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Electronic Discovery: Understanding Preservation Obligations, the Potential for Cost-Shifting, and Current Developments

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Electronic Discovery - What's All The Talk About?

Discovery is an enormous part of litigation to litigants, their counsel, and the judges presiding over their cases. One of the primary purposes of discovery is to help get a case that a litigant and its attorney are determined to win ready for a trial. Part of winning a case is telling the right story, and discovery is a part of putting together that story.[2] Where does electronic discovery - or "e-discovery" - come into play? In recent years, there has been a shift from a paper world to an electronic world. In 1999, for example, 93% of all information created was generated in digital form, either on computers or on some other digital media. [3] It is safe to assume that over the last five years, the percentage of information generated in digital form has grown. Today, "[m]illions of transaction[s] *with legal significance* take place using computer-mediated communications, such as email, the Web, and file exchanges. Products are built and designed, orders are placed, payments are made, goods are shipped, people are hired and fired, all by computer. Everything has been automated . . . ."[4] Moreover, email usage is the primary mode of communication today, exceeding postal usage.[5] Despite this shift, a misperception lingers, namely that discovery does not include electronic documents. To demonstrate, seventy five percent of attorneys in the American Bar Association's Litigation Section, in response to a survey conducted in 1997, indicated that their clients were not aware that electronic documents were discoverable until served with a discovery request for electronic documents. [6] Email and other electronic information are in fact subject to discovery during litigation.[7]

How does the shift toward electronic information affect litigants and their counsel? Electronic information is more voluminous than paper information and can be stored, and therefore must be searched, in many more locations than paper information. Furthermore, while paper documents can easily be lost, damaged, or destroyed, deleting electronic data does not automatically erase the data.[8] All of the major differences between conventional paper discovery and electronic discovery translate into cost, one of the most important consideration for litigants. [9] "[E]-discovery has the potential to be vastly more expensive due to the

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sheer volume of electronic information that can be easily and inexpensively stored on backup media."[10] Consider the substantial burden on the party subject to a document production request that includes electronic information:

> [T]he scope of what is included in the phrase "electronic records" can be enormous, encompassing voice mail, e-mail, deleted e-mail, data files, program files, back-up files, archival tapes, temporary files, system history files, web site information in textual, graphical or audio format, web site files, cache files, "cookies" and other electronically stored information.[11]

There are many ways electronic information is stored and many places a producing party will have to search for electronic information. The costs associated with searching for electronic information can be in the hundreds of thousands of dollars:

> Searching for deleted electronic records can be particularly time consuming and expensive given the number of storage locations that may have to be checked (e.g., desk-top computer, laptops, PDA's, employee home computers, back-up and archive data, and systems files, for instance) coupled with the possible need to use special search methods to locate deleted files.[12]

Because of the cost implications of e-discovery, one of the most common disputes among litigants has been "who will foot the bill."[13] In recent years, case law - primarily federal - has been emerging to give litigants, attorneys, and judges guidance with e-discovery, and jurisdictions are implementing local e-discovery rules to provide additional guidance. Perhaps the most important updates, and the most anticipated, in e-discovery are the proposed amendments to the Federal Rules of Civil Procedure. To put it simply, a lot is going on in the world of e-discovery, and it may not be the easiest topic for litigants, attorneys, and judges to get their hands around.[14] This article suggests ways in which litigants can prepare, even before anticipation of litigation, for e-discovery in order to lower costs and avoid collateral litigation, discusses what is expected from litigants and their attorneys once litigation is anticipated so sanctions can be avoided, and discusses what issues may develop during the course of litigation and how litigants and attorneys can avoid or confront those issues. Finally, the article ends with an overview of the District of Delaware's default local rules on electronic document discovery and the proposed amendments to the Federal Rules of Civil Procedure.

Preparing For E-Discovery - Yes, Even Before Litigation is Anticipated

There are a number of steps a company can take to prepare for e-discovery even before litigation is anticipated. These steps are especially critical to companies frequently engaged in litigation, and steps taken will help reduce the cost of

e-discovery.

The most important step a company can take is to adopt a document management plan.[15] The company should have "document retention and destruction practices, backup protocols, tape rotation and recycling schedules, and other practices related to electronic data management."[16] Under the document management plan, the company should "retain[] all records necessary to the business, regulatory, and legal needs of the organization."[17] The existence and effectiveness of a document management plan may factor into any spoliation analysis,[18] and a company may be able to show that it legitimately destroyed information by following, in good faith, a document retention or destruction policy.[19]

Companies should create back-up plans with the goal of making retrieval of desired information easier, faster, and cheaper during e-discovery.[20] "A company that diligently complies with applicable laws and dutifully preserves electronic evidence in light of pending litigation may be in for a rude awakening if its retention 'plan' consists of disorganized or overwritten backup tapes."[21] For example, a company may wish to organize back-up data by type, e.g. e-mail, word processing, website, etc., and should think about which type of information should be kept in which storage media because the reasonable accessibility of the electronic information is, in at least some jurisdictions, a key factor in determining whether the responding party can shift the cost of producing the electronic information to the requesting party.[22]

The case of *Kaufman v. Kinko's*[23] demonstrates the peril at which a company proceeds in Delaware by failing to have an organized back-up and retrieval system. In this case, the plaintiffs sought to discover e-mail communications it alleged were relevant to the litigation.[24] The defendants opposed the plaintiffs' motion to compel production of the e-mail, arguing that it did "not at present possess an electronic document storage retrieval system that makes the requested information readily accessible and available."[25] The defendants told the court that the cost of retrieving the e-mail communications would be close to $100,000, which it claimed outweighed the potential benefit of the production of the e-mails to the plaintiffs.[26] The court first held that the e-mail communications met the "broad definition of discoverable material . . . [and] plaintiffs . . . made a sufficient showing to require their production."[27] The court compelled the defendants to produce the emails, admonishing the defendants for not having a back-up retrieval system:

> Although the imposition of not insubstantial cost may appear to be unfair, the need to provide an information retrieval system is the prevailing concern . . . . Upon installing a data storage system, it must be assumed that at some point in the future one may need to retrieve the information previously stored. That there may be deficiencies in the retrieval system (or inconvenience and cost associated with the actual retrieval) cannot be sufficient to defeat an otherwise good faith request to examine relevant information (or information likely to lead to the discovery of admissible evidence).[28]

Finally tape rotation and recycling practices should take into consideration that future

litigation may occur. This would entail, among other things, ensuring that backup tapes are not recycled so frequently that future litigation is not accounted for.[29] In summary, a company should establish, with an eye toward the possibility of future litigation and e-discovery, a document management policy, ensure that it is followed, and implement an information storage system "in a manner that anticipates future business use and permits efficient searching and retrieval."[30]

Anticipation of Litigation - What is Expected of Litigants and Attorneys

When Does The Preservation Obligation Attach?

In any discovery dispute, the first - and crucial - question the court will analyze is when the responding party's preservation obligation attached. Generally speaking, "[t]he obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation."[31] More concisely put, the duty to preserve documents attaches at the time when a company *reasonably anticipates* litigation.[32]

To understand what it means to reasonably anticipate litigation, it is helpful to illustrate with an example. In the Zubulake case, perhaps the most important case dealing with e-discovery issues,[33] the plaintiff, Laura Zubulake, filed a charge of gender discrimination with the Equal Employment Commission ("EEOC") against her employer, UBS Warburg LLC ("UBS"), and less than two months later, USB fired her. Zubulake then sued UBS for gender discrimination and retaliation under various federal, state, and city laws.[34] On the question of when UBS's duty to preserve evidence attached, the court first noted that the duty to preserve attached, at the latest, when Zubulake filed her charge of gender discrimination with the EEOC.[35] However, the court held that the duty to preserve actually attached approximately four months before Zubulake file the EEOC charge because "almost everyone associated with Zubulake recognized the possibility that she might sue."[36] As the Zubulake case demonstrates, it is not necessary for a complaint to have been filed, or a discovery request to have been served, for a company's duty to preserve to attach.[37]

OK, So The Duty to Preserve Has Attached, Now What?

Knowing when the duty to preserve evidence is triggered is half the battle. Once the

duty to preserve attaches, there are a number of steps a company should take.

The Who and What of Preservation

Two important questions surrounding the duty to preserve are: 1) whose documents must be retained; and 2) what documents must be retained. The answer to the who question is that the company must preserve documents of "those employees likely to have relevant information — the 'key players' in the case."[38]

As the answer to the what question, there is agreement that a company is not required to "preserve every shred of paper, every e-mail or electronic document, and every backup tape."[39] As to backup tapes, "deleted" electronic information, and metadata, there appears to be a difference of opinion. In the *Zubulake* case, the court noted that, even though it is not necessary for the producing party to preserve all backup tapes once the duty to preserve attaches, it is necessary for that party to preserve "unique, relevant evidence that might be useful to an adversary."[40] The key factor for determining what information needs to be preserved, at least in the *Zubulake* case, is the relevance of the information. The producing party must preserve all relevant information existing at the time the duty to preserve attaches and any information that is created after the duty attaches, even if the information is on a backup tape.[41]

Competing with the approach the court took in *Zubulake* with respect to backup tapes is the view of the Sedona Conference Working Group of Electronic Document Production.[42] The Sedona Group's view is that information on backup tapes, as well as "deleted" information, should not have to be automatically preserved,[43] and the Sedona Group proposes that the preservation of backup tapes and other data should not be resorted to unless the "requesting party . . . demonstrate[s] need and relevance that outweigh the cost, burden, and disruption of retrieving and processing the data from such sources."[44] The Sedona Group approach favors a balancing test, whereas the courts seem to be favoring a relevance test.[45] While a balancing test is appropriate for determining who should bear the cost of producing relevant backup tape data or relevant "deleted" data, the more important question for the courts, at least at this stage, is relevance.[46]

Complying with the Preservation Duty

The court in *Zubulake IV* and *Zubulake V* outlined steps a company, and its counsel, must take to comply with their preservation duties. First, once the company reasonably anticipates litigation, it is necessary for the company to 1) suspend any document destruction policy; and 2) implement a litigation hold.[47] Backup tapes that "are accessible (i.e., actively used for information retrieval)" are subject to the hold. [48] The litigation hold does not apply to, and the company may continue to recycle, "inaccessible backup tapes (e.g., those typically maintained solely for the purpose of disaster recovery."[49] The court made one exception to the rule that inaccessible

backup tapes are not subject to the litigation hold - all backup tapes storing the documents of the key players, if the information is not otherwise available, must be preserved.[50]

The court in *Zubulake V* discussed "counsel's obligation to ensure that relevant information is preserved by giving clear instructions to the client to preserve such information and, perhaps more importantly, a client's obligation to heed those instructions."[51] In the *Zubulake* case, UBS' in-house and outside counsel had instructed employees to preserve relevant electronic information, but certain employees deleted the electronic information or never produced the electronic information to counsel.[52] Counsel, however, failed to tell one employee about the litigation hold, never requested preserved electronic information from a key employee, never communicated with another employee about how that employee maintained its files, and failed to safeguard backup takes that may have contained "deleted" information.[53] As a result of these failures, some deleted information was lost forever, and the court ordered sanctions.

In determining whether sanctions were warranted, the "central question" for the court was whether the company and its counsel "took all necessary steps to guarantee that relevant data was both preserved and produced."[54] In order to guarantee that relevant data is preserved and produced, the court held that a company and its counsel "must make certain that all sources of potentially relevant information are identified and placed 'on hold.'" This step entails counsel monitoring for compliance with the hold by doing the following: (1) familiarizing herself with the company's document retention and destruction policies and the company's computer system, including where active and stored data are located; (2) speaking with information technology personnel to familiarize herself with the company's backup and recycling procedure; and (3) communicating with key players to familiarize herself with how these key players store information.[55]

Counsel also has a continuing duty to preserve information and produce responsive information. This entails counsel taking the following steps: (1) issuing a litigation hold when litigation is reasonably anticipated and periodically re-issuing the hold "so that new employees are aware of it, and so that it is fresh in the minds of all employees;" (2) periodically remind the key players of their preservation duty; (3) instruct all employees to produce electronic copies of all their relevant active files; and (4) ensure that all relevant backup tapes are identified and stored safely.[56] With respect to counsel's duty to store backup tapes safely, counsel should physically take possession of the tapes or segregate the tapes and place them in storage.[57]

While the *Zubulake* case does give litigants and their counsel practical advice, here is an overview of steps that a company could consider taking once it anticipates litigation: (1) Prepare a preservation plan.[58] This may entail putting together a cross-functional team, with members of the law department, IT department, as well as outside counsel, and the e-discovery provider, if any.[59] The plan would include maintaining data in the format it was in at the time that it became potentially

relevant or responsive. (2) Identify the key players and prepare them to carry out their e-discovery obligations.[60] (3) Implement a print and retain policy, which would require employees to print out on paper all relevant active electronic data.[61] (4) Communicate with opposing counsel and enter into a preservation agreement.[62] (5) Appoint a preservation coordinator to ensure that all employees are complying with their preservation duties. This person could be a member of the cross-functional team. (6) Appoint an E-Discovery liaison. This person would be responsible for communicating with the other party on issues such as the discovery plan, search methodology, production format, privilege, etc. This person could also negotiate cost allocation and a chain of custody/authentication protocol before the work starts. (7) Use electronic tools to satisfy preservation obligations. When dealing with large amounts of electronic data, companies can use key word searching and data sampling to satisfy their preservation obligations. For example, in addition to any "print and retain" policy, the IT member of the cross-functional team could periodically run key word searches in different storage locations to find relevant information for preservation. The parties could develop an agreed upon list of search terms.[63] The IT person could also perform sampling of different data sources to determine whether that source contains a high or low level of responsive electronic information. This information would be useful to the court on a motion to compel.[64] (8) Preserve all relevant electronic information, whether backup tapes, "deleted" data, or metadata.[65] Aside from the risks associated with the failure to comply with the duty to preserve relevant data, "the failure to preserve and produce metadata may deprive the producing party of the opportunity to later contest the authenticity of the document if the metadata would be material that determination." (9) Consider hiring an outside consultant who can provide the substantial benefit of experience with e-discovery.

Litigation - Cost-Shifting, Sanctions, And Other Considerations

Numerous issues may materialize during litigation in the context of e-discovery. This section focuses primarily on two areas: (1) cost-shifting; and (2) sanctions. The cost-shifting discussion will give a company insight into what the potential costs of e-discovery can be and what factors the court will consider to determine whether it is appropriate for the requesting party to pay some or all of the cost of producing the electronic information. However, while it is possible, as will be shown, to shift the cost of producing electronic information to the requesting party, it is uncertain whether a court would shift any cost to the requesting party. As noted above, the more a company prepares for e-discovery, even before litigation is reasonably anticipated, the more equipped the company will be to conduct and respond to e-discovery in a cost efficient manner and without sanctions.

Cost-Shifting - Who Should Pay?

The *Zubulake* case, specifically *Zubulake I*, "stands to become a major precedent in the law of the cost-shifting for electronic discovery."[66] The judge presiding over the case noted that the case is "a textbook example of the difficulty of balancing the competing needs of broad discovery and manageable costs."[67]

Because of the importance of the *Zubulake* case, it is helpful to understand the nature of the e-discovery dispute before delineating what factors are important to consider in making the ultimate determination of who will pay for the discovery. During discovery, Zubulake asked for the production of "[a]ll documents concerning any communication by or between UBS employees concerning Plaintiff."[68] Zubulake and UBS agreed that UBS would produce responsive e-mails from five UBS employees chosen by Zubulake. UBS produced approximately 100 pages of e-mails, and argued that there were no other responsive e-mails to produce.[69] Zubulake argued that there were responsive e-mails located on UBS' back-up tapes.[70] UBS originally estimated that the cost of producing the e-mails from the backup tapes would be approximately $300,000.[71]

The court first reviewed the following fundamental discovery principles: (1) "[p] arties may obtain discovery regarding any matter, not privileged, that is relevant. . .;[72] (2) the proportionality test of the Federal Rules of Civil Procedure is helpful for determining whether discovery should be limited;[73] and (3) the presumption is that the producing party pays the costs associated with discovery requests, but the producing party may request the court to protect it from undue burden or expense, including shifting the cost of discovery to the requesting party.[74]

The court, after holding that Zubulake was entitled to production of the e-mails because the e-mails were relevant to her discrimination claim,[75] held that cost-shifting is not appropriate in every case.[76] The court reasoned:

> As large companies increasingly move to entirely paper-free environments, the frequent use of cost-shifting will have the effect of crippling discovery in discrimination and retaliation cases. This will both undermine the 'strong public policy favor[ing] resolving disputes on their merits,' and may ultimately deter the filing of potentially meritorious claims.[77]

Cost-shifting will only be *considered* when the production of electronic information is unduly burdensome or unduly expensive,[78] which "turns primarily on whether the information is kept in an *accessible or inaccessible format*."[79] The five categories of storage media the court described, from most accessible to least accessible are: (1) active, online data; (2) near-line data; (3) offline storage/archives; (4) backup tapes; and (5) erased, fragmented or damaged data.[80] The court concluded that data stored in the first three categories is "accessible" because the data in those storage media is in a "readily useable format" and "does not need to be restored

or otherwise manipulated to be usable."[81] Data stored on the last two storage media is "inaccessible" because "[b]ackup tapes must be restored . . . fragmented data must be de-fragmented, and erased data must be reconstructed, all before the data is usable."[82] Therefore, according to the Zubulake court, "it would be wholly inappropriate to even consider cost-shifting" for "accessible" information, but it would be appropriate to consider cost-shifting for "inaccessible" information.[83]

In the *Zubulake* case, the emails on the defendant's backup tapes were the inaccessible information. The court laid out seven factors that it would consider to determine whether it would be appropriate to shift the cost of producing the emails from UBS to Zubulake. The seven factors are:

1. The extent to which the request is specifically tailored to discover relevant information
2. The availability of such information from other sources
3. The total cost of production, compared to the amount in controversy
4. The total cost of production, compared to the resources available to each party
5. The relative ability of each party to control costs and its incentive to do so
6. The importance of the issues at stake in the litigation
7. The relative benefits to the parties of obtaining the information.[84]

The basic question is "how important is the sought-after evidence in comparison to the cost of production?"[85] Determining whether cost-shifting is appropriate must not rest on the assumption that relevant evidence will be found; there must be a factual basis for the analysis.[86] Therefore, before analyzing the seven factors, "the responding party [is required] to restore and produce responsive documents from a small sample of backup tapes."[87] After the responding party performs a sampling, the court will be equipped with the necessary factual information to analyze just how helpful a full restoration would be, and how much the actual - as opposed to estimated - costs of the full restoration would be.

The sampling of UBS' backup tapes yielded approximately 600 responsive emails at a cost of approximately $11,000.[88] This cost included the amount UBS paid to an outside vendor to restore the backup tapes and search for responsive emails as well as attorney and paralegal time for "tasks related to document production."[89] Based on this figure, UBS projected that the total cost of production would be approximately $275,000. Of the six hundred responsive e-mails, sixty-eight of the e-mails were relevant to Zubulake's claims, but none "provide[d] any direct evidence of discrimination."[90]

To begin its analysis, the court noted that the e-mails are only available from the backup tapes and "direct evidence may only be available through restoration."[91]

The court concluded that, upon weighing factors one and two, that the "marginal utility of this additional discovery may be quite high" and that these factors tip "slightly against cost-shifting." The court also concluded that factor three weighed against cost-shifting. The court determined that the total cost of restoration, which it determined to be approximately $165,000, exclusive of attorney time, was not "significantly disproportionate" to the projected value of the case, which it assumed was a multi-million dollar case.[92] The court also held that the fourth factor weighed against cost- shifting, noting that the defendant has "exponentially more resources available to it than Zubulake."[93] The court held that factors five and six were neutral.[94] As to factor seven, the court found that this factor weighed in favor of cost-shifting because Zubulake stood to benefit more from the production of the emails than UBS stood to benefit.[95] After weighing the factors, the court concluded that Zubulake would have to pay twenty-five percent of the cost of *restoring the backup tapes and searching for responsive information*. The court held that Zubulake was not required, however, to share in the cost of reviewing and producing the electronic information. The court reasoned that the producing party, once the information has been restored, has the "exclusive ability to control the costs of reviewing the documents," and cost-shifting is no longer appropriate because the data is no longer "inaccessible."[96]

For the most part, courts that have addressed the issue generally agree with the *Zubulake* court's approach to cost shifting.[97] The Sedona Group, however, takes a notably different approach to cost-shifting:

> Absent a specific objection, agreement of the parties or order of the court, the reasonable costs of retrieving and reviewing electronic information should be borne by the responding party, unless the information sought is not reasonably available to the responding party in the ordinary course of business. If the data or formatting of the information sought is not reasonably available to the responding party in the ordinary course of business, then, absent special circumstances, the costs of retrieving and reviewing such electronic information should be shifted to the requesting party.[98]

There are three differences between the Sedona Group approach and the *Zubulake* approach. First, the Sedona Group substitutes a reasonably/not reasonably available to the responding party in the ordinary course of business test for Zubulake's accessibility test. For the most part, these two tests may yield the same conclusions, but it is possible that information on a particular storage media would be considered "accessible" by the *Zubulake* court but not reasonably available in the ordinary course of business. Second, the Sedona Group approach provides that when the information is not reasonably available in the ordinary course of business, the cost "should be shifted," whereas under the *Zubulake* approach, cost-shifting should only be considered when the information is "inaccessible". Finally, the Sedona Group approach provides that the cost of "retrieving and reviewing" the electronic information should be shifted, whereas under the *Zubulake* approach, only the cost of retrieving and searching the information can be shifted. In all three areas, the Sedona

Group approach favors producing parties.[99]

The Court of Chancery of the State of Delaware has taken a drastically different approach to cost-shifting. The Chancery Court, when confronted with the situation in which a defendant claimed the requested information was not readily accessible, refused to shift any of the cost of production to the requesting party, blaming the producing party for not having an information retrieval system.[100] It is not clear whether the Chancery Court would still refuse to shift any of the cost of producing electronic information in a situation where the producing party does have an information retrieval system, but the information is still "inaccessible."

When dealing with backup tapes or other "inaccessible" data, litigants should expect the possibility that the court will order the responding party to restore a sample of the backup tapes or other storage media.[101] As discussed above, the responding party can at least partially prepare itself ahead of time by sampling information on different storage media in fulfillment of its preservation duties. Litigants should also be prepared to make submissions addressing the Zubulake factors. Broad, conclusory statements that the document request is unduly burdensome or expensive, without particularized facts supporting these allegations, will fail.[102]

Cost-shifting is not the only "limitation" the producing party can request the court to impose. "The options available [under the Federal Rules of Civil Procedure] are limited only the court's own imagination and the quality and quantity of the factual information provided by the parties . . . ."[103] Other potential limitations include: (1) limiting the number of hours the producing party has to search for electronic information; (2) limiting the number of sources the producing party has to search; (3) delaying "production of electronic records . . . until after the deposition of information and technology personnel of the producing party, who can testify in detail as to the systems in place, as well as to the storage and retention of electronic records, enabling more focused and less costly discovery;" and (4) requiring the parties to retain an expert on behalf of the court to assist in the structuring of a search.[104] Parties should not assume that the court will provide the parties with these options, but should instead propose them to the court.

Sanctions

If a party fails to preserve, fails to produce, or destroys relevant evidence, it faces sanctions from the Court.[105] The most drastic sanction is default judgment against the sanctioned party.[106] Other potential sanctions include: (1) an adverse inference jury instruction;[107] (2) ordering the sanctioned party to pay the costs of the discovery motion, including attorney's fees;[108] (3) ordering the sanctioned party to pay the costs of further discovery; (4) ordering the sanctioned party to pay the cost of restoring other backup tapes;[109] (5) preventing the sanctioned party from calling

witnesses at trial;[110] (6) punishing the sanctioned party with a fine;[111] and (7) other sanctions permitted by the Federal Rules of Civil Procedure.[112]

The court in *Zubulake IV* addressed the plaintiff's request for sanctions against UBS. After the court in *Zubulake III* ordered the parties to share in the costs of producing the email communications stored on backup tapes, it was discovered that backup tapes relating to key players and relevant time periods in the case were missing. The court was also informed that UBS employees had deleted emails after the duty to preserve evidence had attached. Zubulake asked for an adverse inference jury instruction. An adverse inference jury instruction, while not as severe as a default judgment, "often ends litigation" because "it is too difficult a hurdle for the spoliator to overcome." The court explained:

> When a jury is instructed that it may infer that the party who destroyed potentially relevant evidence did so out of a realization that the [evidence was] unfavorable, the party suffering this instruction will be hard-pressed to prevail on the merits. Accordingly, the adverse inference instruction is an extreme sanction and should not be given lightly.[113]

In order for the court to sanction a litigant with an adverse inference jury instruction, the party must have destroyed the evidence at a time when it had a duty to preserve it, and the party must have acted with a "culpable state of mind."[114] If the party was negligent in destroying the evidence, the party seeking an adverse inference jury instruction must prove that the evidence was relevant.[115] Any destruction of evidence after the duty to preserve attaches is at least negligent.[116] If the party destroyed the evidence in bad faith, either intentionally or willfully, the party seeking the sanction need not prove relevance.[117]

In *Zubulake IV*, the court held that UBS' destruction of the backup tapes was negligent, and perhaps reckless, but was not willful. The court also held that Zubulake did not show that the destroyed backup tapes contained relevant evidence.[118] The court accordingly refrained from sanctioning UBS with an adverse inference instruction.[119]

While UBS escaped an adverse inference jury instruction in *Zubulake IV*, it was not so fortunate in *Zubulake V*. The court in *Zubulake V* first determined that both UBS and its counsel had violated their duties to preserve evidence.[120] The court then held that UBS acted willfully in destroying the evidence, and as a consequence, sanctioned UBS with an adverse inference jury instruction.[121]

Aside from an adverse inference jury instruction, which itself can be devastating, at least one court has sanctioned a party with a fine in the millions of dollars. The court in the *Phillip Morris* case had ordered the "preservation of 'all documents and other records containing information which could be potentially relevant to the subject matter of this litigation.'"[122] Despite this direct order, and in contravention of its own document retention policies, the defendant deleted and permanently lost relevant e-mails. The court was "astound[ed] that employees at the highest corporate

level in Philip Morris, with significant responsibilities pertaining to issues in this lawsuit, failed to follow" the court's order and the company's own policies.[123] The court sanctioned the defendant by preventing it from calling a person to testify as a fact or expert witness at trial, and requiring it to pay close to *three million dollars* ($2,995,000) to the court registry.[124]

Practically Speaking

Parties engaging in e-discovery should confer as early as possible in the discovery process.[125] The benefits to conferring early in the discovery process include the resolution of disputes and avoidance of litigation over discovery disputes. The parties conducting e-discovery can and should discuss many of the issues as early as a Rule 26(f) conference[126] or even earlier. First, the parties should discuss how electronic discovery factors into the overall discovery plan. The parties should negotiate the scope of e-discovery requests, include date ranges and document type restrictions; for the producing party, such agreements greatly reduce the risk of evidentiary spoliation motions, and may permit normal document retention policies to remain in effect for all materials that fall outside the agreement. Second, the parties can discuss search methodologies, including search terms, to be used in the search of electronic information for preservation and production of relevant electronic information.[127] The parties can propose to the court a sampling plan, which would outline the storage media to be searched, which key words will be used for the search, the date for the responding party to advise the court and the requesting party of the sampling results, as well as how much time and money the producing party spent conducting the search. The production format should also be discussed. Third, the parties can discuss how to deal with privilege in the context of e-discovery. The parties could enter into a privilege agreement, sometimes referred to as a "claw-back" or "quick-peek" agreement, or the parties can approach the court with a non-waiver of privilege order. Whether the parties enter an agreement or the court enters a non-waiver order, the agreement or the order "should provide that the inadvertent disclosure of a privileged document does not constitute a waiver of privilege, that the privileged document should be returned (or there will be a certification that it has been deleted), and that any notes or copies will be destroyed or deleted."[128] A "claw-back" agreement or non-waiver order will alleviate some of the costs the producing party would normally incur in reviewing large amounts of electronic data for privilege,[129] and would be attractive to producing parties in jurisdictions that will shift the cost of retrieving and searching backup tapes but not the cost of reviewing the electronic information for privilege.[130] If the parties do not enter into a "claw-back" agreement, the parties should discuss how to handle privilege logs. Ordinarily, the producing party is required to "describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess

the applicability of the privilege or protection."[131] With e- discovery, because of the sheer volume of electronic data, such a detailed privilege log may be cumbersome and labor intensive, resulting in higher discovery costs. The parties can agree to a more simple privilege log. Finally, the parties, if they wish, could propose to the court that it appoint a special master or an expert.[132] The court-appointed individual would be a neutral person who could help the court mediate or manage electronic discovery issues. The individual could also review electronic information for privilege concerns.[133]

Local Standards And The Federal Rules of Civil Procedure

Despite the increasing emergence of federal and state case law dealing specifically with e-discovery issues, many jurisdictions have not yet addressed e-discovery, and the jurisdictions that have addressed cost-shifting have formulated different tests. Consequently, courts across the nation are adopting local rules addressing e-discovery in order to give guidance to litigants and their counsel,[134] and the federal rule-makers are in the process of amending the Federal Rules of Civil Procedure. This article concludes by outlining the District of Delaware's Default Standards for e-discovery and the proposed amendments to the Federal Rules of Civil Procedure.

District of Delaware Default Standard for Discovery of Electronic Documents

The District of Delaware "expect[s] that parties to a case will cooperatively reach agreement on how to conduct e-discovery."[135] Thus, the following standards are default standards that will apply in the absence of an agreement of the parties otherwise.[136]

Early Exchange of Information

The default standards require the parties to confer early in discovery with respect to e-discovery so that the parties are able to solve issues early in the discovery process rather than later. The parties must exchange information prior to the Rule 26(f) discovery conference, including the names of the custodians of relevant electronic materials, a list of each relevant electronic system, information about electronic documents, whether any electronic documents are of "limited accessibility," the name of the party's "retention coordinator," a description of the party's electronic document

retention policies, the name of the party's "e-discovery liaison," and finally, problems the parties anticipate will arise during e-discovery.[137]

Retention Coordinator Required

Each party is required to have a retention coordinator. Within thirty days of discovery, the parties must start working toward an agreement outlining "the steps each party shall take to segregate and preserve the integrity of all relevant information."[138] Within seven days of identifying the custodians of relevant information, the retention coordinator must take steps to ensure that e-mails and electronic documents of the custodians identified are not permanently deleted or altered. The retention coordinator must also give the other party notice of any spam or e-mail filtering criteria, and e-mails filtered based on the system are deemed non-responsive. Each party must file with the court a certificate of compliance with these required steps.[139]

These standards require the parties and their retention coordinators to take preservation steps after an action has commenced, either within 30 days of discovery or within seven days of identifying the custodians of electronic information. While these standards provide litigants and their counsel with more specific, concrete timelines, the case law suggests that the duty to preserve can attach, and litigants and counsel should be taking preservation steps, before discovery commences, and sometimes even before a complaint is filed. Parties litigating in Delaware should be aware of this difference and may wish to incorporate the steps recommended by the default standards as soon as litigation is reasonably anticipated.

E-Discovery Liaison Required

In order to facilitate e-discovery, and "promote communication and cooperation between the parties," the default standards require each party to appoint an e-discovery liaison. While each party's counsel remains ultimately responsible for e-discovery, the e-discovery liaisons are "responsible for organizing each party's e-discovery efforts to insure consistency and thoroughness." The party can designate inside or outside counsel, a third party consultant, or an employee to act as the e-discovery liaison. All discovery requests and responses are made through the e-discovery liaison. The e-discovery liaison must be familiar with the party's electronic systems, knowledgeable about electronic document storage, organization, and format, and [p]repared to participate in e-discovery dispute resolutions."[140]

Accessible v. Inaccessible Information

When a party is served with a discovery request, the default standards require the producing party to search for and produce responsive electronic information.[141]

Searches for and production of information the parties previously designated as "limited accessibility" need no be conducted until after the initial search is complete, and requests for "limited accessibility" information "must be narrowly focused with some basis in fact supporting the request."[142]

This default standard underscores the importance of each party carefully designating information as "limited accessibility" when exchanging information with the other party. If information is not designated as "limited accessibility" at the outset, the producing party must search and produce inaccessible electronic information during the first search. The presumption in the District of Delaware is that the producing party bears the costs of discovery, and the "court will apportion the costs of electronic discovery upon a showing of good cause."[143] The producing party may have difficulty convincing the judge to shift the cost of producing the inaccessible information to the requesting party when it failed to designate it as such in the first place.

Production

The default standards require the parties to disclose any limitations "which might affect their ability to conduct a complete electronic search of the electronic documents."[144] The parties must also reach agreement as to the search methodology and search terms.[145] The default standards reinforce what other authorities have suggested - by reaching agreement on search methodology, search terms, and search limitations (e.g. date restrictions, document types), the parties can significantly reduce discovery expenses.

As to the format of the information to be produced, the parties are free to agree on a particular format in which the electronic documents will be produced; in the absence of an agreement otherwise, the default standard is to provide the electronic documents in image files, such as PDF or TIFF. Once the electronic documents are produced, the producing party must preserve the original formatting of the documents, metadata, and any revision history. The producing party is not required to produce this other "data" unless the requesting party "demonstrate[s] particularized need for production of documents in their native format."[146] This default standard, while not requiring the producing party to produce metadata and revision history, does require the producing party to preserve that data. This requirement is in accord with the general rule that all relevant evidence should be preserved. The parties can always argue cost later, but a producing party should err on the safe side in case a court later rules that it was required to preserve and produce metadata or revision history. If the producing party fails to preserve metadata and revision history, and the requesting party has demonstrated the requisite particularized need, the court may not shift the cost of producing the data to the requesting party. A failure to preserve this data may also result in significant sanctions.

Finally, with respect to privilege, the default standards provide that any electronic

information containing privileged information or attorney work product must be returned to the producing party immediately when, on their face, the documents appear to have been inadvertently produced, or if the producing party gives notice within 30 days that the documents have been inadvertently noticed.[147]

Proposed Amendments to the Federal Rules of Civil Procedure

Proposed Amendments to the Federal Rules of Civil Procedure dealing with electronic discovery were published for comment in August 2004.[148] The Advisory Committee on Federal Rules of Civil Procedure cited many reasons for the need to amend the federal rules, including "[t]he distinctive features of electronic discovery," inconsistent case law, the existing federal rules' inadequate accommodation of new technology, "[t]he uncertainties and problems lawyers, litigants, and judges face in handling electronic discovery under the present federal discovery rules," and "the burdens and costs of complying with unclear and inconsistent discovery obligations."[149] The Advisory Committee also believes that "[a]doption of differing local rules by many district courts may freeze in place different practices and frustrate the ability to achieve the national standard the Civil Rules were intended to provide."[150]

The Proposed Amendments concerning electronic discovery are to Rules 16, 26, 33, 34, 37, 45, and Form 35.[151] While the amendments focus on many areas, this article will highlight the proposed amendments, including comments about the proposed amendments,[152] as they relate to the early discussion of issues related to electronic discovery, electronically stored information that is not reasonably accessible, asserting privilege after production, and the safe harbor from sanctions.

The most common criticism of the proposed amendments is that they will "give corporate litigants additional procedural and substantive advantages" and "extra opportunities not to produce."[153] Proponents of the proposed amendment view the amendments as necessary.

Early Discussion of Issues Relating to E-Discovery - Amendments to Rules 16 and 26(f)

The amended Rule 26(f) would include three additional areas of discussion during the parties' discovery planning conference. These three areas include: (1) "issues relating to preserving discoverable information;" (2) "issues relating to disclosure or discovery of electronically stored information, including the form in which it should be produced;"[154] and (3) "whether, on agreement of the parties, the court should enter an order protecting the right to assert privilege after production of privileged information."[155]

Discussion of all three of these areas during the discovery planning conference in a case involving electronic discovery will be beneficial to both parties as well the judge presiding over the case. To the extent the parties anticipate issues relating to e-discovery to arise during discovery, it is easier and less costly to resolve them earlier rather than later.

The amendment relating to preservation issues is not limited to "electronically stored information." However, preservation obligations become increasingly complicated and burdensome when discovery of electronically stored information is involved.[156] Therefore, if parties discuss the nature of their computer systems in advance, for example the automatic deletion or overwriting of information, the parties can strike a balance between meeting preservation obligations and continuing business as usual.[157]

It is extremely important for parties engaging in electronic discovery to discuss issues relating to electronic discovery. The Committee Note recommends that parties may find it helpful to discuss their respective computer systems at the discovery planning conference. This would entail counsel becoming familiar with their clients' systems, and, possibly, taking limited discovery regarding the other party's systems.[158] The Committee Note also suggests that the parties discuss the sources of information to be searched, whether information to be searched is "reasonably accessible," the burden and cost of retrieving and reviewing information, the form or format in which the parties keep electronic information, as well as the form or format of producing electronic information.[159] The Committee Note provides that "production may be sought of information automatically included in electronic document files but not apparent to the creator of the document," and recommends that the parties discuss during the discovery planning process whether this type of information (e.g. metadata) should be produced. After discussing these issues, the parties can include their agreements in the discovery plan presented to the court, and, if necessary, can request court action with respect to any of the issues, including, for example, allocating the costs of discovery of electronically stored information.

Finally, the amended Rule 26(f) provides that the parties can present to the court in their discovery plan an agreement as to the non-waiver of privilege. This amendment is not limited to electronically stored information; however, the Committee Note recognizes that privilege issues can be more problematic during e-discovery. The Committee Note comments that quick-peek and claw-back "agreements can facilitate prompt and economical discovery by reducing delay before the discovering party obtains access to documents, and reducing the cost and burden of review by the producing party."[160]

Electronically Stored Information that is Not Reasonably Accessible - Rule 26(b)(2)

This is one area in which the Committee has specifically requested additional comment. The Amendment to Rule 26(b)(2) inserts the following sentences:

> A party need not provide discovery of electronically stored information that the party identifies as not reasonably accessible. On motion by the requesting party, the responding party must show that the information is not reasonably accessible. If that showing is made, the court may order discovery of the information for good cause and may specify terms and conditions for such discovery.[161]

Under this new "rule" for electronically stored information, the producing party must provide reasonably accessible electronically stored information without a court order.[162] This portion of the rule is consistent with the *Zubulake* approach. The producing party, however, does not have to "review or produce" electronically stored information that is not reasonably accessible. When the producing party designates the information as "not reasonably accessible," the requesting party must move to compel production of the information. The responding party has the burden of demonstrating that the information is not reasonably accessible. Even if the producing party shows that the information is not reasonably accessible, the court may still order production of the information but only upon a showing of good cause by the requesting party. As with discovery of other information, the courts can impose terms and limitations on the discovery of electronically stored information, including which party should bear the cost of production.[163] This aspect of the proposed amendment to Rule 26(b)(2) deviates from the *Zubulake* approach. Under the *Zubulake* approach, relevance determines whether electronically stored information must be produced, subject to limitations measured by the proportionality test, and the accessibility of electronically stored information only shapes the cost-shifting analysis.

One of the criticisms of this proposed amendment is that it would "continue the corrosion of the right to discovery."[164] Even though the producing party has the burden of demonstrating that the information is "not reasonably accessible," information a party designates as "not reasonably accessible" starts off as being not subject to production. The proposed rule places the burden on the requesting party to file a motion to compel the information and to demonstrate good cause for the information. For electronically stored information, the proposed amendment would substitute a broad rule of discovery (subject to limitations) for a limited rule of discovery (subject to broadening upon a showing of good cause). It is argued that this shift in burdens gives large entities an advantage in discovery and litigation.

Another criticism of this amendment is that parties served with discovery requests may routinely indicate that the electronically stored information is not reasonably accessible, which could in turn raise a barrier to discovery and increase collateral litigation.[165]

Asserting Privilege After Production - Rule 26(b)(5)

The Proposed Amendment to Rule 26(b)(5) "sets up a procedure to allow the responding party to assert privilege after production and to require the return,

sequestration, or destruction of the material pending resolution of the privilege claim."[166] The proposed amendment requires the producing party to notify the requesting party within a "reasonable time" that it has produced privileged material. The producing party must "preserve the information and put it on a privilege log, pending the court's ruling on whether the information is, in fact, privileged and whether any privilege has been waived or forfeited by inadvertent production."[167]

This amendment is not limited to electronically stored information. The Committee in interested in further comment on whether the party receiving the privileged information must certify that the material was returned, sequestered, or destroyed.[168] Such a requirement would hold receiving parties accountable.

One criticism of this amendment is the potential for abuse of the procedure: permitting a litigant to assert privilege after production would not only increase collateral litigation, but would allow a producing party to assert privilege after it learns (e.g. through a pleading) that the requesting party is using information that it believes to be helpful in establishing the producing party's liability.[169]

Sanctions - The Safe Harbor Provision

The Proposed Amendment to Rule 37, titled "Failure to Make Disclosure or Cooperate in Discovery; Sanctions," adds subdivision (f), which is a "safe harbor" from sanctions when a party's electronically stored information is lost because of the routine operations of the party's computer system.[170] The proposed "safe harbor" provides:

> Electronically Stored Information. Unless a party violated an order in the action requiring it to preserve electronically stored information, a court may not impose sanctions under these rules on the party for failing to provide such information if:
>
> > (1) the party took reasonable steps to preserve the information after it knew or should have known the information was discoverable in the action; and
> >
> > (2) the failure resulted from loss of the information because of the routine operations of the party's electronic information system.[171]

If electronically stored information is lost because of a party's routine computer operations, the party would not have a safe harbor from sanctions if: (1) the party violated a court order requiring the party to preserve the information;[172] or (2) the party failed to take "reasonable steps to preserve the information after it knew or should have known that the information was discoverable in the action."[173]

The proposed safe harbor provision does not address a party's duty to preserve electronically stored information before an action has been commenced,[174] but addresses the party's duty to preserve once an action has commenced, regardless

if there has been a discovery request. The reasonable steps the party must take are known as the litigation hold.[175]

The Committee Note offers insight as to what is meant by the routine operations of a computer system: "The reference to the routine operation of the party's electronic information system is an open-ended attempt to describe the ways in which a specific piece of electronically stored information disappears without a conscious human direction to destroy that specific information." Despite this clarification, one criticism of the proposed safe harbor is that the provision "would green-light destruction of information that would establish liability" and "invite [companies] to set up 'routine' data purges at short intervals."[176]

As the proposed amendment stands, the degree of culpability precluding application of the safe harbor is negligence. This is an area in which the Committee is especially interested in receiving public comment, and the Committee is considering raising the degree of culpability to an intentional or reckless standard.[177] Proponents of a negligence standard fear that raising the degree of culpability to something higher than negligence "would provide inadequate assurance that relevant information is preserved for discovery."[178]

Conclusion

As this article demonstrates, the concept of electronic discovery is becoming more prevalent in dialogue and in actual use, and e-discovery issues are becoming increasingly common. Only time will tell what effect, if any, the proposed amendments to the Federal Rules of Civil Procedure will have on litigants. If and when the proposed amendments to the Federal Rules are adopted, it will take time for case law interpreting the new rules to develop. Until then, litigants should carefully consider the concepts addressed in this article and keep up to date on the ever-evolving case law.

Notes:

1 William R. Denny is a partner at Potter Anderson & Corroon LLP practicing in the areas of electronic commerce and commercial litigation. The author would like ot acknowledge Elizabeth King for her assistance with the preparation of this article. The views and opinions herein are those of the authors and do not necessarily reflect those of Potter Anderson & Corroon LLP or its clients.

2 James W. McElhaney, *Channeling Discovery*, ABA JOURNAL, November 2004, at 26.

3 *Electronic Discovery*, National Workshop for Magistrate Judges, June 12, 2002, slide 02, available at http://www.fjc.gov/public/pdf.nsf/lookup/ElecDi07.pdf/$file/ElecDi07.pdf (last viewed November 10, 2004).

4 *Id.* at slide 04 (emphasis added).

5 *The Sedona Principles: Best Practices, Recommendations & Principles for Addressing Electronic Document Discovery 3* (Sedona Conference Working Group Series 2004).

6 *Electronic Discovery*, supra note 3, at slide 05.

7 *Thompson v. United States Dep't of Housing and Urban Dev.*, 219 F.R.D. 93, 96 (D. Md. 2003) (noting that Fed.R.Civ.P. 34(a) "defines the word 'documents' broadly" and "[c]ourts similarly have held that email and other electronically stored information is subject to the disclosure requirement of Rule 26(a)(1), as well as discovery by a Rule 34 document production request").

8 *Id.* at 97. When an electronic record is deleted, the computer designates is as " ' not used,' thereby enabling the computer to write over it." *Id.* If the computer writes over the deleted data, it is unrecoverable. This "writing over" of deleted data is a part of the nature of computer systems.

9 Despite the high costs, the benefits of e-discovery cannot be ignored. E-discovery effectively eliminates the problems associated with a large-scale document review. Compared to storing and sorting through 10,000 boxes of documents, "electronic files are faster to copy, significantly more portable, and can be gathered in a fraction of time." *Reaping the Benefits of E-Discovery*, THE E-DISCOVERY STANDARD, April 2004, at 4, available at http://www.lexisnexis.com/applieddiscovery/lawLibrary/newsletter/EDS_Apr04.pdf (last viewed November 10, 2004). To militate against overlooking relevant documents or inadvertent production, e-discovery offers the advantage of electronic key word searching and reporting. Id. at 7.

10 *Wiginton v. CB Richard Ellis, Inc.*, Case No. 02 C 6832, 2004 WL 1895122, *3 (N.D. Ill. Aug. 10, 2004) (*Wiginton II*).

11 *Thompson*, 219 F.R.D. at 96. Electronically stored information can also include "metadata," or information about information. "Metadata is information embedded in an electronic file about that file, such as the date of creation, author, source, history, etc. This information . . . is generated automatically by the software application the author is using, without the author's knowledge or intent." *Electronic Discovery*, supra note 3, at slide 15.

12 *Thompson*, 219 F.R.D. at 97.

13 *Wiginton II*, 2004 WL 1895122, at * 11.

14 In e-discovery, "[t]he problems posed vex corporations, litigants, and the courts alike, yet there exist few guides sufficient to meet the complexity of issue that even the most simple document request can raise." *The Sedona Principles: Best Practices, Recommendations & Principles for Addressing Electronic Document Discovery* ii (Sedona Conference Working Group Series 2004).

15 *The Practical Side of E-Discovery*, THE E-DISCOVERY STANDARD, Fall 2004, at 2, available at http://www.lexisnexis.com/applieddiscovery/lawLibrary/newsletter/EDS_Fall04.pdf (last viewed November 10, 2004).

16 *Id.*

17 *The Sedona Principles*, Cmt. 1.b. This would involve training employees "to manage and retain business records created or received in the ordinary course of business." *Id.*

18 *The Sedona Principles*, Cmt. 1.a. Spoliation refers to "'the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation.'" *Zubulake v. UBS Warburg LLC*, 02 Civ. 1243 (SAS), slip op. at 5, 220 F.R.D. 280 (S.D.N.Y. Oct. 22, 2003) (*Zubulake IV*) (quoting *West v. Goodyear Tire & Rubber Co.*, 167 F.3d

776, 779 (2d Cir. 1999)).

19 *The Sedona Principles*, Cmt. 1.b (The "good faith disposal pursuant to a bona fide consistent and reasonable document retention policy could justify a failure to produce documents in discovery.") (citing *Willard v. Caterpillar, Inc.*, 40 Cal. App. 4th 892, 921 (Cal. 1995).

20 Catherine Damavandi, *Electronic Document Discovery: What You Don't Know Could Cost You*, INRE:, Volume 28, No. 4, November 2004, at 20 (noting that "[i]mplementing a backup system without considering how stored information will be retrieved later can cost a company hundreds of thousands of dollars").

21 *Id.*

22 See *Zubulake v. Warburg LLC*, 02 Civ. 1243 (SAS), slip op. at 21, 217 F.R.D. 309 (S.D.N.Y. 2003) (*Zubulake I*).

23 2002 WL 32123851 (Del. Ch. Apr. 16, 2002).

24 *Id.* at *1.

25 *Id.*

26 *Id.*

27 *Id.* at *2. The defendants never argued that that the e-mail were "not relevant or would not lead to the discovery of admissible evidence." *Id.* at *3, n1.

28 *Id.* at *2.

29 John M. Barkett, *More Bytes, Bits & Bucks: Digital Diligence Defined*, The E-Discovery Standard, Fall 2004, at 8, available at http://www.lexisnexis.com/applieddiscovery/lawLibrary/newsletter/EDS_Fall04.pdf (last viewed November 10, 2004).

30 *The Sedona Principles*, Principle 8.

31 *Zubulake IV*, slip op. at 6 (internal quotation and citation omitted).

32 *Zubulake I*, slip op. at 9; see also *Wiginton v. CB Richard Ellis*, 2003 WL 22439685, *4 (N.D. Ill. Oct. 27, 2003) (*Wiginton I*) ("A party has a duty to preserve evidence over which it had control and 'reasonably knew or could reasonably foresee was material to a potential legal action.'") (citation omitted); *Thompson*, 219 F.R.D. at 99-100 (citing *Zubulake IV* for the proposition that the duty to preserve evidence is triggered when the party reasonably anticipates litigation); *The Sedona Principles*, Cmt. 5.a ("organizations must take reasonable steps to preserve electronic documents for litigation, whether pending or reasonably anticipated").

33 The Zubulake case has been pivotal for many e-discovery issues. The judge presiding over the Zubulake case has written five opinions relating to discovery. This article discusses *Zubulake I, Zubulake III, Zubulake IV,* and *Zubulake V*. This article does not discuss *Zubulake II*.

34 *Zubulake I*, slip op. at 5.

35 *Zubulake v. UBS Warburg LLC*, 02 Civ. 1243 (SAS), slip op. at 7, 216 F.R.D. 280 (S.D.N.Y. July 24,2003) (*Zubulake III*).

36 *Id.*, slip op. at 8.

37 See *Wiginton I* at *4 (noting that "a party must preserve evidence that it has notice is reasonably likely to be the subject of a discovery request even before a request is actually received" and that "[n]otice may be received before a complaint is filed if a party knows that litigation is likely to begin . . . ."). The plaintiff in *Wiginton*, like *Zubulake*, filed a charge of sexual harassment with the state of Illinois before she filed her complaint, and the court took special notice of the fact that her state harassment charge included allegations relating to e-mail. *Id*. at *5.

38 *Zubulake IV*, slip op. at 11 (explaining that the duty to preserve extends to electronic information made by individuals "likely to have discoverable information that the disclosing party may use to support its claims or defenses" and electronic information prepared for those individuals) (citing Fed. R. Civ. R. 26(a)(1)(A)).

39 *Id.*, slip op. at 9; *The Sedona Principles*, Cmt. 5.g ("A party's preservation obligation does not require freezing of all electronic documents and data, including e-mail.").

40 *Zubulake IV*, slip op. at 10-11.

41 *Id.*, slip op. at 11-12. The court suggested one way in which to accomplish the preservation of relevant information on backup tapes:

For example, a litigant could choose to retain all then-existing backup tapes for the relevant personnel (if such tapes store data by individual or the contents can be identified in good faith and through reasonable effort), and to catalog any later-created documents in a separate electronic file. That, along with a mirror image of the computer system taken at the time the duty to preserve attaches (to preserve documents in the state they existed at that time), creates a complete set of relevant documents.

Id.

42 The Sedona Conference Working Group is a group of lawyers, academics, and other individuals formed to address current legal issues. The first area the Sedona Conference Working Group addressed is electronic discovery, and its "core principles" are published in *The Sedona Principles: Best Practices, Recommendations & Principles for Addressing Electronic Document Production* (Sedona Conference Working Group Series 2004). The article will address the Sedona Conference Working Group hereinafter as "the Sedona Group."

43 *The Sedona Principles*, Principles 8 and 9.

44 *Id.*, Principle 8.

45 *Wiginton I*, 2003 WL 22439685, at *2-6 (where plaintiff instructed defendant to preserve information on backup tapes, the primary concern of the court was relevance; court also entered preservation order that required defendant to "retain and not destroy month end backup tapes").

46 The Zubulake approach and the Sedona Group approach differ in this respect in terms of both preservation and production.

47 *Zubulake IV*, slip op. at 12.

48 *Id.*

49 *Id.*

50 *Id.*; *see also Thompson*, 219 F.R.D. at 100 (noting that "[a]mong the electronic records subject to the 'litigation hold' are those generated or maintained by the 'key players' in the case").

51 *Zubulake v. UBS Warburg LLC,* 02 Civ. 1243 (SAS), slip op. at 2, 2004 WL 1620866 (S.D.N.Y. July 20, 2004) (*Zubulake V*); see also *Thompson*, 219 F.R.D. at 20 ("'When a lawyer who has been retained to handle a matter learns that litigation is probable or has been commenced, the lawyer should inform the client of its duty to preserve potentially relevant documents and of the possible consequences for failing to do so.'") (quoting American Bar Association Civil Discovery Standards, August 1999, Standard No. 10 "Preservation of Documents").

52 *Zubulake V*, slip op. at 2.

53 *Id.,* slip op. at 3.

54 *Id.,* slip op. at 23.

55 *Id.*, slip op. at 24-26. For those bigger companies where it may not be feasible for counsel to communicate with each key player, the court suggested that counsel herself preserve relevant evidence:

[C]ounsel must be more creative. It may be possible to run a system-wide keyword search; counsel could then preserve a copy of each "hit." Although this sounds burdensome, it need not be. Counsel does not have to review these documents, only see that they are retained. For example, counsel could create a broad list of search terms, run a search for a limited time frame, and then segregate responsive documents. When the opposing party propounds its document requests, the parties could negotiate a list of search terms to be used in identifying responsive documents, and counsel would only be obliged to review documents that came up as "hits" on the second, more restrictive search. The initial broad cut merely guarantees that relevant documents are not lost.

Id., slip op. at 26-27.

56 *Id.*, slip op. at 30-31.

57 *Id.*, slip op. at 31.

58 *The Sedona Principles*, Cmt. 1.a (recommending the adoption of a "preservation approach triggered by the reasonable anticipation of litigation" which would include "provisions for litigation holds to preserve documents related to ongoing or reasonably anticipated litigation . . . .").

59 *The Practical Side of E-Discovery, supra* note 15, at 2; *see also The Sedona Principles*, Cmt. 2.c ("Decisions regarding preserving electronic documents and date are typically a team effort, involving counsel (inside and outside), information systems professionals, end-user representatives, records management personnel, and, potentially, other individuals with knowledge of the relevant computer systems and how data is used, such as information security personnel.").

60 *Zubulake IV*, slip op. at 11; The Practical Side of E-Discovery, supra note 15, at 2.

61 See *United States v. Philip Morris USA Inc.*, Civil Action No. 99-2496 (GK), slip op. at 4 (D.D.C. July 21, 2004) (defendant had a "print and retain" policy which the employees at the highest corporate level of the company failed to follow).

62 A preservation agreement, or court order, is not required to trigger a party's duty to preserve relevant evidence. Thompson, 219 F.R.D. at 100.

63 *The Sedona Principles*, Principle 11, Cmt. 1l.a.

64 The company will be able to show the court the percentage of responsive documents each source contains, which will help the court decide whether to compel further discovery from that source.

65 *The Sedona Principles*, Cmt. 12.a.

66 *Id.,* Cmt. 13.a.

67 *Zubulake I*, slip op. at 3.

68 *Id.,* slip op. at 6.

69 *Id.*, slip op. at 6-7.

70 *Id.*, slip op. at 7-8.

71 *Id.,* slip op. at 7.

72 *Id.,* slip op. at 14 (citing Fed. R. Civ. P. 26(b)(1)) (emphasis in original).

73 *Id.,* slip op.at 14-15. The Federal Rules of Civil Procedure provide:

The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule *shall be limited by the court* if it determines that: (i) the discover sought is unreasonably cumulative or duplicative, or is *obtainable from some other source that is more convenient, less burdensome, or less expensive*; (ii) the party seeking discovery has 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.*

Fed. R. Civ. P. 26(b)(2) (emphasis added).

74 *Zubulake I*, slip op. at 15.

75 *Id.*, slip op. at 17.

76 *Id.*, slip op. at 19.

77 *Id.*, slip op. at 20 (quoting *Pecarsky v. Galaxiworld.com, Inc.*, 249 F.3d 167, 172 (2d Cir. 2001)) (alteration in original).

78 The burden or expense is undue when it "'outweighs [the] likely benefit [of the discovery], 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.'" *Zubulake I*, slip op. at 20 (quoting Fed. R. Civ. Pr. 26(c)).

79 *Id.*, slip op. at 21, 22.

80 *Id.*, slip op. at 22-24.

81 *Id.*, slip op. at 24-25.

82 *Id.*, slip op. at 25.

83 *Id.*, slip op. at 26.

84 *Id.*, slip op. at 32.

85 *Id.*, slip op. at 33.

86 *Id.*, slip op. at 34.

87 *Id.,* slip op. at 35-36

88 *Zubulake III,* slip op. at 4-5.

89 *Id.*, slip op. at 5.

90 *Id.*, slip op. at 11, 14.

91 *Id.*, slip op. at 17.

92 *Id.*, slip op. at 18-19.

93 *Id.*, slip op. at 20. The court also noted that "it is not unheard of for plaintiff's firms to front huge expenses when multi-million dollar recoveries are in sight." *Id.*

94 *Id.*, slip op. at 21-22. As to factor six, the court noted that it would "only rarely come into play." *Id.*, slip op. at 22. (internal quotation and citation omitted).

95 *Id.*, slip op. at 22-23.

96 *Id.*, slip op. at 24-28.

97 *See Hagermeyer North America, Inc. v. Gateway Data Sciences Corp.*, 222 F.R.D. 594, 603 (E.D.Wis. 2004) (adopting the *Zubulake I* seven-factor test); *Wiginton II,* 2004 WL 1895122, at *4 (adopting the *Zubulake I* factors and adding "the importance of the requested discovery in resolving the issues at stake in the litigation" as a factor).

98 *The Sedona Principles*, Principle 13.

99 The proposed amendment to the Federal Rules of Civil Procedure concerning accessibility more closely resembles the Sedona Group approach than the *Zubulake* approach.

100 *Kaufman*, 2003 WL 32123851, at *1-2.

101 Sampling is becoming common in e-discovery. See *Hagermeyer*, 222 F.R.D. at 603 (requiring the producing party to restore a sample of the backup tapes).

102 *Thompson*, 219 F.R.D. at 98.

103 *Id.* at 99.

104 *Id.*

105 "The authority to sanction litigants for spoliation arises jointly under the Federal Rules of Civil Procedure and the court's own inherent powers." *Zubulake IV*, slip op. at 5.

106 *Wiginton I*, 2003 WL 22439685, at *6 (plaintiff requested default judgment sanction, and court held that the defendant's actions did "not constitute an extreme situation which would require such a harsh sanction" because it differed from those cases where the only existing evidence was destroyed).

107 *Zubulake V*, slip op. at 40.

108 *Id.,* slip op. at 48.

109 *Id.,* slip op. at 44.

110 *Philip Morris*, slip op. at 6.

111 *Id.*, slip op. at 6.

112 These other sanctions include ordering that certain facts be taken as established at trial, ordering that pleadings be stricken, and finding the disobedient party in contempt of court for failing to obey a prior court order. Thompson, 219 F.R.D. at 102 (citing Fed. R. Civ. P. 37(b)(2)).

113 *Zubulake IV*, slip op. at 16 (internal quotations and citation omitted) (alteration in original).

114 *Id.,* slip op. at 17; see also *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99

(2d Cir. 2002) (where the breach of the discovery obligation was the non-production of evidence).

115 *Zubulake IV*, slip op. at 17.

116 *Id.*, slip op. at 18.

117 *Id.*, slip op. at 17.

118 *Zubulake IV*, slip op. at 19, 22; but see *Residential Funding*, 306 F.3d at 109 (holding that "gross negligence in the destruction or untimely production of evidence will in some circumstances suffice, standing alone, to support a finding that the evidence was unfavorable to the grossly negligent party").

119 The court did, however, sanction UBS by ordering that it pay the cost of re-deposing witnesses. *Zubulake IV*, slip op. at 22-23.

120 *Zubulake V*, slip op. at 37. See pages 11-12 for a discussion of UBS' and its counsel's sanctionable conduct.

121 *Zubulake V,* slip op. at 40.

122 *Philip Morris*, slip op. at 1.

123 *Id.*, slip op. at 4.

124 *Id.*, slip op. at 6.

125 *The Sedona Principles*, Principle 3 ("Parties should confer early in discovery regarding the preservation and production of electronic data . . . ."); Principles 10, 11.

126 A "Rule 26(f) conference" is a discovery planning conference. See Fed. R. Civ. P. 26(f).

127 *The Sedona Principles*, Cmt. 11.a.

128 *The Sedona Principles*, Cmt. 10.a.

129 *Zubulake III*, slip op. at 26 (encouraging the parties to reach a "claw-back" agreement with respect to the backup tapes to "avoid any cost of reviewing these tapes for privilege").

130 Although a claw-back agreement may be attractive from a cost-perspective, there are risks associated with the agreements, and the Sedona Group believes they are "ill-advised." See *The Sedona Principles*, Cmt. 10.d.

131 Fed. R. Civ. P. 26(b)(5).

132 *The Sedona Principles*, Cmt. 10.c.

133 *Id.*

134 Aside from the District of Delaware's adoption of default e-discovery standards, the Ninth Circuit is currently reviewing proposed rules for electronic discovery for district courts within the Ninth Circuit, and local rules touching on electronic discovery exist in the Eastern and Western Districts of Arkansas, the Middle District of Florida, the District of Kansas, the District of New Jersey, and the District of Wyoming. California's Code of Civil Procedure and Texas' rules of civil procedure have undergone change to reflect e-discovery, and the Illinois Supreme Court and the Supreme Court of Mississippi have adopted court rules addressing e-discovery. *Court Rules*, LexisNexis Applied Discovery Law Library, available at http://www.lexisnexis.com/applieddiscovery/lawLibrary/courtRules.asp (last viewed November 16, 2004).

135 *Default Standard for Discovery of Electronic Documents ("E-Discovery")*, Ad Hoc Committee for Electronic Discovery of the U.S. District Court for the District of Delaware, at 1, available at http://www.ded.uscourts.gov/AnnounceMain.htm, (last viewed November 16, 2004).

136 *Id.* at 1-2.

137 *Id.* at 2.

138 *Id.* at 3.

139 *Id.*

140 *Id.* at 2.

141 *Id.* at 2-3.

142 *Id.* at 3.

143 *Id.*

144 *Id.*

145 *Id.*

146 *Id.*

147 *Id.*

148 The comment deadline is February 15, 2005, and public hearings concerning the proposed amendments to the civil rules will be held in January and February 2005. After the public comment period closes, the Advisory Committee must submit the proposed rules to the Standing Committee. The Judicial Conference of the United States and the Supreme Court of the United States will then consider the proposed rule. *Memorandum to the Bench, Bar, and Public on Proposed Amendments to Civil Rules*, August 9, 2004, available at http://www.uscourts.gov/rules/comment2005/Memo.pdf, (last viewed November 16, 2004).

149 *Report of the Civil Rules Advisory Committee*, May 17, 2004, Revised, August 3, 2004, at 3-4, available at http://www.uscourts.gov/rules/comment2005/CVAug04.pdf (last viewed November 16, 2004).

150 *Id.*

151 The Proposed Amendments and Committee Notes are available at http://www.uscourts.gov/rules/comment2005/CVAug04.pdf following the *Report of the Civil Rules Advisory Committee* (last viewed November 16, 2004).

152 Public comments submitted to the Committee are published at http://www.uscourts.gov/rules/newrules1.html (last viewed November 18, 2004).

153 James E. Rooks, Jr., *Will Discovery Get Squeezed?*, TRIAL, November 2004, at 20, 22.

154 The proposed amendment to Rule 34 distinguishes between “documents” and “electronically stored information.” The term “electronically stored information” is added to the title of Rule 34 and added to the list of “things” the producing party must allow the requesting party to inspect, copy, test, or sample. The words “test” and “sample” are proposed additions to Rule 34. Under the amended Rule, “lawyers and litigants should specify whether they seek discovery of documents, electronically stored information, or both.” *Report of the Civil Rules Advisory Committee, supra* note 149, at 15. The Committee is still seeking public comment on whether the Rule or the Committee Note should state that a producing party should not avoid reviewing and producing electronically stored information simply because a production request did not separately seek it.

155 Proposed Amendment to Federal Rule of Civil Procedure 26(f), *supra* note 151, at 8-9.

156 Committee Note to Proposed Amendment to Rule 26(f), *supra* note 151, at18.

157 *Id.* at 18-19.

158 *Id.* at 17. A local rule requiring the parties to exchange information about their computer systems, like the District of Delaware’s Default Standards, would eliminate the need for discovery with respect to that information.

159 *Id.* at 18.

160 *Id.* at 21.

161 Proposed Amendment to Rule 26(b)(ii), *supra* note 151, at 6.

162 *Report of the Civil Rules Advisory Committee, supra* note 149, at 11.

163 *Id.* at 12.

164 *Will Discovery Get Squeezed?*, supra note 153, at 20.

165 *Id.* at 21.

166 *Report of the Civil Rules Advisory Committee, supra* note 149, at 13.

167 *Id.* at 14.

168 *Id.*

169 *Will Discovery Get Squeezed?, supra* note 153 , at 21.

170 *Report of the Civil Rules Advisory Committee, supra* note 149, at 17.

171 Proposed Amendment to Rule 37(f), *supra* note 151,at 31-32.

172 *Report of the Civil Rules Advisory Committee, supra* note 149, at 17.

173 Proposed Amendment to Rule 37(f), *supra* note 151, at 32.

174 *Report of the Civil Rules Advisory Committee, supra* note 149, at 18.

175 "E-mail records and electronic 'files' of key individuals and departments will be the most obvious candidates for preservation." Committee Note to Proposed Amendment to Rule 37(f), *supra* note 151, at 35.

176 *Will Discovery Get Squeezed?, supra* note 153, page 21.

177 Committee Note to Proposed Amendment to Rule 37(f), *supra* note 151, at 32-33.

178 *Report of the Civil Rules Advisory Committee, supra* note 149, at 19.