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Legal Research in an Electronic Age: Electronic Data Discovery, a Litigation Albatross of Gigantic Proportions

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Legal Research in an Electronic Age: Electronic Data Discovery, a Litigation Albatross of Gigantic Proportions

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I. INTRODUCTION

Minor changes to the Federal Rules of Civil Procedure¹ occur regularly, and electronic discovery (“e-discovery”) has been a source of these changes.² As a result of the electronic age, standard methods of procedure in the business industry have changed. These changes have impacted the legal profession—especially e-discovery. On September 20, 2005, the Judicial Conference of the United States

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1. *See generally* FED. R. CIV. P. The 1938 rules provided for broad discovery and were expanded in 1946 and 1970. *See* FED. R. CIV. P. 26–37. Subsequent amendments to the rules occurred in 1980, 1983, 1993, and 2000 to curtail discovery abuses. *See* FED. R. CIV. P. 26–37 advisory committee’s notes.

2. *See* FED. R. CIV. P. 34. An amendment to the Federal Rules of Civil Procedure addressing discovery of electronically stored information went into effect on December 1, 2006. *See* FED. R. CIV. P. 34 advisory committee’s notes (2006).

approved amendments to the Federal Rules of Civil Procedure³ that unequivocally tackle a party's discovery obligations with respect to electronic documents.⁴ "Electronic discovery" refers to the discovery of electronic documents and data, which includes "e-mail, web pages, word processing files, computer databases, and virtually anything that is stored on a computer" or device that can store electronic information in some form.⁵ "Electronic data" includes all data that exists in a form that requires the use of a computer to view.⁶ Computer hard drives, servers, cell phones, palm devices, and a host of other electronic devices have become the standard for conducting business. Since these devices have the capacity to store, send, and retrieve information, they have become the focus of the trial process as it relates to discovery.

"The impact of electronic data on modern litigation can hardly be overstated,"⁷ because, as of 2006, more than 90% of information was created and stored electronically.⁸ As a result, courts have been grappling with issues of electronic data discovery without clear guidance from the Federal Rules of Civil Procedure. Courts have even been reluctant to manage e-discovery through any detailed standards.⁹ This is because "[b]road discovery is a cornerstone of the litigation process contemplated by the Federal Rules of Civil Procedure."¹⁰ The rules are accorded broad treatment to engender

3. JUDICIAL CONFERENCE COMM. ON RULES OF PRACTICE & PROCEDURE, AGENDA E-18, SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, at 21–35 (2005), *available at* <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2005.pdf>.

4. *See* Patricia A. Bronte, *Managing Electronic Discovery Successfully in Insurance Coverage Litigation*, 758 PRACTISING L. INST., LITIG. & ADMIN. PRAC.: LITIG. COURSE HANDBOOK SERIES 55, 64 (2007).

5. Hon. Ronald J. Hedges, *Discovery of Digital Information*, 747 PRACTISING L. INST., LITIG. & ADMIN. PRAC.: LITIG. COURSE HANDBOOK SERIES 41, 47 (2006).

6. *Id.*

7. Steven C. Bennett & Cecilia R. Dickson, *E-Discovery May Be a Job for Special Masters: They Might Show a Way Around the Complexities Inherent in the Process*, NAT'L L.J., July 17, 2006, at S5.

8. *Id.*

9. *See id.*

10. *Jones v. Goord*, No. 95 Civ. 8026 (GEL), 2002 WL 1007614, at *1 (S.D.N.Y. May 16, 2002).

the mutual knowledge of all relevant facts, thereby allowing parties to flesh out their claims with minimal burden.¹¹ The outrageous increase in the quantity of discoverable information is problematic and has impeded a litigant's wherewithal to conduct broad discovery.¹² The uniqueness of electronic documents has significantly changed litigation practice and has become a grave cause for concern to practitioners and judges.¹³

The increase in e-discovery, e-discovery's impact on litigation, and the courts' unavoidable role in defining the limits of discovery led to the author's decision to develop this article. The availability, accessibility, and requestability of electronic data, resulting in increased e-discovery under the Federal Rules of Civil Procedure, is an important issue that will affect the legal profession and its constituents in many ways for years to come. Part II of this article is an overview of Federal Rule of Civil Procedure 26(f). This part stresses that in recognizing the herculean task involved in e-discovery, courts expect that litigants immediately begin the process of understanding what their cases require from an e-discovery standpoint.

Part III highlights judges and cases that have had a clear hand in shaping the terrain of where electronic data discovery issues are heading. Part IV examines the ramifications of failing to comply with Federal Rule of Civil Procedure 26(f), illustrating the importance of Rule 26(f) in the litigation process. Abiding by the agreements that the parties reach under Rule 26(f) could avoid most, if not all, e-discovery problems. Part V examines problems associated with electronic data discovery. Part VI offers workable solutions to electronic data discovery concerns. Finally, Part VII concludes that even though the outer boundaries of e-discovery may be uncertain, judges, practitioners, and law schools must work together to ensure that exposure, training, and classes are available from the earliest possible time to ensure efficient and responsible adherence to the new requirements that the electronic age has brought to the litigation process.

11. See *Hickman v. Taylor*, 329 U.S. 495, 507 (1947).

12. See *Rowe Entm't, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 429 (S.D.N.Y. 2002) (discussing cost shifting in the production of electronic evidence).

13. See *Bronte*, *supra* note 4, at 60.

II. OVERVIEW OF FEDERAL RULE OF CIVIL PROCEDURE 26(F)

The December 2006 amendments to the Federal Rules of Civil Procedure set out specific ways for litigants to deal with discovery issues relating to electronically stored information (“ESI”).¹⁴ The new rules create a solid structure for lawyers to handle electronic documents starting from the beginning of the litigation process.¹⁵ Courts have never been in the business of worrying about discovery minutiae.¹⁶ The very nature of the litigation process makes it difficult to get parties to agree on anything. The legal profession generally, and litigation particularly, has become progressively cut throat and adversarial to such an extent that the litigation process has become bogged down with parties that are gridlocked and unable to reach compromises, even compromises regarding the smallest of matters.¹⁷

Federal Rule of Civil Procedure 26(f) addresses the issue of pretrial conferences,¹⁸ while Federal Rule of Civil Procedure 16(b) addresses the issue of scheduling.¹⁹ During the pretrial conference, Rule 26(f) requires parties to reach agreements on how, when, and in what manner to produce ESI.²⁰ The pretrial conference, often called the “meet and confer” conference,²¹ is intended to thoroughly hash out issues between parties that would otherwise be impossible without court supervision.²² The pretrial conference also sets up methods for the production of information, preservation of information, and timelines for completion of the discovery process.²³ Rule 26(f) requires that parties discuss and agree early on in the discovery

14. See FED. R. CIV. P. 34. An amendment to the Federal Rules of Civil Procedure addressing discovery of ESI went into effect on December 1, 2006. See FED. R. CIV. P. 34 advisory committee’s notes (2006).

15. Jason Krause, *E-Discovery Gets Real*, 93 A.B.A. J. 44, 46 (Feb. 2007).

16. See Bennett & Dickson, *supra* note 7, at S5.

17. See Krause, *supra* note 15, at 47.

18. FED. R. CIV. P. 26(f).

19. FED. R. CIV. P. 16(b).

20. See FED. R. CIV. P. 26(f).

21. Krause, *supra* note 15, at 47.

22. See *id.* at 47–48 (discussing possible court sanctions for parties that fail to comply with discovery agreements).

23. See FED. R. CIV. P. 16(b)(3)(B).

process about the preservation and production of ESI, setting out the scope of each party's rights and obligations.²⁴ Further, Rule 26(f) directs parties to confer on "any issues about disclosure or discovery of ESI, including the form or forms in which it should be produced."²⁵ The 2006 amendments to Rule 26(f) direct parties to discuss discovery of ESI during their discovery-planning conference.²⁶

Rule 26(f) is intended to work in conjunction with Rule 16(b). According to Rule 26(f), "the parties must confer as soon as practicable—and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b)"²⁷ to "consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case."²⁸ Particularly where complex litigation is involved, the new rules fully recognize the importance and necessity of starting e-discovery immediately. Through the rule amendments, the Federal Rules of Civil Procedure Advisory Committee also sought to address the potential for active data destruction through the routine operation of computer systems.²⁹

The 2006 amendments specifically addressed discovery of ESI and brought about, at least on paper, uniformity of application that has been long overdue.³⁰ The amendments added discovery of ESI as a possible subject in a pretrial scheduling order³¹ and included ESI as a category of material subject to initial discovery disclo-

24. See FED. R. CIV. P. 26(f); see also THE SEDONA CONFERENCE, THE SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 21 (2d ed. 2007).

25. FED. R. CIV. P. 26(f)(3)(C).

26. FED. R. CIV. P. 26(f)(3)(C). This change in the rules made it imperative for litigants to start early in any litigation involving e-discovery.

27. FED. R. CIV. P. 26(f)(1).

28. FED. R. CIV. P. 26(f)(2).

29. See COMM. ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE CIVIL RULES ADVISORY COMMITTEE 83–86 (2005), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV5-2005.pdf> (discussing the importance of an amendment to Rule 37(f), which later became Rule 37(e)); see also JUDICIAL CONFERENCE COMM. ON RULES OF PRACTICE & PROCEDURE, *supra* note 3, at 21–35.

30. See FED. R. CIV. P. 16, 26, 33, 34, 37, 45 advisory committee's notes (2006).

31. See FED. R. CIV. P. 16(b)(3)(B)(iii).

tures.³² Furthermore, the amendments provided explicit procedures for a party to resist production of ESI that is “not reasonably accessible because of undue burden or cost,” subject to a showing of “good cause” for its production,³³ and required an early conference between the parties to discuss preservation and discovery of ESI and inadvertent disclosure of privileged documents.³⁴ The amendments also addressed the specific procedure for resolving a claim of inadvertent production of privileged information,³⁵ clarified that interrogatories may be answered by reference to ESI,³⁶ permitted the requesting party to “specify the form or forms in which [ESI] is to be produced,”³⁷ subject to an objection by the producing party, and required the production of ESI either as it is “ordinarily maintained or in a reasonably usable form or forms,” specifying that ESI need not be produced in more than one form.³⁸ The amendments provided a “safe harbor” that precludes sanctions, except in “exceptional circumstances,” for failing to produce ESI that was deleted in accordance with the “routine, good-faith operation of an electronic information system.”³⁹ Lastly, the amendments conformed the subpoena provisions in Rule 45 to the discovery rule changes related to e-discovery.⁴⁰

Paper discovery and e-discovery are different in form; thus, the old civil procedure rules temporarily accommodated both forms of discovery. The amendments merely codified the concepts and procedures that many courts developed and used prior to December 2006.⁴¹ However, the amendments are expected to be widely adopted by state courts as well.⁴² As of 2008, seven states have adopted e-discovery rules closely related to the Federal Rules of Civ-

32. See FED. R. CIV. P. 26(a)(1)(A)(ii).

33. FED. R. CIV. P. 26(b)(2)(B).

34. See FED. R. CIV. P. 26(f)(3)(C); FED. R. CIV. P. Form 35 (“Report of Parties Planning Meeting”).

35. See FED. R. CIV. P. 26(b)(5).

36. See FED. R. CIV. P. 33(d).

37. FED. R. CIV. P. 34(b)(1)(C).

38. FED. R. CIV. P. 34(b)(2)(E)(ii).

39. FED. R. CIV. P. 37(e).

40. See FED. R. CIV. P. 45.

41. Bronte, *supra* note 4, at 65.

42. Krause, *supra* note 15, at 46.

il Procedure, and another fourteen states are considering changes in their court rules to address e-discovery.⁴³ In the meantime, federal judges continue to define and refine the application of the e-discovery rules.

III. JUDGES AND CASES SHAPING E-DISCOVERY

Prior to the adoption of the new Federal Rules of Civil Procedure, federal judges were handling e-discovery issues.⁴⁴ The judges who presided over four seminal cases that dealt with e-discovery issues are viewed as the “rock stars of their professions.”⁴⁵

*Zubulake v. UBS Warburg LLC*⁴⁶ concerned an employment discrimination case where cost shifting for the production of ESI was at issue.⁴⁷ The Southern District of New York navigated the difficult task of refining and modifying certain aspects of an eight-factor balancing test set out in *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*⁴⁸ in 2002.⁴⁹ Judge Scheindlin in *Zubulake* determined

43. Craig Ball, *Piecing Together the E-Discovery Plan: A Plaintiff's Guide to Meet and Confer*, TRIAL, June 2008, at 22 n.3 (“[S]even states have adopted e-discovery rules hewing closely to the federal rules (Arizona, Indiana, Louisiana, Minnesota, Montana, New Jersey, and Utah); another 14 states are considering changes to their court rules to address e-discovery.”). These fourteen states include Alaska, Connecticut, Florida, Illinois, Iowa, Kansas, Maryland, Nebraska, New Mexico, North Dakota, Ohio, Tennessee, Virginia, and Washington. Brett Burney, *Mining E-Discovery Stateside*, L. TECH. NEWS, Jan. 18, 2008, <http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1200594602161>.

44. See Jason Krause, *Rockin' Out the E-Law*, 94 A.B.A. J. 48, 48 (July 2008).

45. *Id.* at 49.

46. 217 F.R.D. 309 (S.D.N.Y. 2003).

47. See *id.* at 312–17.

48. 205 F.R.D. 421 (S.D.N.Y. 2002).

49. See *Zubulake*, 217 F.R.D. at 321–24. The court in *Rowe Entertainment, Inc.* determined that the plaintiffs should bear cost of restoring e-mails they had requested and which were stored on backup tapes. 205 F.R.D. at 433. In reaching its determination, the court used an eight-factor test:

(1) the specificity of the discovery requests; (2) the likelihood of discovering critical information; (3) the availability of such information from other sources; (4) the purposes for which the responding party maintains the requested data; (5) the relative benefit to the parties of obtaining the information; (6) the total cost associated with production; (7) the relative

that under the analysis and test in *Rowe Entertainment, Inc.*, cost shifting inappropriately favored the requesting party in the production of electronic data and failed to take into consideration factors required by Federal Rule of Civil Procedure 26 such as the amount in controversy and what is at stake in the litigation.⁵⁰ Judge Scheindlin noted that a litigation culture that shifts discovery production costs to the requesting party would likely end nearly all litigation.⁵¹ Building upon *Rowe Entertainment, Inc.*, the *Zubulake* court revised the eight-factor test into seven factors.⁵² The seven-factor test is an objective method for determining who should bear the costs of producing ESI and is more in tune with the U.S. Supreme Court's instruction "that the presumption is that the responding party must bear the expense of complying with discovery requests."⁵³

Additionally, in *Thompson v. United States Department of Housing and Urban Development*,⁵⁴ the District of Maryland extended judges' traditional sanction authority.⁵⁵ The parties were enmeshed in e-discovery battles and the court sanctioned the Department of Housing and Urban Development (HUD) for failing to preserve e-mail records of housing officials who left HUD before resolving the lawsuit.⁵⁶ Further, the district court sanctioned HUD for failing to

ability of each party to control costs and its incentive to do so; and (8) the resources available to each party.

Id. at 429.

50. *See Zubulake*, 271 F.R.D at 320–21.

51. *See id.* at 317.

52. The revised seven factors to be considered in cost shifting include:

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 to each party to control costs and its incentive to do so; 6. The importance of the issues at stake in the litigation; and 7. The relative benefits to the parties of obtaining the information.

Id. at 322.

53. *Id.* at 317 (quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978)).

54. 219 F.R.D. 93 (D. Md. 2003).

55. *See id.* at 104–05.

56. *See id.* at 99–100.

timely produce numerous e-mail records.⁵⁷ Attorneys must remember that a court's inherent power to sanction extends to e-discovery infractions, which may have dire consequences to litigants.

Two years later, in *Hopson v. Mayor & City Counsel of Baltimore*,⁵⁸ the District of Maryland maneuvered the parties through the issue of the potential waiver of privilege during production of electronic data evidence.⁵⁹ The new Federal Rules of Civil Procedure recognize the probability that parties will inadvertently produce privileged documents in the attempt to comply with e-discovery requests.⁶⁰ However, the "clawback" provision in Rule 26 essentially allows parties to assert a "non-waiver" agreement so that, if privileged information is inadvertently produced during production of ESI, the information will remain privileged.⁶¹ The "clawback" provision protects the attorney-client privilege, work product privilege, and the client's economic interest, which could be compromised by inadvertent exposure.

Further broadening the e-discovery rule application, in *United States v. O'Keefe*,⁶² the district court for the District of Columbia utilized Rule 34(b) to resolve form issues relating to the production of electronic evidence in a criminal case.⁶³ The court held that if the requesting party failed to specify the form in which electronic evidence should be produced, the responding party must produce, or at

57. *See id.* at 104–05 (holding that sanctions were appropriate where the defendant produced 80,000 responsive e-mail records well after the discovery cut-off deadline). The court amended an earlier sanctions order against the defendant by precluding the defendant from introducing into evidence the newly discovered e-mails and allowing the plaintiff to use the newly discovered e-mails in its case and during cross examination of the defendant's witnesses. *See id.*

58. 232 F.R.D. 228 (D. Md. 2005).

59. *See id.* at 231.

60. *See generally id.* at 232–33 (discussing the problems of producing privileged information when parties comply with e-discovery production requests and how the current revisions to the discovery rules alleviate this problem). At the time of *Hopson*, there was no case within the Fourth Circuit that determined if following the procedure proposed by the recommended discovery rule changes would waive production of privileged documents. *Id.* at 234.

61. *See* FED. R. CIV. P. 26(b)(5)(B).

62. 537 F. Supp. 2d 14 (D.D.C. 2008).

63. *See id.* at 18–19.

least preserve, the evidence in its ordinary form or in a reasonably usable form.⁶⁴

The opinions penned by these judges are treated like a “papal encyclical”⁶⁵ because “[t]he law of e-discovery has largely been driven by a handful of federal judges who realized early on that electronic evidence was going to be a big issue in their courtrooms.”⁶⁶ These cases addressed issues ranging from the scope of producing and preserving electronic information, cost sharing and shifting for evidence produced, and waiver of privilege, to sanctions for failing to preserve electronic evidence.⁶⁷ These cases determined that corporations must preserve papers, emails, or other electronic documents as well as back-up tapes associated with the anticipated litigation.⁶⁸ Generally, courts have made very clear that attorneys have considerable obligations in conducting e-discovery.⁶⁹ As a result, attorney training must be conducted not only on the general rules, but also on how to preserve, request, and ultimately produce e-discovery.

IV. RAMIFICATIONS OF FAILURE TO COMPLY WITH RULE 26(F)

When parties fail to comply with electronic data discovery guidelines set and agreed to by the parties under Federal Rule of Civil Procedure 26(f), courts will sanction the offending party.⁷⁰ Failure of a party and/or its counsel to fulfill the obligation to preserve or produce electronic and other evidence is known as “spoliation of evidence.”⁷¹ Spoliation of evidence can result in civil and even possibly criminal sanctions.⁷² The burden to satisfy a spoliation finding can be mere negligence; parties need not act intentional-

64. *Id.* at 23.

65. Krause, *supra* note 44, at 49 (quoting e-discovery consultant Craig Ball).

66. *Id.* at 48 (quoting Mary Mack of the consulting firm, Fios).

67. See Michael P. Zweig & Mark J. Goldberg, *Electronic Discovery: A Brave New World*, WALL ST. LAW., July 2003, at 14.

68. See *id.*

69. See *id.*

70. See FED. R. CIV. P. 37(f).

71. Zweig & Goldberg, *supra* note 67, at 14.

72. *Id.*

ly.⁷³ Federal Rule of Civil Procedure 37(f) provides for sanctions for loss of ESI.⁷⁴ To determine if spoliation of evidence has occurred and dismissal is warranted, five factors are considered by a court:

- (1) whether the [party] was prejudiced as a result of the destruction of evidence; (2) whether the prejudice could be cured; (3) the practical importance of the evidence; (4) whether the [offending party] acted in good or bad faith; and (5) the potential for abuse if expert testimony about the evidence was not excluded.⁷⁵

Once a court determines that spoliation of evidence has occurred, there are several options available to redress the harm caused to the prejudiced party.⁷⁶ A court may dismiss the case, exclude expert testimony, or issue jury instructions that raise an inference or presumption against the spoliator.⁷⁷ Any of the options could very well serve a death nail to the litigation. For example, *Southern New England Telephone Co. v. Global NAPs, Inc.*⁷⁸ involved a dispute between a telecommunications provider and a licensed telecommunications carrier.⁷⁹ The defendant willfully violated numerous discovery orders issued by the court, lied to the court about its inability to obtain and produce documents from third parties, and withheld and destroyed requested documents.⁸⁰ The court entered default judgment against the defendant.⁸¹ The court noted that such willful discovery infractions not only ruined the plaintiff's ability to prove its case, but also immersed the court in discovery battles that "squan-

73. *Id.*

74. *See* FED. R. CIV. P. 37(f); Zweig & Goldberg, *supra* note 67, at 14.

75. *Flury v. Daimler Chrysler Corp.*, 427 F.3d 939, 945 (11th Cir. 2005) (applying Georgia spoliation of evidence law).

76. *See* FED. R. CIV. P. 37(f); Zweig & Goldberg, *supra* note 67, at 14.

77. *See Flury*, 427 F.3d at 945 (discussing the ultimate sanction of dismissal where the plaintiff failed to preserve a vehicle, which was the subject of the lawsuit, resulting in extreme and incurable prejudice to the defendant).

78. 251 F.R.D. 82 (D. Conn. 2008).

79. *See id.* at 84–85.

80. *See id.* at 86–90.

81. *Id.* at 96.

dered judicial resources” and unnecessarily wasted the court’s time.⁸²

The three-prong test to determine if spoliation of evidence warrants an adverse inference and/or other sanctions is: 1) whether the party having control over the evidence had a duty to preserve the evidence; 2) the mental culpability of the offending party; and 3) if it is likely that the destroyed evidence is relevant to a claim or defense of the affected party.⁸³ However, if it is proven that the ESI was lost in a “routine, good faith operation of an electronic information system,” the right to sanctions is not triggered.⁸⁴

In 2009, court-imposed sanctions on litigants and counsel increased.⁸⁵ Fifty-two percent of the sixty-one reported e-discovery opinions issued by courts during the first five months of 2009 considered whether sanctions should be imposed.⁸⁶ In 36%, or twenty-two of these opinions, courts imposed some form of sanction, in most cases, because of spoliation of evidence.⁸⁷ A study by Kroll Ontrack⁸⁸ of e-discovery opinions shows that for the first five months of 2009, as compared to the first ten months of 2008, there was a two-fold increase in the proportion of e-discovery opinions where courts considered sanctions, as well as a two-fold increase in the proportion of e-discovery opinions where the courts imposed sanctions.⁸⁹

Few cases are dismissed where spoliation of evidence is an issue because the discovery process is meant to ensure that litigants “discover” as much as possible about the facts of a dispute. The effect

82. *Id.*

83. *See* Byrnie v. Town of Cromwell, Bd. of Educ., 243 F.3d 93, 107–08 (2d Cir. 2001).

84. FED. R. CIV. P. 37(e).

85. Michael F. Flanagan, *2009 Mid-Year Update on E-Discovery Cases*, GIBSON, DUNN & CRUTCHER, LLP (July 8, 2009), <http://www.gibsondunn.com/publications/pages/2009Mid-YearUpdateonE-DiscoveryCases.aspx>.

86. *Id.*

87. *Id.*

88. *See generally* KROLL ONTRACK, <http://www.krollontrack.com> (last visited Oct. 30, 2010). Kroll Ontrack is a technology driven services and software company that recovers, searches, analyzes, and produces data for customers in the legal, government, corporate, and financial markets. *See id.*

89. Flanagan, *supra* note 85.

of adverse inference jury instructions is obvious and often ends litigation because the instruction is too difficult of a hurdle for the spoliator to overcome.⁹⁰ However, court findings on discovery issues were never intended to end the dispute altogether.⁹¹

While dismissals and adverse inferences remain confined to cases in which a litigant's discovery misconduct is so egregious that the very integrity of the litigation process has been impugned, courts' growing willingness to apply such sanctions seems to reflect a broadening judicial impatience with litigants who do not carefully fulfill their e-discovery obligations.⁹²

This willingness to award sanctions further supports the author's position that it is important to train attorneys in how to preserve, request, and produce e-discovery.

In *Connor v. Sun Trust Bank*,⁹³ the Northern District of Georgia granted a motion for sanctions against Sun Trust Bank for the destruction of evidence.⁹⁴ Connor, a vice president level banker, returned to work after taking leave under the Family and Medical Leave Act (FMLA)⁹⁵ to find her managerial position dissolved, her responsibilities removed, and her team disbanded.⁹⁶ Connor alleged that Sun Trust Bank's actions violated the FMLA.⁹⁷ The court found that Sun Trust Bank failed to preserve and produce e-mails detailing why Connor was fired shortly after returning to work following an FMLA absence.⁹⁸ The court determined that the spoliation could be cured by issuing appropriate adverse inference jury instructions on the absence of the evidence.⁹⁹

90. See *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 219 (S.D.N.Y. 2003).

91. See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511–12 (2002) (discussing notice pleading requirements in relation to discovery); *Hickman v. Taylor*, 329 U.S. 495, 501 (1947) (discussing broad discovery).

92. Flanagan, *supra* note 85 (quotations omitted).

93. 546 F. Supp. 2d 1360 (N.D. Ga. 2008).

94. See *id.* at 1377.

95. Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601–54 (2006).

96. See *Connor*, 546 F. Supp. 2d at 1365.

97. *Id.* at 1365–66.

98. See *id.* at 1367, 1376.

99. See *id.* at 1377.

V. PROBLEMS ASSOCIATED WITH ELECTRONIC DATA DISCOVERY

The litigation process has always been, and continues to be, mired with pitfalls. The new discovery rules were adopted to alleviate, or at least streamline, the process as it relates to e-discovery. Many litigators believe that e-discovery issues have not been resolved, but have actually compounded discovery problems in general.¹⁰⁰ One major issue that has evolved is the cost on all parties of conducting e-discovery: "Litigation is already dangerously close to being a prohibitively expensive proposition for many people,"¹⁰¹ and "[t]he cost of handling the volumes of data now discoverable is such that we are getting dangerously close to pushing past that point."¹⁰² Such an outcome is not an intended effect of the new rules.

Nevertheless, electronic data discovery is a growing strain on companies, law firms, solo attorneys, and, ultimately, clients.¹⁰³ Better management of electronic records is crucial for keeping costs under control for all parties to the litigation.¹⁰⁴ With the new Federal Rules of Civil Procedure, "the first step in any litigation with e-discovery will be to identify all relevant data sources and formats."¹⁰⁵ This becomes vitally important when it has been estimated that the first-level document review encompasses between 58% and 90% of total litigation costs.¹⁰⁶ Because there is so much more information to discover, discovering all relevant information becomes

100. See Martha Neil, *Litigation Too Costly, E-Discovery a 'Morass,' Trial Lawyers Say*, A.B.A. J., Sept. 9, 2008, http://www.abajournal.com/news/article/litigation_too_costly_e_discovery_a_morass_trial_lawyers_say/ (discussing litigation problems associated with e-discovery).

101. Krause, *supra* note 15, at 46 (quotation omitted).

102. *Id.* (quotation omitted).

103. See Stanley M. Gibson, *Hit 'Delete' to Prevent EDD Disaster*, LAW.COM, Aug. 7, 2007, <http://www.law.com/jsp/article.jsp?id=900005488122>.

104. See *id.*

105. Scott Oliver, *The Real Implications of the New Rules on EDD*, L. TECH. NEWS, Jan. 23, 2007, <http://www.law.com/jsp/lawtechnologynews/PubArticleLTNC.jsp?id=900005471815>.

106. Ashish Prasad et al., *Cutting to the "Document Review" Chase*, 18 BUS. L. TODAY, Nov./Dec. 2008, at 57.

even more expensive. Yet, “discovery is not just about uncovering the truth, but also about how much of the truth the parties can afford to disinter.”¹⁰⁷ Putting a price tag on the truth could prove fatal to the institution of litigation in the United States.

Not only are costs incurred during the battle over e-discovery issues between parties, but there can be additional costs to the litigants in the form of monetary sanctions resulting from an attorney’s failure to comply with discovery mandates. Fees and costs are the most common forms of sanctions.¹⁰⁸ Such fees and costs impose substantial burdens—even on litigants who win on the underlying merits¹⁰⁹—and may often leave the victor and vanquished crippled from the litigation process.¹¹⁰

Another cost associated with e-discovery results from specialists or experts who are used by parties to explain, produce, or unravel difficult issues involving ESI. In 2006, e-discovery consultant fees started at \$275 per hour, and costs of collecting, reviewing, and producing a single e-mail ran between \$2.70 and \$4.00 per e-mail.¹¹¹ Experts in this market estimated that litigants spent over \$2.4 billion on e-discovery services in 2007.¹¹² The e-discovery services market is expected to draw \$4.6 billion annually in 2010.¹¹³ The e-mail archiving market alone is estimated to increase from \$1.2 billion in 2007 to almost \$5.5 billion by 2011.¹¹⁴ The imposition of sanctions

107. *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 311 (S.D.N.Y. 2003) (quoting *Rowe Entm’t, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 429 (S.D.N.Y. 2002)).

108. Flanagan, *supra* note 85.

109. *See id.*

110. *See, e.g., Keithley v. Home Store.com, Inc.*, No. C-03-04447 SI (EDL), 2009 WL 816429, at *4 (N.D. Cal. Mar. 27, 2009) (ruling that the defendant was required to pay \$282,970.37 in fees and costs for flagrant discovery abuse of electronic evidence).

111. Ann G. Fort, *Rising Costs of E-Discovery Requirements Impacting Litigants*, FULTON COUNTY DAILY REP., Mar. 20, 2007, available at <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=900005554136>.

112. *Id.*

113. Lauren Katz, *A Balancing Act: Ethical Dilemmas in Retaining E-Discovery Consultants*, 22 GEO. J. LEGAL ETHICS 929, 929 (2009).

114. *See* Herman Mehling, *Emerging E-Discovery Market Grows More Vital for VARs*, IT CHANNEL PLANET, Feb. 28, 2008, <http://www.itchannelplanet.com/>

for mishandling ESI is well known by litigators and in-house counsel, so hiring an e-discovery consultant is beginning to look mandatory, which is certain to run up litigation costs.¹¹⁵ Lastly, the added cost of attorney review puts the cherry on top. These costs further illustrate why attorneys must be trained in e-discovery, which is becoming a critical aspect of litigation and a critical aspect of an attorney's ability to effectively prepare for a case. Both requesting and producing e-discovery are pivotal to the litigation process.

Expert-mediated conferences will likely increase as courts struggle with the technical specifics of electronic data discovery and the exaggerated costs.¹¹⁶ "In large cases, [electronic data discovery] expenses alone can dwarf the entire amount in controversy in smaller cases; in any size case, [electronic data discovery] mistakes can determine outcomes," which may drive dispositions more than the actual merits.¹¹⁷

"Out-of-control discovery, among other issues, is making it difficult or impossible to pursue many cases that traditionally would have been brought, as parties settle or even decide not to pursue litigation to begin with because of the expense involved."¹¹⁸ In major cases, discovery obligations can be exorbitantly expensive due to the "difficulty of identifying and preserving electronic communications and documents, including e-mail and work done on personal computers and electronic devices."¹¹⁹

Another pitfall litigants face is that judges are very serious about the meet-and-confer conference.¹²⁰ A party cannot demand to see

channel/article.php/3731101/Emerging-E-Discovery-Market-Grows-More-Vital-for-VARs.htm.

115. See Fort, *supra* note 111.

116. See Craig Ball, *Gazing into the EDD Crystal Ball*, L. TECH. NEWS, Feb. 4, 2008, <http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1201864414445>.

117. *Id.*

118. Martha Neil, *OK, Discovery's a Problem, But What Can Be Done About It?*, A.B.A. J. (Sept. 11, 2008), http://www.abajournal.com/news/article/ok_discoverys_a_problem_but_what_can_be_done_about_it.

119. *Id.*

120. See Craig Ball, *Ten Blunders That Stop E-Discovery Cold*, L. TECH. NEWS, Aug. 10, 2006, <http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=900005460047>.

everything and then “hide the ball” when asked to produce ESI.¹²¹ Litigants who wish to pontificate and posture should not do so at the meet-and-confer conference.¹²² Federal Rule of Civil Procedure 26(a) states that initial disclosures during the meet-and-confer conference should include a “copy—or a description by category and location” of relevant ESI.¹²³ To comply with Rule 26(a), litigants are required to rapidly identify all relevant ESI data sources and identify key players who are likely to have discoverable information.¹²⁴ Where parties engage in sloppy or cursory discovery production and additional sources are added after the fact, judges can and do impose sanctions.¹²⁵ Federal courts are quite serious about meet-and-confer conferences, and “heavy boots have begun to meet recalcitrant behinds when Rule 26(f) encounters are perfunctory, drive-by events.”¹²⁶ In other words, the profession is on notice that e-discovery is a very serious matter; thus, attorneys must diligently prepare to handle e-discovery from every angle or bear the risk of incurring judges’ costly wrath for non-compliance.

Depending on the complexity of a case and the amount of ESI involved, courts will inevitably be burdened with sorting out electronic data discovery issues by conducting numerous hearings. When parties fail to conduct proper meet-and-confer conferences, they arrive to the Rule 16 meeting¹²⁷ without having learned anything about the location of electronic records, how such records will be produced, or the important players that will be central to the dispute.¹²⁸ To be productive, meet-and-confer conferences must evolve into a candid, constructive, and collaborative meeting of the minds in

121. *See id.*

122. *See id.*

123. FED. R. CIV. P. 26(a)(1)(A)(ii).

124. *See* FED. R. CIV. P. 26(a)(1).

125. *See* Oliver, *supra* note 105.

126. Craig Ball, *Ask and Answer the Right Questions in EDD*, L. TECH. NEWS, Jan. 4, 2008, <http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=900005499729>.

127. *See* FED. R. CIV. P. 16(b).

128. *See* Jason Krause, *E-Discovery Tips from the Bench*, L. TECH. NEWS, June 16, 2008, <http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202422260266>.

order to take some of the “sting” and “gotcha” out of e-discovery.¹²⁹ A “[m]eet and confer [conference] requires intense preparation built on a broad and deep gathering of detailed information about systems, applications, users, issues and actions.”¹³⁰ This application is also consistent with the initial intent of broad discovery rules.¹³¹

The complexities associated with e-discovery, however—such as identifying electronic data sources, harvesting electronic data and reviewing and producing data—may require some form of judicial intervention. Courts may become bogged down in the details of voluminous electronic data collections, expending large amounts of time to become familiar with the minute details of the technology and document-management issues. Or courts may address e-data issues in broadbrush terms that prove unfair in their individual applications.¹³²

Motions to compel discovery and motions for sanctions often draw courts into these disputes, which at times can become “expert battles, with various technocrats testifying as to what is conceivable versus what is cost-effective” and what is accessible versus what is inaccessible.¹³³ Attorney training may reduce this trend. If attorneys understand e-discovery from the front end (preserving data), to the back end (producing data), these battles may be avoidable.

The adversarial nature of the trial process itself makes resolution of electronic data discovery issues more difficult. Attorneys are doing their clients a disservice if they engage in “counterproductive discovery battles.”¹³⁴ Clients are affected in two ways: First, by the attorney’s billable hours wasted on unnecessary discovery melees; and second, by possible sanctions from judges to the client, attorney, or both. Many jurists agree that the e-discovery rules fundamentally

129. See Ball, *supra* note 126.

130. *Id.*

131. See Swierkiewicz v. Sorema N.A., 534 U.S. 506, 511–12 (2002).

132. Bennett & Dickson, *supra* note 7, at S5.

133. *Id.*

134. Krause, *supra* note 128 (quoting Cathy Bencivengo, Magistrate Judge for the United States District Court for the Southern District of California).

change the way opposing counsel have worked together for hundreds of years.¹³⁵

[T]he old model of competing motions and adversarial discovery is counterproductive [and] [t]he notion that you can go at it tooth and nail and don't have to turn over a damn thing doesn't work. It's great to be a zealous advocate, but with electronically stored information you have to be a problem solver, not a fighter.¹³⁶

Although many advocates are slow to get this lesson, courts' willingness to impose sanctions that send a clear message to attorneys will work in tandem with attorney training to curtail battles and lead to attorneys becoming problem solvers.

In *Mancia v. Mayflower Textile Services Co.*,¹³⁷ the District of Maryland discussed that underlying the entire discovery process is a requirement that parties and lawyers involved in litigation cooperate throughout.¹³⁸ The court delved into elaborate discussions about the role of the adversary system in modern e-discovery times.¹³⁹ It quoted extensively from courts and legal scholars discussing the adversary system and proposed that its nature does not preclude, but indeed requires, collaboration between the parties to reveal and develop the facts underlying their dispute.¹⁴⁰ In particular, the adversary system requires litigants to cooperate in discovery so that disputes can be resolved efficiently through settlement, summary disposition, or trial.¹⁴¹

The issues of the adversarial nature of litigation and the inability of counsel from both sides of the table to come to terms with ESI discovery requirements are highlighted by the Sedona Conference Cooperation Proclamation.¹⁴² The Sedona Conference issued the

135. *See id.*

136. *Id.* (quoting Paul Grimm, Chief Magistrate Judge for the United States District Court for the District of Maryland).

137. 253 F.R.D. 354 (D. Md. 2008).

138. *See id.* at 365.

139. *See id.* at 361–63.

140. *See id.*

141. *See id.* at 365.

142. *See* THE SEDONA CONFERENCE, THE SEDONA CONFERENCE COOPERATION PROCLAMATION (2008), available at <http://www.thesedonaconference.org/content/>

proclamation to announce a “national drive to promote open and forthright information sharing, dialogue (internal and external), training, and the development of practical tools to facilitate cooperative, collaborative, transparent discovery.”¹⁴³ Judges convening at the conference claimed that “[t]he costs associated with adversarial conduct in pre-trial discovery have become a serious burden to the American judicial system.”¹⁴⁴ They further claimed that “[t]his burden rises significantly in discovery of electronically stored information.”¹⁴⁵ Compounding the problem, in addition to rising monetary costs, courts have also witnessed increased discovery motions and “overreaching, obstruction and extensive, but unproductive discovery disputes in some cases precluding adjudication on the merits altogether.”¹⁴⁶ Opposing counsel must cooperate and promote transparency in the preservation and production of ESI.¹⁴⁷ Undoubtedly, e-discovery training for attorneys can help to alleviate much of the adversarial posture of the litigation process and facilitate the cooperation needed to efficiently and successfully complete e-discovery obligations.

“Another issue pertaining to the discovery of electronic data involves the duty to preserve and retain electronic data.”¹⁴⁸ Once a party realizes that litigation is probably imminent, the duty to preserve and retain relevant documents is triggered.¹⁴⁹ Any communi-

tsc_cooperation_proclamation/proclamation.pdf. The Sedona Conference is a non-profit charitable research and education organization whose mission is to facilitate education regarding “cutting edge” issues in law-related topics including complex litigation. See TSC Mission, THE SEDONA CONFERENCE, http://www.thesedonaconference.org/content/tsc_mission/show_page_html (last visited Oct. 30, 2010).

143. THE SEDONA CONFERENCE, *supra* note 142, at 1.

144. *Id.*

145. *Id.*

146. Cecil Lynn III & Alexandra Hicks, *E-Discovery Rulings: 2008 in Review*, L. TECH. NEWS, Jan. 9, 2009, <http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202427312737>.

147. See Craig Ball, *Crafting a More Effective Keyword Search*, L. TECH. NEWS, June 24, 2009, <http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202431693400>.

148. Tammy Wavle Shea, *Discovery of Electronic Data: What Statutes and Case Law Say to Do, and Not to Do*, 40 HOUS. LAW. 29, 33 (2003).

149. *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003).

cation alluding to legal action satisfies the notice requirements triggering the duty to retain and preserve documents.¹⁵⁰ As important, courts nationwide have imposed sanctions for a litigant's wrongful destruction of electronic data.¹⁵¹ Discovery misconduct often encompasses a party's failure to preserve evidence.¹⁵²

Ignorance or mistake is often the culprit behind discovery violations.¹⁵³ Failure to locate evidence responsive to discovery requests, false certifications of the completeness of discovery, and untimely production of documents result when lawyers do not take the time to understand their client's electronic storage systems—which is partly related to lack of training.¹⁵⁴

Many lawyers do not know, or are not trained on, how to handle electronic data issues. Deciphering ESI requires special tools and expertise to see and interpret the information.¹⁵⁵ Because many old-

150. *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001) (ruling that the duty to preserve “arises not only during litigation but also extends to that period before the litigation when a party should reasonably know that the evidence may be relevant to anticipated litigation”); *PML N. Am., LLC v. Hartford Underwriters Ins. Co.*, No. 05-CV-70404-DT, 2006 WL 3759914, at *5 (E.D. Mich. Dec. 20, 2006) (holding that the defendant “was on notice of the potential of litigation” when it received a letter from the plaintiff informing the defendant to expect communication from the plaintiff’s attorneys); *Zubulake*, 220 F.R.D. at 216–17 (holding that duty to preserve arose before suit was filed because employees of the defendant associated with the plaintiff recognized the possibility that the plaintiff may file suit).

151. *See* *Shea*, *supra* note 148, at 33.

152. *See, e.g., Keithley v. Home Store.com, Inc.*, No. C-03-04447 SI (EDL), 2008 WL 3833384, at *19–20 (N.D. Cal. Aug. 12, 2008) (sanctioning the defendant for flagrant e-discovery transgressions and advising the lower court to draft jury instructions that encompassed the defendant’s failure to preserve electronic evidence three years after the plaintiff threatened litigation and a full year after the complaint was filed); *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co.*, No. CA 03-5045 AI, 2005 WL 674885, at *5 (Fla. Cir. Ct. Mar. 23, 2005) (finding deliberate withholding of discovery and fraudulent assurances to court and opposing counsel about completeness of production).

153. *See* *Bronte*, *supra* note 4, at 63.

154. *See id.*

155. *See* Craig Ball, *Steps to Get EDD Right From the Start*, L. TECH. NEWS, Dec. 24, 2008, <http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202426995800> (discussing how to handle “fragile” ESI and use of forensic examination).

er lawyers are set in old ways, they are intimidated by the process and only utilize what they know and ignore everything else.¹⁵⁶ For instance, a prevalent practice of many lawyers is to print documents or convert them to Tagged Image File Format (TIFF),¹⁵⁷ then engage a multitude of document reviewers to review useless or irrelevant documents.¹⁵⁸ Lawyers are not professionally trained, nor are they technically savvy enough, to perform the complicated requirements of electronic data searches. They are not trained to carefully craft keyword searches of electronic data or put into place quality control testing measures for the information that is gathered.¹⁵⁹ A lawyer's experience or competence using existing legal research software such as Westlaw, Lexis, or Google only inspires bogus self-belief in e-discovery search expertise.¹⁶⁰ One judge observed that a keyword search (for e-discovery purposes) "entails a complicated interplay of sciences beyond a lawyer's ken."¹⁶¹ Actually, the litigation playing field has rapidly changed, and lawyers, like the law, are slow at catching up.

VI. SOLUTIONS TO ELECTRONIC DATA DISCOVERY

Various solutions to e-discovery issues abound. These solutions are often categorized into pre-litigation solutions and litigation solutions. Because many avenues are available for potential litigants that

156. *See id.* (discussing steps for having a proactive e-discovery plan).

157. *What is a TIFF File?*, WISEGEEK.COM, <http://www.wisegeek.com/what-is-a-tiff-file.htm> (last visited Oct. 30, 2010). TIFF contains descriptive information about the image and was developed collaboratively by the Aldus Corporation and other contributors in 1986. *See id.* TIFF is the "format of choice" for archiving important images. *TIFF – Tag Image File Format*, SCANTIPS.COM, <http://www.scantips.com/basics9t.html> (last visited Oct. 30, 2010).

158. *See* Christopher Starr, *Strategies in Processing and Reviewing ESI*, L. TECH. NEWS, Oct. 23, 2008, <http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202425459851> (discussing how to be efficient with ESI document review).

159. *See* Craig Ball, *Time to Catch the 'Science of Search'*, L. TECH. NEWS, Apr. 24, 2008, <http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=900005509556>.

160. *See id.*

161. Ball, *supra* note 147 (quoting Magistrate Judge John Facciola).

can ameliorate, or at least lessen, the potential quagmire the electronic age has produced on the litigation process, Part VI of this paper focuses on pre-litigation solutions.

Pre-litigation solutions include litigation hold letters¹⁶² or document retention directives.¹⁶³ Possible automatic deletion and modification of electronic documents requires that parties take extra precautions to ensure preservation.¹⁶⁴ A company's e-mails and other electronic documents are often routinely deleted automatically. Hold letters and other directives force a suspension of deleting electronic documents while litigation is pending. Courts often observe that the hold letters, or other orders directing parties to preserve or retain electronic records, were instituted as a means of ascertaining the extent of sanctions.¹⁶⁵ Any document preservation plan must indicate when and what documents should be retained and the procedure for preserving or destroying documents once a party has notice that litigation is impending.¹⁶⁶

"A party's discovery obligations do not end with the implementation of a 'litigation hold'" and "[c]ounsel must oversee compliance with the litigation hold, monitoring the party's efforts to retain and produce the relevant documents."¹⁶⁷ This is why the most important element of a party's document retention policy is that the policy be executed.¹⁶⁸ Courts expect parties that have such policies to consistently follow them.¹⁶⁹ It is better not to have a document retention policy at all than to have one that is arbitrarily applied.¹⁷⁰ However,

162. A litigation hold letter requires parties engaged in litigation to retain relevant documents and immediately suspend the automatic deletion of e-mails and the writing-over of backup tapes that may be pertinent to the litigation process. *See Bronte, supra* note 4, at 63.

163. Document retention directives perform the same function as litigation hold letters. *Id.* at 68.

164. *See id.* at 63.

165. *See, e.g., S. New Eng. Tel. Co. v. Global NAPs, Inc.*, 251 F.R.D. 82, 92 (D. Conn. 2008) (discussing defendant's use of "wiping" software on her computer after specifically instructed not to destroy any records from the start of the litigation).

166. *See Bronte, supra* note 4, at 72.

167. *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 432 (S.D.N.Y. 2004).

168. *See Bronte, supra* note 4, at 71.

169. *See id.* (discussing litigation holds and document retention policies).

170. *See id.*

a party that has a stated electronic document retention/deletion protocol, and adheres to that protocol, will probably survive a charge of spoliation of evidence.¹⁷¹ Therefore, employees must be regularly reminded of document retention policies to ensure compliance.¹⁷² This will keep old and new employees aware of the duty to retain documents connected to a dispute.¹⁷³

Because parties can be engaged in litigation for years, retention policies should be checked at regular intervals throughout the pendency of the dispute.¹⁷⁴ A party need only prove that destruction of evidence was willful in order to obtain sanctions.¹⁷⁵ Ensuring litigants' compliance and cooperation is paramount to see litigation reach the proper disposition.¹⁷⁶ Thus, hold letters offer a simple methodology to combat the voluminous production and retention of electronic documents in the business world as parties prepare for litigation.

Also, lawyers must become familiar with, and have a working understanding of, their client's information technologies.¹⁷⁷ Lawyers are not expected to be computer scientists or experts in computer systems.¹⁷⁸ However, lawyers need to have some knowledge and competent understanding of ESI.¹⁷⁹ There is no "fast-food" solution to this process. Lawyers cannot learn about a client's computer systems by embarking on superficial instruction or training through has-

171. *See id.*

172. *See id.* at 72.

173. *See* Zubulake v. UBS Warburg LLC, 229 F.R.D. 422, 433 (S.D.N.Y. 2004) (discussing that litigation holds should be periodically reissued so new employees are aware of the policy).

174. Bronte, *supra* note 4, at 72.

175. *See* S. New Eng. Tel. Co. v. Global NAPs, Inc., 251 F.R.D. 82, 92 (D. Conn. 2008) (employee's use of "wiping" software on her computer warranted default judgment order because such action was intentional, done in bad faith, and sufficient to support an inference that the destroyed evidence was harmful to the destroying party).

176. *See id.* at 90 (discussing the need to prevent undue delays and avoid congestion in the courts).

177. *See* Scott Holden Smith, *EDD Training: A Growth Industry*, L. TECH. NEWS, Nov. 15, 2005, <http://www.law.com/jsp/lawtechnologynews/PubArticleLTNC.jsp?id=900005440471>.

178. *See id.*

179. *See id.*

ty CLE programs or perfunctorily issued certifications.¹⁸⁰ In *Zubulake v. UBS Warburg LLC*,¹⁸¹ Judge Scheindlin from the Southern District of New York held that attorneys have the ultimate responsibility over discovery, and therefore must actively take part in all aspects of e-discovery.¹⁸² The exponential growth and sheer volume of e-discovery in the litigation process mandates that members of the bench and bar step up to the plate.

Special Masters trained in e-discovery issues are ideal to assist judges in litigation that involves complex e-discovery issues. This is no foreign concept. In the Eastern District of Texas, Special Masters are used to handle intellectual property cases.¹⁸³ The District is also well known for its plaintiff-friendly and speedy disposition of patent cases.¹⁸⁴ In this same vein, Special Masters can be used for quick disposition of discovery issues dealing with ESI and can also oversee a variety of e-discovery issues.¹⁸⁵ For example, a Special Master can assist judges in detecting the location of discoverable material based on the litigants' computer systems, settle discovery disputes, and apportion cost-shifting amounts between parties.¹⁸⁶ This additional court monitoring would ensure that attorneys receive a clear signal that the court is serious about efficiently handling e-discovery issues.

180. *See id.*

181. 229 F.R.D. 422 (S.D.N.Y. 2004).

182. *See id.* at 432–36.

183. *See, e.g.,* *Datatransury Corp. v. Wells Fargo & Co.*, 490 F. Supp. 2d 749 (E.D. Tex. 2006). The plaintiff in *Datatransury Corp.* sued Wells Fargo and other banks claiming that the banks illegally used plaintiff's patents for taking and transmitting digital images of checks. *Id.* at 752–53. In 2008, the court appointed former U.S. District Judge Layn Phillips as a Special Master to manage settlement negotiations between the parties. *See* Susan Decker, *Alberto Gonzales to Help 'Special Master' on Check Patent Case*, BLOOMBERG, June 6, 2008, <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=abnQSa5RHZsQ>.

184. This is referred to as the "Rocket Docket" of the United States Eastern District of Texas. *See* *The "Rocket Docket,"* TECH LAWFORUM, <http://techlawforum.scu.edu/post.cfm/the-rocket-docket> (last visited Oct. 30, 2010).

185. *See* Bennett & Dickson, *supra* note 7, at S5.

186. *See id.* (discussing the many possible functions that Special Masters can play in e-discovery).

Federal Rule of Civil Procedure 53, adopted in 1937, provides federal courts with the option of appointing a Special Master.¹⁸⁷ Although courts allocate the functions of Special Masters, parties must be given notice before a Special Master can be appointed.¹⁸⁸ However, even though the potential functions of Special Masters in electronic data discovery and other specialty areas are evident, Special Masters are used in less than 1% of federal cases.¹⁸⁹ The electronic age of discovery requires technical computer expertise and legal training.¹⁹⁰ Using Special Masters for e-discovery could be the new solution to resolve discovery disputes that will frequently arise in litigation.¹⁹¹

Just as members of the bench and bar must rush to the electronic training docket, law schools must face the responsibility of ensuring that graduates are fully prepared for the real-world practice of e-discovery. The sphere of e-discovery is swiftly developing into a multi-disciplined field comprised of not only lawyers and judges, but also of computer technicians, software developers, vendors, and paralegals.¹⁹² Solid training in e-discovery is required for lawyers to be competent to represent clients in electronic disputes, but there is a gap in the system because no proper courses are available for lawyers to take.¹⁹³ E-discovery is not taught in law schools; therefore, the majority of attorneys have no formal knowledge or training in e-discovery.¹⁹⁴ Therefore, law firms are left with no choice but to pluck people from litigation support and put them into ongoing litigation involving e-discovery.¹⁹⁵

To this end, law schools must begin to introduce courses on e-discovery into their curriculum in order to expose future members of the bar to the issues involved in a digital litigation world. Lawyers need to learn and study e-discovery as if it were a “brand-new area

187. *Id.*

188. *Id.*

189. *Id.*

190. *See id.* (discussing how e-discovery has affected modern-day litigation).

191. *See* Bennett & Dickson, *supra* note 7, at S5.

192. Richard Acello, *E-Degree*, 96 A.B.A. J. 31, 31 (Jan. 2010).

193. *See id.*

194. *See id.*

195. *See id.*

of law,” even if they are not directly involved in the process.¹⁹⁶ Lawyers and other legal practitioners must be as expert as possible in electronic data issues, and there is an enormous gap between those who know the issues and those who do not know anything.¹⁹⁷ Closing this gap is vital to the continued practice of law in an electronic age.

As soon as practicable, parties should consult with well-reputed electronic data discovery (EDD) specialists.¹⁹⁸ These vendors should provide assistance to attorneys in the areas of ESI and document review.¹⁹⁹ Attorneys must oversee all aspects of the litigation process and ensure that the e-discovery team, made up of technocrats, paralegals, and other support personnel, are constantly monitored for efficient and accurate document review and production.²⁰⁰

Once parties are notified of litigation, every effort should be made to negotiate a discovery protocol.²⁰¹ All document requests should include electronic information.²⁰² The protocol should be drafted so that parties share their methods of storing, deleting, and maintaining information.²⁰³ A “clawback” provision²⁰⁴ should be included in the protocol to protect parties when inadvertent privileged electronic documents are produced.²⁰⁵ A properly implemented protocol will set boundaries on electronic obligations and protect a party from allegations of pre-litigation discovery misconduct.²⁰⁶

196. *Id.*

197. *See id.*

198. EDD specialists are comprised of consultants and vendors whose businesses involve compiling, storing, and securing digital information. Prasad et al., *supra* note 106, at 57–58.

199. *See id.*

200. *See id.* at 58.

201. *See* Bronte, *supra* note 4, at 73 (discussing what should be included in an e-discovery protocol).

202. *See* Tony V. Pezzano, *Electronic Discovery: Managing the Challenge for IP Litigation in the Federal District Courts and the International Trade Commission*, 899 PRACTISING L. INST. PAT., COPYRIGHTS, TRADEMARKS, AND LITERARY PROP. COURSE HANDBOOK SERIES 471, 482 (2007).

203. *See* Bronte, *supra* note 4, at 73.

204. *See* FED. R. CIV. P. 26(b)(5)(B).

205. *See* Bronte, *supra* note 4, at 73.

206. *See id.*

VII. CONCLUSION

The future is uncertain as e-discovery continues to complicate the litigation process. Increased use of e-mail, new scanning capabilities, and the cheap storage costs of electronic documents have decreased the use of paper documents.²⁰⁷ This evolution has caused a large increase in ESI.²⁰⁸ Easy document creation has resulted in billions of documents and has turned relevant document review and production during litigation into a nightmare.²⁰⁹ Disputes too often revolve around e-mails that show a party's wrongdoing.²¹⁰ However, as the cost of researching, retrieving, and producing electronic evidence is spiraling out of control, parties must weigh whether lawsuits are worth litigating.²¹¹ As a result, the prohibitive cost of e-discovery may be the foremost reason that litigation is moribund.²¹²

Harsh penalties await misconduct in e-discovery practices.²¹³ The ever-growing number of players needed to combat the requirements of e-discovery requires that attorneys obtain proper training in all aspects of discovery as soon, and as thoroughly, as possible. "In a crowded, noisy market, too many [EDD] providers are making unsubstantiated claims and creating consumer confusion, while con-

207. Kevin A. Griffiths, *The Expense of Uncertainty: How a Lack of Clear E-Discovery Standards Put Attorneys and Clients in Jeopardy*, 45 IDAHO L. REV. 441, 442 (2009).

208. *See id.*

209. *See id.* (discussing ease of document creation).

210. *See* Matthew Philips, *Goldman Wasn't Alone*, NEWSWEEK, Apr. 23, 2010, <http://www.newsweek.com/2010/04/22/goldman-wasn-t-alone.html> (noting a lawsuit that included e-mails where company executives refer to securities sold to investors as "crap" and "vomit").

211. *See* Felisa Cardona, *Balance Sought on Rising Cost of Gathering Electronic Evidence*, DENV. POST (Oct. 25, 2009), http://www.denverpost.com/technology/ci_13636310.

212. *See* Debra Cassens Weiss, *E-Discovery Fears May Explain Why Recession Didn't Spur Litigation*, A.B.A. J. (Aug. 18, 2009), http://www.abajournal.com/news/article/e-discovery_fears_may_explain_why_recession_didnt_spur_litigation.

213. *See, e.g.,* Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., No. CA 03-5045 AI, 2005 WL 674885, at *10 (Fla. Cir. Ct. Mar. 23, 2005) (holding that the defendant's repeated misrepresentation to court regarding discovery compliance warranted sanctions of adverse inference jury instruction and attorneys costs and fees, among others).

sumers lack effective means to compare technologies and methods.”²¹⁴ A technological solution to the problems of e-discovery would be a methodology that could allow litigants to identify all relevant electronic documents reliably and efficiently.²¹⁵ This solution seems a while off. However, in the meantime, no methodology will be successful without appropriate attorney training.

214. George Socha & Tom Gelbmann, *Strange Times*, L. TECH. NEWS, Aug. 1, 2009, <http://www.law.com/jsp/PubArticle.jsp?id=1202435558482>.

215. See H. Christopher Boehning & Daniel J. Toal, *In Search of Better E-Discovery Methods*, L. TECH. NEWS, Apr. 23, 2008, <http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=900005509469>.