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# eDiscovery & Disclosure

**USA: Law & Practice**
**Sher Garner Cahill Richter Klein & Hilbert LLC**

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# Law and Practice

*Contributed by Sher Garner Cahill Richter Klein & Hilbert LLC*

## Contents

**Sher Garner Cahill Richter Klein & Hilbert LLC** has extensive experience in searching for, collecting and reviewing electronically stored information, whether in large or small cases. The firm assembles a team to adopt case-specific strategies to meet the needs of the case and client, and its experience with numerous eDiscovery databases enables it to control costs. The key areas of practice in relation to the eDiscovery sector are construction, commercial litigation, insurance bad faith claims, insurance coverage, environmental litigation and class action litigation. Sher Garner attorneys often speak at continuing legal education events regarding issues pertaining to eDiscovery.

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## 1. Litigation System

In the USA, there are two judicial systems: a federal system and a separate state court system in each of the states. Federal courts are courts of limited jurisdiction, meaning they can only hear a case where authorised by an act of Congress or the Constitution of the United States. In some instances – such as bankruptcy, copyrights and patents – federal courts enjoy exclusive jurisdiction. State and federal courts enjoy concurrent jurisdiction in other types of cases. Federal law also permits federal courts to hear disputes between citizens of different states if the "amount in controversy" exceeds USD75,000.

The federal court system has three tiers. Federal district courts in certain geographic districts serve as a trial court over matters initiated in the federal system. Appeals from the district courts are heard by the United States Circuit Courts of Appeals that each oversee several district courts in a given jurisdiction. The court of last resort is the United States Supreme Court, which may hear cases involving the interpretation of federal statutes or the US Constitution, or resolve splits where the Courts of Appeals have expressed different views on a given topic.

The state court system in the USA is similar to the federal system. A majority of litigation takes place in state courts. Forty-nine of the 50 states apply common law and state statutes. The one exception is Louisiana, which is a civil law jurisdiction governed by the Louisiana Civil Code and other statutes. Like the federal court system, most state courts have three tiers: trial courts, intermediate appellate courts and a state supreme court. The United States Supreme Court may hear cases from state supreme courts, usually involving federal constitutional issues or the interpretation of federal laws.

## 2. Electronically Stored Information (ESI)

Discovery in American courts is wide-ranging. The goal is to prevent 'trial by ambush'. Any matter, as long as it is not privileged, is discoverable so long as it is relevant to the case and reasonably calculated to lead to the production of admissible evidence. The Federal Rules of Civil Procedure, which govern discovery in the federal system, also require that discovery be proportional to the case. Federal Civil Procedure Rule 26(b)(1) provides that proportional consideration should be given to the issues at stake in the case, the amount in controversy, the parties' access to information, the parties' resources, the importance of discovery in a given case and whether the burden or expense of the discovery outweighs its benefit.

Discovery of electronically stored information (ESI) is also subject to the provisions of Rule 26. Additionally, the Federal Rules of Civil Procedure were amended in recent years to address discovery of ESI as the use of electronic communications increases exponentially. Rule 26(2)(B) provides that ESI need not be produced "from sources that the party identifies as not reasonably accessible." A court could still order such discovery if the party seeking the ESI shows good cause for production. Rule 16(b)(3)(B)(iii) recommends that district courts make provisions for discovery of ESI in its scheduling orders. Further, Rule 37(e) also provides for sanctions for a litigant's failure to preserve ESI in anticipation of litigation. The sanctions for intentional misconduct can include a default judgment, dismissal of the case, or an instruction to the jury that the lost information would have been unfavourable to a party.

Ultimately, interpretation of these rules is for the federal district courts. Further, to the extent that a situation arises that is not specifically addressed in a given rule, courts must address the issue and will create their rules and provide their own guidance for future courts and litigants. Most state courts, whose own rules of civil procedure are patterned on the federal rules, will often find a federal district court's handling of a discovery dispute concerning ESI to be persuasive authority.

## 3. Case Law or Rules Relating to ESI

Recent amendments to the Federal Rules of Civil Procedure have codified the rule that ESI is discoverable. Before 2006, Rule 34 required productions of "documents and things." Some litigants challenged whether "documents" included ESI, but judges afforded a broad interpretation of the term. In 2006, Rule 34 was amended to permit one party to request that another party produce "any designated documents or electronically stored information... stored in any medium from which information can be obtained..." As the 2006 Advisory Committee Notes for the amendment to Section (a) of Rule 34 note, the amendment was to "confirm that discovery of electronically stored information stands on equal footing with discovery of paper documents."

Another important instance of the development of cases and rules for ESI concerns the development of Rule 37(e). The 2006 version of the rule prohibited a court from imposing sanctions on a party for failing to provide ESI if the loss was due to the good faith operation of the system. Courts began creating their own standards for imposing sanctions for a party's failure to preserve ESI. As a result, Rule 37(e) was amended further in 2015. In its current form, the rule applies where the lost information should have been preserved in anticipation of litigation and a party failed to preserve it.

Rule 37(e) requires a court to make certain findings before sanctions will be imposed. If a court finds evidence of prejudice to another party, it may take measures necessary to cure the prejudice. On the other hand, a finding that a party intentionally deprived another party of use of ESI permits a court to presume that the information was unfavourable, instruct the jury that it may presume the information was unfavourable, or dismiss the action and/or enter a default judgment. Rule 37 and the Advisory Committee Notes make clear that dismissal or adverse inferences are permissible only upon a showing of intent.

## 4. Discovery/Disclosure of ESI

In the federal system, discovery, including discovery of ESI, is not permitted until the parties hold a conference under Rule 26(f) to prepare a discovery plan. The parties must also make certain initial disclosures as mandated by Federal Civil Procedure Rule 26(a). The initial disclosures require a party to identify the types and location of any ESI or begin providing the ESI. Initial disclosures are generally due within 14 days of the discovery conference. After the discovery conference, parties are also free to propound additional written requests for production of documents setting forth the types of documents or ESI it is seeking. The responding party will have 30 days to respond or object, although extensions of time to respond are frequently given.

State courts usually have different rules on when discovery may commence. Some states, like Louisiana, may permit a party to serve requests for production of documents, including ESI, with the lawsuit when it is served on a defendant. Such states do not require that the parties meet and confer before discovery begins. Some states, such as Kansas and Arkansas, require a conference between the parties to discuss ESI and submission of a plan for production of ESI to the court. Those practising in multiple jurisdictions would be well served to become familiar with a particular jurisdiction's rules on discovery and ESI production.

## 5. Obligations to Preserve ESI

In federal courts and most state courts, the duty to preserve evidence, including ESI, is triggered when a party has notice that the evidence is relevant to pending or future litigation. Parties must take reasonable steps to preserve ESI when a lawsuit is pending or is reasonably anticipated ('The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production', 19 Sedona Conf J 1 (2018), 93). The duty may arise in instances where suit has not yet been filed, but the party should have known that the evidence may be relevant to future litigation (Master Adjustable Rate Mortgages Trust 2006 OA2 v UBS Real Estate Securities, Inc, 295 FRD 77, 82 (SDNY 2013)). Accordingly, legal holds should typically be issued either before litigation commences or immediately after suit is filed. "Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents" (Consolidated Aluminum Corp v Alcoa, Inc, 244 FRD 335, 340 (MD La 2006), citing Zubulake v UBS Warburg, LLC, 220 FRD 212, 216 (SDNY 2003)).

The duty to preserve ESI may arise before the initiation of litigation. Courts typically apply fact-specific inquiries to determine when a party should have reasonably anticipated litigation such that the duty to preserve was triggered. Generally, a party should reasonably anticipate litigation if it is on notice of a threat of litigation, or it anticipates initiating litigation. For instance, in Blumenthal Distrib, Inc v Herman Miller, Inc, No 14-1926-JAK, 2016 WL 6609208 (CD Cal 12 July 2016), the court held that a party's duty to preserve attached upon receipt of a cease-and-desist letter, and the failure to do so constituted gross negligence warranting sanctions. In Consolidated Aluminum, the court held that a party's duty to preserve was triggered not when it had actual knowledge of the lawsuit, but when it "had constructive knowledge or should have known that certain information may be relevant to future litigation" (244 FRD at 342).

Courts are increasingly finding that the timely execution of a litigation hold is the sole manner by which parties may comply with their duties to preserve. It is not enough to make "some efforts" to meet this obligation; rather, a full litigation hold is required to preserve relevant documents (id at *11). The 2015 comments to the amendments to Federal Rule of Civil Procedure 37 note that, although the rule focuses on the common-law duty to preserve evidence in anticipation of litigation, courts may also consider whether there is an independent requirement that the information be preserved, such as from statutes, administrative regulations, an order in another case, or a party's own document retention policies. Thus, Rule 37 permits courts to consider the totality of the circumstances in determining the breadth of a party's duty to preserve ESI.

Determining the scope of a party's preservation obligation can be challenging. Although the trend is towards a broad duty to preserve, the duty is not so broad as to include the preservation of all ESI or as to require the suspension of a client's routine document retention policies. The producing party must make a reasonable and good faith effort to identify and preserve information that is relevant to the claims or defences in the litigation ('The Sedona Principles, Third Edition', 94). There must be a reasonable balance between an organisation's preservation duty and the organisation's need to continue its operations (see id at 95). It is important to note that preservation obligations may change as claims and defences develop over the course of the litigation (id) (citing Boeynaems v LA Fitness Int'l, 285 FRD 331 (ED Pa 2012)).

## 6. Sanctions and Penalties

The loss or destruction of ESI may be sanctionable when a party fails to take reasonable steps to preserve the ESI and the information cannot be restored or replaced through additional discovery (Shaffer v Gaither, No 5:14-cv-00106, 2016 WL 6594126, at *2 (WD NC 1 September 2016)). As of 1 December 2015, Federal Rule of Civil Procedure 37(e) provides the sole basis for federal courts to sanction a party for its failure to preserve ESI. Rule 37(e) was implemented in part to resolve a split among the federal appellate courts regarding the level of culpability required to impose sanctions for the loss or destruction of ESI (see Fed R Civ Proc 37(e), cmt (2015)). Previously, some appellate circuit courts would impose adverse inference instructions upon a showing of negligence or gross negligence, whereas other appellate circuit courts required a showing of bad faith (Condrey v SunTrust Bank of Ga, 431 F3d 191 (5th Cir 2005)). Pursuant to Rule 37(e), if ESI is lost because a party failed to take reasonable steps to preserve it and the information cannot be replaced through additional discovery, the court, upon finding prejudice to another party from the loss of the ESI, may order measures that are not greater than necessary to cure the prejudice. Only if the court finds that the party acted with intent to deprive another party of the information can the court presume that the loss was unfavourable to the party, instruct the jury that it may or must presume that the information was unfavourable to the party, or dismiss the suit or enter a default judgment.

In Snider v Danfoss, LLC, No 15-CV-4748, 2017 WL 2973463 (ND Ill 12 July 2017), the court noted that the 2015 amendments to Rule 37(e) limited a court's discretion to impose sanctions and set forth the following "five-part winnowing process courts must apply before they can even consider imposing sanctions:"

- the information must be ESI;
- there must be anticipated or actual litigation;

- because of anticipated or current litigation, the ESI "should have been preserved" (limited to relevant evidence);
- the ESI must have been lost because a party failed to take reasonable steps to preserve it; and
- the lost ESI must be unable to be restored or replaced through additional discovery.

"If any of these five prerequisites are not met, the court's analysis stops and sanctions cannot be imposed under Rule 37(e)." But if these five prerequisites are met, the court looks to the prejudice suffered by the party seeking the ESI. Rule 37(e) leaves it to the court to determine how best to assess prejudice, which the court in Snider noted was particularly difficult when the ESI no longer exists and cannot be reviewed.

Most state courts similarly require a showing of bad faith or misconduct to impose sanctions. Some states – including Alabama, Alaska, Florida, Indiana, Kansas, Louisiana, Montana, New Mexico, Ohio and West Virginia – recognise an independent tort claim for spoliation. Other states – including Alaska, Connecticut and Ohio – allow a party to bring a separate action for damages for spoliation of evidence rather than sanctioning the destruction of evidence in the underlying case.

## 7. Timing and Extent of Sanctions

Dismissal is not the "sanction of first resort" under Rule 37(e). Rather, Rule 37(e)(1) permits the court to order measures no greater than necessary to cure the prejudice. However, 37(e)(2) permits the court to award more egregious sanctions "upon a finding that the party acted with the intent to deprive another party of the information's use in the litigation." These sanctions include an adverse inference presumption and corresponding jury instruction, dismissal of the action or the entry of a default judgment.

In GN Netcom, Inc v Plantronics, Inc, No 12-1318, 2017 WL 3792833 (D Del 12 July 2016), the defendant promptly issued a litigation hold after receiving a demand letter, but a senior manager, despite receiving training sessions and quarterly reminders regarding the litigation hold, nevertheless deleted over 40% of his emails and repeatedly sent subsequent emails including statements such as, "I would suggest everyone immediately delete this message, thanks." The court ultimately found that the defendant failed to take reasonable steps to preserve ESI, made repeated misrepresentations of the senior manager's email deletion and thus acted in bad faith, and that the plaintiff was prejudiced by the loss of emails. Accordingly, the court assessed sanctions against the defendant. Conversely, in Snider v Danfoss, LLC, No 15-CV-4748, 2017 WL 2973463 (ND Ill 12 July 2017), the court declined to assess sanctions under Rule 37(e) on a defendant who admitted that it erroneously destroyed ESI. Ultimately, the Snider court found that sanctions were not appropriate under Rule 37(e) because the lost ESI did not appear relevant and the plaintiff failed to produce evidence that the defendant destroyed the ESI with the intent to deprive the plaintiff of the ESI, finding instead that the evidence on the issue of intent indicated that the defendant "acted with a pure heart but an empty head." The GN Netcom and Snider cases demonstrate how courts evaluate spoliation claims to determine if sanctions are appropriate under the 2015 amendments to Rule 37(e).

## 8. Costs of Discovery/Disclosure of ESI

Typically, each party bears the costs of producing ESI. In 2016, Rule 26 of the Federal Rules of Civil Procedure was amended to include the concept of "proportionality" in the definition of the scope of discoverable evidence. Rule 26(b)(1) provides that parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defence and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Although Rule 26 "still permits a wide range of discovery based upon relevance and proportionality, the 'provision authorizing the court to order discovery of any matter relevant to the subject matter involved in the action' has been eliminated" (Sky Med Supply, Inc v SCS Support Claim Svcs, Inc, No 12-6383, 2016 WL 4703656, at *2 (EDNY 7 September 2016). Thus, the new rule, as amended, "constitute[s] a reemphasis on the importance of proportionality in discovery but not a substantive change in the law" (id).

Rule 26(b)(2) specifically permits a trial court to weigh and, where appropriate, shift all or part of the cost or burden of producing ESI to the requesting party. The party from whom the ESI is sought bears the burden to show that the information is not reasonably accessible due to undue burden or cost. But even if the showing is made, the court may still order discovery if the requesting party shows good cause and satisfies the limitations of Rule 26(b)(2)(C). Under Rule 26(b)(2)(C), if the court determines that the information is within the permissible scope of discovery, but will be unreasonably cumulative or duplicative, can be obtained from a more convenient, less burdensome, or less expensive source, or the requesting party had ample time to obtain the information then the "court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule."

Parties concerned about the expense of ESI should note the recent inclusion of "allocation of expenses for the disclosure of discovery" in the items that the court may permissibly include in protective orders (Fed R Civ Proc 26(c)(1)(B)). "Recognizing the authority [to reallocate expense costs from the producing party] does not imply that cost-shifting should become a common practice" (id cmt (2015)). However, the inclusion of cost-shifting as a basis to seek a protective order may produce more motions from parties seeking the reallocation of costs to the requesting party.

In re Bard IVC Filters Products Liability Litigation, 317 FRD 562 (D Ariz 2016), a report prepared for the court by the parties in connection with the fifth case management conference indicated that the parties disagreed on the discoverability of certain ESI generated by foreign subsidiaries of the defendant. Plaintiffs requested communications between foreign entities and regulatory bodies regarding the allegedly defective products at issue in the case and the court engaged in a comprehensive discussion of the changes to Rule 26, both in terms of relevancy and proportionality. With respect to proportionality, the Bard court recognised that "[r]elevancy alone is no longer sufficient" to entitle a party to discovery; rather, "discovery must also be proportional to the needs of the case." But rather than placing the burden of proving proportionality upon the party seeking discovery, the court found, consistent with the Advisory Notes, that "the parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes." Input is thus required from both sides. Nevertheless, the court recognised that the party claiming undue burden or expense "ordinarily has far better information — perhaps the only information — with respect to that part of the determination." Accordingly, the court looked to evidence and arguments from both parties in making its determination.

The Bard defendants argued that their subsidiaries were located in "Canada, Korea, Australia, India, Singapore, Malaysia, Italy, Ireland, the United Kingdom, Denmark, the Netherlands, Sweden, Norway, Finland, Mexico, Chile, Brazil, and China," and plaintiffs sought discovery with respect to all of these entities (id). Defendants argued that compliance with plaintiffs' requests would involve identification of custodians from all these foreign entities for a period spanning 13 years, followed by collection, culling and production. Under these facts, the court found that the burden of plaintiffs' proposed discovery was not proportional to the needs of the case and denied plaintiffs' request for the discovery. This conclusion was supported by the fact that plaintiffs were already engaged in substantial domestic discovery efforts that inquired into defendants' communications with American regulators (id). See also Eramo v Rolling Stone, LLC, 314 FRD 205 (WD Va 2016) (applying the proportionality standard in a case involving a university official's defamation action against Rolling Stone, et al, stemming from false sexual assault allegations at the University of Virginia in 2014); Walker v H&M Henner & Mauritz, LP, No 16-civ-3818, 2016 WL 4742334 (27 January 2017) (quashing defendant's subpoenas to plaintiff's prior schools and employers, finding that the discovery sought was not proportional to the needs of the case where plaintiff had sued employer alleging race discrimination); and Dao v Liberty Life Assur Co of Boston, No 14-cv-04749, 2016 WL 796095 (ND Cal 23 February 2016) (citing Gilead Scis, Inc v Merck & Co, Inc, No 5:13-cv-04057-BLF, 2016 WL 146574, at *1 (ND Cal 13 January 2016) ("No longer is it good enough to hope that the information sought might lead to the discovery of admissible evidence. In fact, the old language to that effect is gone. Instead, a party seeking discovery of relevant, non-privileged information must show, before anything else, that the discovery sought is proportional to the needs of the case.")).

## 9. Obligations of Parties to Meet and Confer

Federal Rule of Civil Procedure 26(f) requires parties or their attorneys to meet to discuss a discovery plan in advance of the pretrial scheduling order required under Rule 16. The Advisory Committee to Federal Rule of Civil Procedure 26 notes that parties often commence discovery without having an appreciation of the factors that bear on proportionality (Fed R Civ Proc 26 cmt (2015)). For instance, parties will often have little to no information regarding the burden or expense another party is likely to incur in responding to a particular discovery request. "Many of these uncertainties should be addressed and reduced in the parties' Rule 26(f) conference and in scheduling and pretrial conferences with the court" (id).Where parties are unable to agree, "[t]he court's responsibility, using all the information provided by the parties, is to consider [the Rule 26(b)(1)] and all other factors in reaching a case-specific determination of the appropriate scope of discovery" (id).

Rule 26(f)(2) requires the parties to discuss and agree on a discovery plan, to be submitted to the court within 14 days after the conference. This plan specifically requires the parties to discuss issues pertaining to eDiscovery, including "any issues about disclosure, discovery, or preservation of [ESI], including the form or forms in which it should be produced" (Fed R Civ Proc 26(f)(3)(C)). Discussion regarding "preservation" is a new addition to this list (see Amii N Castle, 'A Comprehensive Overview: 2015 Amendments to the Federal Rules of Civil Procedure', 64 U Kan L Rev 837, 848-49 (2016)). "Attorneys should have substantive discussions at the outset of a case about the factual and legal issues actually in dispute, the potentially relevant ESI, and what it would take to preserve the ESI" (Amii, supra, at 849).Lawyers should also consider requesting that their computer forensics or other eDiscovery expert and/or the client's in-

house IT professional attend the Rule 26(f) conference in order to assess properly the scope of eDiscovery at the outset. "The heart of the new rule is an expectation that lawyers will work collaboratively and amiably early on to address eDiscovery issues" (id).

The best practice is to try to obtain an agreement with the other side about the scope of the parties' mutual preservation obligations. If relevant ESI is unintentionally lost while following an agreed-upon preservation protocol, an opposing party will have difficulty seeking curative measures later under Rule 37(e). An attorney should address in the Rule 26(f) conferences what ESI is truly and actually discoverable, and try to get an agreement with opposing counsel about the scope of preservation.

Most states that adopted rules following the amendments to Rule 26 do not require parties to meet and confer to create an eDiscovery plan. Some states – including Alaska, New Hampshire and Wisconsin – adopted the federal model and require parties to meet and confer regarding eDiscovery. Other states, such as Arizona, require parties to meet and confer on an eDiscovery plan only in complex cases.

## 10. Scope of Party's Obligation Regarding Electronic Documents

One of the more difficult tasks in conducting a review of electronic discovery is determining the appropriate search technique. Simple keyword searches could lead to too many documents for review or not enough documents depending on how the terms are gathered. One of the leading cases on the use of search terms for gathering ESI is the federal district court's decision in William A Gross Construction Associates, Inc v American Manufacturers Insurance Co, 256 FRD 134 (SDNY 2009). In that case, the court cautioned that ESI requires "cooperation between opposing counsel and transparency in all aspects of preservation and production of ESI" (id at 136). Further, "where counsel are using keyword searches for retrieval of ESI they at a minimum must carefully craft the appropriate keywords and abbreviations they use, and the proposed methodology must be quality control tested to assure accuracy in retrieval and elimination of 'false positives'" (id).

In Victor Stanley, Inc v Create Pipe, Inc, 250 FRD 251, 260-62 (D Md 2008), another federal district court wrote: "While keyword searches have long been recognised as appropriate and helpful for ESI search and retrieval, there are well-known limitations and risks associated with them, and proper selection and implementation obviously involves technical, if not scientific knowledge..."

Selection of the appropriate search and information retrieval techniques requires careful planning by persons qualified to design effective search methodology. The implementation of the methodology selected should be tested for quality assurance and the party selecting the methodology must be prepared to explain the rationale for the method chosen to the court, demonstrate that it is appropriate for the task and show it was properly implemented.

In cases where large sums of data are involved, parties can sample data to determine the extent to which relevant documents exist. Federal Civil Procedure Rule 34(a) expressly permits sampling of ESI to identify relevant documents. The advantage of sampling is that it avoids having to review every document in a large collection of data. The downside is that it is possible that some relevant documents may be missed, but the requirement is that the search be done reasonably so the selection of search terms and appropriate sampling methodology is paramount.

One of the most popular sampling methodologies is technology assisted review (TAR), which allows parties to sample data and determine the likelihood of finding relevant documents within a given collection of data. Courts have also begun to approve of TAR as a means of producing ESI.

## 11. Requirement to Certify that Search Carried Out

Federal Rule of Civil Procedure 26(g) requires a party or its attorney to certify that to the best of his knowledge, information and belief, the production of information, including ESI, is consistent with the Federal Rules of Civil Procedure, is not interposed for an improper purpose and is not unreasonable or unduly burdensome or expensive. Some courts have held in the context of ESI that Rule 26(g) requires parties to conduct a reasonable and good faith search for documents. But Rule 26(g) does not require that parties "affirm that their document searches... are complete without qualification and that no additional responsive documents exist (in re Porsche, 2012 WL 4361430, at *9 (SD Ohio 25 September 2012)).

In Yongevity Int'l Corp, et al v Smith, et al, No 16-cv-00704-BTM (SD Cal 21 December 2017), the defendant argued that the plaintiff's "impermissible certified discovery responses because its productions amounted to a 'document dump' intended to cause unnecessary delay and needlessly increase the cost of litigation." But neither party provided the court with the plaintiff's written discovery responses and certification. Thus, the court held that the defendant failed to establish that the plaintiff violated Rule 26(g) and declined to find that the plaintiff improperly certified the discovery responses "when the record before it does not indicate the content of [plaintiff's] written responses, its certification, or a declaration stating that [plaintiff] in fact certified its responses" (citing Cherrington Asia Ltd v A&L Underground, Inc, 263 FRD 653, 658 (D Kan. 2010)) (declining to

impose sanctions under Rule 26(g) when plaintiffs failed to claim specifically that the certificates signed by defendant's counsel violated the provisions of Rule 26(g)).

## 12. Form of Production of ESI

ESI is created and stored in various forms, and contains metadata and other non-apparent or non-displayed information associated with the ESI. Thus the form of production of ESI raises distinct legal and practical issues. Ideally, parties will come to agreements on the form or forms of production of documents. Absent such agreement, ESI should generally be produced in the form in which it is ordinarily maintained or in a form that is reasonably usable to the requesting party.

Federal Rule of Civil Procedure 34 governs the production of documents and provides that a party "may specify the form or forms in which electronically stored information is to be produced." The timing of production is governed by statutes and court rules. Documents must be produced in accordance with those rules, by another reasonable time identified in a discovery request, at a time agreed to by the parties, or at a time specified by the court.

Rule 34(b)(2)(E) provides that a party must produce documents as they are kept in the ordinary course of business, or the party must organise and label the documents to correspond to the categories in the document request. If a requesting party does not specify the form of production, the producing party must produce the information in the form or forms in which the information is ordinarily maintained or in a reasonably usable form or forms. If a party objects to the requesting party's preferred form for producing ESI, or no form is specified, the producing party must state the form it intends to use. A party does not need to produce the same ESI in more than one form.

When selecting the form or forms of production of ESI, parties and the court should consider several factors, including:

- the forms most likely to provide the information needed to establish the relevant facts related to the parties' claims and defences;
- the need to receive ESI in particular formats in order functionally to cull, analyse, search and display the information produced;
- whether the information sought is reasonably accessible in the forms requested;
- the relative value, and potential challenges created, by responding with ESI in the requested format(s); and
- the requesting party's own ability effectively to manage, reasonably use and protect the information in the forms requested.

A party usually does not need documents produced in their native format to access, cull, analyse, search and display the ESI. Typically, ESI is produced in what is referred to as the production of "TIFF, Text and Load Files." This consists of the creation of "a static electronic image in Tagged Image File Format (TIFF) or Adobe Portable Document (PDF) file format, to place the extracted text from the document into a text file, and to place the selected metadata and other non-apparent data into one or more separate load files." With this format, the parties can reassemble the components in a document review platform so that the information can be text-searched or filtered based on metadata fields. Depending on the circumstances, it may be appropriate to produce certain documents – such as spreadsheet files, portable database files, audio/video files and presentation files – in native format. The TIFF, Text and Load Files production of these types of documents may not provide the relevant aspects of the ESI in a reasonably usable format.

In Mancino v Fingar Ins Agency, 2014 WL 36129 (NY Sup 2 January 2014), a plaintiff filed a motion to compel the defendant to produce documents in a native format because the plaintiff wanted certain metadata associated with that information. The court granted plaintiff's motion and rejected defendant's assertion that the production of documents in a native format was overly expensive. In PSEG Power NY, Inc v Alberici Constructors, Inc, 2007 WL 2687670 (NDNY 7 September 2007), the plaintiff produced thousands of emails that were separate from their attachments, making it difficult for the defendant to determine which attachments belonged with which emails. The court ordered the plaintiff to reproduce the emails with their attachments, finding that the production did not comply with Rule 34's requirement that ESI be produced in the form it is kept in the ordinary course of business or in a reasonably usable format.

## 13. Advance Analytical Tools

The use of computer-assisted technology or algorithms to identify responsive documents has gained widespread acceptance over recent years. Where parties desire to use TAR to review documents, parties should engage those with sufficient analytical skills to make sure the technology is properly utilised. Moreover, parties should have sufficient quality control to verify the reasonableness of the search designed for TAR to run.

TAR has found widespread acceptance in the courts. In Da Silva Moore v Publicis Groupe & MSL Group, 287 FRD 182 (SDNY 2012), the court approved the use of predictive coasting and other sampling data. The court cautioned, however,

that a party must have adequate quality controls in place to ensure that a search is reasonable. In Rio Tinto PLC v Vale SA, 306 FRD 125 (SDNY 2015), the court surveyed the landscape and noted the total acceptance of TAR and noted that it was "black letter law" that a party wishing to utilise TAR would be able to do so by the court.

TAR will not be held to a higher standard than using keywords or manual review of every document. Rather, parties wishing to use TAR must still operate in good faith in an effort to produce all responsive documents.

## 14. Production or Withholding Production of Privileged ESI

Federal Rule of Civil Procedure 26(b)(5)(B) and Federal Rule of Evidence 502 provide guidance to the courts for determining whether the disclosure of privileged material constitutes a waiver of privilege.

Rule 26(b)(5)(B) provides that a party who holds privileged material disclosed by another party must sequester the documents and if need be, present it to the court for a determination on the privilege assertion. But the rule does not address the substantive issue of what constitutes a privilege waiver. Federal Rule of Civil Procedure 26(b)(5)(B) provides that if privileged information is inadvertently produced, the party making the claim of privilege should notify the receiving party of the claim of privilege and the basis for that claim. The receiving party must then promptly return, sequester, or destroy the information and any copies thereof, must not use or disclose the information until the claim is resolved, must take reasonable steps to retrieve the information if the party disclosed it before being notified of the privilege claim and may promptly present the information to the court under seal for a determination on the privilege claim. The producing party claiming privilege must preserve the information until the claim is resolved.

Victor Stanley, Inc v Creative Pipe, 250 FRD 251 (D Md 2008), is a case that was decided after Rule 26(b)(5), but prior to the passage of Rule 502. In Victor Stanley, the parties entered into an ESI agreement. Thereafter, the defendant realised that a page-by-page review of all documents gathered from the agreed-to search terms would be costly and to save money, defendants applied search terms to the discoverable documents to determine which documents were privileged. But the defendant did not ask the court for an order to protect it from the inadvertent disclosure of privileged materials. To determine whether the defendant waived privilege, the court adopted a test that requires the court to balance the following factors to determine whether inadvertent production of attorney-client privilege waives the privilege:

- the reasonableness of the precautions taken to prevent inadvertent disclosure;
- the number of inadvertent disclosures;
- the extent of the disclosures;
- any delay in measures taken to rectify the disclosure; and
- overriding interests in justice.

Ultimately the court found that the defendant failed to ask the court for an order that would have protected the disclosures and thus privilege had been waived. The court also noted that the defendant did not take any samples of the documents to determine if privileged information was captured.

Federal Rule of Evidence 502 was signed into law on 19 September 2008 and was created to provide a consistent standard for courts to apply with respect to privilege waivers. Rule 502 provides that the inadvertent disclosure of attorney-client communications in a federal proceeding or to a federal office or agency does not waive the privilege if:

- the disclosure is inadvertent;
- the holder of the privilege or protection took reasonable steps to prevent disclosure; and
- the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

The committee notes to Rule 502 state: "[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. The implementation of an efficient system of records management before litigation may also be relevant."

In Shields v Boys Town Louisiana Inc, No 15-3243, 2016 WL 9414346 (ED La 24 May 2016), the court looked at Rule 502 to determine whether a defendant waived privilege when it disclosed a privileged email that had been inadvertently produced. The court noted that, "When a communication between an attorney and client is disclosed to a third party, the communication generally is not confidential and the privilege is waived." The court observed that the defendant did not produce any evidence that their production of the email fulfilled the requirements of Rule 502 for clawing back a document to prevent an involuntary waiver of privilege. In Shields, the inadvertently produced email was privileged, but the court held that the production of the email was deliberate and voluntary. At a deposition, defence counsel admitted that she produced the email voluntarily "out of a courtesy to" the plaintiff's attorney. Because the defendants did not satisfy their burden to prove inadvertence, they could not rely on Rule 502 to prevent the wavier of the privilege. Moreover, the defendants failed to establish that they took steps to prevent the disclosure. The court noted that there was no evidence that the email was listed on a privilege log or withheld from production until the court could rule on

the privilege objection. Thus the defendant could not avail itself of the protections of Rule 502.

## 15. Privacy Statutes & Rules or Regulations

Rule 5.2 of the Federal Rules of Civil Procedure permits redaction of any documents containing personal identifying data such as a social security number, bank account, or date of birth. Parties are also free to construct protective orders to limit production of any document with potentially private information.

Moreover, statutes such as the Stored Communications Act prohibit production of customer communications stored by electronic communications providers to any party unless the federal government has first obtained a valid warrant (see 18 USC Sections 2701 to 2712). This statute makes no exceptions for discovery in civil litigation. Other federal laws that may restrict disclosure of private information permit such disclosure if it is in response to a civil litigation discovery request.

Various states may have their own laws restricting disclosure of private information. On occasion, those state laws may overlap with similar federal statutes. At that point, a party must determine whether the state law merely fills a gap on this issue of law or if the federal law is intended to pre-empt state law. Even then, some courts may reach different conclusions. For example, courts have split on the question of whether the Stored Communications Act pre-empts state law. Compare Muskovich v Crowell, 1995 WL 905403, at *1 (SD Iowa 21 March 1995) (holding that there is pre-emption) with Lane v CBS Broadcasting, Inc, 612 F Supp 2d 623 (ED Pa 2009) (holding that state regulations can supplement the federal statute).

Parties responding to discovery should be wary of producing information containing personal information. Such information should either be redacted in the first instance, or a party should consider objecting to the request or seeking a protective order before producing personal information.

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## 16. Transfer of ESI Outside Jurisdictional Boundaries

Laws in the USA do not treat requests for ESI from foreign tribunals differently from requests for other types of documents or information. Federal and state courts will honour requests for evidence from or in aid of a foreign tribunal under the Hague Convention under 28 USC Section 1872 and will order documents, including ESI, produced overseas. Practitioners should be aware, however, that laws concerning treatment of ESI may vary depending on the country involved.

28 USC Section 1782 in particular provides a framework for foreign tribunals and litigants to seek discovery in the USA. Proceedings under Section 1782 are no different whether the request is for ESI or some other data or documents. Section 1782 applies where (i) the person from whom information is sought resides in or is found in the judicial district where the request is made, (ii) the discovery is for use in a foreign tribunal and (iii) the applicant must be a foreign tribunal or be an interested person. Courts may also consider whether the person from whom information is sought is a party in the proceeding, the nature of the proceeding in a foreign tribunal, whether the request is an attempt to circumvent restrictions on gathering evidence in a foreign country, or if the requested information is unduly burdensome (Intel Corp v Advanced Micro Devices, Inc, 542 US 241, 264 (2004)). Foreign tribunals may also refuse to permit a party to seek an application under Section 1782.