

# Breaking from the Digital Flock: Responding to Litigation Involving Electronically Stored Information

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## Introduction

Winston Churchill observed, “In war, there is no guarantee of success. But we can make sure we deserve it.” This advice is especially appropriate with respect to responding to existing and proposed changes concerning how electronically stored information involved in litigation or regulatory investigations is handled. These changes are reflected in the recently amended Federal Rules of Civil Procedure, which introduced electronically stored information (ESI) as a co-equal to paper documents. Michigan is also proposing to substantially adopt these rules.<sup>1</sup> Further, these changes are taking place as more litigation turns on ESI, and increasing legislation directly targets ESI.<sup>2</sup>

But if a survey<sup>3</sup> of 422 national and international companies is an accurate indication of how companies are prepared to respond to the preceding changes affecting ESI, then there is much cause for alarm.

For example, the survey found:

The ability to handle difficult e-discovery matters is a source of concern for most organizations surveyed. Just 19% of respondents consider their companies to be well prepared for e-discovery issues, *while the vast majority (81%) report being not at all prepared to only somewhat prepared.*<sup>4</sup>

Unfortunately, such concerns are not reserved for large corporations. Courts are increasingly unsympathetic to “smaller” companies that are unprepared to respond to these challenges. As one court noted in granting a motion to compel production of e-mails and databases, “... the Court expects that [defendant] will make *all reasonable efforts to comply with its discovery Orders including, if necessary, retaining additional IT professionals to search electronic databases and adding additional attorneys to perform document review.*”<sup>5</sup>

In short, the “I do not have enough resources” defense to meet the legal obligations pertaining to ESI is not going to be acceptable to courts.<sup>6</sup> For better or worse, ESI under the

federal rules may have a significant impact on companies and their attorneys.

This article provides a brief overview of this impact and what consequences companies face if ESI issues are not properly addressed. It further provides an overview of steps that may be taken to avoid or minimize these consequences by leveraging opportunities under certain provisions of the amended Federal Rules of Civil Procedure.

## The Case for Pre-litigation Planning to Address ESI

### *In General*

Many businesses are reluctant to expend resources when there is no clear return on investment because something, i.e., litigation, has not yet happened. Companies that choose to see litigation as entirely separate from their core business function may miss an opportunity to not only significantly minimize litigation risks and burdens but also to improve core business functions. Alternatively, companies can accept that litigation and investigations are a cost of doing business and identify and understand the risks and *opportunities* within the changing legal landscape.

### *Increased Litigation Risks Created by ESI*

The headlines and cases are littered with companies that ignored or were otherwise unable to meet their ESI obligations in litigation.<sup>7</sup> Failing to meet ESI obligations results in significant increases in litigation costs,<sup>8</sup> weakened legal positions due to adverse jury instructions<sup>9</sup> or the exclusion of witness testimony,<sup>10</sup> limiting the cross examination at trial of experts,<sup>11</sup> puts confidential, private, and proprietary company information at risk to unnecessary exposure,<sup>12</sup> and may result in judicial sanctions,<sup>13</sup> financial sanctions,<sup>14</sup> and default judgments.<sup>15</sup> Many of these risks may extend to organizations that are not parties to litigation but still must respond to subpoenaed information.<sup>16</sup>

Failing to properly address ESI may also limit a party's ability to support or defend against a dispositive motion. Assume a hypothetical motion for summary disposition is filed under MCR 2.116(C)(10). This motion requires a court to consider the *substantively admissible* evidence proffered in support or opposition to the motion.<sup>17</sup> Such a motion supported by ESI, however, raises unique admissibility issues. For example, in *Lorraine v Markel American Ins.*,<sup>18</sup> the court denied cross-motions for summary judgment purportedly supported by ESI because the parties failed to present *substantively admissible* ESI.<sup>19</sup>

The *Lorraine* court noted, “[g]iven the pervasiveness today of electronically prepared and stored records, as opposed to the manually prepared records of the past, counsel must be prepared to recognize and appropriately deal with the evidentiary issues associated with the admissibility of electronically generated and stored evidence.”<sup>20</sup> Obviously a party or a court opposing a dispositive motion could make similar arguments regarding a dispositive motion supported by ESI.

Thus, litigants and their counsel must be prepared to take proactive steps to meet challenges relating to the preservation and admissibility of ESI at any stage of the litigation and understand the consequences of failing to do so.

#### *Increased Litigation Costs Created by ESI*

In addition to the judicial risks of failing to plan for litigation involving ESI, there are increased costs of litigation where ESI is involved. To illustrate this point, consider that an average desktop PC's hard drive is 500 gigabytes, which equals roughly 500 pickup trucks filled with books.<sup>21</sup> Now multiply this number by the number of computer users in a particular company—or even department—and it is easy to understand how much information may be initially at issue. It is common for a terabyte (i.e., 500 billion typewritten pages) of ESI to be involved in a large civil litigation or governmental investigation.<sup>22</sup> But experience has shown that even where ESI is limited to a few individuals, it quickly escalates the amount of information that must be reviewed and analyzed. For example, the cost for the retrieval and review of a *sampling* of e-mails for seven former employees and two managers totaled \$42,892.42 in on-going litigation.<sup>23</sup>

Further, the unique nature of ESI imposes risks and costs on a company's preservation

obligations. First, ESI is intangible and dynamic, making it in some instances available only for an “evanescent time period”<sup>24</sup> and thus difficult to preserve. Second, routine business processes often automatically create storage space for other uses without regard for the preservation of discoverable information.<sup>25</sup> Also, some types of ESI—such as metadata or embedded data<sup>26</sup>—are not apparent to the ordinary user and are easily changed, intentionally or otherwise.

These factors have resulted in an unsatisfying mechanical legal mantra of “preserve everything” in response to litigation.<sup>27</sup> While it has been argued whether such a response is required,<sup>28</sup> it will generally be a prudent initial response to take reasonable, good faith efforts to preserve the ESI universe<sup>29</sup> until it is assessed against what is discoverable in the litigation and, therefore, what actually must be preserved.<sup>30</sup>

Failing to make this analysis, however, is simply not an option for many companies.<sup>31</sup> And until the scope of preservation is determined, companies will likely incur unnecessary costs related to preservation. Also, from a judicial perspective, an open-ended “preserve everything” order is not desirable due to the vast amount of non-discoverable and redundant ESI that will likely be preserved with no gains towards resolving the pending action.<sup>32</sup>

To move beyond the status quo requires an understanding of the interplay between the legal claims at issue, how these claims relate to ESI, what steps can ethically and legally be taken to cull discoverable ESI from non-discoverable ESI, and how to best present these assertions to the opposing party and, if necessary, the court. It is inevitable that litigants will fight this reasoned approach in an effort to leverage the ESI costs for defending claims.<sup>33</sup> But such opposition will require courts and attorneys to be even more mindful of their duty under Fed R Civ P 1 to construe the federal rules for the “just, speedy, and inexpensive determination of every action.”<sup>34</sup>

#### **Leveraging the “Not Reasonably Accessible” Designation under the Amended Federal Rules of Civil Procedure**

A completely risk-free and cost-free strategy for preserving ESI once litigation is filed does not exist. But a company can minimize both the risks and costs associated with ESI *before*

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litigation is filed by understanding how pre-litigation, business-side decisions can effectively gain an advantage using options under the existing and prospective rules applicable to discoverable ESI.<sup>35</sup> This is because these decisions can—in part—be used to demonstrate why certain categories of ESI would be unreasonable to retrieve and search due to undue burden or cost.<sup>36</sup>

First, before taking action, a company must assess whether it is presently involved in litigation or is subject to an investigation. This assessment must also extend to litigation or investigation that is *reasonably* anticipated.<sup>37</sup> If so, then a company's options are already limited and no further action should be taken regarding ESI without the advice of counsel. This is due to the potential for sanctions if discoverable information is destroyed or altered.<sup>38</sup>

Second, it is important to note that the entire universe of ESI maintained by a litigant is *initially* subject to preservation because it will rarely, if ever, be sorted out from irrelevant ESI. Furthermore, this universe will likely be distributed across individual PCs, portable storage devices, servers, e-mail accounts, back-up tapes, and PDAs. Thus, a defensible litigation plan must account for all of these sources and whittle away the undiscoverable information, which takes time and resources. A company, however, that has implemented an information management system (i.e., a retention policy) that is regularly enforced has likely significantly reduced the ESI universe before litigation begins.<sup>39</sup> In this regard, it is important to note that information destroyed under a "legitimate"<sup>40</sup> retention policy will—under ordinary circumstances—not give rise to wrongful conduct in subsequent litigation or investigation.<sup>41</sup>

Third, companies must make decisions that maximize their opportunities under the amended Federal Rules of Civil Procedure. One of the most important amendments in this regard is Fed R Civ P 26(b)(2)(B), which provides a company with the opportunity to unilaterally decide that ESI should not be discoverable because it is not "reasonably accessible" due to undue burden or cost.<sup>42</sup> Upon successfully making this designation, the opposing party may be able to convince the court that "good cause" exists to order discovery of the inaccessible ESI nonetheless.<sup>43</sup> The court also may impose conditions before such discovery is allowed.<sup>44</sup>

The obvious advantage to amended Rule 26(b)(2)(B) is that right out of the litigation gates the amount of ESI at issue may be immediately reduced, which creates a corresponding reduction in litigation costs.<sup>45</sup> And even where a court orders the discovery of information that is "not reasonably accessible," there is the opportunity to require the requesting party to pay all or portions of the discovery costs for obtaining the ESI.<sup>46</sup> Another subtle effect of this amendment is that this discussion is *supposed to be* shifted to the beginning of the litigation as part of the initial disclosures.<sup>47</sup> This shift provides the opportunity to move beyond the "preserve every byte of ESI" to preservation of likely discoverable ESI. Failure to address this requirement or reach an agreement may be detrimental to both plaintiffs and defendants.<sup>48</sup>

"Not reasonably accessible" is undefined.<sup>49</sup> Companies and their attorneys, therefore, must understand how courts have analyzed this issue to successfully argue that certain categories of ESI fit this classification.

The most likely target for "not reasonably accessible" ESI is found on back-up tapes because these tapes are generally considered "not reasonably accessible."<sup>50</sup> Back-up tapes are generally intended only for disaster recovery purposes and recycled or overwritten after their usefulness has expired.<sup>51</sup> Thus, back-up tapes are generally *not* intended for record-keeping purposes, i.e., preserving business critical information or regulatory compliance. For these reasons and because of the way in which back-up tapes store ESI, they are arguably "not reasonably accessible."<sup>52</sup> But companies are often blindsided by the impact back-up tapes have on litigation *after* it is filed. One company estimated it would cost \$395,944 to restore and process eight back-up tapes.<sup>53</sup> In other litigation, a defendant argued that it would cost between \$85,000 and \$150,000 to restore back-up tapes that *may* contain responsive e-mails.<sup>54</sup>

These costs are usually unnecessary because experience shows that back-up tapes are commonly maintained beyond disaster recovery purposes, i.e., non-business critical and regulatory compliance preservation purposes. But once a company is involved in litigation, it must take steps to preserve its existing ESI, including collections of back-up tapes that *would have* and *should have* been overwritten under a company's retention policy.<sup>55</sup> In other words, when litigation arises, a company cannot retroactively apply

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its retention policy to overwrite ESI found on back-up tapes even though prior to litigation that same ESI—relevant or otherwise—would have normally been overwritten without adverse consequence.<sup>56</sup> Companies, therefore, will have to deal with the existing ESI universe, which may be significantly larger than necessary if back-up tapes have been recycled.

To successfully apply Fed R Civ P 26(b)(2)(B) to back-up tapes, companies must be able to support the assertion that back-up tapes are “not reasonably accessible.” This will likely require identifying or producing an IT individual from within the organization or use of a third-party consultant to testify about the “accessibility” and costs for retrieving ESI from back-up tapes.<sup>57</sup> For example, in an early case addressing ESI, *Carbon Dioxide Industry Anti-Trust Litigation*, the court granted the plaintiff’s 30(b)(6) deposition notices of the defendant to determine what data each defendant maintained.<sup>58</sup> In holding that the depositions were appropriate, the court noted, “Plaintiffs’ 30(b)(6) depositions to identify how data is maintained and to determine what hardware and software is necessary to access the information are preliminary depositions necessary to proceed with merits discovery.”<sup>59</sup>

Failure to support a “not reasonably accessible assertion” will likely require the retrieval and production of ESI from back-up tapes. For example, in *Best Buy Stores, LP v Developers Diversified Realty Corp*,<sup>60</sup> the court concluded that a discovery order issued by the magistrate judge involving back-up tapes was neither clearly erroneous nor contrary to law. This discovery order required, among other things, that defendants produce responsive documents, including those from back-up tapes, by a date certain. The defendants had argued that, while certain documents that were responsive existed, the cost to retrieve them from an electronic archive *might* be prohibitive. The magistrate judge determined that the defendants failed to meet their burden to establish that the information sought was “not reasonably accessible because of undue burden or cost” under Fed R Civ P 26(b)(2)(B): “Defendants offer no proof, aside from conclusory statements, about the cost to obtain documents from electronic archives. So this concern cannot shield the defendants from discovery here.”<sup>61</sup> After the order, the defendants had their vendor provide cost and time frame estimates

for recovering certain information that was responsive to the discovery requests but located on archived, electronic back-up tapes. The district judge noted that “a modification of the deadline might be warranted if compliance” is in fact technologically impossible. But the court found that the magistrate’s order was thorough and well reasoned based on the information and arguments *presented* to the magistrate.

In contrast to *Best Buy*, the court declined to order such production in *Ameriwood Industries, Inc v Liberman*.<sup>62</sup> This case involved allegations that the defendants improperly used confidential information while in the plaintiff’s employ to sabotage the plaintiff’s business relationships. The defendants responded that the plaintiff’s lost sales were due to the plaintiff’s own mismanagement and not the alleged misconduct. The defendants requested all of the plaintiff’s documents and communications concerning the business made during the relevant period and identified six individuals who may have responsive information. The plaintiff objected to these requests.

The *Ameriwood* court, citing Fed R Civ P 26(b)(2), applied the burden-shifting analysis in deciding whether to compel production of ESI.<sup>63</sup> Applying this analysis and based on the plaintiff’s showing that approximately 52,124 potentially responsive e-mails and 4,413 additional computer files would have to be retrieved, reviewed, and produced, the court found that the information was “not reasonably accessible” because the request was “unduly burdensome.” The court went on to determine that the defendants failed to make a showing of good cause using the factors set forth in the advisory committee’s note to Fed R Civ P 26(b)(2).<sup>64</sup> Specifically, the court found that the defendants’ requests were not narrowly tailored to seek only information relevant to the subject before the court (affirmative defenses). Accordingly, the court granted the motion in part and ordered plaintiff to produce certain documents only responsive to certain categories.

Next, companies should have as a component of their document retention policy a plan in place that addresses preservation of ESI in *response* to litigation or regulatory investigation. Otherwise, a company may find that *reacting* to litigation results in insufficient or improper measures being taken once litigation is filed or reasonably anticipated. And such efforts may contribute to a court’s de-

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cision to order production of back-up tapes that would otherwise be “not reasonably accessible.” For example, in *Disability Rights Council of Greater Washington v Washington Metropolitan Transit Authority*,<sup>65</sup> the court concluded (without analysis) that the back-up tapes at issue were “inaccessible” but ordered their production after examining the factors outlined in Rule 26(b)(2)(C) for the production of the data. While the court undertook this analysis, it did so only after expressing its concern that the producing party failed to suspend back-up tape recycling in response to litigation:

I am anything but certain that I should permit a party who has failed to preserve accessible information without cause to then complain about the inaccessibility of the only electronically stored information that remains. It reminds me too much of Leo Kosten’s definition of chutzpah: that quality enshrined in a man who, having killed his mother and his father, throws himself on the mercy of the court because he is an orphan.<sup>66</sup>

Finally, *In re Celexa and Lexapro Prods Liab Litig*<sup>67</sup> illustrates a “Rolling Stone-like” balance of the plaintiffs asking for what they wanted but working with the defendant to get what they need.<sup>68</sup> This case involved multi-district litigation concerning two prescription drugs. Among other things, the parties agreed that the plaintiffs would preserve the hard drives of computers used by the plaintiffs and the plaintiffs’ decedents, and that such hard drives would be imaged and analyzed pursuant to an agreed forensic examination protocol. The parties also agreed that responsive ESI would be collected by the defendants from the defendants’ active IT environment, and that “absent some exceptional circumstance and a demonstration by plaintiffs of some substantial need,” the defendants were not required to restore any back-up tapes (specifically including but not limited to the 35 back-up tapes the defendants previously made for purposes of the litigation). The parties agreed that the defendants would preserve the 35 back-up tapes, but they may otherwise resume the recycling of back-up tapes.<sup>69</sup> This case—while not a return to Eden—illustrates the results that may be achieved under amended Fed R Civ P 26(f)(3).

These preceding cases certainly illustrate the varying results courts are reaching with respect to the retrieval and production of ESI located on back-up tapes. But they also provide a roadmap for decisions a company may make before litigation is filed to present a solid argument that retrieval from back-up tapes should not be ordered or, if so, ordered at the expense of the requesting party.

## Conclusion

The strategic management of a company’s ESI under amended and prospective rules and the potential cost to the company should not be ignored. By taking steps to plan for potential litigation, a company will have opportunities to control the cost, time, and risks associated with the handling of ESI. This is especially true under the “not reasonably accessible” designation provided for under Fed R Civ P 26. Further, a company can make these decisions—including those as to what information it chooses to retain and to discard—based on its overall business objectives<sup>70</sup> instead of scrambling to react and comply with a court order issued without regard to these objectives. These steps will contribute to a company deserving—in the words of Mr. Churchill—success instead of being led to the judicial chopping block.

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## NOTES

1. See proposed changes to MCR 2.301, 2.302, 2.401, and 2.506. <http://www.michbar.org/generalinfo/pdfs/4-21-07ediscovery.pdf>

2. For example, companies must address obligations regarding ESI under the recently amended Identify Theft Protection Act, MCL 445.69 *et seq.* The amendment provides that a security breach of a database or data that includes personal information, such as social security numbers, credit card numbers, or the last name linked to a driver license, may require the person or agency that owns or licenses that data, to provide a notice of the security breach to each individual whose information accessed or acquired. A violation of the amendment is punishable by a fine of \$250 for each failure to provide notice, and the aggregate liability for multiple violations that arise from the same security breach must not exceed \$750,000. MCL 445.72a. Also, the Health Insurance Portability and Accountability Act (HIPAA), applicable to health care-related entities, and the Gramm-Leach Bliley Act both applicable to financial services companies, both have an information security component applicable to ESI.

3. The 2006 Litigation Trends 3<sup>rd</sup> Annual Survey Findings. The full report is available at: <http://www.fulbright.com/mediaroom/files/2006/FulbrightsThirdAnnualLitigationTrendsSurveyFindings.pdf>

4. *Id.*

5. *Williams v Taser Int'l, Inc.*, 2007 US Dist LEXIS 40280 (ND Ga June 4, 2007) (Emphasis added).

6. *Best Buy Stores, LP v Developers Diversified Realty Corp.*, 2007 US Dist LEXIS 7580 (D Minn Feb 1, 2007). In a lease dispute, the court rejected Developers argument that it did not have the resources or time to retrieve, review and produce information from 345 back-up tapes in 28 days at an estimated cost of nearly \$500,000, which did not include attorney fees.

7. See *Board of Regents of the Univ of Nebraska v BASF Corp.*, 2007 US Dist LEXIS 82492 (D Neb Nov 5, 2007) (producer ordered to pay costs and attorneys' fees for negligent spoliation); *In re Hawaiian Airlines*, 2007 Bankr LEXIS 3679 (Bankr D Hawaii Oct 31, 2007) (bad faith destruction of evidence leads to adverse inference sanctions rather than default judgment); *Doe v Norwalk Community College*, 2007 US Dist LEXIS 51084 (D Conn, July 16, 2007) (adverse inference granted where producer's failure to preserve evidence was grossly negligent); *World Courier v Barone*, 2007 WL 1119196 (ND Cal Apr 16, 2007) (destruction of hard drive by defendant's spouse warrants adverse inference instruction); *In re NTL, Inc Sec Litig.*, 2007 WL 241344 (SDNY Jan 20, 2007) (inadequate legal hold measures and resulting spoliation warrant sanctions.)

8. *Zubulake v UBS Warburg LLC*, 217 FRD 309 (SDNY 2003) (*Zubulake I*) (in a garden variety employment discrimination claim, the employer estimated that it would cost \$273,649.39 to simply respond to plaintiff's request for ESI; *Murphy Oil USA v Fluor Daniel, Inc.* (ED La 2002): The defendant estimated that it would cost \$6.2 million to restore and print e-mail from 93 back-up tapes which did *not* include the costs for attorney's to review this information to see if it was even relevant to the litigation.

9. *DaimlerChrysler Motors v Bill Davis Racing, Inc.*, 2005 US Dist LEXIS 38162 (ED Mich Dec 22, 2005). The court accepted recommendation by magistrate to give an adverse jury instruction against Bill Davis Racing for its failure to preserve e-mails that were automatically deleted by computer program. "Even the negligent destruction of evidence is prejudicial to an opposing party ... I find that a sanction is appropriate in this case." In *Zubulake v UBS Warburg, LLC*, 229 FRD. 422 (SDNY 2004) (*Zubulake V*), the court eventually instructed the jury that because the employer failed to produce missing e-mails that they could assume the missing e-mails would be unfavorable to the employer. Following this instruction, the jury found that the employer discriminated against the former employee and awarded her \$29 million in damages, which consisted of \$20.1 million in punitive damages and \$9.1 million in compensatory damages.

10. *In re Napster, Inc. Copyright Litigation*, 462 F Supp 2d 1060, 1066 (ND Cal 2006) ("court can exclude witness testimony preferred by the party responsible for destroying the evidence and based on the destroyed evidence").

11. *United Medical Supply Co, Inc v United States*, 2007 U.S. Claims LEXIS 207 (Ct Cl June 27, 2007).

12. *In re Ford Motor Co*, 345 F3d 1315 (CA 11, 2003) (Upon granting writ of mandamus, court reversed trial court's order that granted plaintiff "unlimited, direct access" to Ford's database, which included access to information that "would not—and should not—otherwise be discoverable." *Id* at 1317.); See also *GTFM, Inc v Wal-Mart Stores*, 2000 WL 1693615 (SDNY Nov 9, 2000). The court ordered an on-site inspection (i.e., direct access) of Wal-Mart's computer system as a sanction in addition to awarding the plaintiffs' expenses and legal fees related to Wal-Mart's failure to accurately disclose its ESI, which totaled nearly \$110,000.

13. *Metropolitan Opera Association, Inc v Local 100*, 212 FRD 178 (SDNY 2003): The Court granted plaintiff's motion for judgment as to liability against

defendants and for additional sanctions in the form of attorneys' fees necessitated by defendant and its counsel's failure to meet preservation obligations regarding ESI.

14. *Danis v USN Communications, Inc.*, 2000 US Dist LEXIS 16900, 53 Fed R Serv 3d 828 (ND Ill 2000) (CEO fined \$10,000.00 for failing to take adequate steps to preserve discoverable ESI); *United States v Phillip Morris USA, Inc.*, 2004 WL 1627252 (D DC July 21, 2004) (court imposed \$2,995,000.00 in fines in fines for executives and high-ranking executives deletion of e-mails). *Nartron Corp v General Motors Corp.*, 2005 WL 26991 (Mich Ct App Jan 6, 2005) (court ordered defendant to pay \$2.5 million in discovery abuse sanctions).

15. *Arista Records, LLC v Tschirhart*, 241 FRD 462 (WD Tex Aug 23, 2006) (default judgment granted because defendant's "behavior can only be adequately sanctioned with a default judgment. No lesser sanction will adequately punish this behavior and adequately deter its repetition in other cases."); *In re Krause*, 367 BR 740 (Bankr D Kan June 4, 2007) (court entered partial default judgment as a sanction for spoliation).

16. *Guy Chem Co v Romaco AG*, 2007 US Dist LEXIS 37636 (ND Ind May 22, 2007) (non-party to litigation asserted it would cost \$7,200 to comply with subpoena).

17. *Maiden v Rozwood*, 461 Mich 109, 121 (1999).

18. *Lorraine v Markel American Ins Co*, 2007 WL 1300739 (D Md May 14, 2007). This case also calls into question a potentially troublesome attorney tactic of wholesale "delegating" preservation obligations to the company contact through a "preservation letter" purportedly directing the company to "preserve everything." While this mechanical response may be prudent in the first instance, without follow-up or direction, this "save everything approach" is neither feasible nor a good idea. Further, there is no guarantee that without attorney oversight that preserved ESI will meet more rigorous admissibility standards that may be applied by a court.

19. *Id.*

20. *Id.*

21. See <http://www2.sims.berkeley.edu/research/projects/how-much-info-2003/execsum.htm>.

22. See *Manual for Complex Litigation* (4<sup>th</sup>) § 11,446 (2004).

23. *Henry v Quicken Loans, Inc.*, Case No. 4:04-cv-40346-PVG-SDP, Dkt. No. 384 (ED Mich Feb 20, 2007).

24. *O'Brien v O'Brien*, 899 So 2d 1133, 1137 (5th Cir 2005) ("We do not believe that this evanescent time period [the length of time an image appears on a screen] is sufficient to transform acquisition of the communications from a contemporaneous interception to retrieval from electronic storage."). *But compare Columbia Pictures Industries v Bunnell*, CV 06-1093 FMC (JCx) (June 8, 2007, Central District Cal), where the court ordered preservation and production of defendant's Random Access Memory (RAM). RAM files are temporary files stored in the memory chips of a computer. It is quickly overwritten and is purged when a computer is turned off and, therefore, un-powered RAM memory chips contain no information. See White, *How Computers Work*, 6<sup>th</sup> Ed (2002); *Healthcare Advocates, Inc v Harding, Earley, Follmer & Fraley*, 2007 US Dist LEXIS 52544 (ED Pa July 20, 2007) (court declined to sanction defendant for failing to preserve temporary Internet cache files but only because there was no evidence that defendant had notice of litigation or that such files would be requested).

25. *Turner v Resort Condos Int'l, LLC*, 2006 WL 1990379, at \*6 (SD Ind July 13, 2006) (preservation demands went well beyond legal obligations and failed to accommodate the complex computer network).

26. See Craig Ball, *Understanding Metadata: Knowing Metadata's Different Forms and Evidentiary Sig-*

nificance is Now an Essential Skill for Litigators, 13 L. TECH. PRODUCT NEWS 36, 36 (2006).

27. While such an initial response may be appropriate in the first instance, leaving such a potentially business crippling standing order in place is not a practical solution.

28. See *Zubulake v UBS Warburg LLC*, 220 FRD 212, 217 (SDNY 2003) (*Zubulake IV*) (parties must retain all relevant documents in existence or created after the duty to preserve attaches, but organizations need not preserve “every shred of paper, every e-mail or electronic document and every back-up tape”); *Manual for Complex Litigation* (Fourth), Sample Order 40-25 (Fed Jud Ctr 2004) (broad interim protective order intended to encourage the parties to negotiate a more permanent stipulated order).

29. *Residential Funding Corp v DeGeorge Fin Corp*, 306 F3d 99, 108 (2d Cir 2002) (sanctions may be appropriate for negligent failure to take adequate steps to preserve and produce ESI in timely manner); See also *DaimlerChrysler Motors*, supra, n. 8 (“Even the negligent destruction of evidence is prejudicial to an opposing party ... I find that a sanction is appropriate in this case.”).

30. *In re Krause*, supra, n 14 (A party can only be sanctioned for destroying evidence that it had a duty to preserve).

31. See *Zubulake IV*, 220 FRD at 217, supra n. 28 (noting that requiring a company to retain every shred of electronic and paper documents upon notice of potential litigation would “cripple large corporations” that are “almost always involved in litigation. In an extreme illustration of this point, consider that Microsoft Corporation recycles its back-up tapes every 14 days. For 14 days worth of back-up tapes it spends approximately \$65,000.00. Microsoft estimated it would cost approximately \$1.7 million per year if it was required to suspend its back-up tape recycling policy. See Microsoft Corporation’s submitted testimony in response to the proposed Amendments to the Federal Rules of Civil Procedure, 04-cv-001, located at The Federal Judiciary Website, <http://www.uscourts.gov/rules/e-discovery/04-CV-001.pdf>).

32. See Craig Ball, *A practical Guide to E-mail Discovery*, 41 Trial, 29, 33 (2005) (noting that back-up tapes contain significant amounts of duplicative information).

33. For an example of the significant ESI discovery costs see *Kentucky Speedway v NASCAR*, 2006 US Dist LEXIS 92028 (ED Ky Dec 18, 2006) (\$3,000,000 expenses in 5 months for responding to ESI alone).

34. *Brown v Ford Motor Co*, 57 F Supp 825, 827 (ED Mich 1944) (“It is the duty of the courts to construe the Rules of Civil Procedure so as to secure the just speedy and inexpensive determination of every action.”).

35. See amended Federal Rule 26 and, if adopted, amended MCR 2.302(B)(6).

36. Fed R Civ P 26(a)(2)(B); MCR 2.302(C).

37. See *Brenner v Kolk*, 226 Mich App 149, 573 NW2d 65 (1997) (courts have the authority to sanction a party for failing to preserve evidence that it knows or should know is relevant before litigation has commenced).

38. See *Bloemendaal v Town & Country Sports Center, Inc* 255 Mich App 207, 659 NW 2d 684 (2002) (court dismissed the case as a sanction for plaintiffs’ failure to preserve evidence).

39. *Zubulake v UBS Warburg LLC*, 217 FRD 309, 311 (SDNY 2003) (*Zubulake I*) (noting that the more ESI there is to search, “the more expensive it is to discover all the relevant information.”).

40. For an interesting case study of an “illegitimate” document retention policy, see *Rambus, Inc v Infineon Tech AG*, 220 FRD 264, 284 (ED Va 2004), where the

court examined the plaintiff’s changes to its record retention policies (simultaneously or shortly before) filing anticipated patent litigation. The plaintiff went so far as to kick-off the document retention program (which was referred to in e-mail as “Shred Day”) by giving each employee a burlap bag with the instructions to bag all documents slated for the shredder and capping off the day with a beer, pizza, and champagne “celebration.” Shred Day resulted in approximately 20,000 pounds of documents - some 2 million pages of documents - being destroyed. Unfortunately, privilege log entries showed that over seven months before “Shred Day,” the plaintiff anticipated litigation. In fact, entries on the plaintiff’s log were designated as an attorney-client communication regarding “legal strategy in anticipation of litigation” and “strategic patent litigation.”

41. *Arthur Andersen LLP v United States*, 544 US 696, 125 S Ct 2129 (2005): In overturning a criminal conviction of the now defunct Arthur Anderson, the U.S. Supreme Court observed, “Even “persuad[ing]” a person “with intent to ... cause” that person to “withhold” testimony or documents from the Government is not inherently malign. Under ordinary circumstances, it is not wrongful for a manager to instruct his employees to comply with a valid document retention policy, even though the policy, in part, is created to keep certain information from others, including the Government.” *Id* at 704-705.

42. It must be noted, however, that even if information is “not reasonably accessible” a party is not relieved of its common law or statutory duties to preserve the information. See Committee Note to Rule 26(b)(2)(B).

43. Fed R Civ P 26(b)(2)(B). See also *Pipefitters Local No 636 Pension Fund v Mercer Human Res Consulting, Inc*, 2007 US Dist LEXIS 52169 (ED Mich. July 19, 2007), in which the district court struck the portion of the amended scheduling order that shifted the costs of electronic discovery to plaintiffs, noting that if the same issue were raised by motion, the analysis set forth in Fed R Civ P 26(b)(2)(B) would control the outcome.

44. *Id*.

45. See *Zubulake I*, supra n. 39.

46. Committee Note to Rule 26(b)(2)(C). See also *Zubulake v UBS Warburg LLC*, 216 FRD 280 (SDNY 2003) (*Zubulake III*), in which the individual plaintiff was ordered to pay 25% of the costs for restoring and searching e-mails retrieved from the defendant employer’s back-up tapes, which was estimated to costs \$165,955. Thus, the individual plaintiff was required to pay \$41,488.75 for discovery production. *Id*.

47. Fed R Civ P 26(a)(1)(B).

48. *Williams v Taser Int’l, Inc*, 2007 US Dist LEXIS 40280 (ND Ga June 4, 2007). In this case, the court observed that its ESI protocol would impose burdens on both parties: The defendant would likely be required to significantly increase its privilege review and plaintiffs would likely be required to wade through a significant number of documents. “Nevertheless, this case has been ongoing for more than 18 months, and yet discovery has progressed little and we remain far from its resolution. Because that is the case, and because the parties have been unable to cooperate in the discovery process, the Court is compelled to Order the discovery procedures set forth above.” *Id* at \*7; See also *In re Veeco Instruments, Inc Securities Litigation*, 2007 US Dist LEXIS 23926 (SDNY Apr 2, 2007). In addressing Motion to Compel Production of Back-up tapes, the Court noted, “Surprisingly, there was not an electronic discovery protocol entered into between the parties ... The Court finds it would be unreasonable for Plaintiff to assume that back-up tapes were being searched given that an electronic discovery protocol was not entered into and no discussions on the subject were held.” *Id* \* 4.

49. The advisory committee notes provide, “[i]t is not possible to define in a rule the different types of

technological features that may affect the burdens and costs of accessing electronically stored information.” Advisory Committee Note, Rule 26(b)(2).

50. See *Zubulake I*, *supra*: Court observed that back-up tapes are ordinarily inaccessible; *Rowe Entertainment, Inc v William Morris Agency, Inc*, 205 FRD 421, 429 (SDNY 2002) (“Back-up tapes, for example, are not archives from which documents may be easily retrieved.”)

51. *Wiginton v Ellis*, 2003 WL 22439865, at \*3 (ND Ill Oct 27, 2003)(a back-up system is “...a disaster recovery system that takes only snapshots of...computer files so that if a catastrophic event occurs, the information from the immediately preceding period can be reloaded.”)

52. See *Zubulake I*, *supra*; *Rowe Entertainment, Inc v William Morris Agency, Inc*.

53. *Murphy Oil USA, Inc v Fluor Daniel, Inc*, 52 Fed R Serv 3d 168 (ED La 2002).

54. *AAB Joint Venture v United States*, 75 Fed Cl 432 (Fed Cl 2007).

55. See Committee Note to Rule 26(b)(2)(B), which notes that even if information is “not reasonably accessible” a party is not relieved of its common law or statutory duties to preserve the information.

56. See Rule 37(f): “Absent exceptional circumstances, a court may not impose sanctions under these rules on a party failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

57. See *Cache La Poudre Feeds, LLC v Land O’Lakes, Inc*, 2007 US Dist LEXIS 15277, \*15 (D Colo Mar 2, 2007) (plaintiff permitted to take a Fed R Civ P 30(b)(6) deposition to explore defendant’s procedure for identifying and producing responsive documents relative to specific items raised in plaintiff’s motion to compel discovery).

58. 155 FRD 209, 214 (MD Fla 1993).

59. *Id.* at 214.

60. 2007 US Dist LEXIS 7580 (D Minn Feb 1, 2007).

61. January 4, 2007 Discovery Order, at p. 12.

62. 2007 US Dist LEXIS 10791 (ED Mo Feb 13, 2007).

63. *Id.* at \*5; Applying Rule 26(b)(2)(B). The court may specify conditions for the discovery.

64. The Committee Notes to Fed R Civ P 26(b)(2), provide that appropriate considerations for evaluating whether to order production of ESI that is not reasonably accessible include: (1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties’ resources.

65. 2007 US Dist LEXIS 39605 (DDC June 1, 2007).

66. *Id.* at \*26 (internal citations and footnote omitted).

67. 2006 US Dist LEXIS 91590 (ED Mo Nov 13, 2006).

68. See *McPeck v Ashcroft*, 202 FRD 31, 34 (DDC 2001) (noting that “American lawyers engaged in discovery have never been accused of asking for too little. To the contrary, like the Rolling Stones, they hope that if they ask for what they want, they will get what they need. They hardly need any more encouragement to demand as much as they can from their opponent”).

69. The parties were unable to reach agreement on three subject areas, and those matters would be subject to further briefing and argument. Those disputed topics include: (1) how the cost of the discovery plaintiffs seek from defendants should be apportioned; (2) the scope of discovery relating to the production of entire electronic databases; and (3) whether plaintiffs should be allowed to perform their own forensic examination of plaintiffs’ computer hard drives, or whether an independent forensic consultant should perform the analysis. *Id.*

70. It is also assumed that the company is complying with the statutory or regulatory record retention policy, if any, that may be applicable to that business.



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