Electronic Discovery Best Practices

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I. INTRODUCTION

[1] The concept of electronic discovery is still somewhat intimidating to many attorneys, but those who have learned to implement electronic discovery best practices are enjoying the advantages it offers, which include greater control over document review and production processes as well as significant cost reductions. Whether you come to the discovery process as in-house or outside counsel, you can anticipate some of the issues involved in responding to electronic data requests. Pre-review cooperation among in-house counsel, their litigators, and Information Technology (IT) personnel is ideal for planning a successful electronic discovery response.

[2] The abundance of electronic information makes pre-litigation planning more important than ever before. Finding and producing information in response to electronic document requests can initially appear to be an enormous undertaking, and a disorganized or untimely response can have disastrous consequences. With preparation and the proper technology, however, the document review and production process

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can be easier and more efficient than procedures used in the "paper world." Counsel can streamline discovery response, minimize its impact upon ongoing business operations, reduce costs of review and production, and gain a strategic advantage in the process. Proper planning among corporate counsel, IT departments, and outside counsel integrates preparation for discovery with daily operations. Rather than experience a crisis when litigation arises, corporate management and its counsel are instead ready to respond, leveraging the advantages of electronic discovery.

II. DISCOVERABILITY OF ELECTRONIC DOCUMENTS

[3] The basic legal framework for electronic discovery is the same as for paper documents. Federal Rule of Civil Procedure 34 authorizes requests for production of documents, including "electronic data compilations."[1] Courts now routinely require litigants to demonstrate good faith efforts to identify discoverable electronic data, and to inform opposing counsel when data is available for production in electronic form.[2]

[4] The Federal Rules of Civil Procedure have not been changed to account for electronic data, but the Discovery Subcommittee of the Advisory Committee on the Rules of Civil Procedure undertook substantial work in 2003 to evaluate the need for such changes.[3] Regardless of official rule changes, application of discovery rules to electronic documents raises issues unforeseen in the days of paper storage. Companies that can expect to receive electronic discovery requests must anticipate the need for ready access to responsive information, while

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[1] FED. R. CIV. P. 34(a); Simon Prop. Group L.P. v. mySimon, Inc., 194 F.R.D. 639, 640 (S.D. Ind. 2000) (holding that computer records, including those that have been "deleted," are discoverable documents under Rule 34); Bills v. Kennecott Corp., 108 F.R.D. 459, 461 (D. Utah 1985) (holding that it is "axiomatic" that electronic data is discoverable).

[2] *See, e.g.*, *In re* Livent, Inc. Noteholders Sec. Litig., No. 98 Civ. 7161, 2002 U.S. Dist. LEXIS 26446 (S.D.N.Y. Jan. 2, 2003); *In re* Bristol-Myers Squibb Sec. Litig., 205 F.R.D. 437 (D.N.J. 2002) (declining to enforce requesting party's agreement to pay per-page copy costs where producing party failed to disclose that documents were available in electronic form).

[3] As of December, 2003, federal courts in New Jersey, Arkansas, Florida and Wyoming had implemented local rules specific to electronic discovery practice. Ken Withers, *Electronic Discovery Rules, Proposed Rules, Commentary, and Debate* (Dec. 31, 2003), *at* http://www.kenwithers.com/rulemaking/toc.html.

guarding against creating an overwhelming volume of material to be searched.

III. DUTY TO INVESTIGATE AND DISCLOSE

[5] At the commencement of litigation, and before receiving any formal discovery request, a party must disclose to opposing parties certain information, including a description by category and location of documents and data compilations.[4] This requirement means that a party must search available electronic systems for relevant information.[5] Multiple copies of responsive electronic information may be stored in hard drives, networks, backup tapes, laptops, floppy disks, employees' home computers, and PDAs. How far does the duty to unearth information extend?

[6] *GTFM, Inc. v. Wal-Mart Stores, Inc.* examined the duty to investigate the existence of electronic information.[6] The plaintiffs requested information about Wal-Mart's local sales.[7] In responding, Wal-Mart's attorney relied on a senior executive, who indicated that local sales data was maintained for five weeks only and was no longer available.[8] Wal-Mart claimed that providing the information would be unduly burdensome because it did not have the centralized computer capacity to track the information segregated as requested.[9] One year later, the plaintiffs deposed a Wal-Mart MIS vice president, who testified that Wal-Mart's computers could in fact track the requested information for up to one year.[10] At the time of plaintiffs' request, the local sales information was segregated and available, but because of the delay caused by counsel's misrepresentation, it was no longer available.[11] The court chastised counsel for failing to consult MIS personnel:

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[4] FED. R. CIV. P. 26(a)(1)(B).

[5] McPeek v. Ashcroft, 202 F.R.D. 31, 32 (D.D.C. 2001).

[6] GTFM, Inc. v. Wal-Mart Stores, Inc., No. 98 Civ. 7724, 2000 U.S. Dist. LEXIS 3804, at *3 (S.D.N.Y. Mar. 30, 2000).

[7] *Id*.

[8] *Id*. at *4.

[9] *Id*.

[10] *Id*. at *5.

[11] *Id*.

> Whether or not defendant's counsel intentionally misled plaintiffs, counsel's inquiries about defendant's computer capacity were certainly deficient . . . . As a vice president in Wal-Mart's MIS department, she was an obvious person with whom defendant's counsel should have reviewed the computer capabilities.[12]

An on-site inspection of defendant's computer facilities at Wal-Mart's expense was ordered.[13] The court further imposed upon Wal-Mart all the plaintiff's expenses and legal fees caused by the inaccurate disclosure, including the cost of the cumbersome process plaintiffs had to use to extract the information sought.[14] This misstep ultimately cost Wal-Mart nearly $110,000.[15]

[7] Client information systems yielded another unpleasant surprise in *Linnen v. A.H. Robins Co*.[16] Plaintiff's document request for certain emails specifically called for deleted emails available on backup tapes.[17] Defendant Wyeth initially responded, and later confirmed, that it had no backup tapes for a particular time frame.[18] Months later, Wyeth learned that its IT department had in fact preserved over one thousand backup tapes holding potentially responsive information, and that the estimated cost to restore the tapes would exceed $1 million.[19] Though Wyeth's policy was to recycle backup tapes after three months, these tapes had been set aside during unrelated litigation.[20] As a sanction for its failure to disclose the existence of the tapes, "whether unintended or willful," the court imposed upon Wyeth all costs and fees associated with email discovery.[21]

[8] In addition to mandatory disclosures and responses to specific discovery requests, Rule 30(b)(6) provides for deposing a designated IT

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[12] *Id*. at *6.
[13] *Id*.
[14] *Id*.
[15] *Id*.
[16] Linnen v. A.H. Robins Co., 10 Mass. L. Rep. 189, 1999 Mass. Super. LEXIS 240 (Mass. Super. Ct. June 15, 1999).
[17] *Linnen*, 1999 Mass. Super. LEXIS 240, at *7.
[18] *Id*.
[19] *Id*. at *12.
[20] *Id*. at *27.
[21] *Id*. at *22.

person in order to obtain discovery of an opponent's computer systems.[22] Deposing a designated IT person may provide substantive information about systems and document management protocols that could shape further discovery.[23]

IV. SCOPE OF DISCOVERY

[9] Rule 26(b)(2) provides protection from unduly burdensome or expensive discovery requests.[24] A court may deny a discovery request or require a requesting party to pay expenses if the burden or expense of the proposed discovery outweighs any likely benefits.[25] As courts become more experienced with electronic discovery, they will expect litigants to demonstrate a reasoned approach to electronic document requests. Electronic discovery requests that are not sufficiently tailored to identify potentially relevant information will be denied.[26]

[10] When a requesting party demonstrates a good faith effort to furnish reasonably tailored electronic discovery requests, courts will hold the responding party to a higher standard in providing a full response.[27] A party unable to readily produce responsive data may open itself to intrusive measures; for example, the court may order that an opponent's expert be given direct access to its computers.[28] However, at least one

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[22] FED. R. CIV. P. 30(b)(6).

[23] *See, e.g.*, Alexander v. FBI, 188 F.R.D. 111, 119 (D.D.C. 1998) (permitting a deposition to learn about email systems and systems for acquisition, location, and disposition of computers to guide substantive discovery); *In re* Carbon Dioxide Indus. Antitrust Litig., 155 F.R.D. 209, 214 (M.D. Fla. 1993) (explaining that in order to access the information necessary to proceed with substantive discovery, information about data maintained on defendants' computers, including hardware and software, should be acquired through depositions).

[24] FED R. CIV. P. 26(b)(2).

[25] Simon Prop. Group L.P. v. mySimon, Inc., 194 F.R.D. 639, 640 (S.D. Ind. 2000) (citing FED. R. CIV. P. 26(c); Bills v. Kennecott Corp., 108 F.R.D. 459, 462 (D. Utah 1985)).

[26] *See, e.g.*, Wright v. AmSouth Bancorporation, 320 F.3d 1198, 1205 (11th Cir. 2003) (finding that plaintiff's request was broad and unduly burdensome).

[27] Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 108 (2d Cir. 2002) (stating that sanctions, including an adverse inference jury instruction, may be given when ordinary negligence leads to a failure to produce electronic information).

[28] Playboy Entm't, Inc, v. Welles, 60 F. Supp. 2d 1050, 1052-53 (S.D. Cal. 1999) (ordering such an inspection after the defendant testified that she routinely deleted emails and could not retrieve them); *see also* Procter & Gamble v. Haugen, 179 F.R.D. 622, 632

court has interpreted Rule 34 to require some showing of non-compliance with discovery obligations before an opponent will be allowed direct access to a company's computer databases.[29]

[11] If a corporation's own actions contribute to its discovery difficulties, it is especially unlikely that a court will be sympathetic to pleas for relief.[30] In *In re Brand Name Prescription Drugs Antitrust Litigation*, the defendant acknowledged that part of its problem retrieving stored information was the limitations of the software it was using.[31] The court reasoned that it would be unfair to impose upon plaintiffs the cost of defendant's choice of an inferior electronic storage media.[32] As in matters involving paper discovery, courts are unimpressed with vague claims that a particular request is unduly burdensome.[33]

V. COST-SHIFTING

[12] In the context of electronic discovery, questions of undue burden and expense typically arise when a request calls for data that is not readily retrievable. For example, data that has been "deleted" is not readily retrievable because it is stored only on backup tapes, on outdated systems, or is no longer available in electronic form. Production might require, for

(D. Utah 1998) (allowing a keyword search of opposing party's database to extract relevant information).

[29] *In re* Ford Motor Co., 345 F.3d 1315, 1317 (11th Cir. 2003).

[30] *See, e.g.*, Itzenson v. Hartford Life & Accident Ins. Co., No. 99-4475, 2000 U.S. Dist. LEXIS 14680, at *3 (E.D. Pa. Oct. 6, 2000) (stating that defendant's assertion that it could not retrieve certain statistics was "difficult to believe … in the computer era"); Toledo Fair Hous. Ctr. v. Nationwide Mut. Ins. Co., 703 N.E.2d 340, 354 (Ohio Ct. Com. Pl. Lucas County 1996) (preventing defendant from "frustrat[ing] discovery of relevant material because the method it has chosen to store documents makes it burdensome to retrieve them"); *In re* Brand Name Prescription Drugs Antitrust Litig., No. 94 C 897, 1995 U.S. Dist. LEXIS 8281, at *6 (E.D. Ill. June 13, 1995) (suggesting defendant should pay to devise email-retrieval program because this expense was "a product of the defendant's record-keeping scheme").

[31] *In re Brand Name Prescription Drugs*, 1995 U.S. Dist. LEXIS 8281, at *6.

[32] *Id.*

[33] Simon Prop. Group L.P. v. mySimon, Inc., 194 F.R.D. 639, 640 (S.D. Ind. 2000) (providing for plaintiff's expert's access to defendant's hard drive when defendant provided "extremely sparse" information about computers and networks involved in the dispute, resulting in potential costs or business disruptions for the procedure); Zonaras v. Gen. Motors Corp., No. C-3-94-161, 1996 U.S. Dist. LEXIS 22535, at *11-*12 (S.D. Ohio 1996) (compelling production of electronic crash test results over "unspecified burden" claimed by defendant).

example, restoration of backup tapes or creation of programs to search for and retrieve responsive data. In such circumstances, producing parties frequently argue that costs of production should be shifted to requesting parties.

[13] Such efforts to shift costs have traditionally yielded mixed results. Some courts have ordered the requesting party to pay extraordinary costs of production.[34] Others have required parties to restore responsive information at their own expense, denying claims that substantial costs involved were "undue."[35] In *Linnen*, defendant Wyeth estimated that restoring backup tapes containing potentially relevant information could cost over $1 million.[36] The court deferred ruling on restoration of all the tapes, awaiting results of a sampling, but indicated that Wyeth would be required to bear the cost.[37] The court reasoned that it would be unfair for a corporation to enjoy the benefits of technology and also to use it as a shield in litigation.[38]

[14] More recently, case law on the subject of cost allocation demonstrates courts' efforts to develop a methodical approach to electronic discovery disputes.[39] The *Zubulake* decision instructs that the following three-step analysis is required in disputes involving the scope and cost of discovery of electronic data:

> (1) The court must thoroughly understand the responding party's computer system, both with respect to active and stored data. For data kept in an accessible format, the usual

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[34] *See, e.g.*, Anti-Monopoly, Inc. v. Hasbro, Inc., No. 94-Civ. 2120, 1995 U.S. Dist. LEXIS 16355, at *8 (S.D.N.Y. Nov. 3, 1995) (noting that further rulings will require plaintiff's willingness to pay defendant's costs in creating computer programs to extract requested data); *In re* Air Crash Disaster at Detroit Metro. Airport, 130 F.R.D. 634, 639 (E.D. Mich. 1989) (ordering requesting party to pay for creation of computer tape).

[35] *See, e.g.*, *In re Brand Name Prescription Drugs*, 1995 U.S. Dist. LEXIS 8281, at *5 (requiring producing party to develop, at own expense, a retrieval program to access emails from backup tapes, though estimated cost was $50,000 to $70,000).

[36] Linnen v. A.H. Robins Co., 10 Mass. L. Rep. 189, 1999 Mass. Super. LEXIS 240, at *11 (Mass. Super. Ct. June 15, 1999).

[37] *Linnen*, 1999 Mass. Super. LEXIS 240, at *11.

[38] *Id.* at *7.

[39] The *Zubulake* decision signaled a fundamental shift in how attorneys, litigants, and the courts must approach electronic discovery. Zubulake v. UBS Warburg LLC, 217 F.R.D. 309 (S.D.N.Y. 2003).

> rules of discovery apply and the responding party will be required to pay for production. The court should consider shifting costs only when inaccessible data is at issue.
> (2) Because the cost-shifting analysis is so fact-intensive, the court must determine what data may be found on the inaccessible media. A "sampling" approach is sensible in most cases.
> (3) In conducting the cost-shifting analysis, a seven-factor test should be applied.[40]

[15] The new seven-factor test represents a modification of the widely followed cost-shifting analysis set forth in *Rowe Entertainment, Inc. v. William Morris Agency, Inc*.[41] The seven-factor cost-shifting test follows the initial three-step analysis:

> (1) The extent to which the request is specifically tailored to discover relevant information,
>
> (2) The availability of such information from other sources,
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> (3) The total cost of production, compared to the amount in controversy,
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> (4) The total cost of production, compared to the resources available to each party,
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> (5) The relative ability of each party to control costs and its incentive to do so,
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> (6) The importance of the issues at stake in the litigation, and
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> (7) The relative benefits to the parties of obtaining the information.[42]

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[40] *Id.* at 352.

[41] Rowe Entm't, Inc. v. William Morris Agency, Inc., No. 98 Civ. 8272, 2002 U.S. Dist. LEXIS 8308, at *3-4 (S.D.N.Y. May 9, 2002).

[42] *Zubulake*, 217 F.R.D. at 322.

The *Zubulake* court instructed that the seven factors should not be weighted equally.[43] Instead, the central question must be whether the request imposes an undue burden or expense on the requesting party - or, stated differently, "[H]ow important is the sought-after evidence in comparison to the cost of production?"[44]

[16] The court stated that the first two factors - comprising a "marginal utility" test - are the most important.[45] The second part of the analysis should consider factors three, four, and five in making a determination of expense and relative ability to bear the burden of the expense.[46] The court further stated that factor six, which considers the importance of the litigation itself, must stand on its own and has the potential to predominate over the other factors when it comes into play.[47] Finally, factor seven was listed as the least important because of the general presumption that the response to a discovery request will generally [this is an important distinction] benefit the requesting party.[48]

VI. FORM OF PRODUCTION

[17] A producing party should not expect to meet discovery obligations by providing hard copies of electronic data. Data is discoverable in computerized form even if the same information has already been produced on paper.[49] While computer-based documents may be technically usable in printed form, they are unnecessarily cumbersome for a requesting party to review. When further analysis would entail substantial costs in re-inputting data, courts have ordered producing parties to provide materials in computer-readable form.[50] Production in a

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[43] *Id*.
[44] *Id*. at 323.
[45] *Id*.
[46] *Id*.
[47] *Id*.
[48] *Id*.
[49] *In re* Bristol-Myers Squibb Sec. Litig., 205 F.R.D. 437, 441 (D.N.J. 2002); *see also, e.g.*, Anti-Monopoly, Inc. v. Hasbro, Inc., No. 94 Civ. 2120, 1995 U.S. Dist. LEXIS 16355 (S.D.N.Y. Nov. 3, 1995) (holding that the production of information in hard copy documentary form did not preclude a party from receiving that same information in computerized or electronic form).
[50] Nat'l Union Elec. Corp. v. Matsushita Elec. Indus. Co., 494 F. Supp. 1257, 1262 (E.D. Pa. 1980); *In re* Air Crash Disaster at Detroit Metro. Airport, 130 F.R.D. 634, 636 (E.D. Mich. 1989) (ordering defendant to provide on computer tape material already produced in printed form).

form directly readable by the adverse party's computers is decidedly the "preferred alternative."[51]

[18] In *Bristol-Myers Squibb*, plaintiffs and defendants initially entered an agreement regarding copying costs.[52] The plaintiffs were to pay ten cents per page for documents defendants copied for production.[53] After the defendants produced a significant quantity of paper and delivered the bill, plaintiffs disputed how much they actually owed.[54] Defendants moved for an order seeking reimbursement in the amount of ten cents per page produced, as originally agreed upon by plaintiffs.[55] The plaintiffs had some objections.[56] Though Bristol-Myers Squibb was producing documents it had stored in both paper and electronic form, it produced all documents to the plaintiffs in paper form.[57] Defendants scanned documents stored in paper form to create electronic images for its own review, while "blowing back" paper copies for production to the plaintiffs.[58]

[19] With respect to the documents that were stored electronically, the plaintiffs argued that those documents stored in electronic form should have been produced in electronic form.[59] The court noted that the plaintiffs specifically asked for paper, even after the court raised the issue of electronic information at a case management conference.[60] The plaintiffs "had every opportunity" to request electronic information, but they did so only after receiving the bill for paper production.[61] Nevertheless, the court sided with the plaintiffs on this issue. The court found it "somewhat troublesome" that the defendants had responsive information in electronic form but produced it on paper.[62] The court held that the defendants fell short of their Rule 26 disclosure obligations by not telling the plaintiffs

[51] *Nat'l Union Elec. Corp*., 494 F. Supp. at 1262.
[52] *In re Bristol-Myers Squib*, 205 F.R.D. at 439.
[53] *Id*.
[54] *Id*.
[55] *Id*. at 438-39.
[56] *Id*. at 439.
[57] *Id.*
[58] *Id.*
[59] *Id*. at 440.
[60] *Id.*
[61] *Id*.
[62] *Id.*

that the information was available in electronic form.[63] The plaintiffs were not required to pay the costs of copying paper because the defendants did not tell the plaintiffs that requested documents were available in electronic form.[64]

VII. DOCUMENT RETENTION AND SPOLIATION

[20] Besides anticipating the logistics of discovery response, a corporation must consider its legal duty to preserve evidence.[65] The duty to preserve evidence applies to electronic evidence as well as to paper.[66]

[21] Once litigation is pending or imminent, a party must take affirmative measures to preserve potential evidence that might otherwise be destroyed in the course of business.[67] Usual procedures for data destruction or recycling may have to be suspended. In *Procter & Gamble*, for example, the company initially disclosed that emails of five key employees might be relevant.[68] Then, however, it failed to preserve the emails.[69] Though the court had not issued a specific preservation order, it imposed a $10,000 fine for this "sanctionable breach of P&G's discovery duties."[70]

[22] *In re Prudential Insurance Co. of America Sales Practice Litigation*[71] illustrates the duty to preserve electronic evidence.

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[63] *Id.*

[64] *Id.* at 440-41.

[65] Lewy v. Remington Arms Co., 836 F.2d 1104, 1113 (8th Cir. 1987) (holding that if a corporation knows or should know that particular documents may eventually become material, it must preserve them).

[66] Danis v. USN Communications, Inc., No. 98 C 7482, 2000 U.S. Dist. LEXIS 16900, at *4 (N.D. Ill. Oct. 20, 2000); *see* Procter & Gamble v. Haugen, 179 F.R.D. 622, 632 (D. Utah 1998); William T. Thompson Co. v. Gen. Nutrition Corp., 593 F. Supp. 1443, 1455 (C.D. Cal. 1984).

[67] *See Danis*, 2000 U.S. Dist. LEXIS 16900, at *96-100. "[T]he duty to preserve documents in the face of pending litigation is not a passive obligation. Rather it must be discharged actively." *Id.*

[68] *Procter & Gamble*, 179 F.R.D. at 631.

[69] *Id.*

[70] *Id.* at 632; *see also* Applied Telematics, Inc., v. Sprint Communications Co., No. 94-4603, 1996 U.S. Dist. LEXIS 14053, at *11 (E.D. Pa. Sept. 18, 1996) (finding Sprint's normal procedure of recycling backup tapes should have been suspended during litigation); Linnen v. A.H. Robins Co., 10 Mass. L. Rep. 189, 1999 Mass. Super. LEXIS 240 (Mass. Super. Ct. June 15, 1999) (finding defendant's customary recycling of backup tapes to be "inexcusable conduct" when it continued after plaintiffs' discovery request).

[71] 169 F.R.D. 598 (D.N.J. 1997).

Prudential, alleged to have engaged in deceptive sales practices, was ordered to preserve all potentially relevant records. In spite of the order, its employees in at least four locations destroyed outdated sales materials.[72] Further discovery revealed that Prudential had distributed document retention instructions to agents and employees via email; however, some employees lacked access to email and others routinely ignored it.[73] Prudential also distributed a hard copy memorandum, but did not distribute it universally.[74] Furthermore, senior executives never directed distribution of the court's order to all employees.[75]

[23] The court found Prudential's efforts were inadequate, noting the lack of a "clear and unequivocal document preservation policy."[76] Though the court found no willful misconduct, it nevertheless inferred that the lost materials were relevant and would have reflected negatively on Prudential.[77] Citing Prudential's "gross negligence" and "haphazard and uncoordinated approach," the court imposed a sanction of $1 million.[78]

[24] More recently, the *Zubulake* court examined the standards for spoliation of information stored on backup tapes:

> Must a corporation, upon recognizing the threat of litigation, preserve every shred of paper, every email or electronic document, and every backup tape? The answer is clearly, 'no'. Such a rule would cripple large corporations, like UBS, that are almost always involved in litigation. As a general rule, then, a party need not preserve all backup tapes even when it reasonably anticipates litigation.[79]

However, the court noted that anyone who is a party or anticipates being a party to a lawsuit "must not destroy unique, relevant evidence that might

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[72] *Id.* at 613.
[73] *Id.* at 612.
[74] *Id.*
[75] *Id.*
[76] *Id.* at 615.
[77] *Id.* at 615-16.
[78] *Id.* at 615-17.
[79] Zubulake v. UBS Warburg LLC, No. 02 Civ. 1243, 2003 U.S. Dist. LEXIS 18771, at *12 (S.D.N.Y. Oct. 22, 2003).

be useful to an adversary."[80] Noting that the duty to preserve extends to all employees likely to have relevant information, or the "key players" in the case, the court determined that all the individuals whose backup tapes were lost fell into this category in this case.[81]

[25] In assessing the duty of a litigant to preserve evidence, the court noted that electronic data presents some unique issues:

> A party or anticipated party must retain all relevant documents (but not multiple identical copies) in existence at the time the duty to preserve attaches, and any relevant documents created thereafter. In recognition of the fact that there are many ways to manage electronic data, litigants are free to choose how this task is accomplished.[82]

[26] The court went on to summarize a party's preservation obligations with regard to electronic data in general, and backup tapes in particular:

> The scope of a party's preservation obligation can be described as follows: 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. As a general rule, that litigation hold does not apply to inaccessible backup tapes (e.g. those typically maintained solely for the purpose of disaster recovery), which may continue to be recycled on the schedule set forth in the company's policy. On the other hand, if backup tapes are accessible (i.e. actively used for information retrieval), then such tapes *would* likely be subject to the litigation hold. However, it does make sense to create one exception to this general rule. If a company can identify where particular employee documents are stored on backup tapes, then the tapes storing the documents of 'key players' to the existing or threatened litigation should be preserved if the

[80] *Id.* at *13.
[81] *Id.* at *14.
[82] *Id.* at *15.

> information contained on those tapes is not otherwise available. This exception applies to *all* backup tapes.[83]

Though they may harshly punish litigants for failure to preserve evidence, courts also recognize that certain documents are destroyed in the ordinary course of business.[84] Not every missing document supports a finding of spoliation. No unfavorable inference can be drawn from destruction of documents when the circumstances properly account for it.[85] A party may defeat a claim of spoliation by showing that evidence was destroyed pursuant to a valid and consistently enforced document management policy.[86] The basic standard, set forth in *Lewy v. Remington Arms Co.*, is whether a document retention policy is reasonable.[87]

[27] In *Lewy*, the defendant firearms manufacturer had destroyed customer complaints and gun examination reports pursuant to its records retention policy.[88] The court delineated factors that help determine whether destruction pursuant to such a policy justified a "negative inference instruction."[89] Specifically, the court remanded the case with instructions to consider: (1) whether the policy was reasonable given the facts and circumstances of the relevant documents; (2) whether lawsuits or complaints had been filed, and the frequency and magnitude of any such complaints; and (3) whether the policy was instituted in bad faith, to limit evidence available to potential plaintiffs.[90] The court emphasized that whatever the dictates of a corporate policy, a corporation must preserve those documents that it knows or should know may become material in

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[83] *Id*. at *16-*17.

[84] *See, e.g.*, Linnen v. A.H. Robins Co., 10 Mass. L. Rep. 189, 1999 Mass. Super. LEXIS 240 (Mass. Super. Ct. June 15, 1999) (noting that recycling of backup tapes is, under normal circumstances, a "widely accepted business practice").

[85] Lewy v. Remington Arms Co., 836 F.2d 1104, 1112 (8th Cir. 1987) (citing Gumbs v. International Harvester Inc., 718 F.2d 88, 96 (3d Cir. 1983)); Crescendo Invs., Inc. v. Brice, 61 S.W.3d 465, 479 (Tex. Ct. App. 2001) (noting party's testimony that he routinely deleted emails after reading them supported finding he had no fraudulent intent).

[86] *See* Carlucci v. Piper Aircraft Corp., 102 F.R.D. 472, 486 (S.D. Fla. 1984) (explaining court is not holding that the good faith disposal of documents pursuant to a *bona fide*, consistent and reasonable document retention policy can not be a valid justification for a failure to produce documents in discovery).

[87] *Lewy*, 836 F.2d at 1112.

[88] *Id*. at 1111.

[89] *Id*. at 1112.

[90] *Id*.

litigation.[91] A company cannot shield itself with a policy of wholesale document destruction.[92]

VIII. TEN TIPS FOR IMPLEMENTING ELECTRONIC DISCOVERY BEST PRACTICES

[28] Keeping up with the quickly changing law of electronic discovery is a good start, but knowing how to put these lessons to work in practice is the key to conducting electronic discovery successfully. Effective planning requires a new working relationship among internal and external legal and technical resources.

[29] *A. Inside Counsel*

1. Consider implementing a formal document retention policy to formalize rules for saving and destroying electronic documents. Be sure that the policy includes electronic information, and that employees understand the purpose of the policy and the importance of compliance. If your company opts not to formalize such a protocol, be sure you have outlined the pros and cons of this decision for the management team.

2. Focus on making litigation preparedness a part of employees' daily work. Increase company-wide awareness of the types of information that must be disclosed in litigation. Educate all employees about the pitfalls of carelessly destroying or retaining information. Train employees to document and store their work in an organized (and ultimately defensible) fashion.

3. Establish an ongoing working relationship between in-house legal and IT personnel. Provide guidance to IT personnel about document retention and destruction and enforcement of a formal document retention policy if one is in place. Make IT employees aware of the most common electronic data problems: retaining unnecessary information for too long, or failing to retain

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[91] *Id.*

[92] *Id.*; *see also Carlucci*, 102 F.R.D. at 486 (entering default judgment where stated purpose of document policy was to destroy documents that might prove detrimental in litigation).

information that the company has an obligation to keep. Striking the right balance here is critical to avoiding problems in court.

4. Organize data storage efforts and establish systems that simplify later identification, retrieval, and production of responsive information. Talk to IT personnel about the implications of choosing software and changing systems. Consider capabilities that may be relevant to a discovery response: How is data stored? In what format is it stored? Is it accessible or inaccessible? Do you want to have ready access to information from systems no longer in use?

5. To preserve evidence when necessary, outline a specific plan for the suspension of usual document destruction and backup tape recycling protocols. Identify key employees from the legal and IT department to be involved as soon as litigation is pending or imminent. Determine how best to distribute evidence preservation instructions to all employees, and ensure that enforcement mechanisms are in place.

6. Designate and train an IT representative to act as the company's 30(b)(6) deposition witness when electronic data storage may be at issue. Advise key IT employees that clear communication with outside counsel will be necessary to properly respond to electronic document requests.

[30] *B. Outside Counsel*

7. Expand working knowledge of client operations to include client information systems: What information is maintained? How is it stored? What will be the procedures for and costs of retrieval if an electronic discovery request is received? With a solid working knowledge of client systems, outside counsel will be equipped to establish discovery parameters with opposing counsel early in the case and challenge overbroad requests if necessary.

8. Maintain a focus on minimizing disruption of client operations. Work with IT personnel and inside counsel to reduce the time individual employees must divert to examining their files for responsive information. Know how to use technology to protect employees' time and produce timely, accurate responses. Prompt

and complete discovery responses can prevent the imposition of intrusive measures, such as on-site inspections.

9. Before and after a document request is received, adequately explain the scope of the obligation to preserve electronic data and the duty to search different systems and storage media. Do not expect a written document request to be self-explanatory. Be a partner in the data retrieval process, not just the vehicle for the message.

10. Become acquainted with key IT personnel. Educate them about the types of documents most frequently requested in litigation as well as questions they can expect if deposed. Prepare with them to make a prompt and thorough inventory of stored information when litigation arises.

IX. CONCLUSION

[31] While electronic discovery disasters such as crushing costs, harsh sanctions, and even default judgments can strike the unready, great benefits are available to those who prepare. In-house counsel, litigation attorneys, and IT personnel all have roles to play. Electronic discovery response planning is not just a matter of gathering responsive information, but of working in advance to control what information is created and how it is stored.

[32] Electronic discovery best practices begin with making data management a part of daily business operations. Attorneys cannot accomplish this objective without involving IT personnel, and IT personnel cannot properly maintain electronic data without guidance from counsel about what should be kept or destroyed. Outside counsel can help by providing ongoing advice about the law of electronic discovery and what to expect in the process.

[33] As a part of discovery planning, attorneys and IT personnel should also educate themselves about how available technology can streamline the discovery process. When litigation arises, they can take advantage of technology to gather and review information without substantially disrupting operations. Technology exists to provide lawyers with tools and resources to handle complex discovery in a speedy, cost-efficient manner without interrupting the workflow of familiar business and

discovery practices. With the use of such tools, in-house lawyers can gain control over data retrieval and review processes, while outside counsel can enjoy a tremendous advantage in preparing client cases for the best resolution.