identification and filtering of an initial subset of ESI "most likely to contain the relevant and discoverable information."[26] Counsel must also discuss the scope of discoverable ESI to be preserved, the format for preservation and production of ESI, the potential for phased discovery to help reduce costs, and "the potential need for a protective order and any procedures to which the parties might agree for handling inadvertent production of privileged information and other privilege waiver issues pursuant to Rule 502(d) or (e) of the Federal Rules of Evidence."[27]

Many states have also taken actions to deal with e-discovery. In addition to local district courts and circuits pushing ahead on comprehensive e-discovery rules and guidelines, many states have begun to embrace the federal rules and case law, while others have put their own detailed legislation into place. More and more states are adopting statutes and court rules addressing the discovery of electronically stored information. States that have put in place rules or regulations have used approaches ranging from judicial action based upon the input of a committee to direct legislative action by the legislative branch. As of June, 2012, almost forty states had enacted e-discovery rules, the majority of which are based in whole or in substantial part on the 2006 amendments to the Federal Rules.[28]

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[24] Seventh Circuit Electronic Discovery Pilot Program Report on Phase Two, May 2010 - May 2012, *available at* www.discoverypilot.com

[25] Seventh Circuit Electronic Discovery Pilot Program, Principles Relating to the Electronic Discovery of Information, Principle 2.01.

[26] Id.

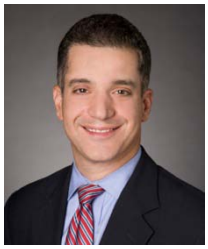
[27] Id. at Principle 2.01(a)(5).

[28] Navigating the Hazards of E-discovery: A MANUAL FOR JUDGES IN STATE COURTS ACROSS THE NATION, Institute for the Advancement of the American Legal System University of Denver (2012), available at http://iaals.du.edu/initiatives/rule-one-initiative/research/navigating-the-hazards-of-e-discovery-a-manual-for-judges-in-state-courts-a

There is no question that states and local districts and circuits have been very active in recent years in attempting to streamline the discovery process and focus attorneys on understanding the e-discovery at issue in their cases. Whether or not these actions have helped to make the e-discovery process more effective and cost-efficient remains to be seen. But what is certain is that these days it is vitally important to check the local rules of the court you are in to see if there are any special e-discovery rules. It is just the new normal.

January 24, 2013

Charles W. Cohen is a partner in the New York office of Hughes Hubbard. He also serves as the co-chair of Hughes Hubbard's eDiscovery practice group.



Ignatius A. Grande is Senior Discovery Attorney/Director of Practice Support at Hughes Hubbard and co-chair of the New York State Bar Association Social Media Law Committee.

Hughes Hubbard & Reed LLP
One Battery Park Plaza | New York, New York 10004-1482 | 212-837-6000