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David J. Lender



Hon. Andrew J. Peck

10 Key E-Discovery Issues In 2011: Expert Insight to Manage Successfully

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Hon. Andrew J. Peck
UNITED STATES MAGISTRATE
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DISTRICT OF NEW YORK

Editor’s Note: The tender green shoots of recovery are beginning to emerge. You, the corporate counsel of our great country, play an important role in support of policies that will nurture that recovery and lend it momentum. There are a number of hurdles, not faced by corporations based in other countries, that can slow or reverse that recovery. We have dedicated substantial editorial space to showcasing articles that suggest ways that these hurdles can be overcome. One such hurdle is the cost

of e-discovery.

In our March issue, we ran articles and interviews focusing on the increasing sophistication of the technology (machines) available to reduce e-discovery costs. These included a version of this article which was received by us late in the editorial process and was published in the March issue without having been reviewed by the authors, a distinguished practitioner and one of the leading magistrate judges. It included editorial errors on our part. We are therefore republishing the article here with the authors’ corrections.

This article is particularly important because in it the authors suggest ways of reducing the costs of e-discovery that can, through a cooperative effort by parties and the courts, be applied immediately.

Starting with the *Zubulake* decisions in 2003-2004, and continuing through 2010, courts, attorneys and companies have struggled with electronic discovery issues.

Despite more than four years of jurisprudence under the revised Federal Rules of Civil Procedure, electronic discovery is still a nascent, yet developing, field. Each year offers new insights into more “developed” issues, such as preservation, privilege and production, but presents new emerging issues as well, such as social networking and cloud computing. Conferences are held throughout the year, technology continues to improve, and more and more consulting firms and law practices are being formed to assist in navigating through the e-discovery process. Yet, in conversation after conversation with

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Coming in May

Japanese Earthquake And Tsunami:
Legal Issues Of Interest To U.S. Companies

10 Key E-Discovery Issues

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companies, they continue to be concerned about the explosive cost of electronic discovery, the lack of predictability and the risk of serious, sometimes case ending or career threatening sanctions for the attorneys involved. This article discusses ten key issues that companies face today and offers some insights and suggestions as to how to deal with them in the foreseeable future.

1. Cooperation

The mantra that is being repeated more and more by courts as a means to reduce the costs of electronic discovery is cooperation.¹ As one court explained, cooperation among counsel “will almost certainly result in having to produce less discovery, at lower cost,” and for requesting parties, “cooperation will almost certainly result in getting helpful information more quickly.”²

Courts have looked at Fed. R. Civ. P. 16 and 26(f), which require the parties to hold a conference and prepare a discovery plan, as key means of requiring cooperation to limit the costs of electronic discovery. Indeed, litigants who approach the Rule 26(f) conference unprepared or as a non-event lose an opportunity to rein in the potential scope of electronic discovery. For example, litigants can discuss search terms, limiting the number of custodians, date ranges, limiting the scope of privilege logging, whether and when to discover ESI from more inaccessible data, the form of production, clawback and sneak peak arrangements, and the scope of preservation, among other things, each of which can reduce the burdens and costs of electronic discovery substantially.

Litigants also should be aware that more and more judges have endorsed *The Sedona Conference Cooperation Proclamation* and its call for “cooperative, collaborative, [and] transparent

discovery.” That Proclamation notes that courts see discovery rules “as a mandate for counsel to act cooperatively,” and that courts “expect parties to reach practical agreement on search terms, date ranges, key players, and the like.”³

2. Proportionality

The cost of electronic discovery has skyrocketed as more and more information is kept simply because it is cheaper and easier to retain and preserve than to discard it. Companies also tend to over-preserve information because of the lack of predictability in the law on the duty to preserve and the risk of sanctions if mistakes are made. Thus, it is not uncommon for companies to end up spending hundreds of thousands of dollars to produce millions of pages of documents in a single litigation.³ When compared with the reality that most trials focus only on no more than a few hundred documents from certain key custodians, it becomes abundantly clear that something is broken in the process and needs to be fixed. A corollary to the principle of cooperation that is floating around electronic discovery circles these days and that may provide a solution to this imbalance is “proportionality.”⁴

For years courts have had the power to limit discovery when appropriate under Fed. R. Civ. P. 26(b)(2)(C). That rule provides that courts may limit discovery when “the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.” Similarly, Judge Grimm in *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 358 (D. Md. 2008), made clear that litigants had a duty under Fed. R. Civ. P. 26(g)⁵ to “behave responsibly during discovery” including not seeking discovery “the cost and burden on which is disproportionately large to what is at stake in the litigation.”

Thus, in order to make litigation more affordable and focused the entire paradigm of discovery needs to change. Litigants and courts should approach discovery differently depending on what is at stake in the case, and how complex the issues are expected to be. There simply is no reason in most cases to produce thousands upon thousands of documents from dozens of custodians, simply because they have touched an issue, when the dispute really centers around a handful of key players who will have most (albeit not all) of the documents that are potentially relevant to the case. For example, if the dispute is about a single contract over a discrete period of time, then discovery should be limited to that period of time and the few custodians who were involved in negotiating and overseeing the operations pursuant to the contract. Or as one court has described it: “[T]he reasonableness of discovery burdens in a \$550 million case arising out of the liquidation of hedge funds, as in *Pension Committee*, will be different than the reasonableness of discovery burdens in a suit

to enforce noncompetition agreements and related issues, as in the present case.”⁶

Courts also should consider phasing discovery as a vehicle to control the costs of electronic discovery. Before more expensive discovery is commenced, or discovery from less involved custodians is pursued, discovery should first focus on the key players and from active, more easily obtained sources, to see if that discovery provides sufficient information to litigate the case.

Lastly, courts also should apply the concept of proportionality to the scope of preservation. As explained by the court in *Rimkus*, “[w]hether preservation or discovery conduct is acceptable in a case depends on what is *reasonable*, and that in turn depends on whether what was done – or not done – was *proportional* to that case and consistent with clearly established standards.”⁷

3. When To Collect?

In *Pension Committee of the University of Montreal Pension Plan v. Banc of America Secur., LLC*, 685 F. Supp. 2d 456 (S.D.N.Y. 2010), in a decision titled “*Zubulake* Revisited: Six Years Later,” Judge Scheindlin issued a lengthy opinion offering additional insights into the issues of preservation and spoliation. One issue in the opinion that has raised concerns is the court’s suggestion that preservation requires collection as opposed to an instruction to, and appropriate follow-up with, key employees to preserve and not destroy potentially relevant documents. In that case, the court held that counsel’s oral instruction to plaintiffs was insufficient because it did not direct employees to preserve all documents “nor does it provide a mechanism for *collecting* the preserved records so that they can be searched by someone other than the employee.”⁸

Although it is unclear precisely what the court meant in this statement, requiring litigants to collect documents as part of preservation would dramatically increase the costs of litigation since, as noted above, most companies preserve more broadly than they produce. Preservation occurs early in the process, oftentimes before a complaint is even filed, so requiring parties to collect all of this data before the issues are even crystallized makes little sense and will simply increase the costs. There may be some exceptions, however, that should be considered. For example, where a specific employee’s own conduct is at issue in the case and, thus, that employee may have an incentive to destroy unhelpful documents, a company should consider collecting that employee’s documents early in the process to avoid the loss of important information in the case.⁹

4. Search

In the “good old days” of paper discovery, junior associates (or contract attorneys or paralegals) reviewed every page of every document for relevance and privilege. That is no longer possible for the review of ESI. First, the volume of ESI is staggering, and it simply is not cost effective (nor is there enough time under most scheduling orders) for such

hands-on review. Second, and equally important, search literature shows that this so-called “gold standard” of hands-on manual review results in production of only around 20-25 percent of the relevant responsive ESI.¹⁰

Since technology created the volume, lawyers have turned to technology to attempt to solve the review problem, predominantly through keyword searches. Lawyers who are familiar with that concept through legal research on Westlaw or Lexis seem to forget that in e-mail, abbreviations abound, misspellings are rampant, and the client may use terminology, acronyms or code words that no outsider could be expected to know. Thus, it is important that keywords be carefully chosen and tested.

Following on decisions by Magistrate Judges Facciola and Grimm, Judge Peck’s decision in *William A. Gross Construction Assoc. v. American Manufacturers Mutual Ins. Co.*, 256 F.R.D. 134, 134, 136 (S.D.N.Y. 2009) (Peck, M.J.), constituted a “wake up” call to the Bar, as follows:

This Opinion should serve as a wake-up call to the Bar in this District about the need for careful thought, quality control, testing, and cooperation with opposing counsel in designing search terms or “keywords” to be used to produce emails or other electronically stored information (“ESI”)....

....

Electronic discovery requires cooperation between opposing counsel and transparency in all aspects of preservation and production of ESI. Moreover, where counsel are using keyword searches for retrieval of ESI, they at a minimum must carefully craft the appropriate keywords, with input from the ESI’s custodians as to the words and abbreviations they use, and the proposed methodology must be quality control tested to assure accuracy in retrieval and elimination of “false positives.” It is time that the Bar – even those lawyers who did not come of age in the computer era – understand this.

Even if the steps suggested in the *William A. Gross* decision are followed, keyword searching will produce less than 50 percent of responsive ESI.¹¹ There are more sophisticated search tools available, such as clustering and concept searching techniques instead of or in combination with keyword searches that may be considered. We are not aware of any published judicial decision addressing these tools, but that does not mean that they should not be considered – especially if done transparently and under the cooperation model. *William A. Gross* and the other decisions that address keyword searches are not a judicial stamp of approval for keyword searching; indeed, the decisions criticized the way the particular keyword searching was done.

The studies by the TREK Legal Track provide a great deal of statistical

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data about the effectiveness of different search techniques. The most important lesson from TREK is that senior lawyer discussions with client personnel, and use of iterative searches (i.e., modified additional searches are run as more is learned about the relevant issues, the client's terminology and ESI characteristics) vastly improves the search results. No search will produce every responsive e-mail; the question is one of proportionality, i.e., how much money is it worth to go from producing say 50 percent of responsive ESI to 60 percent?

5. Rule 502

On September 19, 2008, President Bush signed into law Rule 502 of the Federal Rules of Evidence, which essentially adopted the majority, case-by-case approach as the uniform rule governing the issue of the waiver of the attorney-client privilege or work product doctrine in all federal courts. After two years of jurisprudence under the rule, certain trends are starting to form in the law.¹² However, the rule has yet to yield one of its main purposes, which was to reduce the costs of privilege reviews. The hope is that as technology continues to improve, reducing the costs of electronic document productions can finally become a reality.

Rule 502(b) specifically provides that a disclosure of privileged information in a Federal proceeding does not operate as a waiver of the privilege in a Federal or State proceeding if: (1) the disclosure is inadvertent; (2) the holder of the privilege took reasonable steps to prevent the disclosure; and (3) the holder of the privilege promptly took reasonable steps to rectify the error. The Advisory Committee Notes to Rule 502(b) state that using technology to conduct privilege reviews may be sufficient to constitute taking reasonable steps under Rule 502(b):

Depending on the circumstances, a party that uses advanced analytical software applications and linguistic tools in screening for privilege and work product may be found to have taken "reasonable steps" to prevent inadvertent disclosure.¹³

Although courts to date have held that the use of technology did not satisfy Rule 502(b), because of the specific way the parties utilized technology,¹⁴ those decisions have indicated that technological solutions may be sufficient so long as proper quality assurance testing is employed and can be established. This means that both the privileged and responsive sets need to be tested with statistically significant samples to ensure that the key words or other techniques utilized (e.g., clustering, logic-based algorithms) reasonably worked to isolate the privileged documents from the remainder of the production. We expect new decisions to come out in the next year or so expressly sanctioning the use of technology-based privilege reviews.

In addition, new Rule 502(d), which allows for the enforcement of clawback agreements, was expressly enacted "as a way to avoid the excessive costs of pre-

production review for privilege and work product."¹⁵ That rule specifically states that a "federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court – in which event the disclosure is also not a waiver in any other federal or state proceeding."¹⁶ The court can require the return of produced privileged documents even without the agreement of the parties,¹⁷ and "irrespective of the care taken by the disclosing party."¹⁸ Parties should request a Rule 502(d) clawback agreement in every case, endorsed by the court, to protect the parties in the likely event that privileged documents are produced. In addition, as a means to reduce the cost of privilege reviews, parties should consider producing documents, at least for certain custodians or certain types of ESI, under a 502(d) agreement, without conducting a page by page privilege review in advance of production.¹⁹ However, because of ethical rules prohibiting the disclosure of client confidences, litigants should discuss and obtain client approval before producing documents in this fashion.

6. Privilege And Privilege Logs

As discussed above, a hands-on, document by document review is expensive and no guarantee that privileged documents will not be inadvertently produced. Appropriate use of keywords and/or other automated search techniques can identify most potentially privileged documents – e.g., by searching for words like attorney, counsel, lawyer, legal, privilege; by searching for the names of known in-house and outside counsel; and by searching for email address extensions of outside counsel (e.g., any e-mail in the form "name@weil.com"). Such searches are not likely to find an e-mail between two non-lawyer company executives saying something like "David said we should ...," where David is outside counsel, but query whether even a human reviewer would recognize that e-mail as privileged. Moreover, if a Rule 502(d) order has been sought and entered, any such e-mail that falls through the cracks can be recalled without any loss of privilege.

E-mail chains create complications for the preparation of privilege logs as required by Fed. R. Civ. P. 26(b)(5) and individual courts' local rules. Some decisions require every e-mail in the chain to be separately logged; other decisions allow a single entry for the entire e-mail chain. If all the e-mails in the chain are to and from the same people (e.g., Peck to Lender, Lender to Peck, etc.) separate logging of each e-mail in the chain would seem unnecessary. But an e-mail chain often branches out (e.g., at some point Lender forwards the e-mails to another person, who may further forward it to still others) and it is important to know if any recipient is not covered by a privilege.

Nevertheless, with the quantity of e-mails and other ESI, a "traditional" privilege log may have many thousands of entries (usually prepared by the most junior and inexperienced member of the team, with instruction that, if in doubt, consider it privileged). The volume of privileged ESI calls for something other

than the traditional privilege log. Magistrate Judge Facciola (along with attorney Jonathan Redgrave) wrote a law review article suggesting a more intelligent "categorization" method – some privileged ESI would not be logged at all, others logged in a general sense, and only certain ESI logged in full detail, as determined by cooperation among counsel with rigorous judicial supervision.²⁰

Finally, in December 2010, amendments to Federal Rule of Civil Procedure 26(b)(4) went into effect limiting discovery from expert witnesses. Rule 26(b)(4)(B) now provides that drafts of expert reports are protected by the work-product privilege. Rule 26(b)(4)(C) further provides that communications between counsel and an expert are protected by the work-product privilege except communications relating to the expert's compensation, and facts or data or assumptions provided by counsel that the expert considered in forming the expert's opinion.

7. Social Networking

Social networking sites such as Facebook and MySpace can provide important and useful evidence in connection with a litigation.²¹ For example, pictures and other information posted on private portions of sites can provide powerful rebuttal evidence to personal injury claims. However, the use of such sites by employees creates novel issues regarding discovery and preservation that will need to be addressed by courts. For example, do companies have a duty to preserve and produce information posted by employees on such sites when done solely for personal use? Arguments can be made that such information is not within the possession, custody or control of the company, but the analysis may differ if the employee posted the information utilizing the company's computer, especially where the company's computer usage policy expressly states that all information created or exchanged using the employer's computer belongs to the company.

Other issues may arise where a company directly encourages the use of social networking for business purposes. In such instances, does the employee have any expectation of privacy, rendering it inappropriate for an employer to review the employee's social networking page without the employee's consent? Would the company have to produce such social networking information in discovery? In addition, companies that encourage and monitor the use of these company social networking sites are more likely to have preservation obligations that will need to be implemented.²²

8. Cloud Computing

In order to reduce expenses or increase storage capacity some companies have begun to shift away from in-house e-mail and document servers and instead store such documents in the "cloud" with third-party providers. Cloud computing raises a host of issues that companies must evaluate, including ensuring that information stored in the cloud can be preserved and produced without altering relevant metadata. In addition, companies must consider privacy issues and the maintenance of

privilege in the cloud. Although there are no cases squarely addressing these issues, companies should ensure that cloud providers take steps to restrict access by the provider's employees to the actual contents of the company's e-mail and ESI. Specifically, access should be limited to that necessary for the proper administration of the system and for no other purpose. Another concern is the risk that adversaries, government agencies and foreign governments will seek to serve subpoenas on the cloud provider to get access to a company's data stored in the cloud. To limit this risk, companies should insist on notification provisions and permitting the company to intervene and control the response to the subpoena, and resisting the request to the extent legally permissible.²³ In addition, the location of the cloud provider's servers may subject the data to discovery in a jurisdiction different from where the company is located. To limit this risk, companies should discuss whether it is possible to keep its data only on United States based servers.

9. Foreign Discovery

The difficulties in electronic discovery are multiplied when some of a party's ESI is located outside the United States. Countries in the European Union, Asia and elsewhere have data privacy statutes and blocking statutes. It may be virtually impossible for a company to comply with its U.S. discovery obligations without violating another country's data privacy statutes. For example, as discussed elsewhere in this paper, the first thing a company must do if it reasonably anticipates litigation is initiate a litigation hold; however, the mere step of preserving ESI may violate EU data privacy laws.

Over twenty years ago, in *Societe Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa*, 482 U.S. 522 (1987), the United States Supreme Court held that in determining whether discovery abroad could proceed under the Federal Rules of Civil Procedure or only under the Hague Convention, courts should use a five-part test, as follows:

1. The importance to the investigation or litigation of the documents or other information requested;
 2. The degree of specificity of the request;
 3. Whether the information originated in the United States;
 4. The availability of alternative means of securing the information; and
 5. The extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the country where the information is located.
- Since *Aerospatiale*, courts (particularly in the Second Circuit), consider two additional factors:
6. The hardship of compliance on the party or witness from whom discovery is sought;
 7. The good faith of the party resisting discovery.

In applying these factors, cases in 2010 (and earlier) show that United States courts are likely to enforce dis-

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covery demands unless a clear foreign-state interest is shown. For example, in *In Re Air Cargo Shipping Servs. Antitrust Litig.*, 2010 WL 1189341 (E.D.N.Y. Mar. 29, 2010), the court found that the U.S. interest in enforcing the antitrust laws outweighed France's privacy interest. The court noted that, based on its legislative history, the French data privacy statute "was never expected or intended to be enforced against French subjects but was intended rather to provide them with tactical weapons and bargaining chips in foreign courts."²⁴ In contrast, the court prohibited the discovery in *In Re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.*, 2010 WL 3420517 (E.D.N.Y. Aug. 27, 2010), because of the strong interest shown by the foreign government.

We can expect more decisions in this area in 2011 and beyond. Counsel are advised to consult with experienced data privacy counsel in the foreign country to better walk the tightrope of conflicting U.S. discovery obligations and foreign data privacy laws.

10. Sanctions

The year 2010 was the year of the sanctions. Several leading electronic discovery jurists issued important decisions (e.g., *Pension Committee*, *Rimkus*, *D'Onofrio*) addressing spoliation and sanctioning companies for preservation failures, including, in one case, threatening jail time unless the defendant paid the plaintiff's attorneys' fees and costs by a certain date.²⁵ However, certain take-aways can be gleaned from these decisions that are worth noting.

First, with very few exceptions, courts have not imposed severe sanctions, such as adverse inference instructions or default judgments, for honest mistakes made by litigants. To the contrary, courts generally have imposed these types of sanctions only where the party fails to cooperate with the other side or is not candid with the court.²⁶

Second, much of the lack of uniformity in sanctions decisions is caused by the differing standards applied by different jurisdictions.²⁷ For example, the Second Circuit, under whose law the *Pension Committee* case was decided, has held that gross negligence is sufficient to impose an adverse inference instruction. Based on a finding of gross negligence by some of the plaintiffs, including the failure to issue a written hold notice, the continued deletion of ESI after the duty to preserve arose, and the filing with the court of "misleading or inaccurate declarations" about their preservation and collection efforts,²⁸ the court imposed an adverse inference instruction against certain of the plaintiffs.

Conversely, the *Rimkus* case was decided under Fifth Circuit law, which has held that negligence is not enough to warrant an adverse inference instruction.²⁹ In that case, the court addressed sanctions in the context of more egregious conduct than was presented in *Pension Committee* – the intentional deletion of documents after the duty to preserve had triggered. Yet, the *Rimkus*

court imposed a less severe sanction than the court did in *Pension Committee*, holding that the jury would hear about the deletion of e-mails and discovery responses that concealed such deletions, but that the court would not instruct the jury that the defendants failed to preserve documents after the duty to preserve triggered. The court further held that only if the jury decides that defendants deleted e-mails to prevent their use in the litigation will the court instruct the jury that it may, but is not required to, infer that the content of the missing e-mails would have been unfavorable to the defendants.

As has been the case for the past several years, we expect 2011 to continue to be dominated by motions for sanctions for alleged preservation failures. As discussed throughout this article, the best insurance policy against the risk of significant sanctions is cooperation and transparency. Working with your adversary and the court upfront can help raise and resolve issues early, and may lead to limiting the scope of preservation and production to more significant players, thereby minimizing the likelihood of mistakes occurring. However when mistakes invariably occur, it is important to be candid and open with your adversary and the court and discuss reasonable solutions to the problems. This is the best way to avoid distracting motions and the risk of case dispositive sanctions, and instead allow all of the parties to focus on the merits of the case.

¹ See, e.g., *SEC v. Collins & Aikman Corp.*, 256 F.R.D. 403 (S.D.N.Y. 2009) (SEC's refusal to negotiate a workable search protocol was "patently unreasonable"); *William A. Gross Constr. Assocs., Inc. v. American Mfrs. Mut. Ins. Co.*, 256 F.R.D. 134, 136 (S.D.N.Y. 2009) ("Electronic discovery requires cooperation between opposing counsel and transparency in all aspects of preservation and production of ESI."). The Seventh Circuit currently is engaged in an electronic discovery pilot program to develop procedures to better manage electronic discovery. Cooperation among counsel is included in its guiding principles.

² *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 365 (D. Md. 2008).

³ According to the Socha-Gelbmann Electronic Discovery Survey, electronic discovery costs exceeded \$2.7 billion in 2007 and were expected to top \$4.6 billion in 2010.

⁴ See *Tamburo v. Dworkin*, 2010 WL 4867346, at *3 (N.D. Ill. Nov. 17, 2010) ("If courts and litigants approach discovery with the mindset of proportionality, there is the potential for real savings in both dollars and time to resolution.") (citing John L. Carroll, *Proportionality in Discovery: A Cautionary Tale*, 32 Campbell L. Rev. 455, 460 (2010)).

⁵ Among other things, Rule 26(g) requires every discovery request and response to be certified to the best of the person's knowledge, information and belief "formed after a reasonable inquiry" that the request and response is consistent with the rules, not interposed for an improper purpose and "is neither unreasonable nor unduly burdensome or expensive" considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

⁶ *Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598, 613 n.9 (S.D. Tex. 2010).

⁷ *Id.* at 613 (emphasis in original). But see *Orbit One Communications, Inc. v. Numerex Corp.*, 2010 WL 4615547, at *6 (S.D.N.Y. Oct. 26, 2010) (finding the standard set forth in *Rimkus* to be "too amorphous" and holding that, "[u]ntil a more precise definition is created by rule, a party is well-advised to 'retain all relevant documents (but not multiple identical copies) in existence at the time the duty to preserve attaches.'" (citation omitted).

⁸ *Id.* at 473 (emphasis added).

⁹ See, e.g., *Orbit One*, 2010 WL 4615547, at *12 (identifying placing primary responsibility for preservation in the hands of the employee "with the greatest incentive to destroy evidence harmful to Orbit One and to his own interests" as an example of Orbit One's failure to adopt appropriate preservation procedures).

¹⁰ Lawyers or clients who believe such a hands-on review is necessary to avoid production of privileged material are deluding themselves and wasting money.

¹¹ If the parties agree on a keyword search protocol and the producing party becomes aware of other ESI that the agreed search did not find, must the producing party produce that additional ESI? We are not aware of any case that has addressed this issue, but suggest that ethical considerations likely would require such production.

¹² These trends are discussed more fully in David J. Lender, *Privilege Issues in the Age of Electronic Discovery*, 2010 Edition (BNA E-Discovery Portfolio Series).

¹³ Fed. R. Evid. 502, Advisory Committee Notes.

¹⁴ See, e.g., *Mt. Hawley Ins. Co. v. Felman Production, Inc.*, 2010 WL 1990555 (S.D. W. Va. May 18, 2010); *Rhoads Indus., Inc. v. Building Materials Corp. of America*, 254 F.R.D. 216 (E.D. Pa. 2008).

¹⁵ Rule 502, Advisory Committee Notes.

¹⁶ Rule 502(e) enforces clawback agreements between parties, but makes clear that the agreement does not bind third-parties unless the agreement is incorporated into a court order.

¹⁷ See *Rajala v. McGuire Goods, LLP*, 2010 WL 2949582 (D. Kan. July 22, 2010) (entering an order containing a clawback provision over plaintiff's objection).

¹⁸ Rule 502(d), Advisory Committee Notes.

¹⁹ See *Radian Asset Assurance, Inc. v. College of the Christian Brothers of New Mexico*, 2010 WL 4928866 (D.N.M. Oct. 22, 2010) (ordering defendant to produce documents without conducting privilege review pursuant to Rule 502(d), as offered by defendant, and rejecting plaintiff's arguments that this approach constituted a data dump or shifted the costs of electronic discovery to the plaintiff).

²⁰ See John M. Facciola & Jonathan M. Redgrave, *Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola Redgrave Framework*, 4 Fed. Cts. L. Rev. 19 (2009).

²¹ See *Romano v. Steelcase Inc.*, 2010 WL 3703242 (N.Y. Sup. Ct. Sept. 21, 2010) (ordering access to plaintiff's Facebook and MySpace pages and

accounts, including all deleted pages and related information). But see *McCann v. Harleyville Ins. Co. of N.Y.*, 910 N.Y.S.2d 614, 615 (N.Y. App. Div. 2010) (affirming denial of motion seeking to compel production of photographs posted to Facebook because defendant sought permission to conduct a "fishing expedition . . . on the mere hope of finding relevant information," but allowing defendant to seek disclosure in the future).

²² Another issue arising from Twitter is jurors, who despite instructions, tweet during the course of the trial. A similar concern arises from jurors who use the Internet to conduct research during the course of the trial.

²³ In some instances, government officials might subpoena data in the cloud and require the cloud supplier not to inform the owner of the data. This could be problematic because then a company would not even know that a government is looking at its data. One possible solution is to require encryption of data at rest, but even then, some foreign governments are requiring that the key be available to them at all times.

²⁴ See also *Gucci Am., Inc. v. Cuveval Fashion*, 2010 WL 808639 (S.D.N.Y. Mar. 8, 2010) (enforcing subpoena where U.S. interest is strong and Malaysian government had not opposed discovery); *Access-data Corp. v. ALSTE Tech. GMBH*, 2010 WL 318477 (D. Utah Jan. 21, 2010).

²⁵ *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497 (D. Md. 2010).

²⁶ Indeed, as the *Pension Committee* court noted, courts are not looking to sanction parties because such decisions involve a significant amount of work that is unrelated to the merits of the dispute. *Pension Committee*, 685 F. Supp. 2d at 472 n.56 (stating that court and law clerks spent close to three hundred hours resolving the spoliation motion and noting that "sanctions motions, and the behavior that caused them to be made, divert court time from other important duties – namely deciding cases on the merits").

²⁷ *Victor Stanley*, 269 F.R.D. at 542-553 (summarizing different standards applied by circuits).

²⁸ 685 F. Supp. 2d at 479.

²⁹ *Rimkus*, 688 F. Supp. 2d at 613.

Corporate Counsel Organization Highlights

Association Of Corporate Counsel Announces New President

The Association of Corporate Counsel (ACC), the world's largest association of in-house counsel, announced today that Veta T. Richardson, executive director of the Minority Corporate Counsel Association, has been selected as the association's new president and CEO, effective July 1, 2011. She will succeed Frederick J. Krebs, who has served as president for 20 years.

"Veta's close ties to the in-house counsel community, her excellent communication, interpersonal and leadership skills, coupled with the regard in which she is held as an association executive and a leader in the diversity arena will be invaluable assets for ACC," noted J. Alberto Gonzalez-Pita, ACC board chair and executive vice president and general counsel of HCP, Inc. "The board is looking forward to working with her and to seeing ACC's continued growth and success."

The search committee, chaired by Jonathan Oviatt, ACC board vice-chair and chief legal officer and secretary, Mayo Clinic, included representatives from ACC's board, chapters and committees, and was intent on identifying a candidate who not only satisfied specific job requirements and responsibilities, but who would also transition seamlessly with members, staff and the legal community. The search committee was unanimous in its decision that Ms. Richardson best met these specifications.

"Due to the stable infrastructure Fred established, ACC was well positioned to be able to identify the next innovative,

strong leader," explained Mr. Oviatt. "Veta's stellar reputation, laudable achievements and commitment to the legal profession made her uniquely qualified for the position. ACC will benefit greatly from her strong leadership skills and depth of knowledge and experience within the industry."

As executive director of MCCA since 2001, Ms. Richardson established its reputation and credibility as the nation's thought leader and leading advocate in advancement of diversity in the legal profession through a multipronged platform consisting of groundbreaking research and education, thought-provoking publications, such as *Diversity & the Bar*, and best-in-class programs, services and large-scale networking events. She is also credited with launching a diversity scholarship program, which has raised and distributed more than \$1,500,000 and assisted more than 100 diverse law students over the program's five-year history.

"I am deeply honored to have been selected as president and CEO of ACC, an organization I have held in high regard for so many years," explained Ms. Richardson. "ACC has a dedicated and extremely talented staff and leadership, strong and committed volunteers, and a robust and growing membership. ACC's work and contributions are not only important to the in-house counsel community, but to the broader legal profession and beyond. I am excited about the opportunity to build on the remarkable work and momentum Fred initiated and oversaw for the past 20 years."