PRESERVATION OF ELECTRONIC EVIDENCE:

Legal and Ethical Obligations Involving Electronic Discovery And the Proposed Federal Rules of Civil Procedure

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TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. THE RIGHT TO ELECTRONIC DISCOVERY 2

III. THE DUTY TO PRESERVE 5

IV. ETHICAL CONCERNS IN ELECTRONIC DISCOVERY 7

A. Ethical Duty to Preserve and Produce Documents 7

B. The Importance of Protecting Against Inadvertent Disclosure 8

C. Measures to Deal With the Realities of Electronic Discovery and the Risk of Inadvertent Privilege Waiver 10

V. PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE FOR THE YEAR 2006: ADDRESSING ELECTRONIC DISCOVERY 11

A. Introduction 11

B. Evaluating and Addressing Issues Relevant to Electronic Discovery at the Beginning of Litigation: Rules 16(b), 26(a), 26(f) 13

C. Issues Surrounding Discovery of Electronically Stored Information That is Not Reasonably Accessible: Rule 26(b)(2) 16

D. Asserting Claims of Privilege and Work Product Protection After Production: Rule 26(b)(5) 22

E. Electronically Stored Information and its Impact on Interrogatories and Requests for Production: Rule 33, Rule 34(a) and Rule 34(b) 24

1. Rule 33 24

2. Rule 34(a) 25

3. Rule 34(b) 26

F. Sanctions for the Loss of Electronically Stored Information: Rule 37(f) 28

G. Third-Party Subpoenas Requesting Electronic Information: Rule 45 31

VI. PENALTIES FOR FAILING TO REPLY WITH DISCOVERY REQUESTS 32

A. Spoliation of Evidence 32

1. Authority to Sanction Spoliation 33

a. Determining Whether to Sanction 34

2. The Purposes of Sanctions 34

a. How Courts Determine What Sanctions are Appropriate 35

B. Types of Sanctions 36

1. Adverse Inference Instructions 36

2. Fines/Attorneys Fees 40

3. Default Judgment/Dismissal 41

VIII. CONCLUSION 43

I.
INTRODUCTION

Today, businesses rarely create and store paper documents. Well over ninety percent of all information is created in digital form on computers.[1] This shift has created unforeseen difficulties for the broad discovery upon which our civil litigation system depends.[2] As a result of the increasing use of electronic media, "the universe of discoverable material has expanded exponentially," and discovery costs have skyrocketed.[3] Discovery is no longer "just about uncovering the truth, but also about how much of the truth the parties can afford to disinter."[4]

The duty to preserve and produce documents relevant to litigation is not new. However, the use of electronic media has greatly broadened the scope of that duty. Because the amount of information has increased exponentially, the difficulty in identifying, preserving, and producing information that is relevant to a lawsuit is greater than it has ever been.

Electronic discovery also presents attorneys with serious ethical dilemmas. Attorneys have an ethical duty to aid and counsel clients in truthfully and fully responding to discovery requests. Therefore, if an attorney breaches his legal duties in this regard, he also commits an ethical breach. In addition, every attorney has an ethical duty to protect his client's privileged information. The sheer volume of electronic information greatly increases the risk of inadvertent disclosure of privileged information and the waiver of that privilege. Despite the increased

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[1] Mary Kay Brown & Paul D. Weiner, *Digital Dangers: A Primer on Electronic Evidence in the Wake of Enron*, 30 Litigation 1, at 25 (ABA Section of Litigation ed. Fall 2003) (quoting *In re Bristol-Myers Squibb Securities Litigation*, 205 F.R.D. 437, 440 n.2 (D.N.J. 2002)).

[2] *See Zubulake v. U.B.S. Warburg, L.L.C. (Zubulake I)*, 217 F.R.D. 309, 311 (S.D.N.Y. 2003).

[3] *Zubulake I*, 217 F.R.D. at 311.

[4] *Id.* ExxonMobil's in-house counsel recently estimated that his company spends $1.9 million a month creating and preserving electronic information on backup tapes for litigation. *See Judicial Panelists Debate Need for Rules Covering Discovery of Electronic Data*, 22 Empl. Discrim. Rep. (BNA) 9, at 252 (March 3, 2004).

burden in reviewing documents, attorneys still have an ethical obligation to take every reasonable step to ensure that all privileged documents are identified and withheld.

This paper deals with the peculiar legal and ethical implications of the shift to electronic discovery. It discusses the most common and serious problems stemming from electronic discovery that courts, attorneys and litigants must face. To the extent possible, it focuses on employment discrimination cases.[5] Because the courts have not uniformly dealt with electronic discovery issues, this paper is not intended to be, nor could it be, a comprehensive treatment of these issues.

II.
THE RIGHT TO ELECTRONIC DISCOVERY

Courts have consistently held that information stored in electronic format is discoverable under the Federal Rules of Civil Procedure ("Federal Rules") as long as it is within the scope defined by the Rules. Rule 26 permits parties to "obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party." [6] The 1970 Advisory Committee Notes regarding Rule 34(a) specifically recognizes that discovery procedures under the Federal Rules apply to electronic data and information.[7] Similarly, the 1993 Advisory Committee Notes to Fed. R. Civ. P. 26(a)(1)(B) indicate that parties should disclose the "nature

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[5] Electronic discovery, particularly of e-mail, is critical in modern employment litigation. *See* Samuel Thumma & Darrel Jackson, *The History of Electronic Mail in Litigation*, 16 Computer & High Tech. L.J. 1 (Nov. 1999).

[6] Fed. R. Civ. P. 26(b)(1).

[7] Fed. R. Civ. P. 34(a) Advisory Committee's Notes, 1970, in relevant part provided: "The inclusive description of "documents" is revised to accord with changing technology. It makes clear that Rule 34 applies to electronic data compilations from which information can be obtained only with the use of detection devices, and that when the data can as a practical matter be made usable by the discovering party only through a respondent's devices, respondent may be required to use his devices to translate the data into usable form."

and location" of "computerized data and other electronically recorded information."[8] Rule 26(b)(2) sets out the general limitations on the scope of discovery. Discovery "shall be limited by the court" if:

> (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from other source that is more convenient, less burdensome, or less expensive; (ii) the parties seeking discovery have had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation and the importance of the proposed discovery in resolving the issues.

Discovery requests targeting non-privileged, relevant electronic information, and which do not run afoul of Rule 26(b)(2), are appropriate under the Federal Rules. For example, courts have routinely held that electronic information is discoverable,[9] in forms such as computer magnetic tapes, disks, computer files, e-mails, backup systems, hard drives, etc..[10] Moreover, due to the unique nature of computerized data even "deleted" electronic information is subject to discovery because it is often saved on a backup or emergency system.[11] Further, discovery of

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[8] Fed.R.Civ.P. 26(a)(1)(B) Advisory Committee's Notes 1993. This requirement "by its plain language only goes to data *already* in electronic form at the time the mandatory disclosure is to be made." *In re Bristol Meyers Squibb Securities Litigation*, 205 F.R.D. 437, 441 (D.N.J. 2002).

[9] *See, e.g*., *Zubulake I,* 217 F.R.D. at 317 (plaintiff "is entitled to discovery of the requested e-mails so long as they are relevant to her claims"); *Antioch Co. v. Scrapbook Borders, Inc.,* 210 F.R.D. 645, 652 (D. Minn. 2002) ("it is a well accepted proposition that deleted computer files, whether they be e-mails or otherwise, are discoverable"); *Rowe Entertainment, Inc. v. The William Morris Agency, Inc.,* 205 F.R.D. 421, 427, 431 (S.D.N.Y. 2002) ("electronic documents are no less subject to disclosure than paper records."); *McPeek v. Ashcroft,* 202 F.R.D. 31 (D.D.C. 2001) ("During discovery, the producing party has an obligation to search available electronic systems for information demanded.").

[10] *Rowe Entertainment,* 205 F.R.D. 421 (e-mail); *McPeek,* 202 F.R.D. 31 (computer backup tapes); *Playboy Enterprises v. Welles*, 60 F.Supp.2d 1050 (S.D. Cal. 1999) (hard drives); *Fauteck v. Montgomery Ward & Co.,* 91 F.R.D. 393 (electronic personnel files and computerized database).

[11] *See Simon Property Group, L.P. v. MySimon, Inc.,* 194 F.R.D. 639, 640 (S.D. Ind. 2000) ("computer records, including records that have been deleted, are documents discoverable under Fed. R. Civ. P. 34."); *Playboy Enterprises,* 60 F.Supp.2d at 1053 ("Plaintiff needs to access the hard drive of Defendant's computer only because

electronic information may be available even though a responding party has previously produced responsive documents in another form, such as paper.[12] Courts, in some cases, have also ordered a responding party to "manufacture" electronic documents if the party did not have the data in electronic form. However, such an order is often conditioned on the requesting party's willingness to pay for the creation of such documents.[13]

However, if a request does not comply with the requirements of Rule 26, courts have not hesitated to deny a requesting party's motion to compel.[14] For example, in *Storch v. IPCO Safety Products Company of Pennsylvania, Inc*., 1997 WL 401589 (E.D. Pa. July 16, 1997), the District Court for the Eastern District of Pennsylvania, in an FMLA retaliation suit, denied the

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Defendant's action in deleting those e-mails made it currently impossible to produce the information as a "document").

[12] *See, e.g., National Union Electronic Corp. v. Matsushita Electric Industrial Co.*, 494 F.Supp. 1257, 1262 (E.D. Pa. 1980) (the requesting party was entitled to a computer readable tape even though the responding party had already provided the same information in paper form); *Haroco, Inc. v. American National Bank and Trust, Co. of Chicago*, 662 F.Supp. 590, 596 (N.D. Ill. 1987), *vacated in part*, 1987 WL 17486 (N.D. Ill. Sept. 23, 1987) (the requesting party was entitled to discovery of information in electronic form even though the responding party had provided the same information in paper form).

[13] *See Anti-Monopoly, Inc. v. Hasbro, Inc.*, 1995 WL 649934, at *1 (S.D.N.Y. Nov. 3, 1995) ("the producing party can be required to design a computer program to extract data from its computerized business records, subject to the court's allocation of costs"); *Anti-Monopoly, Inc. v. Hasbro, Inc*., 1996 WL 22976, at *2 (S.D.N.Y. Jan. 23, 1996) (requesting party had to pay for the costs responding party incurred in the "creation" of the electronic data); *In re Air Crash Disaster at Detroit Metropolitan Airport on August 16, 1987*, 130 F.R.D. 634, 635 (E.D. Mich. 1989) (responding party required to create disk but the requesting party was to "pay all reasonable and necessary costs that may be associated with the manufacturing of the computer readable tape."); *Williams v. E. I. DuPont de Nemours & Co.,* 119 F.R.D. 648, 651 (W.D. Ky. 1987) (ordering requesting party to split the costs of manufacturing computerized information).

[14] *See, e.g., McCurdy Group, LLC v. American Biomedical Group, Inc*., 9 Fed. App. 822, U.S. App. Lexis 10570, at *23 (10th Cir. May 21, 2001) (upholding district court's refusal to permit a physical inspection of the plaintiff's hard drive); *In Re General Instrument Corporation Securities Litigation*, 1999 WL 1072507, at *6 (N.D. Ill. Nov. 18, 1999) (burden or expense of the additional discovery of e-mails outweighed its likely benefit when among other things the responding party had already turned over thousands of pages of e-mails); *Westrienen v. Americontinental Collection Corp*., 189 F.R.D. 440, 441 (D. Or. 1999) (plaintiffs were not entitled to "unbridled access [to] defendants' computer system," instead, "plaintiffs should pursue other less burdensome alternatives"); *Alexander v. FBI,* 188 F.R.D. 111, 117 (D.D.C. 1998) (production of backup in archived e-mails, and deleted or archived computer files was denied because the production could not lead to the discovery of any information responsive to the request for production). *Haroco, Inc.*, 662 F.Supp. at 596 (production not required because computerized tapes were of marginal usefulness).

plaintiff's motion to compel computerized data regarding sales figures of other employees because the plaintiff could not show how it would be relevant to her claim.[15]

In addition to the Federal Rules providing for electronic discovery, some states and federal districts have adopted special rules regarding electronic discovery. For example, to obtain information in electronic or magnetic form under Rule 196.4 of the Texas Rules of Civil Procedure, the requesting party must specifically request production of electronic or magnetic data and specify the form in which it is requested.[16] Likewise, State of Virginia Supreme Court Rule 3A:12 provides that responsive information stored in electronic form need only be produced in electronic form if a hard copy is unavailable.[17] Under Local Rule 26.1 of the Eastern and Western Districts of Arkansas, the Rule 26(f) report must disclose a parties' intent to request information contained in electronic or computer based form.[18] Similarly, under Local Rule 26.1 of the District of Wyoming, the requesting party must disclose their intent to discover computer based or electronic information and identify the categories of information sought.[19]

III.
THE DUTY TO PRESERVE

Because electronic evidence is just as discoverable as any other, litigants and their attorneys clearly have a duty to preserve any and all electronic documents that may be relevant to pending or reasonably anticipated litigation. Relevance is broadly defined in the electronic

[15] 1997 WL 401589, at *2.

[16] Tex. R. Civ. P. 196.4.

[17] Va. S. Ct. R. 3A:12(b).

[18] D. Ark. Local Rule 26.1(4).

[19] D. Wyo. Local Rule 26.1(d)(3)(A).

discovery context.[20] Although the general duty to preserve relevant documents is clear, courts do not agree on when the duty arises. In making this determination, courts generally focus on whether the party had notice that the information in question was relevant to pending or reasonably anticipated litigation. It is this particular determination—when a party is put on notice that certain documents are relevant to pending or anticipated litigation—upon which the courts disagree.[21]

Despite the uncertainty, it is critical for litigants and their counsel to identify when the duty arises because once it does, they generally have a duty to preserve all unique, relevant evidence.[22] Counsel, in particular, must be careful to identify when the duty arises because "[o]nce on notice, the obligation to preserve evidence *runs first to counsel*, who then has a duty to advise and explain to the client its obligations to retain pertinent documents that may be relevant to the litigation."[23]

A party is clearly put on notice of litigation and has a duty to preserve relevant documents when a complaint is filed and that party is served. The preservation duty may be held to arise much earlier than the filing or service of a complaint, depending on the jurisdiction. By way of example, courts have held that a party is put on notice from similar litigation in another

[20] *See, e.g., Zubulake v. U.B.S. Warburg, L.L.C. (Zubulake IV)*,--F.R.D.--, 2003 WL 22410619, at *3 (S.D.N.Y. Oct. 22, 2003) (quoting *William T. Thompson Co. v. General Nutrition Corp., Inc.*, 593 F.Supp. 1443, 1455 (C.D. Cal. 1984) (internal quotation omitted) ("[A]nyone who anticipates being a party or is a party to a lawsuit may not destroy unique, relevant evidence that might be useful to an adversary. While a litigant is under no duty to keep or retain every document in its possession…it is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request).

[21] Adam I. Cohen & David J. Lender, ELECTRONIC DISCOVERY: LAW AND PRACTICE § 3.01 (Aspen Publishers, 1st ed. 2004).

[22] *See Zubulake IV*, 2003 WL 22410619, at *3 (litigant and counsel must preserve any unique evidence that know or should know is relevant to litigation).

[23] *Telecom International America, Ltd. v. AT&T Corp.*, 189 F.R.D. 76, 81 (S.D.N.Y. 1999) (emphasis added).

jurisdiction,[24] or even when an informal letter from opposing counsel warns of possible future litigation.[25] In the employment context, one court has recently ruled that a defendant-employer's duty to preserve evidence relevant to an employment discrimination claim arises, "at the latest," when the plaintiff files an EEOC charge.[26] Thus, counsel and their clients should take care to begin preserving relevant documents as soon as they reasonably anticipate litigation, even if that reasonable anticipation occurs prior to the plaintiff filing suit. Otherwise, they place themselves at risk of breaching the preservation duty and spoliating evidence, for which counsel and litigants may be sanctioned.

IV.
ETHICAL CONCERNS IN ELECTRONIC DISCOVERY

A. Ethical Duty to Preserve and Produce Documents

In addition to their legal duty, attorneys also have an ethical obligation to ensure proper document preservation and production. ABA Model Rule of Professional Conduct 3.4(a) states that "[a] lawyer shall not: unlawfully obstruct another party'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 any such act."[27] The Comment to Rule 3.4(a) elaborates that "[t]he procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the

[24] *U.S. v. Koch Industries, Inc.*, 197 F.R.D. 463, 466, 482 (N.D. Ok. 1998) (finding that deposition testimony in previous lawsuit, of which in-house counsel was aware, placed company on notice that future litigation over its alleged mismeasurement of oil produced was likely and thus gave rise to duty to preserve relevant documents).

[25] *William T. Thompson Co.*, 593 F.Supp. at 1446 (finding party was put on notice of relevance of destroyed documents by opposing counsel's letter three weeks before complaint filed).

[26] *Zubulake IV*, 2003 WL 22410619, at *3 (the court actually held that the preservation duty arose earlier because the evidence demonstrated that "the relevant people"—the plaintiff's former supervisors and co-workers—anticipated litigation before the EEOC charge was filed).

[27] MODEL RULES OF PROF'L CONDUCT R. 3.4(a) (1983).

adversary system is secured by prohibitions against destruction or concealment of evidence,…obstructive tactics in discovery procedure, and the like."[28]

Many states have adopted similar rules. For example, Texas Disciplinary Rule of Professional Conduct 3.04(a)[29] is nearly identical, except that the language specifically applies to evidence in anticipation of a dispute that a competent attorney would believe has potential or actual evidentiary value.[30] Clearly, attorneys have an ethical obligation to guard against the destruction of relevant evidence, including the obligation not to counsel or assist their clients in doing so.[31]

B. The Importance of Protecting Against Inadvertent Disclosure

ABA Model Rule of Professional Conduct 1.6(a) provides that "[a] lawyer shall not reveal information relating to representation of a client unless the client consents after consultation."[32] This includes information protected by the attorney-client privilege.[33] Therefore, every attorney has an ethical obligation to safeguard their client's information that falls under the attorney-client privilege. Yet, the explosion in electronic document creation and communication has rendered this task more difficult than ever. Attorneys now must often conduct a privilege review of thousands of electronic documents in complex cases. Mistakes are bound to happen, and some privileged documents will inevitably be disclosed to the opposing

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[28] MODEL RULES OF PROF'L CONDUCT R. 3.4(a) cmt. 1 (1983).

[29] TEX. DISCIPLINARY R. PROF'L CONDUCT R. 3.04(a), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (Vernon Supp. 1997).

[30] *Id.* Texas adopted Model Rule 3.4(a)'s Comment 1 verbatim.

[31] Some federal courts have codified this ethical duty in their local rules. *See, e.g., Danis*, 2000 WL 1694325, at *1 (threshold duty to preserve "finds expression in this Court's Rules of Professional Conduct," which is a verbatim adoption of the ABA's rule).

[32] MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (1983).

[33] MODEL RULES OF PROF'L CONDUCT R. 1.6(a) cmt. 16 (1983).

party. Despite the difficulty in ensuring against inadvertent disclosure in such circumstances, attorneys have an ethical duty to their clients to do so.

Courts take differing approaches to determining whether or not the inadvertent disclosure of privileged documents waives attorney-client privilege. Generally, the approaches fall into one of three categories. First, some courts hold that inadvertent disclosure never waives attorney-client privilege.[34] Second, other courts have adopted a '"strict accountability"' rule and hold that the privilege is always waived by the inadvertent disclosure of privileged documents.[35] Third, many courts have adopted a middle road/balancing approach to determine when inadvertent disclosure waives attorney-client privilege.[36] Except in those jurisdictions that have adopted the "never waived" approach, the legal consequences for the client can be severe for counsel's breach of the ethical duty to ensure preservation of the attorney-client privilege.

For example, in *Amgen Inc. v. Hoechst Marion Roussel, Inc.*, 190 F.R.D. 287 (D. Mass. 2000), the District Court for the District of Massachusetts held that the attorney-client privilege had been waived by the inadvertent disclosure of 200 privileged documents out of a total of 200,000 reviewed, of which 70,000 were produced to the opposing party in a complex patent suit.[37] After reviewing the three general approaches described above, the court adopted the middle road/balancing approach because it provides flexibility and "accounts for the errors that inevitably occur in modern document-intensive litigation."[38] The court then identified and

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[34] *See Amgen Inc. v. Hoechst Marion Roussel, Inc.*, 190 F.R.D. 287, 290 (D. Mass. 2000) (discussing cases where courts hold the attorney-client privilege can never be waived by an attorney's inadvertent disclosure).

[35] *See Amgen Inc.*, 190 F.R.D. at 290.

[36] *See id.* at 291.

[37] 190 F.R.D. at 292-93.

[38] *Id.* at 292.

applied five factors that courts using this approach consider, "including (1) the reasonableness of the precautions taken to prevent inadvertent disclosure, (2) the amount of time it took the producing party to recognize its error, (3) the scope of the production, (4) the extent of the inadvertent disclosure, and (5) the overriding interest of fairness and justice."[39]

C. Measures to Deal With the Realities of Electronic Discovery and the Risk of Inadvertent Privilege Waiver

In response to the increased risk of inadvertent disclosure in electronic discovery, some states have revised their discovery rules to protect litigants against waiver of the attorney-client privilege. For instance, Texas recently revised its procedural rules to protect against privilege waiver in the event of inadvertent disclosure. Under Rule 193.3(d), if privileged documents are inadvertently produced without the intent to waive a claim of privilege, the privilege is not waived if the producing party requests return of the documents within ten days (or shorter time on court order) of the discovery of the inadvertent production. If the producing party amends its response to the production request and asserts a privilege over the inadvertently produced documents and the court determines that the privilege exists, then there is an ethical requirement that the party receiving the information take affirmative steps to return all versions of the document, including any electronically reproduced copies or images.[40]

A U.S. Judicial Conference Committee approved a package of rule amendments on April 16, 2004, to deal with the realities of electronic discovery. One of the amendments approved would change Federal Rule of Civil Procedure 26 to allow the disclosing party to retrieve inadvertently disclosed privileged documents and would protect against privilege

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[39] *Id.*

[40] *See* TEX. R. CIV. P. 193.3(d). *See also Morin-Spatz v. Spatz*, 2002 WL 576513, at *9-10 (Tex.App.—Dallas April 18, 2002). The ABA has also taken the position that the party receiving the privileged documents has an ethical duty not to read them and to return them. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-368 (1992).

waiver. In fact, the receiving party would be required to return the information if the producing party requests it. If the receiving party does not return the documents, it will have the burden of proving to the court why it is entitled to them. However, the proposed rule amendments will not take effect until and unless they are approved by the Judicial Conference's standing rules committee, the full conference, the United States Supreme Court, and Congress. The earliest the proposed changes could become effective is December 2006.[41]

For now, some attorneys attempt to protect against waiver by seeking an agreement with opposing counsel that neither party waives any privilege when they inadvertently disclose privileged documents. In addition, counsel may seek a court order to the same effect. In the end, thorough and competent document review remains the best protection against ethical breaches and privilege waiver by inadvertent disclosure.

V.
PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE FOR THE YEAR 2006: ADDRESSING ELECTRONIC DISCOVERY

A. Introduction

On September 20, 2005, the full Judicial Conference of the United States approved the amendments to the Federal Rules of Civil Procedure concerning electronic discovery. The judicial conference is the judiciary's main policymaking body and its approval is required before the amendments can be enacted. The amendments should become effective on December 1, 2006, if the Supreme Court promulgates them by May 1, 2006 and if Congress takes no action to de-rail their enactment.

[41] *See Judicial Conference Panel Backs Changes to Accommodate Discovery of Electronic Data*, 22 Empl. Discrim. Rep. (BNA) 16, at 447 (April 21, 2004).

The Rule amendments[42] address discovery of electronically stored information, including revisions of Rules 16, 26, 33, 34, 37 and 45. As set forth in various reports by the Civil Rules Advisory Committee ("Committee"), the purpose of the amendments is to amend the Rules to better accommodate electronic discovery – that is discovery concerning information stored in or exchanged through computers. Two broad themes are consistent throughout the proposed amended Rules. First, electronically stored information is different from data recorded on paper. For instance, it is (i) retained in immensely greater volume than hard-copy documents; (ii) electronically stored information is dynamic rather than static; and (iii) electronically stored information may be incomprehensible when separated from the system that created it. Second, these differences from traditional hard-copy information cause problems that the Rule amendment were designed to address.[43]

The Committee began by publishing six categories of proposed amendments:

(i) amending Rules 16 and 26(f) to require attention to electronic discovery issues while still early in the litigation process;

(ii) amending Rule 26(b)(2) to provide better management of discovery in electronically stored information;

(iii) amending Rule 26(b)(5) to establish a procedure for assertions of privilege after production;

(iv) amending Rules 33 and 34 to make their application to electronically stored information more tangible;

(v) amending Rule 37 to clarify the use of the sanctions rules for abuses of discovery when dealing with electronically stored data; and

(vi) amending Rule 45 to conform with the changes in Rules 16, 26, 33 and 34.

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[42] May 27, 2005 (Revised July 25, 2005) REPORT OF THE CIVIL RULES ADVISORY COMM. at p.15 (hereinafter "ADVISORY COMMITTEE REPORT"). In light of the recent enactment of the proposed rules . . . .

[43] ADVISORY COMMITTEE REPORT at p. 16.

The proposed Rules accommodate electronic discovery by calling for early attention to electronic discovery issues and addressing problems in the forms of producing electronically stored information. The amended Rules should streamline the discovery of electronic information and permit a more feasible way of producing electronically stored data.

B. Evaluating and Addressing Issues Relevant to Electronic Discovery at the Beginning of Litigation: Rules 16(b), 26(a), 26(f)

Proposed Rule 16(b) and Rule 26(f) require the parties to evaluate and discuss electronically stored information and relevant discovery. Next, the parties should include these topics in a report to the court. Finally, the court should address these topics in its scheduling order.[44] "The overall directive is broad, but specific provisions focus on three areas recognized as frequent sources of difficulty in electronic discovery: the form of producing electronically stored information in discovery; preserving information for the litigation; and the assertion of privilege and work product protection claims."[45]

The Committee has proposed amending Rule 26(a), by making Rule 26(a)(1) require a description of information subject to disclosure requirements, including electronically stored information.[46] As amended, Rule 26(a)(1) applies to "documents and electronically stored information," and has deleted the words "data compilations."[47] As drafted, the Rule requires the parties to disclose electronically stored information with their initial disclosures.[48] The

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[44] Advisory Committee Report at p. 21; FED.R.CIV.P. 16(b) & 26(f) (proposed); *see also In re Bristol Myers Squibb Sec. Litig.*, 205 F.R.D. 437, 441 (D.N.J. 2002) (where party posses relevant information in electronic format, it is obligated to advise adversary under mandatory disclosure rules).

[45] ADVISORY COMMITTEE REPORT at p. 21.

[46] ADVISORY COMMITTEE REPORT at p. 21.

[47] ADVISORY COMMITTEE REPORT at p. 21.

[48] ADVISORY COMMITTEE REPORT at p. 21.

disclosure obligation, thus, will apply to electronically stored information. At the same time, the Committee has attempted to reduce unnecessary burden on the parties. The disclosure obligation does not force premature search for electronically stored data.[49] Instead, similar to the current Rule, the proposed Rule only requires disclosure or identification and supplementation of electronic information the disclosing party may use in support of its claims or defense.[50]

In a further effort to address electronic discovery early in the litigation, Rule 26(f) requires the parties consider the potential for spoliation of evidence.[51] Proposed Rule 26(f) states that the parties have to discuss "any issue relating to preserving discoverable information."[52] As recognized by the Committee, "the dynamic nature of electronically stored information, and the fact that routine operation of computer systems changes and deletes information, make it important to address preservation issues early in cases involving discovery of electronic data." [53]

Proposed Rule 26(f)(3) further directs the parties to discuss "any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced."[54] Proposed Rule 16(b)(5) provides that the scheduling order entered by the court may include "provisions for disclosure or discovery of electronically stored information."[55] The Notes following the proposed Rule address the need to discuss these topics

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[49] ADVISORY COMMITTEE REPORT at p. 21.

[50] ADVISORY COMMITTEE REPORT at p. 21; FED.R.CIV.P. 26(a)(1) (proposed).

[51] ADVISORY COMMITTEE REPORT at p. 22.

[52] FED.R.CIV.P. 26(f) (proposed).

[53] ADVISORY COMMITTEE REPORT at p. 22; FED.R.CIV.P.. 26(f) (proposed); *see also In re Bristol Myers Squibb Sec. Litig*., 205 F.R.D. at 444 (D.N.J. 2002) ("Counsel should take advantage of the required Rule 26(f) meeting to discuss issues associated with electronic discovery").

[54] ADVISORY COMMITTEE REPORT at p. 22; FED.R.CIV.P. 26(f)(3) (proposed).

[55] ADVISORY COMMITTEE REPORT at p. 22; FED.R.CIV.P. 16(b)(5) (proposed).

early in the case and, therefore, identify disputes before costly and time-consuming searches or production occur.[56] Electronic data can be produced in various forms, and the proposed amendment states that the parties should discuss "any issues relating to . . . the form *or forms* in which it should be produced."[57] As a testament to their focus on electronic discovery, the proposed Rules recognize that data and information will be produced in any number of formats – either traditional or electronic.[58]

Proposed Rule 26(f)(4) addresses the assertion of privilege and work product protection when a party makes its initial disclosures.[59] Reviewing electronically stored information for privilege and work product protection adds to the expense and delay associated with discovery. Issues that complicate the production of electronic data with initial disclosures include the added volume, the dynamic nature of the information, and the complexities of locating potentially privileged information.[60] Metadata and embedded data are examples of such complexities.[61] Even if they contain privileged communications, it may not be apparent when the information is

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[56] ADVISORY COMMITTEE REPORT at p. 22.

[57] ADVISORY COMMITTEE REPORT at p. 22; FED.R.CIV.P. 16(b)(5) (proposed).

[58] *See e.g., McNally Tunneling Corp. v. City of Evanston*, No. 00 C 6979, 2001 WL 1568879, at *4 (N.D. Ill. Dec. 10, 2001) (denying motion to compel production of computer files that had already been produced in hard copy form where requesting party only offered vague assertions supporting its need for electronic version); *Williams v. Owens-Illinois, Inc.*, 665 F.2d 918, 932-33 (9th Cir. 1982) (same); *but see Anti-Monopoly, Inc. v. Hasbro, Inc.*, No. 94 Civ. 2120, 1995 WL 649934, at *2 (S.D.N.Y. Nov. 3, 1995) ("[P]roduction of information in 'hard-copy' documentary form does not preclude a party from receiving that same information in computerized/electronic form.").

[59] ADVISORY COMMITTEE REPORT at p. 22.

[60] ADVISORY COMMITTEE REPORT at p. 22-23 (discussing issues relevant to disclosure of privileged information).

[61] ADVISORY COMMITTEE REPORT at p. 23. It can be argued that much of the information that can be retrieved from metadata is less relevant and necessary than the information that can be retrieved from paper documents or "final" electronic versions of information. For example, certain metadata, such as metadata reflecting prior revisions to a document, can be analogized to paper drafts. One court, speaking in the context of paper drafts, has noted: "Drafts, by their very nature, rarely satisfy the test of relevance…Absent extrinsic evidence tending to show the relevance of a particular draft, production of these documents is likely to lead only to wasteful fishing expeditions concerning the identification and deciphering of handwriting and the reasons for immaterial revisions." *Grossman v. Schwarz*, 125 F.R.D. 376, 385 (S.D.N.Y. 1989).

reviewed before production.[62] To reduce the inherent risk of turning over privileged information, and to alleviate costs, the proposed Rules embrace agreements that allow the assertion of privilege or work product protection after documents or electronically stored information are produced.[63] Recognizing the values of these "claw back" provisions, proposed Rule 16(b)(6) is amended to state that if the parties have reached an agreement for "asserting claims of privilege or protection as trial preparation material after production," the court may include those agreements in the scheduling order.[64] As contemplated by the Notes, this protection should apply even as to inadvertent disclosures to third-parties. In light of these amendments to Rule 16 and Rule 26, adverse parties should consider entering into an agreed protective order that would permit "recovery" or "claw back" of privileged information and work product upon making an inadvertent disclosure.[65]

C. Issues Surrounding Discovery of Electronically Stored Information That is Not Reasonably Accessible: Rule 26(b)(2)

Instead of requiring its actual production, the proposed change to Rule 26(b)(2)(B) permits a party to identify sources of electronically stored information that are not accessible because of undue burden or cost.[66] After it has been identified, if the requesting party still seeks discovery of the electronic information, then the responding party has the burden to show that the

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[62] ADVISORY COMMITTEE REPORT at p. 22-23.

[63] ADVISORY COMMITTEE REPORT at p. 23.

[64] ADVISORY COMMITTEE REPORT at p. 23; FED.R.CIV.P. 16(b)(6) (proposed).

[65] ADVISORY COMMITTEE REPORT at p. 23; *See, e.g., Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 290 (S.D.N.Y. 2003) ("Indeed, many parties to document-intensive litigation enter into so called 'claw-back' agreements that allow the parties to forego privilege review altogether in favor of an agreement to return inadvertently produced privileged documents."); *but see Murphy Oil USA, Inc. v. Fluor Daniel, Inc.*, No. Civ. A. 99 3564, 2002 WL 246439, at *7 (E.D. La. Feb. 19, 2002 (noting that court cannot compel the disclosure of privileged communications in claw-back arrangement).

[66] ADVISORY COMMITTEE REPORT at p. 40; FED.R.CIV.P. (b)(2)(B) (proposed).

sources are not "reasonably" accessible.[67] However, even when that showing is made, the court can still order discovery of the information if the requesting party shows "good cause."[68] Of course, the court may specify conditions for the limitation of discovery.[69]

Some commentators have described the proposed Rule as a "two-tier" system.[70] As with most of the other proposed amendments, it is designed to respond to discrete problems encountered in discovery of electronically stored information.[71] These problems are unique and have little relation to the discovery of paper documents.[72] The proposed Rules recognize that some forms of computer storage can be searched only at considerable cost and effort.[73] As noted by the Committee, the responding party may be able to identify difficult-to-access information that could contain responsive information, but cannot retrieve the information (or even determine whether any responsive information is contained in the source) without incurring substantial burden or cost.[74] Common examples include:

(i) data obtained from different sources of information storage, such as backup tapes that are not indexed, organized, or subject to electronic searching;

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[67] ADVISORY COMMITTEE REPORT at p. 40; *See Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 217 (S.D.N.Y. (2003) (noting there are various ways to manage electronic documents and thus many ways in which a party may comply with its obligations); *cf. In re Ford Motor Co.*, 345 F.3d 1315 (11th Cir. 2003) (stating that the producing party's choice to review database and only produce those relevant portions was adequate discovery response absent specific evidence to the contrary).

[68] ADVISORY COMMITTEE REPORT at p. 40; FED.R.CIV.P. (b)(2)(B) (proposed); *cf. Zubulake v. UBS Warburg LLC*, No. 02-Civ. 1243, 2004 WL 1620866, at *7-8 (S.D.N.Y. July 20, 2004) (sanctioning party where certain key employees failed to comply with litigation hold and party failed to interview other key witnesses in litigation or perform appropriate key-word searches).

[69] ADVISORY COMMITTEE REPORT at p. 40.

[70] ADVISORY COMMITTEE REPORT at p. 40.

[71] ADVISORY COMMITTEE REPORT at p. 40.

[72] ADVISORY COMMITTEE REPORT at p. 40.

[73] ADVISORY COMMITTEE REPORT at p. 40.

[74] ADVISORY COMMITTEE REPORT at p. 40.

(ii) "legacy data" that remains from obsolete systems or unintelligible sources;

(iii) data that is "deleted" but remains in fragmented forms; and

(iv) limited databases that are inaccessible. [75]

These discrepancies present particular problems for electronic discovery. In many cases, a party may have a large amount of information responsive to discovery requests, but it requires recovery, restoration, or translation before it can be retrieved, reviewed or produced.[76] Thus, if a court requires production of documents from a difficult source or in a different format than previously produced, the court should consider shifting the costs of production to the party who has requested the information.[77] By the same token, more easily accessed sources, like paper, may yield the same, or equally useful, information.[78] The proposed Rule suggests that the parties develop a two-tier practice.[79] First, they should identify and produce information that can be provided from easily accessed sources. Next, the parties should determine whether they need to search the difficult to access sources of information.[80]

Proposed Rule 26(b)(2) does not expressly apply the two-tiered structure to the discovery of electronically stored information. Rather, it should be established through negotiations

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[75] ADVISORY COMMITTEE REPORT at p. 40.

[76] ADVISORY COMMITTEE REPORT at p. 40.

[77] ADVISORY COMMITTEE REPORT at p. 40-41; *See In re Air Crash Disaster at Detroit Metro. Airport on August 16, 1987*, 130 F.R.D. 634, 636 (E.D. Mich. 1989) (requiring requesting party to bear costs of creating copies of data in electronic format).

[78] ADVISORY COMMITTEE REPORT at p. 40*; see also Fennell v. First Step Designs, Ltd.,* 83 F.3d 526, 532-33 (1st Cir. 1996) (affirming court order denying electronic discovery where that discovery would be a fishing expedition); *Stallings-Daniel v. Northern Trust Co.,* No. 01 C 2290, 2002 WL 385566, at *1 (N.D. Ill. Mar. 12, 2002) (refusing to reconsider denial of a request by plaintiff for an order permitting an expert to conduct an intrusive and detailed examination of discovery of defendant's email system where the basis for the claims were "speculation").

[79] ADVISORY COMMITTEE REPORT at p. 40-41.

[80] ADVISORY COMMITTEE REPORT at p. 40; FED.R.CIV.P. 26(b)(2) (proposed).

between the parties.[81] The proposed Rule also recognizes the recurring problems inherent to electronically stored data, and facilitates judicial supervision of the search for discoverable information.[82]

As set forth in the proposed Rule, the responding party has an affirmative duty to identify potentially responsive "information" that it is not reasonably accessible.[83] Of course, a responding party cannot identify information without actually searching it and retrieving it. In an effort to strike a balance, the proposed Rule directs the party to identify the sources of information that *may be responsive* but are not reasonably accessible.[84] As set forth in the Rule, information may be considered "not reasonably accessible" if it would cause "undue burden or cost" to recover the information.[85] The inaccessibility of electronically stored data may be brought to the court's attention by the requesting party through a motion to compel, or by the responding party with a protective order.[86] As stressed throughout the proposed amendments, it is necessary for the responding party to keep the court adequately informed of issues regarding electronic data collection and production of information.[87] This is particularly true under the "two-tier" approach. Should a responding party file for a protective order to resolve the extent to

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[81] ADVISORY COMMITTEE REPORT at p. 41.

[82] FED.R.CIV.P. 26(b)(2) (proposed).

[83] ADVISORY COMMITTEE REPORT at p. 41; FED.R.CIV.P. 26(b)(2)(B) (proposed)

[84] ADVISORY COMMITTEE REPORT at p. 41.

[85] ADVISORY COMMITTEE REPORT at p. 41; FED.R.CIV.P. 26(b)(2)(B) (proposed).

[86] ADVISORY COMMITTEE REPORT at p. 41; FED.R.CIV.P. 26(b)(2)(B) (proposed);

[87] *See e.g., Keir v. Unum Provident Corp*., No. 02 Civ. 8781, 2003 WL 21997747, at *12 (S.D.N.Y. Aug. 22, 2003) (specifically noting counsel's failure to inform the court of burdens and technological issues regarding court preservation order); *see also Landmark Legal Foundation v. EPA*, 272 F.Supp.2d 70, 77-79 (D.D.C. 2003) (reciting failures of agency's attorneys to properly communicate preservation order to agency and holding that agency committed contempt of court by reformatting hard drives and erasing email backup tapes after it received notice of the order).

which electronic information must be preserved until litigation is resolved, it will be better received if the potential problems with electronic discovery were identified in the parties' Rule 26 report to the court.

Even if the responding party establishes that the source of information is not reasonably accessible, it will not necessarily stop discovery.[88] The court may still order discovery for "good cause."[89] Good cause will be shown if the responding party can demonstrate that the discovery sought is "unreasonably cumulative or duplicative or is obtainable from some other source that is more convenient, less burdensome, or less expensive" or if the responding party can demonstrate that "the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought;" the standard set forth in the current Rule 26.[90]

In a significant departure from current rule, proposed Rule 26 requires the responding party to identify the sources of information that were not searched.[91] This has the effect of clarifying and focusing the issue for the requesting party.[92] In many cases, discovery obtained from accessible sources should be sufficient to meet the discovery needs of a case.[93] However, if the accessible information does not satisfy the requesting party, the proposed rule allows that

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[88] ADVISORY COMMITTEE REPORT at p. 41.

[89] FED.R.CIV.P. 26(b)(2)(B) (proposed); *see also* ADVISORY COMMITTEE REPORT at p. 41-42.

[90] FED.R.CIV.P. 26(b)(2)(C) & 26(c); *see also Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978) (responding party may invoke Rule 26(c) as protection from "undue burden or expense," and in the district court's discretion, it may condition "discovery on the requesting party's payment of costs of discovery.").

[91] ADVISORY COMMITTEE REPORT at p. 42.

[92] *See* FED.R.CIV.P. 26(b)(2)(B) (proposed); *see e.g., In r: Bristol Meyers Squibb Sec. Litig.,* 205 F.R.D. 437, 441 (D.N.J. 2002) (where a party possesses relevant information in electronic format, it is obligated to advise adversary under mandatory disclosure rules); *Kleiner v. Burns*, No. 00 2160, 2000 WL 1909470, at *4 (D. Kan. Dec. 15, 2000) (holding that Rule 26 requires disclosure of nature and location of relevant electronic documents).

[93] *See Stallings-Daniel v. Northern Trust Co.,* No. 01 C 2290, 2002 WL 385566, at *1 (N.D. Ill. Mar. 12, 2002) (refusing to reconsider denial of a request by plaintiff for an order permitting an expert to conduct an intrusive and detailed examination of discovery of defendant's email system where the basis for the claims were "speculation").

party to obtain additional discovery from sources identified as "not reasonably accessible," subject to judicial discretion.[94]

There are several areas of concern under newly proposed Rule 26(b). First, some have criticized the proposed Rule because it allows the responding party to "self-designate" information not produced simply because it is not "reasonably accessible."[95] However, all discovery and privilege designation rests, to a certain extent, on "self-designation."[96] In response to this problem, the proposed Rule requires a responding party to identify categories of potentially responsive information that were not searched.[97] In this way, a requesting party can decide whether to challenge the designation.[98] Others have speculated that the parties could make information electronically inaccessible to deter discovery.[99] Most commentators, however, do not believe that the proposed Rules would encourage entities to bury electronic data – information that is necessary or useful for business purposes.[100] In any event, whether under the current Rules or the proposed Rules, a party who makes information "inaccessible" because it is likely to be discoverable in litigation is subject to sanctions.[101]

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[94] ADVISORY COMMITTEE REPORT at p. 42; *See e.g., In re Amsted Indus., Inc., "ERISA" Litig.,* 2002 WL 31844956, at *2 (N.D. Ill. Dec. 18, 2002) (requiring defendants to "research their tapes under the broader subject matter and time period" ordered by the court).

[95] ADVISORY COMMITTEE REPORT at p. 42.

[96] *See Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 217 (S.D.N.Y. Oct. 22, 2003) ("In recognition of the fact that there are many ways to manager electronic data, litigants are free to choose how this task is accomplished."); *see also Concord Boat Corp. v. Brunswick Corp*., No. LR C 95 781, 1997 WL 33352759, at *4 (E.D. Ark. Aug. 29, 1997) ("[T]o hold that a corporation is under a duty to preserve all email potentially relevant to any future litigation would be tantamount to holding that the corporation must preserve all email.").

[97] ADVISORY COMMITTEE REPORT at p. 42.

[98] ADVISORY COMMITTEE REPORT at p. 42.

[99] ADVISORY COMMITTEE REPORT at p. 42.

[100] ADVISORY COMMITTEE REPORT at p. 42-43.

[101] ADVISORY COMMITTEE REPORT at p. 43; FED.R.CIV.P. 26.

D. Asserting Claims of Privilege and Work Product Protection After Production: Rule 26(b)(5)

Problems of privilege review can be more acute in the electronic discovery setting than with conventional discovery. The volume of electronically stored information responsive to discovery and the manner in which electronic information is stored and displayed[102] make it more difficult to review for privilege.[103] The production of privileged material has substantial risk, and the costs associated with privilege reviews are on the rise.[104] The proposed amendment to Rule 26(b)(5) addresses some of these problems by establishing a procedure to assert privilege and work product protections after production.[105]

Under the proposed rule, if a party produces information that it claims is privileged or work product, that party may notify the receiving party of the claim and state the basis for its assertion of privilege.[106] Thereafter, the receiving party must return or destroy the information, and may not use or disclose it until the claim is resolved by the court or through negotiation.[107]

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[102] *See, e.g*., Richard L. Marcus, *Confronting the Future: Coping with Discovery of Electronic Material*, 64 LAW & CONTEMP. PROBS. 253, 280-281 (Spring/Summer 2001) (at least thirty percent of electronic information is never printed to paper).

[103] ADVISORY COMMITTEE REPORT at p. 52; *See Byers v. Illinois State Police*, 53 Fed. R. Serv. 3d 740, No. 99 C 8105, 2002 WL 1264004 (N.D. Ill. May 31, 2002) (discussing difference between paper documents and email communications).

[104] ADVISORY COMMITTEE REPORT at p. 53.

[105] ADVISORY COMMITTEE REPORT at p. 52; FED.R.CIV.P. 26(b)(5) (proposed).

[106] FED.R.CIV.P. 26(b)(5)(B) (proposed); ADVISORY COMMITTEE REPORT at p. 52.

[107] ADVISORY COMMITTEE REPORT at p. 52. Some courts already permit recovery of privileged or work-produce material without waiver or any applicable privilege. For example, the district court in the Southern District of Indiana issued the following Case Management Order to control multi-district litigation:

> In the event that a privileged document is inadvertently produced by any party to this proceeding, the party may request that the document be retuned. In the event that such request is made, all parties to the litigation and their counsel shall promptly return all copies of the document in their possession, custody, or control to the producing party and shall not retain or make any [copies]. Such inadvertent disclosure of a privileged document shall not be deemed a waiver with respect to that document or other documents involving similar subject matter.

Alternatively, the receiving party can submit the material to the court to decide whether the information is privileged or protected.[108] The court then may also be called upon to determine whether a waiver has occurred.[109] As yet another step designed to protect privileged electronic information, a receiving party that has already disclosed the information to a non-party before receiving notice of its privileged status must take "reasonable" steps to recover the information.[110] Finally, the producing party has an affirmative duty to preserve the information until the court can rule on whether (i) the information is privileged or protected and (ii) whether a waiver has occurred. There is no requirement that a party assert the claim of privilege within a "reasonable time period," as some jurisdictions require.[111] However, it is likely that courts will examine whether a party reasonably sought recovery of the information as part of determining whether waiver has occurred.[112]

Under the proposed Rules, the producing party asserting a claim of privilege must articulate the basis for privilege when giving notice of inadvertent disclosure.[113] Then, if the receiving party chooses to contest the claim, it should submit the statement to the court, along

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In re Brigestone/Firestone, Inc., ATX, ATXII, and Wilderness Tires Prods. Liab. Litig., 129 F.Supp.2d 1207, 1219 (S.D. Ind. 2001); *see also Murphy Oil USA, Inc. v. Fluor Daniel, Inc*., No. Civ. A. 99 3564, 2002 WL 246439, at *12 (E.D. la. Feb. 19, 2002) (outlining "claw-back" protocol for inadvertently produced documents).

[108] ADVISORY COMMITTEE REPORT at p. 53.

[109] FED.R.CIV.P. 26(b)(5)(B) (proposed); ADVISORY COMMITTEE REPORT at p. 52.

[110] ADVISORY COMMITTEE REPORT at p. 52.

[111] ADVISORY COMMITTEE REPORT at p. 53.

[112] ADVISORY COMMITTEE REPORT at p. 53; *see e.g., Fleet Bus. Credit Corp. v. Hill City Oil Co*., No. 01 02417, 2002 WL 31741282, at *9-11 (W.D. Tenn. Dec. 5, 2002) (applying a number of factors to determine if inadvertent disclosure waived privilege and concluding that reviewing documents for privilege before disclosure, and then acting swiftly to correct inadvertent disclosure, preserved privilege).

[113] ADVISORY COMMITTEE REPORT at p. 53.

with the relevant information at issue.[114] The notice, thus, educates the court as to the basis for the claim and permits the receiving party to seek a ruling from the court regarding the waiver, privilege or protection.[115] The party claiming privilege, therefore, should set forth the claim of privilege or work product in as much detail as possible in it its notice to the receiving party since it may subsequently be the party's first chance to educate the court. Furthermore, a prudent practitioner will include a recitation of the steps taken to avoid inadvertent disclosure.[116]

E. Electronically Stored Information and its Impact on Interrogatories and Requests for Production: Rule 33, Rule 34(a) and Rule 34(b)

1. Rule 33

Similar to the current rules, proposed amendment to Rule 33 reiterates the option to use business records when responding to an interrogatory addressing electronic data.[117] Under the proposed Rule, a party has the option of producing business records, or making them available for examination or inspection, including electronically stored information.[118] The Notes following the proposed Rule clarify that the provision of Rule 33(d), permitting the production of records to respond to an interrogatory when "the burden of deriving or ascertaining the answer" is substantially the same for either party, applies to electronically stored information as well as

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[114] ADVISORY COMMITTEE REPORT at p. 53.

[115] ADVISORY COMMITTEE REPORT at p. 53.

[116] *Cf., Medtronic Sofamor Danek, Inc. v. Michelson*, No. 01-2373, 2003 WL 21468573, at *12 (W.D. Tenn. May 13, 2003) (noting that even when large volumes of electronic documents are involved, parties are well-advised to search for privileged material before production to avoid inadvertent disclosure and to improve the chances of being allowed to recover accidentally produced material).

[117] ADVISORY COMMITTEE REPORT at p. 62.

[118] FED.R.CIV.P. 33 (proposed); ADVISORY COMMITTEE REPORT at p. 62; *see also, e.g., Giardina v. Lockheed Martin Corp.*, No. A 2-1030, 2003 WL 1338826, at *2-3 (E.D. La. March 14, 2003) (ordering production of internet websites accessed by defendant's employees in response to interrogatory and awarding attorneys fees as sanctions for prior failure to do so in compliance with rules).

traditional paper documents.[119] As explained by the Committee, "[t]he responding party may be required to provide some combination of technical support, information on application software, or other assistance" to enable the questioning party to derive or ascertain the answer from electronically stored information.[120] However, the level of support must be adequate to permit the requesting party to access the information "as readily as the responding party."[121] This support may go so far as to permit direct access to the producing party's electronic information system.[122]

2. Rule 34(a)

Specifically recognizing issues relevant to the production of electronic data, the proposed amendment to Rule 34(a) adds "electronically stored information" as a category subject to production in addition to "documents."[123] The Committee's report recognizes that there are significant and growing differences between "documents" and "electronically stored information."[124] Even though electronically stored information can (and will) often be produced in the form of a document, it is more likely that, in future years, information will be produced in forms other than "documents."[125] The Notes following the proposed Rule 34(a) also state that a

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[119] ADVISORY COMMITTEE REPORT at p. 62.

[120] FED.R.CIV.P. 33(d) (proposed); ADVISORY COMMITTEE REPORT at p.62, 67-68

[121] ADVISORY COMMITTEE REPORT at p. 62, 67-68

[122] ADVISORY COMMITTEE REPORT at p. 62.

[123] ADVISORY COMMITTEE REPORT at p. 62; FED.R.CIV.P. 34(a) (proposed).

[124] ADVISORY COMMITTEE REPORT at p. 62-63.

[125] ADVISORY COMMITTEE REPORT at p. 63; *See, e.g., Rowe v. Entm't, Inc. v. The William Morris Agency, Inc.*, 205 F.R.D. 421, 428 (S.D.N.Y. 2002) ("Electronic documents are no less subject to disclosure than paper records.").

party is required to produce responsive information no matter how it is maintained.[126] As a result, the proposed Rule makes it inconsequential whether a party asks for "documents" or "electronically stored information."[127]

3. Rule 34(b)

Proposed amended Rule 34(b) addresses the form in which electronic data is requested and produced. As drafted, the proposed Rule:

(i) permits a requesting party to specify a form for producing electronically stored information,

(ii) articulates that a responding party can object to a request on the grounds that it seeks information in a requested form,

(iii) requires the responding party to identify the form it will use for production and written responses,

(iv) states that a party is not required to produce electronically stored information in more than one form; and

(iv) provides "default" forms of production to apply when the requesting party did not specify a form and there is no agreement or order stating that a particular form of production be used by the parties.[128]

Addressing a common problem in modern litigation, proposed amended Rule 34(b) recognizes that electronically stored information exists and can be produced in a number of forms.[129] The form of producing electronically stored information is increasingly a source of

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[126] ADVISORY COMMITTEE REPORT at p.72-73; *see also, e.g., Antioch Co. v. Scrapbook Borders, Inc.*, 210 F.R.D. 645, 652 (D. Minn. 2002) ("[I]t is a well accepted proposition that deleted computer files, whether they be emails or otherwise, are discoverable.").

[127] *Cf., Simon Prop. Group L.P. v. mySimon, Inc.*, 194 F.R.D. 639, 640 (S.D. Ind. 2000) ("[C]omputer records, including records that have been 'deleted,' are documents discoverable under Fed.R.Civ.P. 34.").

[128] ADVISORY COMMITTEE REPORT at p. 64; FED.R.CIV.P. 34(b) (proposed).

[129] ADVISORY COMMITTEE REPORT at p. 64.

disputes in discovery.[130] The proposed amendment has a dual purpose. First, the proposed Rule permits the parties (as opposed to the court) to identify the form of production that is most useful and appropriate for the case. Second, it provides a methodology for the responding party to produce the information. Under proposed amended Rule 34(b), the form in which a responding party ordinarily maintains its information will probably be the "default" choice of the responding party.[131] However, it may be required to translate the information to make it "reasonably usable" if it is maintained on archaic or unusual systems.[132] In the alternative, the responding party can produce the information in a form that it does not ordinarily use, as long as it is reasonably usable.[133] If a responding party maintains the information in a form that is not usable by anyone, the problem is addressed under Rule 26(b)(2), which covers electronically stored information that is not reasonably accessible.[134] If the requesting party has unusual or unorthodox features on its information system that cannot be accommodated without undue burden or cost, a producing party should only be required to produce the information in a form that can be used with software that is generally available.[135]

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[130] *See McNally Tunneling Corp. v. City of Evanston*, No. 00 C 6979, 2001 WL 1568879, at *4 (N.D. Ill. Dec. 10, 2001 (denying motion to compel production of computer files that had already been produced in hard copy forms where requesting party only offered vague assertions supporting its need for electronic versions); *Williams v. Owens-Illinois, Inc*., 665 F.2d 918, 932-33 (9th Cir. 1982) (same); *but see Anti-Monopoly, Inc. v. Hasbro, Inc*., No. 94 Civ. 2120, 1995 WL 649934, at *2 (S.D.N.Y. Nov. 3, 1995) ("[P]roduction of information in 'hard copy' documentary form does not preclude a party from receiving that same information in computerized/electronic form.").

[131] ADVISORY COMMITTEE REPORT at p. 65.

[132] ADVISORY COMMITTEE REPORT at p. 65.

[133] ADVISORY COMMITTEE REPORT at p. 65; FED.R.CIV.P. 34(b) (proposed).

[134] FED.R.CIV.P. 34(b) (proposed); ADVISORY COMMITTEE REPORT at p. 65.

[135] FED.R.CIV.P. 34(b) (proposed); ADVISORY COMMITTEE REPORT at p. 65-66.

As set forth in the Notes following the proposed Rule 34(b), the option to produce material in a reasonably usable form does not give a responding party the right to convert electronically stored information from the form in which it is ordinarily maintained to a different form that makes it more costly, difficult or burdensome for the requesting party to use.[136] For example, if the responding party typically maintains the information in an electronically searchable format, the information should be produced in the same form, and not in a way that obviates this feature.[137]

F. Sanctions for the Loss of Electronically Stored Information: Rule 37(f)

Proposed Rule 37(f) addresses issues that arise through the normal use of computer systems – the routine modification, overwriting and deletion of information.[138] The proposed rule provides some limited protection against sanctions for a party's inability to produce electronically stored information because it was lost through the normal use of a computer system.[139] However, operation of the system must have been in "good faith."[140]

In its protecting against sanctions for inadvertent destruction of information, the proposed Rule takes into account the fact that automated deletion of information is essential to the normal operation of electronic information systems.[141] Furthermore, suspending or interrupting these

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[136] FED.R.CIV.P. 34(b) (proposed); ADVISORY COMMITTEE REPORT at p.75-76

[137] ADVISORY COMMITTEE REPORT at p.75-76.

[138] ADVISORY COMMITTEE REPORT at p. 81.

[139] ADVISORY COMMITTEE REPORT at p. 81.

[140] FED.R.CIV.P. 37(f) (proposed); ADVISORY COMMITTEE REPORT at p.81.

[141] ADVISORY COMMITTEE REPORT at p.81; *Cf., Stevenson v. Union Pac. R.R. Co.*, 354 F.3d 739, 745-49 (8th Cir. 2004) (adverse inference instruction should not be given on the basis of negligence alone; there must be a finding of bad faith or some other culpable conduct, such as ongoing destruction of documents during litigation and discovery even after they have been specifically requested); *New York State Nat'l Org. for Women v. Cuomo*, No. 93 Civ. 7146, 1998 WL 395320, at *2-3 (S.D.N.Y. July 14, 1998) (rejecting sanctions for destroyed computer databases where there was no evidence of bad faith or that plaintiffs were prejudiced by the loss).

features can be not only expensive, but burdensome as well.[142] The parties cannot be expected to cease the routine operation of their computer systems every time they believe litigation could be on the horizon. However, in other situations, interruption of a company's electronic information systems may be prudent to avoid losing large quantities of information when a party reasonably believes that it may be sought through discovery or necessary for use in litigation.[143] In light of the proposed Rules' focus on the "form" of information, if an adverse party has requested documents in a specific electronic format, permitting those documents to be destroyed can lead to sanctions. This may be true even if hard copies of the information still exist.[144]

There is no blanket protection under proposed Rule 37(f) for parties that intentionally or willfully destroy information because it may be used in litigation.[145] Striking a middle road, the proposed rule will protect a party from sanctions when it destroys information through the "good faith" routine operation of its electronic information system.[146] As explained in the Notes following the rule, "good faith" does not mean that a party can ignore the threat of litigation and

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[142] ADVISORY COMMITTEE REPORT at p. 81; *See, e.g., Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003) (organizations need not preserve "every shred of paper, every email or electronic document and every back-up tape."); s*ee also, Wiginton v. CB Richard Ellis, Inc*., No. 02-C-6832, 2003 WL 22439865, at *4 ("A party does not have to go to extraordinary measures to preserve all potential evidence…[i]t does not have to preserve every single scrap of paper in its business.").

[143] *See, e.g., Residential Funding Corp. v. DeGeorge Fin. Corp*., 306 F.3d 99, 108 (2d Cir. 2002) (holding that sanctions may be appropriate for failure to take adequate steps to preserve and produce documents in a timely manner); *Wiginton v. CB Richard Ellis, Inc*., No. 02-C-6832, 2003 WL 22439865, at *7 ("[O]nce a party is put on notice that specific relevant documents are scheduled to be destroyed according to a routine document retention policy, and the party does not act to prevent that destruction, at some point it has crossed the line between negligence and bad faith.").

[144] *See Lombardo v. Broadway Stores, Inc*., 2002 WL 86810, at * 8 (Cal. Ct. App. Jan. 22, 2002) (affirming sanctions for allowing and concealing loss of electronic files and rejecting argument that there was no spoliation even if paper copies still existed).

[145] FED.R.CIV.P. 37(f) (proposed); ADVISORY COMMITTEE REPORT at p. 82.

[146] ADVISORY COMMITTEE REPORT at p. 82-83.

continue to operate its system with the knowledge that relevant information is being destroyed.[147] Instead, a party may need to suspend certain features of the routine operation of an information system to deter loss of information subject to preservation obligations.[148] This intervention is often referred to as "the litigation hold."[149] The rule itself does not require parties to engage in a "litigation hold." However, it is evident that such an obligation can arise from numerous sources, including common law, statutes and regulations.[150] A party's efforts to institute an effective "litigation hold" could also demonstrate a "good faith" effort to preserve relevant information. By the same token, compliance with any discovery agreements and any court orders requiring preservation of electronically stored information will also weigh in favor of "good faith."[151] As previously discussed, agreements between the parties addressing electronic discovery may emerge from the discovery planning conference, where the parties should discuss preserving discoverable information as contemplated by Rule 26(f).[152]

Finally, the proposed Rules do not apply only to "a party's" information system. Instead, the Rules clearly state that they apply to "an" information system.[153] As recognized by the Committee, a party's electronic data is often stored on systems owned by third-parties, such as a

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[147] ADVISORY COMMITTEE REPORT at p. 85.

[148] ADVISORY COMMITTEE REPORT at p. 85.

[149] ADVISORY COMMITTEE REPORT at p. 83.

[150] ADVISORY COMMITTEE REPORT at p. 85; *See e.g., Silvestri v. General Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001) ("The duty to preserve material evidence arises not only during litigation but also extends to that period before litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation.").

[151] ADVISORY COMMITTEE REPORT at p. 83; *See, e.g., Carlucci v. Piper Aircraft Corp.*, 102 F.R.D. 472 (S.D. Fla. 1984) ("Having determined that Piper intentionally destroyed documents to prevent their production, the entry of a default is the appropriate sanction.").

[152] ADVISORY COMMITTEE REPORT at p. 83. The revised rule also includes a provision that permits sanctions in "exceptional circumstances" even when information is lost because of a party's good faith routine operation of a computer system. ADVISORY COMMITTEE REPORT at p. 83.

[153] FED.R.CIV.P. 37(f) (proposed); ADVISORY COMMITTEE REPORT at p.83.

vendors.[154] Under the Rules, therefore, a party's "good faith" efforts to preserve information must include efforts to preserve a party's data maintained on the systems of third-parties.[155]

G. Third-Party Subpoenas Requesting Electronic Information: Rule 45

Following the lead set forth in the other proposed Rules, proposed Rule 45 requires the production of electronically stored information as well as traditional "documents" in response to a subpoena.[156] In so amending, Rule 45 comports with the other amendments addressing electronically stored information. As set forth by the Committee, Rule 45 should be conformed, where appropriate, to any changes proposed for the other rules.[157] This "tit-for-tat" can be seen throughout the proposed Rule.

For example, Rule 45(a)(1) was modified to state that a subpoena may specify the "form" for producing electronically stored information.[158] Obviously, this change parallels the modifications made to Rules 26(f) and 34.[159] By the same token, proposed Rule 45(c)(2)(B) permits a party to object to the "form" requested in the subpoena, and proposed Rule 45(d)(1)(B) discusses the "default" form of production.[160] To stay in accord with the other Rules, the default form of the production provision in Rule 45 was amended to match revised Rule 34(b), dropping

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[154] ADVISORY COMMITTEE REPORT at p. 83.

[155] ADVISORY COMMITTEE REPORT at p. 83-84.

[156] ADVISORY COMMITTEE REPORT at p. 89.

[157] ADVISORY COMMITTEE REPORT at p. 89.

[158] ADVISORY COMMITTEE REPORT at p. 89; FED.R.CIV.P. 45(a)(1) (proposed).

[159] ADVISORY COMMITTEE REPORT at p. 89.

[160] FED.R.CIV.P. 45(c) & (d) (proposed).

the alternative for "an electronically searchable form" and substituting a form or forms that are "reasonably usable."[161]

Proposed Rule 45(d)(1)(E) protects against production of electronically stored information that is not reasonably accessible.[162] This was revised to comport with revisions made in Rule 26(b)(2)(B).[163] As with Rule 26, the producing person must identify the sources, and not the information.[164] "Undue burden or cost" was added to provide a test of reasonable accessibility.[165] Similar to the prior Rule, motions both to compel electronic discovery and to quash are expressly recognized in the proposed Rule. Discovery of information not reasonably accessible can be allowed by the court, but only after a finding of good cause within the limitations of Rule 26(b). Finally, the court retains the authority to specify conditions for discovery.[166]

VI.
PENALTIES FOR FAILING TO REPLY WITH DISCOVERY REQUESTS

A. Spoliation of Evidence

"Spoliation is the willful destruction of evidence or the failure to preserve potential evidence for another's use in pending or future litigation."[167] Spoliation has become an increasingly important issue as the breadth of electronic discovery has grown. There are more

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[161] ADVISORY COMMITTEE REPORT at p. 89; FED.R.CIV.P. 45 (proposed).

[162] ADVISORY COMMITTEE REPORT at p. 89.

[163] ADVISORY COMMITTEE REPORT at p. 89.

[164] ADVISORY COMMITTEE REPORT at p. 89.

[165] FED.R.CIV.P. 45 (proposed).

[166] ADVISORY COMMITTEE REPORT at p. 89.

[167] *Trigon Insurance Co. v. U.S.*, 204 F.R.D. 277, 284 (E.D. Va. 2001) (citing *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 778 (2nd Cir. 1999); *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995); *Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76, 78 (3rd Cir. 1994); *Black's Law Dictionary*, 1401 (6th ed. 1997)).

documents than ever that can be accidentally deleted or intentionally destroyed. Thus, courts are frequently called on to decide electronic discovery disputes containing allegations of spoliation. When courts find that a party has failed to preserve relevant documents or has intentionally destroyed them, the penalties, in the form of sanctions, can be severe. Courts take very seriously spoliation claims because:

> The destruction of evidence can lead to manifest unfairness and injustice, for it increases the risk of an erroneous decision on the merits of the underlying cause of action and can increase the costs of litigation as parties attempt to reconstruct the destroyed evidence or to develop other evidence that may be less persuasive, less accessible, or both.[168]

1. Authority to Sanction Spoliation

Courts may sanction a party for spoliation of evidence under either Rule 37(b) or its inherent authority.[169] Courts may only use their authority under Rule 37(b) to sanction spoliation when a party has destroyed or withheld evidence in contravention of a court order.[170] Thus, because destruction of evidence most often occurs prior to the entering of any explicit discovery

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[168] *Trigon Insurance Co.*, 204 F.R.D. at 285; *see also Silvestri v. General Motors Corp.*, 271 F.3d 583 (4th Cir. 2001) (courts must sanction spoliation "to preserve the integrity of the judicial process in order to retain confidence that the process works to uncover the truth"); *Metropolitan Opera Association, Inc. v. Local 100, Hotel Employees and Restaurant Employees International Union*, 212 F.R.D. 178, 181 (S.D.N.Y. 2003) (noting that lawsuits are a search for the truth, and full and honest discovery is the key to that search); *Danis v. USN Communications, Inc.*, 2000 WL 1694325, at **1-2 (N.D. Ill. Oct. 23, 2000) (noting that to uphold people's faith in the judicial process, discovery must be fair and conducted with integrity, so "when a charge is made that relevant information has been destroyed, and especially when a charge is made of intentional destruction, it is a charge that strikes at the core of our civil litigation system").

[169] *See, e.g., Shepherd v. American Broadcasting Cos., Inc.*, 62 F.3d 1469, 1474-75 (D.C. Cir. 1995) (holding that court has authority under Rule 37(b) or inherent powers to sanction spoliation); *Wiginton v. Ellis*, 2003 WL 22439865, at *3 & n. 5 (N.D. Ill. Oct. 27, 2003) (same); *Zubulake IV*, 2003 WL 22410619, at *2 (same); *McGuire v. Acufex Microsurgical, Inc.*, 175 F.R.D. 149, 153 (D. Mass. 1997) (same).

[170] *See, e.g., Shepherd*, 62 F.3d at 1474-75 (turning to inherent authority to analyze district court's award of sanctions because the court had not issued any explicit discovery order).

orders, courts frequently rely on their inherent authority to sanction spoliation. In general, the analysis is the same under either source, so the distinction is largely one without a difference.[171]

a. Determining Whether to Sanction

The courts do not completely agree on the essential elements of a spoliation claim. However, all courts seem to require at least a showing that: (1) the alleged spoliator had a duty to preserve the documents; (2) the alleged spoliator destroyed the documents with some level of culpability or blameworthiness; (3) the spoliated evidence was relevant to some party's claims or defenses; and (4) the moving party has suffered some prejudice because of the spoliation.[172]

2. The Purposes of Sanctions

Courts generally recognize that sanctions are intended to serve one or more of three purposes, including: (1) compensation—to place the innocent party in the same evidentiary position that they would have been in had the evidence not been destroyed; (2) punishment—to penalize the spoliator for its discovery abuse; and (3) deterrence—to send a message to other current and future litigants that spoliation will not be tolerated, but rather will be punished.[173]

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[171] *See Wiginton*, 2003 WL 22439865, at *3 n. 5 (proceeding under the court's inherent authority because no discovery order had been ignored, "noting that the analysis is essentially the same under either alternative."). *But see Shepherd*, 62 F.3d at 1480 (overturning district court's award of default judgment for spoliation, and distinguishing between a court's Rule 37(b) to award default judgment or dismiss claims and its inherent authority, because a court's inherent power "is not grounded in rule or statute and must be exercised with particular restraint.").

[172] *See Wiginton*, 2003 WL 22439865, at **4-6 (elements of spoliation are: (a) duty to preserve; (b) intentional or willful destruction; and (c) relevance); *Zubulake IV*, 2003 WL 22410619, at *6 (elements required for an adverse inference instruction are: (a) duty to preserve; (b) destroyed with a 'culpable state of mind;' and (c) relevance); *Trigon Insurance Co.*, 204 F.R.D. at 286 (elements are: (a) duty to preserve; (b) intentional destruction; and (c) prejudice; but some prejudice is presumed as natural consequence of destruction); *Danis*, 2000 WL 1694325, at *31 (elements are: (a) duty to preserve; (b) breach of that duty with some level of culpability; and (c) prejudice); *McGuire*, 175 F.R.D. at 154 (elements are: (a) duty to preserve; (b) breach of that duty; (c) intentional destruction; (d) relevance; and (e) prejudice; but prejudice bears more on the issue of what sanction is appropriate); *Computer Associates International, Inc., v. American Fundware, Inc.*, 133 F.R.D. 166, 168-69 (D. Colo. 1990) (elements are: (a) duty to preserve; (b) breach of that duty with some culpability; and (c) relevance).

[173] *Metropolitan Opera Association, Inc.*, 212 F.R.D. at 219 (holding that sanctions serve two functions—punishment and deterrence); *Trigon Insurance Co.*, 204 F.R.D. at 287 ("Once spoliation has been established, the sanction chosen must achieve deterrence, burden the guilty party with the risk of an incorrect determination and

a. How Courts Determine What Sanctions are Appropriate

Courts have broad discretion to determine what sanctions are appropriate, under either Rule 37(b) or their inherent authority.[174] This discretion is necessary because the inquiry into what sanction is appropriate is fact-specific and is determined on a case-by-case basis.[175] Accordingly, there is no single test or set of factors for determining the appropriate sanction(s) in a particular case.[176] But courts generally consider: (1) the degree of fault/culpability of the spoliating party; (2) the degree of prejudice suffered by the innocent party; and (3) whether a lesser sanction will serve the purposes outlined above.[177] The most important considerations are the degree of fault and the degree of prejudice suffered.[178] If the degree of fault and/or the

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attempt to place the prejudiced party in the evidentiary position it would have been in but for the spoliation."); *Danis*, 2000 WL 1694325, at *31 (holding that sanctions one or more of three purposes—compensation, punishment, and/or deterrence); *Koch Industries, Inc.*, 197 F.R.D. at 483 (among the purposes sanctions serve are punishment, general deterrence, and compensation).

[174] *See, e.g., Stevenson v. Union Pacific Railroad Co.*, 354 F.3d 739, 747-48 (8th Cir. 2004) (reviewing district court's grant of adverse inference instruction only for abuse of discretion and upholding the sanction award despite questioning its wisdom); *Vodusek*, 71 F.3d at 156 (noting that general rule is that district court has broad discretion in fashioning appropriate remedy for spoliation). *But see Shepherd*, 62 F.3d at 1475 ("Although we review a district court's use of its inherent power only for abuse of discretion, our review is not perfunctory.") (internal citation omitted).

[175] *See Trigon Insurance Co.*, 204 F.R.D. at 287-88.

[176] *Id.* at 288 (quoting *Gates Rubber Co. v. Bando Chemical Industries, Ltd.*, 167 F.R.D. 90, 102 (D. Colo. 1996); Cohen & Lender, ELECTRONIC DISCOVERY: LAW AND PRACTICE at § 3.02[C].

[177] *Trigon Insurance Co.*, 204 F.R.D. at 288 (quoting *Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76, 79 (3rd Cir. 1994)); *Koch Industries, Inc.*, 197 F.R.D. at 483 ("A court should select the least onerous sanction necessary to serve [the] remedial purposes. The severity of the sanction selected should be a function of and correspond to the willfulness of the spoliator's destructive act and the prejudice suffered by the non-spoliating party."); Cohen & Lender, ELECTRONIC DISCOVERY: LAW AND PRACTICE at § 3.02[C].

[178] *Silvestri*, 271 F.3d at 593 (to justify a sanction, at bottom, the district court must consider the spoliator's conduct and the prejudice caused); *Trigon Insurance Co.*, 204 F.R.D. at 288 ("Given the rationale for, and the policy behind, the rule against spoliation, assessment of sanctions depends most significantly on the blameworthiness of the offending party and the prejudice suffered by the opposing party.") (citations omitted); *Koch Industries, Inc.*, 197 F.R.D. at 483 (the two factors carrying the most weight are the degree of culpability and the degree of prejudice suffered).

degree of prejudice suffered is great, the sanction may be severe, including default judgment or dismissal of claims.[179]

B. Types of Sanctions

A court may sanction spoliation of evidence using a variety of remedies, "including imposing fines, shifting costs and awarding attorneys fees, excluding evidence, instructing the jury on permissible adverse inferences to be drawn from the missing evidence, or even dismissing claims or entering default judgment."[180] How courts handle claims for adverse inference instructions, fines/attorneys fees, and default judgment/dismissal is discussed below.

1. Adverse Inference Instructions

The rationale for giving an adverse inference instruction for the spoliation of evidence is "captured in the maxim *omnia presumuntur contra spoliatorem*, which means, 'all things are presumed against a despoiler or wrongdoer.'"[181] An adverse inference instruction is an instruction allowing, but not requiring, the jury to infer that the destroyed or withheld evidence would have been harmful to the spoliator's case if it had been produced.[182] The inference may be rebutted by evidence that satisfactorily explains why the spoliated evidence was not

[179] *See, e.g., Silvestri*, 271 F.3d at 593 ("At bottom, to justify the harsh sanction of dismissal, the district court must consider both the spoliator's conduct and the prejudice caused and be able to conclude either (1) that the spoliator's conduct was so egregious as to amount to a forfeiture of his claim, or (2) that the effect of the spoliator's conduct was so prejudicial that it substantially denied the defendant the ability to defend the claim.").

[180] Cohen & Lender, ELECTRONIC DISCOVERY: LAW AND PRACTICE at § 3.02[A]; *see also Shepherd*, 62 F.3d at 1475 (citing Gregory P. Joseph, *Sanctions: The Federal Law of Litigation Abuse* § 28(A) (2d ed. 1994)) (noting that available sanctions under a court's inherent authority include default judgment, fines, expenses, attorneys fees, evidence preclusion, adverse inference instructions, contempt citations, and disqualification of counsel).

[181] *Trigon Insurance Co.*, 204 F.R.D. at 284 (quoting *Black's Law Dictionary*, 1086 (6th ed. 1997)).

[182] *Vodusek*, 71 F.3d at 155-56.

produced.[183] It is a very serious sanction because it is often difficult to rebut; and when it is not rebutted, the adverse inference instruction may be outcome determinative.[184]

Despite its importance, courts do not agree on the level of fault that must be found before an adverse inference instruction is given. Some courts hold that a party moving for sanctions need not show the evidence was destroyed in bad faith.[185] For example, the Second Circuit only requires the aggrieved party to show mere negligence.[186] And in the Fourth Circuit, the party seeking an adverse inference instruction must show more than mere negligence, but less than bad faith. Specifically, the innocent party must demonstrate that the spoliator knew the evidence was relevant to some issue in the litigation and the spoliator willfully destroyed it.[187] Other courts hold that a showing of bad faith is a prerequisite to securing an adverse inference jury instruction.[188] In the spoliation context, bad faith is perhaps best understood as intentional destruction of relevant evidence with the desire to suppress the truth or interfering with the other party's ability to make its case.[189]

Adverse inferences play a significant role in employment litigation, both at the summary judgment stage and at trial. This is particularly true in employment discrimination cases

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[183] *Id.* at 156.

[184] *Zubulake IV*, 2003 WL 22410619, at *5.

[185] *See, e.g., Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 108 (2nd Cir. 2002); *Vodusek*, 71 F.3d at 156; *Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993); *Nation-Wide Check Corp., Inc. v. Forest Hills Distributors, Inc.*, 692 F.2d 214 (1st Cir. 1982).

[186] *Residential Funding Corp.*, 306 F.3d at 108.

[187] *Vodusek*, 71 F.3d at 156.

[188] *See, e.g., Stevenson*, 354 F.3d at 746; *Bashir v. Amtrak*, 119 F.3d 929 (11th Cir. 1997); *Aramburu v. The Boeing Co.*, 112 F.3d 1398, 1407 (10th Cir. 1997); *S.C. Johnson & Son, Inc. v. L & N R. Co.*, 695 F.2d 253 (7th Cir. 1982); *Vick v. Texas Employment Commission*, 514 F.2d 734, 737 (5th Cir. 1975).

[189] *See Stevenson*, 354 F.3d at 746; Cohen & Lender, ELECTRONIC DISCOVERY: LAW AND PRACTICE at § 3.02[C][a].

stemming from EEOC charges. EEOC regulations 29 C.F.R. §§1602.14 (private employers) and 1602.31 (public employers) require a defendant-employer who is notified of an EEOC charge of discrimination to "preserve relevant personnel records until the charges' final disposition."[190] In essence, "once an employer learns an employee (or ex-employee) has filed a charge of discrimination against it, the employer cannot destroy or discard any relevant personnel records."[191] "Relevant personnel records" is broadly defined to include not only the plaintiff's personnel records but also those pertaining to the plaintiff's supervisor(s), "underlings, peers, or any other employee, depending on the facts of the case."[192] As a result, when a defendant-employer destroys relevant personnel files before the end of litigation despite these administrative regulations, a plaintiff-employee may move for sanctions, including an adverse inference. In this context, several courts have granted a plaintiff-employee's motion for an adverse inference, or have at least recognized the propriety of applying such an inference.[193] In some cases, the adverse inference may be sufficient to overcome a defendant-employer's motion

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[190] *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1418-19 (10th Cir. 1987).

[191] *Lombard v, MCI Telecommunications Corp.*, 13 F.Supp.2d 621, 628 (N.D. Ohio 1998).

[192] *Id.* at 628.

[193] *See Hicks*, 833 F.2d at 1419 (granting plaintiff a rebuttable adverse inference/presumption that destroyed clock charts and daily reports, upon which defendant relied in disciplining plaintiff, would have bolstered her case had they been produced and reversing judgment for defendant); *Morgan v. Houston's Restaurants, Inc.*, 84 F.E.P. Cases 696 (S.D. Fla. 2000) (granting plaintiff's motion in limine in part by granting a rebuttable inference of pretext based on destroyed documents through summary judgment stage and prima facie case at trial; reserving judgment on whether adverse inference instruction would be given to the jury); *Lombard*, 13 F.Supp.2d at 629 (granting plaintiff a rebuttable presumption, for summary judgment purposes, that destroyed files would have been favorable to her case if produced and denying defendant's motion for summary judgment on retaliation claim; reserving for trial the determination of the extent and weight of the presumption); *Shipley v. Dugan*, 874 F.Supp. 933, 940 (S.D. Ind. 1995) (granting plaintiff an adverse inference at summary judgment stage and, thus, denying summary judgment on plaintiff's national origin discrimination claims); *EEOC v. Jacksonville Shipyards, Inc.*690 F.Supp. 995, 998-99 (while not deciding exactly what sanction appropriate for spoliation of personnel records, recognizing that possible sanction is granting of adverse inference).

for summary judgment.[194] These cases clearly illustrate the profound effect an adverse inference sanction for spoliation can have on employment discrimination cases.

One of the most recent and important decisions addressing the "adverse inference instruction" is *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.*[195] In this case, Morgan Stanley was sued on the grounds that they had allegedly defrauded investors. In the course of discovery, Morgan Stanley failed to produce emails, overwrote emails, failed to produce hundreds of 8mm tapes, failed to produce attachments to emails and incorrectly "word searched" thousands of emails, resulting in their failure to be identified as responsive discovery documents. On top of it all, Morgan Stanley's representative responsible for conducting the discovery search submitted a false verification, stating incorrectly that Morgan Stanley had complied with the court's discovery orders. In response to this conduct, the court wrote that "[t]he conclusion is inescapable that [Morgan Stanley] sought to thwart discovery." The court also stated that Morgan Stanley "gave no thought to using an outside contractor to expedite the process of completing the discovery, though it had certified completion months earlier; it lacked the technological capacity to upload and search the data at that time, and would not attain that capacity for months." Thus, the court issued an adverse inference instruction to the jury, directing them that Morgan Stanley had helped to defraud investors, as established by their conduct in discovery. Relying on the court's instruction, on May 16, 2005, the jury awarded the plaintiffs over $600 million in compensatory damages. Relying on the same adverse inference

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[194] *See Morgan,* 84 F.E.P. Cases 696; *Lombard*, 13 F.Supp.2d at 629; *Shipley*, 874 F.Supp. at 940.

[195] 2005 WL 679071 (Fla. Cir. Ct. Mar. 1, 2005) & 2005 WL 674885 (Fla. Cir. Ct. Mar. 23, 2005).

instruction, the jury went on to award $850 million in punitive damages. In total, the adverse inference instruction cost Morgan Stanley $1.4 billion in total damages.[196]

2. Fines/Attorneys Fees

Awards of costs and attorneys fees are the most commonly granted sanctions for spoliation.[197] Fines are also relatively common.[198] Courts may grant these monetary sanctions under the Federal Rules, their inherent authority, or by statute. Monetary sanctions can be levied against the spoliating party, including its individual officers, the attorney(s), or both, depending on whom the court finds responsible for the spoliation.[199] In essence, anyone responsible for the preservation and production of relevant documents may face monetary sanctions for spoliation.

Because fines and an award of attorneys' fees are essentially punitive, some courts require a showing of discovery misconduct by clear and convincing evidence before granting these monetary sanctions.[200] Others require a showing of bad faith, at least when proceeding under the court's inherent authority to sanction spoliation.[201] Still others will award attorneys

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[196] *See* Barton, Jill, *Perelman Wins $1.4 Billion Total in Suit Against Morgan Stanley,* (Law.com, May 19, 2005).

[197] Cohen & Lender, ELECTRONIC DISCOVERY: LAW AND PRACTICE at § 3.02[C][2].

[198] *Id.*

[199] *Metropolitan Opera Association, Inc.*, 212 F.R.D. at 220 (court may sanction party and/or attorneys under inherent power); *Danis*, 2000 WL 1694325, at *6 (fining CEO personally for spoliation caused by his lack of action to ensure preservation).

[200] *See Shepherd*, 62 F.3d at 1477, 1478 (citing *Autorama Corp. v. Stewart*, 802 F.2d 1284, 1287-88 (10th Cir. 1986); *Weinberger v. Kendrick*, 698 F.2d 61, 80 (2nd Cir. 1982)) (under inherent authority, courts must find predicate misconduct by clear and convincing evidence before imposition of fines and attorneys fees); *Danis*, 2000 WL 1694325, at *34 n.22 (imposition of fines requires clear and convincing evidence under Rule 37 or inherent authority because of penal nature; reasoning would apply with equal force to attorneys fees).

[201] *See Stevenson*, 354 F.3d at 751 (courts have the inherent authority to award attorneys fees so long as there is a finding of bad faith—i.e., the misconduct "abuses the judicial process in some manner."); *Metropolitan Opera Association, Inc.*, 212 F.R.D. at 220 (under inherent authority, bad faith must be shown before attorneys fees are awarded).

fees, costs or impose fines absent clear and convincing evidence or a finding of bad faith.[202] Therefore, litigants and their attorneys should determine the standards for imposing monetary sanctions for spoliation in their specific jurisdiction.[203]

3. Default Judgment/Dismissal

An award of default judgment/dismissal of claims is clearly the most severe sanction that can be given for spoliation. There is a general presumption in favor of disposition of cases on the merits.[204] These sanctions, therefore, are generally viewed as a last resort.[205] This does not mean, however, that a litigant or its counsel must first receive a warning that continued spoliation will result in sanctions, in general, or default/dismissal, in particular.[206] But the fact that a party and its counsel have been given several chances and warnings but continue their spoliation may be considered in determining whether default/dismissal is appropriate.[207]

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[202] *Zubulake IV*,--F.R.D.--, 2003 WL 22410619, at *7 (finding no bad faith and proceeding under preponderance of evidence rule, yet ordering spoliating party to pay costs of re-deposing four witnesses regarding the destruction of relevant electronic documents and issues raised by destruction); *Trigon Insurance Co.*, 204 F.R.D. at 291 (awarding attorneys fees and costs of preparing for and litigating spoliation issues under preponderance of evidence standard and after explicitly acknowledging that bad faith is not necessary for sanctions in the Fourth Circuit).

[203] Counsel should also note that they can be held personally liable for spoliation under 29 U.S.C. §1927. *See Metropolitan Opera Association, Inc.*, 212 F.R.D. at 220 (counsel can be held personally liable for attorneys fees and costs when their actions multiply and delay proceedings "unreasonably and vexatiously" in bad faith).

[204] *See, e.g., Shepherd*, 62 F.3d at 1475.

[205] *Wiginton*, 2003 WL 22439865, at *6 (default is reserved for extreme cases); *Metropolitan Opera Association, Inc.*, 212 F.R.D. at 220 (default is reserved only for extreme circumstances); *ABC Home Health Services, Inc. v. International Business Machines, Corp.*, 158 F.R.D. 180, 182 (S.D. Ga. 1994) (default or dismissal is used only as a last resort).

[206] *Metropolitan Opera Association, Inc.*, 212 F.R.D. at 230 (warning is not required before sanctions, including default, can be given for spoliation); *Danis*, 2000 WL 1694325, at *31 (same).

[207] *Metropolitan Opera Association, Inc.*, 212 F.R.D. at 184 n. 4 (Counsel and the litigant "had more than sufficient opportunity to correct their deficiencies during the course of discovery…The time to face the consequences is now at hand."); *Wm. T. Thompson Co.*, 593 F.Supp. at 1456 (pattern of violations, including ignoring four separate court orders, served as an independent basis for granting default judgment and dismissing claims in a related suit).

Although the courts are not in total agreement on the standards used to determine whether default/dismissal is appropriate, most consider: (1) the egregiousness of the spoliator's conduct; (2) the prejudice caused by the spoliation; and (3) whether lesser sanctions would sufficiently compensate for, punish and deter the spoliation.[208] The egregiousness of the conduct and the prejudice suffered are balanced with each other to determine whether default/dismissal is appropriate. The most severe sanctions may be appropriate either when the conduct is very egregious, or when the resulting prejudice is severe.[209]

The courts generally agree that proof of willfulness or bad faith is needed before default/dismissal will be granted.[210] Courts disagree over the level of proof necessary, however, to grant default/dismissal. Some courts, particularly when proceeding under their inherent authority, require clear and convincing evidence of the spoliator's conduct and level of

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[208] *Silvestri*, 271 F.3d at 593-94 (holding that court must consider the egregiousness of the spoliator's conduct and/or the prejudice caused, and find one or the other so egregious as to warrant dismissal); *Shepherd*, 62 F.3d at 1478-79 (default is usually reserved only for cases of wholesale destruction or the destruction of dispositive evidence, and district court must specifically provide a reasoned basis why lesser sanctions are insufficient); *Wm. T. Thompson Co.*, 593 F.Supp. at 1456 (granting default judgment because spoliator acted willfully, spoliation destroyed the best available evidence regarding central issues in the case, and lesser sanctions would effectively reward spoliator for egregious conduct).

[209] *Silvestri*, 271 F.3d at 593-94 (court must consider conduct and prejudice—dismissal usually granted only where bad faith shown, but may also be used when prejudice is "extraordinary;" affirming dismissal because plaintiff destroyed only physical evidence in products liability case even though was perhaps merely negligent); *Danis*, 2000 WL 1694325, at *34 (when spoliation is negligent, look to prejudice to balance; declining to grant default judgment because spoliation was negligent and destroyed evidence was not the only evidence, even if it was the best); *Wm. T. Thompson Co.*, 593 F.Supp. at 1456 (finding two independent bases for granting default for spoliation—spoliation deprived the aggrieved party of critical evidence, and spoliation was willful, i.e., there was a pattern of violations of court orders).

[210] *Silvestri*, 271 F.3d at 593 (proof of bad faith is generally required for default/dismissal in the Fourth Circuit, but negligence may be sufficient if extreme prejudice); *Wiginton*, 2003 WL 22439865, at *6 (requiring willfulness, bad faith or objective unreasonableness); *ABC Home Health Services, Inc.*, 158 F.R.D. at 182 (willfulness or bad faith required in Eleventh Circuit); *Wm. T. Thompson Co.*, 593 F.Supp. at 1455 (willfulness/bad faith required, at least under the court's inherent authority).

culpability.[211] Again, litigants and counsel should check the most current case law in their jurisdiction to determine what standard the court will use to decide what sanction is appropriate.

VIII.
CONCLUSION

The dramatic increase in the use of electronic media has fundamentally changed civil discovery. Courts, litigants, and attorneys are faced with new issues, such as when shifting the costs of discovery is appropriate. In addition, old issues, like the preservation duty and counsel's ethical obligations, have been given a new spin. Unfortunately, courts have been inconsistent in the way they approach these issues in electronic discovery disputes. Some states have revised their rules to reflect the realities of electronic discovery and to deal with particular issues, and in the past month, a panel of the United States Judicial Conference has approved a set of proposed rule amendments that would be a first step toward doing the same on the federal level. However, these proposed changes will not take effect until December 2006, at the earliest. Until then, litigants and their attorneys must continue to identify and adhere to the standards used to deal with electronic discovery issues in their particular jurisdiction.

[211] *See, e.g., Shepherd*, 62 F.3d at 1472 (requiring clear and convincing evidence of abusive discovery misconduct, as opposed to preponderance, before granting default under inherent authority); *see also Danis*, 2000 WL 1694325, at *34 (clear and convincing evidence is required under both inherent authority and Rule 37(b)).