THE USES AND ABUSES OF ELECTRONIC DISCOVERY

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The article below was written by Pearl Zuchlewski in conjunction with a lecture on the same topic, entitled "Electronic Discovery: The Creative Uses and Suspect Misuses of a Developing Litigation Device," given on October 4, 2011 at Wayne State University Law School. This presentation was part of the annual I. Goodman Cohen Lecture series. The I. Goodman Cohen Lecture in Trial Advocacy was established through the generosity of the family of the late I. Goodman Cohen, a prominent trial attorney who was active in the Michigan Trial Lawyers Association. Each year, a leading jurist is invited to the Law School to deliver a public lecture on an aspect of trial advocacy. The lecture is intended to supplement the Law School's training program in trial skills and add to the variety of professional perspectives students receive during their time at the Law School.

I am here tonight to speak to you about the uses and abuses of electronic discovery, which is a very broad topic about a very complex discovery mechanism. I will not be able to cover the entire subject of e-discovery in depth, and I suspect that you would not want me to. Instead, I will focus on a few specific aspects of electronic discovery which I believe have had the most impact upon litigation and have raised the stakes for litigators and litigants alike in today's legal environment. As Professor Sedler mentioned to you, I practice employment law. Much of my practice is representing clients in the financial services industry; that, by its very nature, is going to inform many of the examples that I will use. However, I also will address issues that affect the broad community of lawyers who litigate in a variety of fields. First, I will offer some background information to provide a context in which to discuss electronic discovery. Initially, I will briefly describe the more important aspects of electronic discovery, then review some of the basic case law in this area. I will also comment on the Sedona Conference,[1] which has established some widely recognized guidelines for electronic discovery. I will then turn to recent amendments to the Federal Rules of Civil Procedure which have been enacted to address the sea change that

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1. *See* THE SEDONA CONFERENCE, www.thesedonaconference.org (last visited Aug. 1, 2012).

electronic discovery has brought to litigation.[2] After providing that context, I will focus on three key aspects of electronic discovery that are among the most difficult, perplexing, and dangerous for litigants and the lawyers who represent them. The first issue is the potential waiver of attorney-client privilege when voluminous material is produced very quickly and exchanged between parties. Second, I will address the cost of e-discovery production, where electronic information is stored in many different places and in many different ways. Finally, I will touch on something that is of real concern to me: the perils of sanctions in electronic discovery. Sanctions are increasing exponentially as a result of disputes about electronic discovery,[3] and this is a potential danger to the legal profession.

What is electronic discovery, and what is discoverable in the e-discovery world? It is difficult to say because the answers to these questions are changing by the day due to the rapidly evolving nature of electronic communications.[4] For example, there is email on your office computer, email on your personal computer, instant messages, cell phone images, text messages and, as we were talking about earlier this afternoon, social media websites. This is a dynamic and fluid area, since the types of electronic information that are out there are constantly changing. In addition, some industries have their own specific electronic communication devices. As I indicated, I work primarily with clients in the financial services industry. People in financial services live and die by their Bloomberg terminals. In addition to the usual personal computer that is on everyone's desk, or the laptop that they take home each night, Bloomberg Terminals are in every single investment bank and hedge fund, which represents yet another avenue of communication.[5]

Moreover, all of these sources of information have different characteristics and different ways to store and retrieve information at different time frames. The securities industry is a heavily regulated industry in which the Securities and Exchange Commission and other

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2. *See generally* Jessica DeBono, *Preventing and Reducing the Costs and Burdens Associated with E-Discovery: The 2006 Amendments to the Federal Rules of Civil Procedure*, 59 MERCER L. REV. 963, 963 (2008) ("On December 1, 2006, amendments to the Federal Rules of Civil Procedure (the 'Rules') regarding the discovery of electronically stored information went into effect.").

3. Dan H. Willoughby, Jr., et al., *Sanctions for E-Discovery Violations: By the Numbers*, 60 DUKE L.J. 789, 794 (2010).

4. *See generally* Michael F. Fleming & Christina L. Kunz, *Foreword: Riding the Long Wave of Developing Law*, 37 WM. MITCHELL L. REV. 1666 (2011).

5. BLOOMBERG PROFESSIONAL, http://www.bloomberg.com/professional/hardware/ (last visited Aug. 1, 2012).

regulators require painstaking maintenance of records and, in addition, it is necessary to have everything that happens on trading desks recorded.[6]

In the retail industry, the standards and expectations of information storage are different,[7] and in more respects than simply the form of electronic communication that is being used. Emails, we know, are saved for quite some time, whether it is on your personal computer or your server. Whereas in most cases, text messages, as I just learned in an arbitration I was doing, disappear within five days from your phone. Although, if one chooses, he or she can go to their provider and retrieve them.[8]

Accordingly, there are many different types of electronic communications on a variety of different devices that are saved for different periods of time for different reasons. And, not only is there a range of different devices and different kinds of communications, there is a huge volume of electronic communications. During last year, there were 294 billion emails alone sent worldwide each day.[9] That amounts to 107 trillion emails over the course of 2010.[10] This staggering flood of information has given litigants access to information which they never had before. When I graduated from law school in 1979, we had only paper discovery. Sometimes, if one was really creative, you went to the offsite location where the documents were stored.

Against this backdrop, how do attorneys obtain access to this kind of information? It is logical to begin with the most commonly sought-after form of electronic discovery: production of emails. Most often, lawyers obtain emails in discovery in a cooperative atmosphere with one's adversary by together designing a search that includes to whom, from whom, and among whom the emails are circulated; the relevant time period; and key words, often referred to as "search terms."[11] Although this sounds like a fairly straight-forward and easy exercise, it frequently

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6. *The Laws that Govern the Securities Industry*, U.S. SEC. AND EXCH. COMM'N, http://www.sec.gov/about/laws.shtml (last visited Aug. 1, 2012).

7. *See generally* Mark MacCarthy, *Information Security Policy in the U.S. Retail Payments Industry*, 2011 STAN. TECH. L. REV. 3, 11 (2011).

8. Jacob Leibenluft, *Do Text Messages Live Forever?*, SLATE (May 1, 2008, 6:51 PM), http://www.slate.com/articles/news_and_politics/explainer/2008/05/do_text_messages_live_forever.html.

9. Tracy Smith, *Is Penmanship Being Written Off?*, CBS NEWS (Jan. 23, 2011), http://www.cbsnews.com/stories/2011/01/23/sunday/main7274525.shmtl.

10. *107 Trillion Emails Sent in 2010*, SOFTPEDIA, http://news.softpedia.com/news/107-Trillion-Emails-Sent-in-2010-177968.shtml (last visited Aug. 1, 2012).

11. Jason R. Baron, Edward C. Wolfe, *A Nutshell on Negotiating E-Discovery Search Protocols*, 11 SEDONA CONF. J. 229, 229-32 (2010).

is not. Litigants often believe that all one need do is to identify a time frame, put in the individuals' names, include the key words, and then strike a key. Then, as if you have clicked on "find" on your computer, all of the needed information is spewed out, and we very quickly and efficiently proceed to litigation with all of these new documents and information. In reality, it is not nearly that easy.

To use my name as an example, the day before I came here I "Googled" myself for the sole purpose of seeing how many of "me" there are out there. According to the results of this Google search, there is only one "Pearl Zuchlewski" in the United States. Thus, one might think that if you wanted to get some electronic information about me, you simply need to enter my name into an internet search engine like Google, and only information about me will appear. But, this is not necessarily the case. For instance, on occasion people have, not surprisingly, misspelled my name. In addition to the "zucks" and other variations on "zuch," sometimes I am referred to by my initials or as "Pearl Z." Moreover, there have been times when people write my first name as "Perle," opting to use the French spelling as opposed to its American equivalent. Clearly, carrying out an electronic search is not as simplistic as inputting words that you think will produce what you need. Rather, it is necessary to try to anticipate what documents exist as well as what those documents might contain, and then to structure your search accordingly.

Nevertheless, access to email has provided litigants with huge benefits, and I will identify just a few that I have found most useful. First, for the most part, you really do know what you are getting in e-discovery. You can determine when a document was created and who created it.[12] You can also pinpoint—virtually to the second—when an email was sent.[13] It is not necessary to wonder if someone slipped a page into an electric typewriter and created a document or backdated it. That is a very hard thing to do in electronic discovery, so the authenticity of the document is relatively assured.

However, in e-discovery, it is not impossible to tamper with documents. Somebody can still pick up my Blackberry and send a scurrilous, inflammatory message, and it appears as though it is coming from me. I actually have had this happen in a few cases. For example, in a sex harassment case I handled, my client showed me many extremely distasteful messages that she had received from someone. We thought it

12. Scott Nagel, *Embedded Information in Electronic Documents: Why Metadata Matters*, L. PRAC. TODAY (2004), *available at* http://apps.americanbar.org/lpm/lpt/articles/ftr07044.html.

13. *Id.*

was clear that "John Smith" was the author and sender of these messages because the email address itself identified him as the sender. However, it turned out that one of Mr. Smith's friends had picked up his Blackberry and sent these emails as a joke. This got Mr. Smith into considerable trouble with his firm because it was a firm-issued Blackberry. So, while discovery of emails provides a lot of helpful information, you still need to be a little skeptical about what you observe.

Another example involving discovery of electronic information that I personally found very disturbing involved a client of mine who worked for a Fortune 500 corporation for fifteen years. Although I always take my clients' stories with a grain of salt, this client seemed like one of the more honest individuals I had dealt with. He explained that while he was at a meeting, someone had gone into his office and searched pornographic sites using his computer. The company had a zero tolerance policy with regard to pornography on office computers, and New York, where I practice, is an employment-at-will state. The corporation decided to adhere strictly to its policy and terminated my client without asking him any questions. As far as the company was concerned, it was my client's computer and, therefore, his problem. Despite disturbing stories like this, I do think for the most part that the relative authenticity of documents in e-discovery is very useful.

The other aspect of the authenticity issue entails the very basic questions of (1) who created a document and, (2) when was the document created. Are the communications in emails more authentic than those in other documents? Professor Sedler and I were talking about this, and he made a comment that I thought was very thought provoking. He compared email content to information disclosed in depositions. I think he is right: email content is like deposition testimony, but without a defending lawyer present. This is because people will communicate in emails in ways that they do not do when they write a formal memo or a letter.[14] For example, if a supervisor has a problem with an employee, the supervisor may decide it is prudent to document that problem in the employee's Human Resources file. To do so, the supervisor generally creates a formal document regarding the problem, which is then shared with Human Resources staff and, perhaps, in-house counsel. In the process, a number of people will edit this document, and it will eventually state what the supervisor and others should say and should not say to the employee or to appropriately handle the problem. On the other hand, imagine that the same supervisor instead wrote an email to her

14. *See generally* Thomas E. Spahn, *The Ethics of E-Mail*, 15 RICH. J.L. & TECH. 12 (2009).

colleagues, venting about her troublesome employee. That email communication is going to sound considerably different than what the supervisor would have created to place in a Human Resources file. Thus, what is produced in e-discovery are exchanges of information that are very candid, spontaneous, and straightforward, and I believe that Professor Sedler is correct; it almost creates a deposition transcript for you.

From my perspective, one disadvantage of e-discovery in employment cases is that electronic communications also create the opportunity for what is known as "after-acquired" evidence.[15] If an employer decided to fire an employee because the employee is sixty-six years old, getting "long in the tooth," and cannot figure out how to use a computer correctly, the employer's motivation for getting rid of the employee is very likely his age. If an employer actually says the dismissal is age-related, the employee may retain a lawyer who will then send a letter to the employer suggesting that they talk about the separation and about a severance package.[16] In today's climate, one of the first things that the employer probably will do is comb through the employee's computer. If the employer then learns that sick days the employee was taking coincided with golf outings at his country club, that can be used to justify the employee's termination after-the-fact. Also, the employee's supervisors might make admissions and statements in emails that they might not want known that he can obtain. Once individuals and businesses began relying on electronic communications for both commercial and personal purposes, lawyers woke up and realized this practice could be a great source of information for litigation.

Initially, there were virtually no electronic discovery guidelines about what was discoverable, how it was to be produced and who would pay for retrieving it.[17] That uncertainty began to be seriously addressed by 2003.[18] An extensive case law review is impractical, but I think it is important to identify a few of the more seminal cases.

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15. David J. Willbrand, *Better Late Than Never? The Function and Role of After-Acquired Evidence in Employment Discrimination Litigation*, 64 U. CIN. L. REV. 617, 617 (1996) ("In employment discrimination litigation, 'after-acquired evidence' refers to that evidence of certain employee misconduct or dishonesty uncovered by an employer after its effectuation of an employment decision adverse to the employee.").

16. Age Discrimination in Employment, 29 U.S.C. § 623(a)(1) (2012) ("It shall be unlawful for an employer to . . . discharge any individual . . . because of such individual's age.").

17. John H. Beisner, *Discovering a Better Way: The Need for Civil Litigation Reform*, 60 DUKE L.J. 547, 564-73 (2010).

18. *Id.* at 585 (citing Zubulake v. UBS Warburg LLC, 217 F.R.D. 309 (S.D.N.Y. 2003)).

Although there is no connection to the fact that I am from New York, the first major cases on electronic discovery did emanate from a series of decisions by Judge Shira Scheindlin in the U.S. District Court for the Southern District of New York, in 2003 and 2004. Coincidently, these decisions were in an employment discrimination case involving the securities industry: *Zubulake v. UBS Warburg*.[19]

In *Zubulake*, an equities trader asserted that she was discriminated against because of her gender and retaliated against for making complaints of discrimination.[20] As I indicated earlier, and you probably know, the securities industry is one where emails are commonly used for many purposes, and there is also a requirement that those emails be retained.[21] There were endless disputes between the parties in *Zubulake* about what was produced, when it was produced, and whether emails that could have been produced because they were on servers were in fact readily accessible.[22] Judge Scheindlin took these issues and ran with them. As a result of *Zubulake*, we had the initial four or five cases that established some general guidelines for e-discovery and certainly started the conversation on electronic discovery and how the courts should handle it.

Among the more significant of the *Zubulake* decisions was one that addressed the distinction between accessible and inaccessible electronic documents.[23] "Accessible," as the term suggests, applies to the type of information that a lawyer can go into someone's computer and promptly retrieve.[24] "Inaccessible" means that the material either has gone into backup files or fragmented files.[25] While accessible information is fairly easily produced, inaccessible is often difficult and costly to obtain.[26] We are going to discuss this a little further when I touch on the issue of costs. Judge Scheindlin not only distinguished between accessible and inaccessible information, she set forth a seven factor test for determining

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19. There are five different decisions in *Zubulake*, all of which deal in whole or in part with e-discovery issues. They are: Zubulake v. UBS Warburg (*Zubulake I*), 217 F.R.D. 309 (S.D.N.Y. 2003); Zubulake v. UBS Warburg (*Zubulake II*), 230 F.R.D. 290 (S.D.N.Y. 2003); Zubulake v. UBS Warburg (*Zubulake III*), 216 F.R.D. 280 (S.D.N.Y. 2003); Zubulake v. UBS Warburg (*Zubulake IV*), 220 F.R.D. 212 (S.D.N.Y. 2003); Zubulake v. UBS Warburg (*Zubulake V*), 229 F.R.D. 422 (S.D.N.Y. 2004).

20. *Zubulake I*, 217 F.R.D. at 312.

21. Electronic Storage of Broker-Dealer Records, SEC Interpretive Letter, Release No. 34-47806 (May 3, 2007), *available at* http://www.sec.gov/rules/interp/34-47806.htm.

22. *Zubulake V*, 229 F.R.D. at 425-30.

23. *Zubulake I*, 217 F.R.D. 318-21.

24. *Id.* at 318.

25. *Id.* at 321.

26. *Id.* at 320-21.

which party should bear the often significant cost of e-discovery,[27] which has had widespread implications and will also be discussed later.

Traditionally, in federal litigation the producing party pays for production of discovery materials.[28] That was always a given, but now, with electronic discovery and the distinction between accessible and inaccessible information, that is not always the case.[29] Judge Scheindlin also discussed the standards for preservation of electronic information. The judge stated that once a party has actual notice of a lawsuit or suspects litigation is imminent, it has an obligation to issue litigation holds that should be conveyed in writing to the client.[30] In fact, it is best to put it in writing to your client not just once, but repeatedly.[31] The client has to be advised and reminded that there is a litigation, either anticipated or in progress, and that documents that could be related to it should not be allowed to go migrating to the servers, or, worse yet, be deleted.[32]

Judge Scheindlin also addressed the question of sanctions.[33] The attorneys in *Zubulake* were operating in a fairly new world. Nevertheless, Judge Scheindlin had very strong opinions about preservation of evidence, and because she determined that electronic evidence was not sufficiently protected by UBS, she issued an adverse inference instruction to the jury when the case was finally tried.[34] She ruled that if emails had been deleted or not sufficiently preserved, the jury should assume that they were prejudicial to UBS and weigh that in deciding the case.[35] The outcome of *Zubulake* was very unfortunate for UBS. After a jury trial, the plaintiff was awarded the biggest verdict ever in a single employment case: over $2 million in back pay, more than $6 million in front pay, and $20 million in punitive damages.[36] It is a fair inference that some of those punitive damages came as a result of the sanction that resulted in an adverse inference instruction against UBS because of its failure to preserve evidence.[37] The case was ultimately settled, and I

27. *Id.* at 322.
28. *Id.* at 316.
29. *Zubulake I*, 217 F.R.D. at 316.
30. *Zubulake V*, 229 F.R.D. at 431-32.
31. *Id.* at 434.
32. *Id.* at 431-34.
33. *Id.* at 436-37.
34. *Id.* at 437.
35. *Id.* at 439-40.
36. Eduoardo Porter, *UBS Ordered to Pay $29 Million in Sex Bias Lawsuit*, N.Y. TIMES, Apr. 7, 2005, http://www.nytimes.com/2005/04/07/business/07bias.html.
37. *A Survey of E-Discovery Case Law in 2010*, Am. Bar Assoc. Section of Litigation and Criminal Justice Annual CLE Conference: Guidance Through a Rough and Often Uncharted E-Discovery Terrain, Apr. 13-15, 2011, *available at*

strongly suspect that it was settled for something under $29 million. Nevertheless, $29 million was the benchmark from which they were operating. I, and many others believe that award was primarily a result of the disputes over electronic discovery and the battle UBS ultimately lost to the plaintiff about e-discovery.[38]

While not all courts have followed *Zubulake*'s approach to cost allocation, the standards for care in preservation of evidence and the circumstances for which sanctions are appropriate are still groundbreaking. *Zubulake* set some parameters for the courts to deal with this and related e-discovery issues, and other courts quickly began to discuss theory as well as nuts and bolts issues about electronic discovery. For example, in *Consolidated Rail Corporation v. Grand Trunk Western Railroad Company*,[39] a case out of the Eastern District of Michigan, a party made a request for electronically stored documents and, although the other party produced documents, it did not organize the production.[40] The receiving party made a motion to compel, seeking an order that the documents be organized in an efficient and usable fashion.[41] The court, however, ruled that the receiving party was only entitled to electronically stored documents in the form in which they were maintained in the normal course of business.[42] Under the rationale of this decision, if you are seeking documents from a hospital that has carefully maintained medical records, you will likely receive a well-organized response. However, if the hospital is a poorly run company that throws information all over its servers, that is what will be produced. Another issue that comes up in e-discovery is how the electronic information is produced. It is best to request not only the substantive email that we talked about earlier—who sent and received it, the dates it was sent, what the key words were—but also to request the email in a particular electronic format. Certain electronic formats will allow you to run a search of the document. This means that, if you receive three or four disks from your adversary, but all you want is information about convertible bonds, you can enter "convertible bonds" into a search and retrieve the information you need if you have received the document in

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http://www2.americanbar.org/calendar/aba-sections-of-litigation-and-criminal-justice-2011-joint-annual-conference/Written%20Materials/E-Discovery%20and%20Court%20Updates/06.3b_Survey.pdf.

38. *Id.*

39. No. 09-CV-10129, 2009 WL 5151745 (E.D. Mich. Dec. 18, 2009).

40. *Id.* at *1.

41. *Id.*

42. *Id.*

one of these searchable formats.[43] Unless you ask for documents in a particular format, the courts will not direct your adversary to do the work for you.[44] Thus, courts will expect you to have some basic information about what you want and the format in which you want it.[45]

Courts have also been emphasizing the requirement that parties cooperate in e-discovery.[46] One of the things I have noticed in my practice as an attorney over time is that federal courts tend to be a bit more lenient with federal government, state, and city governments before them than they are with private litigants. However, some courts have held even public sector litigants to a high standard in electronic discovery. For example, in *National Day Laborers Organizing Network v. U.S. Immigration & Customs Enforcement Agency*,[47] the Customs and Immigration Service simply refused to talk to the plaintiffs about e-discovery and produced a voluminous amount of information to its adversary.[48] When the plaintiff protested, the court ordered the agency to produce the material again, but in a more coherent and understandable fashion.[49] Such an outcome has occurred in many cases, and it can be inferred that a failure to cooperate with an adversary will frequently lead to negative repercussions.

The concept of cooperation in electronic discovery has a number of origins. It derives from case law and the Federal Rules of Civil Procedure,[50] and it also is embodied in the work of an entity called the Sedona Conference.[51] The Sedona Conference is a research and educational institute engaged in the advanced study of, among other topics, complex litigation.[52] Stephen Calkins, a faculty member here at

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43. *E-Discovery Documents Production Formats: Native, TIFF and PDF*, LEXBE, http://www.lexbe.com/hp/e-Discovery-production-formats-native-PDF-TIFF.aspx (last visited Aug. 1, 2012).

44. *See generally* JAY E. GRENIG ET AL., 1 E-DISCOVERY & DIGITAL EVIDENCE § 1:5 Metadata (2011).

45. *Id.*

46. Robert C. Manlowe et al., *Paradigm Shifts in E-Discovery Litigation: Cooperate or Continue to Pay Dearly*, 78 DEF. COUNSEL J. 170, 172-75 (2011).

47. No. 10 Civ. 3488, 2011 WL 381625 (S.D.N.Y. Feb. 7, 2011) (withdrawn), *available at* http://www.rcfp.org/newsitems/docs/20110209_154924_southern_district_ny_decision.pdf.

48. *Id.* at *1-4.

49. *Id.* at *20-25.

50. *In re* Telxon Corp. Secs. Litig., No. 5:98-CV-2876, 2001 WL 3192729, at *19-20 (N.D. Ohio, July 16, 2004) (discussing the cooperation principles courts have derived from FED. R. CIV. P. 27).

51. THE SEDONA CONFERENCE, *supra* note 1.

52. *Working Group One on Electronic Document Retention and Production (WG1)*, THE SEDONA CONFERENCE, at 1 (2009), *available at*

Wayne State, was on the Sedona Advisory Board from 2004 to 2007.[53] The members of the Sedona Conference focused on the issue of electronic discovery and issued several papers that have been cited by the courts as well as the advisory board that recently amended the Federal Rules of Civil Procedure.[54] The Sedona Conference electronic discovery reports emphasized several concepts: proper preservation of information, early communication with clients and opposing counsel, and how to deal with inaccessible information that has found its way onto backup tapes.[55] Interestingly, Sedona urged limited use of sanctions other than for grievous misconduct.[56]

Sedona continues to be involved in the development of the law and practice of electronic discovery, and it recently issued a conference Cooperation Proclamation[57] that many judges have endorsed.[58] When litigating in federal court, it is advisable to ascertain whether your judge has signed the Sedona Proclamation because that will give you an indication of how conversant the judge is with this type of discovery and how involved he or she is.

It is important to stress that the courts are rapidly losing patience with litigants who have not familiarized themselves with e-discovery. One decision by a magistrate judge in the Southern District of New York illustrates this trend and has some interesting language that is worth noting. In this case, *William A. Gross Construction Associates, Inc. v. Manufacturers Mutual Insurance Company*,[59] a multi-party litigation, one party refused to cooperate with another regarding discovery of certain electronically stored information.[60] Magistrate Judge Andrew Peck observed:

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http://www.ned.uscourts.gov/internetDocs/cle/2011-01/TSC%20Publications%20Handout.pdf [hereinafter *Sedona Working Group*].

53. *Steven Calkins Faculty Profile*, WAYNE STATE UNIV. LAW SCH., http://law.wayne.edu/profile/stephen.calkins/ (last visited Aug. 1, 2012).

54. *Sedona Working Group*, *supra* note 52, at 1.

55. *See id.* at 2.

56. *See id.*

57. The Sedona Conference, *Sedona Conference Cooperation Proclamation*, 10 SEDONA CONF. J. 331 (2009).

58. *See* William A. Gross Constr. Assocs., Inc. v. Am. Mfrs. Mut. Ins. Co., 256 F.R.D. 134, 136 (S.D.N.Y. 2009); *see also* Technical Sales Assocs., Inc. v. Ohio Star Forge Co., No. 07-11745, 2009 WL 728520, at *4 (E.D. Mich. Mar. 19, 2009); *see generally* Ralph C. Losey, Mancia v. Mayflower *Begins a Pilgrimage to the New World of Cooperation*, 10 SEDONA CONF. J. 377 (2009).

59. 256 F.R.D. 134 (S.D.N.Y. 2009).

60. *Id.* at 134-35.

> [T]his case is just the latest example of lawyers designing key word searches in the dark by the seat of their pants without adequate, indeed here, apparently without any, discussion with those who wrote the emails. Prior decisions by magistrate judges have warned counsel of this problem, but the message has not gotten through to the Bar of this district. It is time for the Bar, even those lawyers who did not come of age in the computer age, to understand this.[61]

Magistrate Judge Peck's admonition is a message to those of us who graduated in 1979, or around that time, when there essentially were no personal computers. We need to confront the realities of e-discovery.

Sedona's cooperation principles and some of the issues that arose in *Zubulake* were incorporated into the November 2006 amendments to the Federal Rules of Civil Procedure.[62] Among those rules changed that were specifically designed for the electronic discovery age was Federal Rule of Civil Procedure 16, which relates to pre-trial conferences and scheduling.[63] The amendments provide that scheduling orders may now include provisions for electronic discovery procedures which, for example, direct counsel to cooperate and determine whether inaccessible documents will be part of discovery and who is going to pay for retrieving them.[64]

Federal Rule of Civil Procedure 26, the general discovery rule, requires that parties discuss electronic discovery during a case's initial planning conference and include that in their discovery plan.[65] Attorneys cannot walk into a discovery conference with an adversary and say, "you know, we're going to get to that." Litigators must have a clear idea about how much electronic discovery they will need and what type of electronic information they will seek. In general, if electronic information is not accessible because it is on backup tapes, the requesting party may still obtain it, but must provide a reason why he needs it.[66] If the producing party inadvertently produces privileged information, the recipient must return it, sequester or destroy it, and it must be included in the producing party's privilege log.[67] Additionally, the requesting party should specify the form in which the electronic discovery material is to

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61. *Id.* at 135.

62. Thomas Y. Allman, *Conducting E-Discovery After the Amendments: The Second Wave*, 10 SEDONA CONF. J. 215, 216-18 (2009).

63. FED. R. CIV. P. 16.

64. *Id.*

65. FED. R. CIV. P. 26(b).

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

67. FED. R. CIV. P. 26(b)(5)(B).

be produced, and the other party may still object if producing the documents requested is likely to be burdensome or unduly costly.[68]

Federal Rule of Civil Procedure 37 has also been amended, and now specifically states that a court may not impose sanctions if electronically stored information has been lost due to the "routine operation" of a computer system.[69] Here too, however, I suggest caution before using the "routine operation" excuse. In a Texas case, *Rimkus Consulting Group, Inc. v. Cammarata*,[70] after litigation had already commenced, one party decided to adopt a policy on retention of emails that entailed deleting emails more than two weeks old.[71] Not only was the new company policy only a few weeks old, but instead of applying to all emails as a general matter, the policy applied only to those emails of a sensitive nature that might be the object of discovery.[72] The court frowned on this ploy, imposing sanctions on the defendants for intentionally destroying electronic information relevant to the litigation.[73] However, if there is a genuinely routine operation responsible for the loss of electronically stored information—that might constitute a legitimate reason for failure to produce documents.

Having reviewed what electronic discovery is, some basic case law on e-discovery, the principles devised by the Sedona Conference, and changes to the Federal Rules of Civil Procedure, I would like to focus on the three areas in e-discovery that I think are the most difficult and problematic. Specifically, I refer to the potential waiver of attorney-client privilege when conducting e-discovery, the cost of e-discovery, and the threat of sanctions. First, I will address the potential for attorney-client privilege waiver, and begin with an unusual example. A recent case reported in April's ABA Journal described a copyright infringement suit between Viacom and YouTube where the judge ordered production of twelve terabytes of data.[74] For the sake of comparison, ten terabytes of data are equivalent to all of the printed material in the Library of Congress.[75] These facts are extreme, but because such voluminous production is now being ordered, it is not surprising that some privileged documents may slip through despite the attentiveness of the first-year associates performing document production.

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68. FED. R. CIV. P. 26(b)(2)(B).
69. FED. R. CIV. P. 37(e).
70. 688 F. Supp. 2d. 598 (S.D. Tex. 2010).
71. *Id.* at 633.
72. *Id.* at 642.
73. *Id.* at 653.
74. Viacom Int'l Inc. v. YouTube Inc., 253 F.R.D. 256, 265 (S.D.N.Y. 2008).
75. John C. Tredennick, Jr., *There is a lot of data out there . . .*, L. PRAC. TODAY (2004), *available at* http://apps.americanbar.org/lpm/lpt/articles/fwr01041.html.

This issue is addressed in an amendment to the Federal Rules of Evidence, specifically Rule 502. Rule 502 provides that inadvertent disclosure does not waive the attorney-client privilege if reasonable steps have been taken to prevent it and reasonable steps have been taken to rectify it if in fact it is disclosed.[76] There have not been many court decisions on the application of Rule 502, but it appears that courts will be reluctant to conclude that people have waived attorney-client privilege. Because the more extreme cases are often the most interesting ones, an Eastern District of Pennsylvania decision, *Rhoades Industries v. Building Materials Corporation of America*,[77] is worth mentioning. In *Rhoades*, eight hundred privileged documents were purportedly inadvertently produced and the receiving party asked the court to find that privilege had been waived.[78] The producing party conceded both that the production was careless and that no privilege logs had been provided—presumably a showing sufficient to establish waiver.[79] Nevertheless, the court concluded that, in its words, the "spirit" of Rule 502 warranted denying the request for waiver.[80] This dispute could have been avoided if the parties had utilized Federal Rule of Evidence 502(d), which provides that the parties may ask the court to sign an order confirming that if there is inadvertent disclosure of attorney-client privileged information, the privilege is not waived.[81] Under Rule 502(d), one may proactively obtain an order from a federal court to protect attorney-client privilege before any inadvertent disclosure has occurred.[82]

Magistrate Judge Peck has much to say about electronic discovery, and he opined at one conference I attended that it is malpractice for an attorney not to obtain a Rule 502(d) order.[83] I find this absolutely extraordinary. One principal that is repeatedly drilled into lawyers' heads is that the attorney-client privilege is sacrosanct. We should think seriously about these changes to the Federal Rules and about seeking court orders stating that we are protected if we inadvertently disclose

76. FED. R. EVID. 502(b).
77. 254 F.R.D. 216 (E.D. Pa. 2008).
78. *Id.* at 233.
79. *Id.*
80. *Id.* at 227.
81. FED. R. EVID. 502(d).
82. *Id.*
83. Chris Dale, *Final Round-up of the Carmel Valley E-Discovery Retreat*, THE E-DISCLOSURE INFORMATION PROJECT (Aug. 8, 2011), http://chrisdale.wordpress.com/2011/08/08/final-round-up-of-the-carmel-valley-ediscovery-retreat/ (commenting that one of the judges on the panel, including U.S. Magistrate Judge Andrew Peck, noted, "[I]t is malpractice not to ask for an order under Federal Rule of Evidence 502(d) and fail to turn a clawback agreement into a court order.").

privileged material. I often wonder how clients would feel if they knew that their attorneys were requesting court orders stating that the lawyers are protected from liability if they inadvertently waive the privilege. This looser standard for protecting attorney-client privilege in e-discovery generally is a matter of concern.

On one occasion back in the "paper days," I actually did obtain privileged material that arrived in the proverbial brown paper envelope. Someone who worked with one of my clients had decided to be helpful, copied some company information and dropped it off at my office through the mail slot. Once you see something of that nature, at least from my perspective, it is difficult to get it out of your head. If a lawyer sees a privileged document, it is difficult to understand how—even if the court finds that the privilege has not been waived—an attorney is not going to consciously or unconsciously use that information, no matter how ethical or professional he or she is trying to be. As a result, at least from my perspective, the changes in the Federal Rules of Evidence that have altered the effectiveness of the attorney-client privilege are very important.

The second issue I want to discuss is cost. Cost issues usually arise when a party seeks production of inaccessible electronic information—that is, backup tapes or fragmented or damaged tapes. The cost of retrieving such information is not insignificant, because it requires the services of electronic specialists and their services are often costly. For example, in a single employment case in New York, the cost of retrieving inaccessible email imposed on one plaintiff was over $180,000.[84] One way for litigants to keep expenses under control is to make sure that what they request in discovery is not located on servers or backup tapes, or will not in the routine course of computer operations go into such storage. Despite the inclination of litigators to try to surprise their adversaries, in today's electronic age, I suggest that the sooner you put all of your information out there and shift the burden to the other side to preserve all of their emails and electronic information, the better it will be for you. If you put the other side on notice that you have reason to believe that there may be communications among certain people during a particular time period about an issue, and the other side allows those communications to disappear altogether or be moved to a place where it is difficult to retrieve them, in my opinion it is highly unlikely a court is going to order you to pay the cost of retrieving that material. That is one way to manage costs, even if it does not necessarily line up with one's litigation strategy.

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84. Quinby v. WestLB AG, 245 F.R.D. 94, 101 (S.D.N.Y. 2006).

If you find yourself in a situation where the electronic information that's sought has gone onto backup tapes, there are ways of approaching the problem. Southern District of New York Judge Shira Scheindlin, one of the primary judges writing on the topic of electronic discovery, has established a seven factor test, in descending order of importance, for deciding whether costs should be allocated to the party that's requesting electronic information, the party who's producing it, or a combination of the two.[85] These are the factors that Judge Scheindlin and many other courts use in deciding cost allocation questions: whether the discovery request is specifically tailored to obtain relevant information; the availability of the information from other sources; the total cost of production; the resources of each party; the ability and incentive of each party to control costs; the importance of the discovery issues in the case; and the relevant benefits to the parties of obtaining the information.[86]

Other courts have different standards. One judge in the Northern District of Illinois has proposed a marginal utility standard that attempts to gauge how likely it is that a search will discover critical information and how fair cost-shifting is to the respective parties.[87] Judge Lawson in the Eastern District of Michigan has advanced an alternative approach to the cost issue. When confronted with the question of who should bear the cost of expensive discovery, he observed that "the most practical way to curb the bilateral tendency towards excess is to require the party seeking discovery to pay for the cost of finding and producing it."[88] Due to its volume and the cost, I have heard electronic discovery described as "weapons of mass destruction of discovery." That may be an apt description.

The final topic I will cover is sanctions. Electronic discovery is often called "discovery about discovery."[89] The high volume and dynamic nature of this new form of discovery has confounded many practitioners since the early days of the computer era. Even the most professionally responsible and technologically competent lawyers have difficulty with it. It has become a "gotcha" in litigation because, if there is an error, parties are going to try to exploit it. An article in Duke Law School's Law Review recently analyzed sanction motions and sanction orders in

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85. *Zubulake I*, 217 F.R.D. at 322.

86. *Id.*

87. Byers v. Ill. State Police, No. 99 C 8105, 2002 WL 1264004, at *11 (N.D. Ill. June 3, 2002).

88. Laethem Equip. Co. v. Deere & Co., 261 F.R.D. 127, 146 (E.D. Mich. 2009).

89. *See generally* Paul W. Grimm et al., *Discovery About Discovery: Does the Attorney-Client Privilege Protect all Attorney-Client Communications Relating to the Preservation of Potentially Relevant Information?*, 37 U. BALT. L. REV. 413 (2008).

discovery cases prior to 2010.[90] In 1999, there were five sanctions issued in federal district courts relating to electronic discovery.[91] By 2009, the number of e-discovery sanctions had grown to one hundred—a significant and exponential increase.[92] Interestingly, e-discovery sanctions are most prevalent in employee contract and intellectual property cases, and defendants are sanctioned three times as often as plaintiffs.[93] That is not necessarily because better lawyers represent plaintiffs but, rather, because defendants usually have more information and they are probably less likely to want to produce it since they are defendants.[94] Why are sanctions imposed? Primarily, the reasons are failure to preserve information, failure to issue litigation holds and failure to supervise discovery.[95] The courts are imposing very high obligations on attorneys not only to initiate a litigation hold at the beginning of discovery, but also to insure that it continues.

With respect to the forms of sanctions imposed, these range from the extreme of dismissal of claims or defenses to the adverse jury instructions in *Zubulake*, to awards of attorney's fees and costs for all or part of a litigation.[96] At times, if a court finds that a party has not produced evidence, it will award the cost of the deposition needed to identify what was lost and the cost of retrieving the material in question, or order other supplemental discovery.[97]

There is no question that sanctions are sometimes appropriate. One extreme case involving e-discovery sanctions is *Qualcomm Inc. v. Broadcom Corporation*,[98] a patent infringement case from the Southern District of California in 2008. After Qualcomm brought an action against Broadcom, Broadcom counterclaimed.[99] The court learned that there were 46,000 emails that should have been produced by Qualcomm but were not, and that the lawyers in Qualcomm either knew or should have known that they existed.[100] Qualcomm's counsel also erroneously represented to the court that certain events had not happened, when all they had to do to verify this representation was either sufficiently

90. Willoughby, Jr., *supra* note 3.
91. *Id.* at 795.
92. *Id.*
93. *Id.* at 798-803.
94. *Id.*
95. *Id.* at 804.
96. Willoughby, Jr., *supra* note 3, at 804-05.
97. *Id.*
98. No. 05CV1958-B, 2008 WL 66932 (S.D. Cal. Jan. 7, 2008), *vacated in part* No. 05CV1958-RMB, 2008 WL 638108 (S.D. Cal. Mar. 5, 2008).
99. *Id.* at *1.
100. *Id.* at *12-13.

interview their witnesses or review discovery materials.[101] There were so many instances of misconduct that the court awarded $8.5 million in attorneys' fees and costs to Broadcom.[102] The court further ordered the Qualcomm lawyers to meet with a magistrate judge, review every aspect of that litigation that had gone awry, and report back to the court.[103] Finally, the court made referrals to the state bar involving some of the Qualcomm lawyers whom it thought had engaged in questionable conduct.[104]

The courts have many different approaches to discovery and sanction issues. In the Southern District of New York, where I practice, the courts have not hesitated to issue sanctions and adverse inferences.[105] In the Southern District, when there is negligence by a lawyer discharging discovery obligations, the courts frequently have instructed juries that they are to presume that any lost evidence is relevant to the case and prejudicial to the party who has not received it.[106] As pointed out above, a federal court also may instruct juries to make adverse inferences as a sanction.[107]

Other courts, of course, have a more flexible view of what measures are appropriate when there is a showing that an attorney or party has not sufficiently managed or provided electronic discovery that entails reviewing the totality of the circumstances. For example, many courts consider whether failure to produce electronic information really was prejudicial,[108] whether the information could be obtained from other sources,[109] and whether or not the non-production had a major impact.[110] In addition, instead of giving a directive to the jury in the charge, some

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101. *Id.*

102. *Id.* at *17.

103. *Id.* at *18-19.

104. *Qualcomm, Inc.*, 2008 WL 66932, at *18.

105. *See Zubulake V*, 229 F.R.D. at 437-40.

106. *Id.*

107. *Id.*

108. *Rimkus Consulting Group, Inc.*, 688 F. Supp. 2d. at 618 (quoting Sampson v. City of Cambridge, Md., 251 F.R.D. 172, 180 (D. Md. 2001) ("Extreme sanctions—dismissal or default—have been upheld when 'the spoliator's conduct was so egregious as to amount to a forfeiture of his claim' and 'the effect of the spoliator's conduct was so prejudicial that it substantially denied the defendant the ability to defend the claim.'").

109. *Id.*

110. Leon v. IDX Sys. Corp., 464 F.3d 951, 959 (9th Cir. 2006) (alteration in original) (quoting United States *ex rel.* Wiltec Guam, Inc. v. Kahaluu Constr. Co., 857 F.2d 600, 604 (9th Cir. 1988) ("The prejudice inquiry 'looks to whether the [spoiling party's] actions impaired [the non-spoiling party's] ability to go to trial or threatened to interfere with the rightful decision of the case.'").

courts have concluded that it is a jury question to determine whether a failure to produce was inadvertent, prejudicial or harmful.[111]

I hope I have left you with something of a useful guidebook with which to think about electronic discovery. This is clearly an evolving field; there are certainly a lot of issues that have not remotely been addressed. However, it is something that we all need to stay on top of whether or not we feel that technology is our area, or e-discovery our preferred tool for conducting discovery. In sum, we must accommodate ourselves to the electronic world or hire someone to do it for us because if you do not, the courts are not tolerating e-discovery lapses any longer and the potential cost to you and your client—both in terms of economic cost and prejudice in litigation—is very significant. Electronic discovery gives us much authentic, comprehensive and interesting information, but it also has the potential for being exceedingly harmful.

111. *Rimkus Consulting Group, Inc.*, 688 F. Supp. 2d. at 620.