# THE EXPANDING DUTIES OF ESI AND IN-HOUSE COUNSEL: PROVIDING DEFENSIBLE PRESERVATION AND PRODUCTION EFFORTS AFTER *SWOFFORD V. ESLINGER.*

By David W. Degnan*

Cite as: David W. Degnan, *The Expanding Duties of ESI and In-House Counsel: Providing Defensible Preservation and Production efforts After Swofford v. Eslinger*, XVI Rich. J.L. & Tech. 12 (2010), http://jolt.richmond.edu/v16i4/article12.pdf.

## INTRODUCTION

[1] As a general rule, companies and government agencies should plan for preservation and production before litigation is probable. This means having a document retention program.[1] These programs ensure that documents are retained or deleted in an orderly fashion.[2] If a company properly follows its policies and procedures, this retention program acts as a "shield" against the incomplete preservation of relevant (or "hot") documents deleted before the proper initiation

* David W. Degnan is an Associate with KOELLER, NEBEKER, CARLSON AND HALUCK, LLP in Phoenix Arizona.

[1] *See* Jackson v. Harvard Univ., 721 F. Supp. 1397, 1410, 1411–13 (D. Mass. 1989) (finding that Harvard's complex records management system was sufficient to show that sanctions were not necessary for accidental destruction of relevant evidence by a third party).

[2] *See* Working Group on Elec. Document Retention & Prod., The Sedona Conference, *The Sedona Conference Commentary on Email Management: Guidelines for the Selection of Retention Policy*, 8 SEDONA CONF. J. 239, 240 (2007) *available at* http://www.thesedonaconference.org/dltForm?did=Commentary_on_Email_Management___revised_cover.pdf [hereinafter *E-mail Management*]; WORKING GROUP ON ELEC. DOCUMENT RETENTION & PROD., THE SEDONA CONFERENCE, THE SEDONA PRINCIPLES: BEST PRACTICES, RECOMMENDATIONS &, PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 11 cmt. 1.a (Jonathan M. Redgrave et al. eds., 2d ed. 2007) *available at* http://www.thesedonaconference.org/dltForm?did=2007Summaryof SedonaPrinciples2ndEditionAug17assentforWG1.pdf [hereinafter THE SEDONA PRINCIPLES].

of a litigation hold.[3] If parties do not follow, or inconsistently follow, such a program, they might have to explain what happened to a missing relevant document. Thus, a retention program might act as a "sword**,**" allowing an opposing party to claim that the company's preservation was not complete.[4] Indeed, having a haphazard document retention program is probably worse than not having a retention program at all.[5]

[2] But once a party is sued or a critical threat of litigation is reached,[6] the document retention policies and procedures must be placed on hold to preserve relevant documents and tangible evidence for trial.[7] At such a point, counsel has an affirmative duty to preserve relevant information that might lead to the discovery of admissible evidence.[8] This preservation process can become very expensive.[9] To that end, clarification is needed about what electronically stored information (ESI) and in-house counsel's duties are throughout pre-trial litigation.

---

[3] *See* Stevenson v. Union Pac. R.R. Co., 354 F.3d 739, 750–51 (8th Cir. 2004); Healthcare Advocates, Inc. v. Harding, Earley, Follmer & Frailey, 497 F. Supp. 2d 627, 640–41 (E.D. Pa. 2007).

[4] *See* Swofford v. Eslinger, 671 F. Supp. 2d 1274, 1279 (M.D. Fla. 2009). *See generally* Mikron Indus., Inc. v. Hurd Windows & Doors, Inc., No. C07-532RSL, 2008 WL 1805727, at *2 (W.D. Wash. Apr. 21, 2008) (finding that the defendant failed to provide the court with proof of a document retention program); Telectron, Inc. v. Overhead Door Corp., 116 F.R.D. 107, 127 (S.D. Fla. 1987) (finding that the defendant willfully destroyed documents). The sword and shield analogy is most eloquently phrased in SHIRA SCHEINDLIN ET AL., ELECTRONIC DISCOVERY AND DIGITAL EVIDENCE IN A NUTSHELL 33–35 (2009).

[5] *See In re* Prudential Ins. Co. of Am. Sales Practices Litig., 169 F.R.D. 598, 615 (D.N.J. 1997) (drawing an adverse inference that destroyed documents were relevant).

[6] *See* Kronisch v. United States, 150 F.3d 112, 126 (2d Cir. 1998) (stating that the "obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation—most commonly when suit has been filed").

[7] *See* Zubulake v. U.B.S. Warburg LLC (*Zubulake IV*), 220 F.R.D. 212, 217 (S.D.N.Y. 2003) (stating that a litigant "is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is subject of a pending discovery request").

[8] *See* Rambus, Inc. v. Infineon Tech. AG, 220 F.R.D. 264, 281 (E.D. Va. 2004).

[9] *See generally* David W. Degnan, *Seven Questions (and Some Answers) on Electronic Discovery*, PRETRIAL PRAC. & DISCOVERY NEWSLETTER (A.B.A. Sec. Litig., Chicago, Il.), Spring 2008, at 8

[3] In perhaps the first case of its kind, *Swofford v. Eslinger*[10] presents an exemplar of why clarification is needed in every jurisdiction. The *Swofford* court imposed pecuniary sanctions for discovery abuses against in-house counsel but not the counsel of record.[11] The court found that the failure to preserve tangible and electronic evidence was inexcusable and merited monetary sanctions and adverse inferences.[12] This decision is troublesome for in-house counsel and necessitates a fundamental shift in the power structure in big cases between in-house counsel, ESI counsel, and trial counsel.

[4] This article provides a roadmap for ESI and in-house counsel to prevent spoliation sanctions and to ensure that the case is decided on the merits rather than by discovery sanctions. Part I of this article takes a detailed look at *Swofford v. Eslinger*, reviewing preservation problems in the case and the spoliation ruling. Part II addresses what steps should be taken to create a defensible preservation effort. Part III investigates the steps necessary to provide a reasonable production to the opposing party. Part IV highlights the importance of cooperation among counsel.

## I. *SWOFFORD V. ESLINGER*

[5] *Swofford* presents a textbook situation of electronic discovery taking over a case.[13] *Swofford* was a negligence case stemming from a police shooting.[14] Although the amount of evidence created from such an event should be relatively

*available at* www.abanet.org/litigation/mo/premium-lt/newsletters/pretrial/pretrial_spring2008.pdf (providing some examples of how much electronic discovery costs).

[10] 671 F. Supp. 2d. 1274.

[11] *See id.* at 1287–88.

[12] *See id.* at 1278, 1289.

[13] *See generally Swofford*, 671 F. Supp. 2d 1274.

[14] *See id.* at 1277–78.

small,[15] it was three years after discovery began that the court reached the sanctions discussed in this article.[16]

### A. Background: Officers Shoot a Home Owner

[6] The facts of this case are relatively straightforward.[17] A car was stolen on April 20, 2006 in Seminole County, Florida.[18] At the time of the theft, Seminole County Sheriff's Deputy Ronald Remus was in the area and pursued two suspects.[19] Unsuccessful in his pursuit, Remus returned to the scene of the crime and, with the help of the K-9 unit and Deputy William Morris Jr.,[20] searched the apartment complex and around adjacent homes.[21] Robert Swofford, the owner of one of the adjacent homes, came out of his house with a weapon drawn.[22] When the deputies saw that Swofford was armed, they shot him seven times.[23] Swofford survived but was confined to a hospital bed for six weeks.[24]

[7] After recovering from the shooting, Swofford filed suit in federal court against the Seminole County Sheriff's Office (SCSO), Sheriff Donald Eslinger, and others, alleging excessive force and improper entry onto his property.[25]

---

[15] *See id.* at 1278 (noting that the document requests only asked for the preservation of e-mails, electronic evidence, and certain tangible evidence).

[16] *See id.* at 1278.

[17] *See generally id.* at 1277–78.

[18] *Id.* at 1277.

[19] *Swofford*, 671 F. Supp. 2d at 1277.

[20] *Id*.

[21] *Id*.

[22] *Id*.

[23] *Swofford*, 671 F. Supp. 2d at 1277-78.

[24] *Id*. at 1278.

[25] *Id*. at 1277.

Further, Swofford asserted several state law claims, including "battery, gross negligence, simple negligence, and negligent training and supervision."[26]

[8] After filing suit, Swofford requested that the defendants preserve relevant tangible and electronic evidence for trial.[27] Specifically, Swofford sought Remus' laptop computer; all internal e-mails for the 14 months following the incident; and the deputies' radios, guns, and uniforms used on the night of April 20, 2006.[28]

### B. Preservation Problems: Preservation Requires More than Sending a Letter to Key Players

[9] Swofford's counsel requested by letter, dated August 24, 2006, that "all evidence in the SCSO's possession related to the shooting be maintained in its original order."[29] Swofford's counsel followed up with a second letter on February 6, 2007,[30] asking SCSO's counsel for additional evidence, "including firearms, clips and ammunition, training records, and electronic evidence."[31] Swofford's counsel also made public records requests for e-mail communications regarding the incident.[32]

[10] The SCSO acknowledged that it received these preservation and notice letters, but its general counsel, David Lane, noted that it "never issued any directives or litigation hold memos to suspend all orders, practices, or policies that could lead to the destruction of evidence . . . ."[33] In fact, the SCSO's General Counsel noted that "the only action taken by anyone . . . in response to the preservation letters was that . . . a paralegal in the General Counsel's office, reviewed the letters and forwarded a copy of the letters to approximately six

[26] *Id*.

[27] *Id*. at 1278.

[28] *Swofford*, 671 F. Supp. 2d at 1278.

[29] *Id*.

[30] *Id*.

[31] *Id*.

[32] *Id*.

[33] *Swofford*, 671 F. Supp. 2d at 1278 (internal quotation marks omitted).

senior SCSO employees, including Sheriff Eslinger."[34] The second letter from Swofford's counsel was also sent to several other officers, including the department's Captain of Professional Standards.[35]

[11] According to the General Counsel, distributing the preservation letters to SCSO key employees would "cover the course and scope of the evidence requested in the first letter and in the second letter," and that "nothing further needed to be done."[36] Morris and Remus, however, did not receive any preservation instructions related to the incident.[37] Moreover, after the preservation requests were forwarded, none of the department's employees preserved any relevant evidence.[38] Indeed, the General Counsel failed to do anything "to ensure that SCSO employees were properly complying with the preservation letters."[39]

[12] The *Swofford* court found that "it is no defense to suggest . . . that particular employees were not on notice."[40] "The obligation to retain discoverable materials is an affirmative one; it requires that the agency or corporate officers having notice of discovery obligations communicate those obligations to employees in possession of discoverable materials."[41] Applying this standard, the court reviewed the failure of the SCSO to suspend or bar destruction procedures and determined whether all the evidence was properly preserved after Swofford's requests were made.[42] Based on the evidence, including the defense counsel's admission of wrongdoing, the court imposed sanctions.[43]

---

[34] *Id*.

[35] *Id*.

[36] *Id*. at 1279.

[37] *Id*.

[38] *Swofford*, 671 F. Supp. 2d at 1279.

[39] *Id*.

[40] *Id.* (citing Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68, 73 (S.D.N.Y. 1991)).

[41] *Swofford*, 671 F. Supp. 2d at 1279 (citing *Turner*, 142 F.R.D. at 73)).

[42] *Swofford*, 671 F. Supp. 2d at 1279.

[43] *Id*. at 1282.

### C. Spoliation Standard: It Is Bad Faith for Counsel To Not Oversee the Preservation of Relevant Documents

[13] The court noted that it may impose sanctions by its own inherent authority or where certain elements are satisfied.[44] In the Eleventh Circuit, the elements for a spoliation claim are:

> (1) the existence of a potential civil action; (2) a legal or contractual duty to preserve evidence which is relevant to the potential civil action; (3) destruction of that evidence; (4) significant impairment in the ability to prove the lawsuit; (5) a causal relationship between the evidence destruction and the inability to prove the lawsuit; and (6) damages.[45]

The Eleventh Circuit also incorporates a bad faith element, requiring more than mere negligence to sustain an adverse inference instruction.[46] The court went on to define the factors to be considered in determining the sanctions to be imposed against a party failing to preserve pertinent evidence.[47] Those factors are: "(1) the willfulness or bad faith of the party responsible for the loss or destruction of the evidence; (2) the degree of prejudice sustained by the opposing party; and (3) what is required to cure the prejudice."[48]

[14] The *Swofford* court held that the defendants acted in bad faith by failing to take affirmative steps to ensure compliance with the preservation letter and failing to understand their duties with respect to the preservation of such evidence.[49] Moreover, the court reasoned that the parties who received the preservation letters failed to preserve the specified evidence.[50] For example, the guns used in the

---

[44] *See id.* at 1280.

[45] Green Leaf Nursery v. E.I. DuPont De Nemours and Co., 341 F.3d 1292, 1308 (11th Cir. 2003).

[46] *See Swofford*, 671 F. Supp. 2d at 1280.

[47] *See id.*

[48] *Id*.

[49] *See id.* at 1281.

[50] *See id.* ("[S]enior SCSO officials who received the letters . . . completely disregarded the letters and their resultant legal obligations.").

incident were dismembered, and the uniforms worn by the deputies were destroyed.[51] In fact, the court found no evidence that the defendants or their counsel complied with the preservation obligations.[52] Therefore, given the defendants' "knowing and willful disregard for the clear obligation to preserve evidence that was solely within [their] possession and control," the court found that bad faith was "clear" and resulted in substantial prejudice to Swofford.[53] Accordingly, the court imposed several adverse inferences.[54]

[15] Interestingly, the court also issued sanctions against the company's General Counsel.[55] The court imposed fees and costs against him "in light of his complete failure to fulfill his duty . . . as General Counsel for SCSO and as initial counsel for all Defendants . . . ."[56] Additionally, the court found the General Counsel liable for failing "to take affirmative steps to monitor compliance so that all relevant, discoverable information is identified, retained and produced."[57]

### D. Commentary: *Swofford*'s Effects

[16] Commentators have been swift to provide feedback about this case. Ralph Losey, an acclaimed e-discovery blogger, compared the role of in-house counsel to the Wizard of Oz.[58] Effectively, *Swofford* "pulls aside the curtain," exposing the in-house counsel to liability.[59] Losey notes: "Judges from now on may not be satisfied with the Wizard attorney of record, they may look for the 'man behind

[51] *See Swofford*, 671 F. Supp. 2d at 1286–87.

[52] *See id.* at 1283.

[53] *Id*. at 1282.

[54] *See id.* at 1289.

[55] *See id*. at 1287–88.

[56] *Swofford*, 671 F. Supp. 2d at 1287.

[57] *Id.* at 1287–88.

[58] *See In-House Counsel Sanctioned for Defendant's Failure to Preserve Evidence*, E-DISCOVERY TEAM, Nov. 1, 2009, http://e-discoveryteam.com/2009/11/01/in-house-counsel-sanctioned-for-defendants-failure-to-preserve-evidence/.

[59] *See id.*

the curtain,' the in-house counsel pulling all the levers."[60] Consequently, Losey warns that "[i]n-house counsel should beware. They are not safe behind the curtain of non-appearance. They too are exposed to sanctions, just like their counsel of record, if they are not diligent in the responsibilities they assume."[61]

[17] The ramifications of the *Swofford* opinion made waves through the legal community. In fact, Benjamin Wright, another prolific blogger, noted: "Many veteran lawyers will be astonished to hear that a federal judge sanctioned an in-house government lawyer for taking something less than vigorous steps to cause and monitor the preservation of electronic evidence."[62] Wright explains that the *Swofford* decision requires lawyers to understand the ephemeral nature of ESI and be especially vigilant "to preserve it under a litigation hold."[63]

[18] These two views, coupled with the *Swofford* opinion itself, suggest that more guidance is needed. To ensure a transparent preservation of relevant documents, counsel need to understand and to plan scrupulously for discovery in a manner that will ensure future compliance and understand that it must supervise its employees and all nonlawyers that it enlists to help it with discovery.[64] The time to plan, therefore, is well before the first complaint is filed, well before the first summons is issued, and well before the initial conflict arises.

## II. DEFENSIBLE PRESERVATION

[19] The *Swofford* case has received significant press coverage for reasons that are not readily apparent. *Swofford* demonstrates the need for counsel to understand discovery requirements and plan proactively for e-discovery disputes. Doing so helps counsel and client save face, time, and money during e-discovery. The next two sections propose certain steps for developing a reasonable

[60] *Id.*

[61] *Id.*

[62] *Treat Electronic Records the Same as Paper Records?,* ELEC. DATA RECORDS LAW I HOW TO WIN E-DISCOVERY, Nov. 2, 2009, http://legal-beagle.typepad.com/wrights_legal_beagle/2009/11/records-policy html.

[63] *See id.*

[64] *See* Zubulake v. UBS Warburg LLC (*Zubulake V*), 229 F.R.D. 422, 432–433 (S.D.N.Y. 2004).

preservation strategy that will allow cases to proceed to trial rather than to excessive discovery motions and sanctions.

A. Companies Should Have, and Follow, a Document Retention Program.

[20] A document retention program provides a uniform set of practices for how long a company keeps or destroys its documents.[65] Each retention program is different and must meet the individual demands of that company, while considering existing statutory and regulatory preservation obligations particular to each industry.[66] For example, although the Sarbanes-Oxley Act might require a financial institution to keep financial records for a number of years, such obligations probably are not an issue with a privately owned car company.[67] But there are some common features and benefits of a well-founded and transparent retention program.

[21] Typically, a document retention program must address electronic communications, which is not limited to e-mail.[68] Common features of a retention program include a limitation on the amount of e-mail storage space available to each user;[69] the automatic deletion of e-mails retained for a certain period of time;[70] a usage restraint, preventing the user from transferring documents onto their personal computer;[71] and a mandatory storage folder to keep privileged or statutorily required documents.[72] Initiating such measures, if nothing else, allows

[65] *See* Arthur Andersen LLP v. United States, 544 U.S. 696, 704 (2005) ("Document retention policies, which are created in part to keep certain information from getting into the hands of others, including the Government, are common in business.") (internal quotations omitted).

[66] *See E-mail Management*, *supra* note 2, at 239–40.

[67] *See id.* at 240; Posting of Sarah D. Scalet to CSO Online, http://www.csoonline.com/article/220939/The_Seven_Deadly_Sins_of_Records_Retention?page=1 (July 1, 2006).

[68] *See generally E-mail Management*, *supra* note 2, at 240.

[69] *See id.*

[70] *See id.* at 241.

[71] *See id.* at 242.

[72] *See id.* at 241–42.

a company to know exactly where its documents are and to explain the deletion of any given document.

[22] The benefits of implementing a document retention program are numerous. It prevents counsel from preserving "every shred of evidence."[73] It ensures that documents have a reasonable shelf life and are deleted when they are no longer needed.[74] It decreases the amount of work for document reviewers.[75] It prevents some spoliation motions for failure to produce relevant evidence.[76] And to the cynical at heart, it thwarts the preservation of "hot" documents if those documents are automatically deleted as part of the company's retention policy.[77] For instance, in *Southeastern Mechanical Services v. Brody*,[78] the Middle District of Florida held that sanctions are inappropriate, absent a showing of bad faith, where a "hot" document is destroyed after litigation is anticipated but before the proper initiation of a litigation hold.[79]

[23] But a retention program is beneficial only if it is scrupulously followed.[80] Following a retention program requires constant oversight and supervision by

[73] *See Zubulake IV*, 220 F.R.D. at 217.

[74] *See* THE SEDONA PRINCIPLES, *supra* note 2, at 12 cmt. 1.b.

[75] *See Indexing Digital Documents--It's NOT an Option Pay Now or Pay (More) Later*, http://www.ischool.utexas.edu/~scisco/inel.html

[76] *See* THE SEDONA PRINCIPLES, *supra* note 2, at 12 cmt. 1.b.

[77] *Compare* THE SEDONA PRINCIPLES, *supra* note 2, at 12–13 cmt. 1.b (noting that there are several benefits of an organized document retention program), *with* Lewy v. Remington Arms Co., 836 F.2d 1104, 1112 (8th Cir. 1998) (noting that one of the elements to determine the reasonableness of a document retention policy is bad faith; therefore, the policy should not be written for the sole purpose of deleting "hot" documents).

[78] No. 8:08-CV-1151-T-30EAJ, 2009 U.S. Dist. LEXIS 69830, at *13 (M.D. Fla. July 24, 2009).

[79] *See id. But see* Broccoli v. Echostar, 229 F.R.D. 506, 512 (D. Md. 2005) (discussing the correlation between bad faith and a finding of spoliation).

[80] *See* Gippetti v. UPS, Inc., No. C07-00812 RMW (HRL), 2008 WL 3264483, at *1, 4 (N.D. Cal. Aug. 6, 2008) (allowing a defendant to successfully defend its destruction of relevant evidence by showing it had a document retention program since 2002); *see* Sarah D. Scalet, *The Seven Deadly Sins of Records Retention*, CSO ONLINE, July 1, 2006, http://www.csoonline.com/article/220939/The_Seven_Deadly_Sins_of_Records_ Retention?page=1.

both in-house and ESI counsel.[81] Moreover, with organizations that are constantly in litigation, counsel should meet with IT personnel for a briefing on "the relevant technology and storage architecture,"[82] and notify these personnel of the company's affirmative duty to make them available for depositions on the subject.[83] The Sedona Conference recommends asking questions regarding the storage of the company's e-mail, determining the company's consistency of checking or overseeing its document retention program, and identifying who at the company is responsible for ensuring compliance.[84] Asking questions like these provides counsel with the information necessary to locate relevant documents and set up a suitable document retention program.[85]

[24] More importantly, a document retention program must be consistent with a company's needs and expectations.[86] For several reasons, it is better for a company to change the policies or procedures of its document retention program than to fail to meet the lofty goals or ideals outlined in the program.[87] If a company decides to change its policies, however, it should anticipate the costs associated with such a change, including any costs for training employees how to manage the company's records.[88] Although the *Swofford* court considered SCSO's document retention program only in passing, the general rule is that litigation holds should always be discussed in the context of the document retention program.[89]

---

[81] *See* Newman v. Borders, Inc., 257 F.R.D. 1, 1 (D.D.C. 2009) (discussing the plaintiff's argument that the defendant did not produce someone knowledgeable of its document retention program).

[82] *See E-mail Management*, *supra* note 2, at 244.

[83] *See* Heartland Surgical Specialty Hospital v. Midwest Div., Inc., 2007 WL 1054279, at *7 (D. Kan. Apr. 9, 2007) (finding that the corporation had an "affirmative duty to produce a representative who can answer questions . . . known or reasonably available.").

[84] *See id.* THE SEDONA PRINCIPLES, *supra* note 2, at 244.

[85] *See id.* at 243–44.

[86] *See* Scalet, *supra* note 80.

[87] *See generally id.*

[88] *See E-mail Management, supra* note 2, at 247–48.

[89] *Swofford*, 671 F. Supp. 2d at 1280–81.

B. Preparing for a Litigation Hold Is Complex: Develop a Plan

[25] Once a party is sued or has reasonable facts to know that it will be sued, counsel has an affirmative duty to put its document retention program on hold and start saving its relevant documents.[90] The duty to preserve may arise from some harm or injury, a statute, or a parallel agency proceeding.[91] A litigation hold is a multi-faceted (and sometimes very expensive) process that requires the effort of multiple parties working together.[92] To ensure compliance on such a measure, it takes support from the team of attorneys, employees and reviewers.[93] Employees must review all documents, retaining those relevant to the litigation hold. Counsel must provide oversight and conduct a reasonable investigation into whether all relevant documents are being retained. These steps require "back-up" measures to ensure a defensible position and rely on counsel taking control of the discovery process.[94]

[26] A team approach improves the execution of litigation holds and organization of other discovery measures.[95] There should be a meeting where members of the IT, legal, financial, and records management departments are briefed on their responsibilities with respect to the litigation hold.[96] In turn, those

[90] Cache la Poudre Feeds, LLC v. Land O'Lakes, Inc., 244 F.R.D. 614, 630 (D. Colo. 2007) ("Counsel retains an on-going responsibility to take appropriate measures to ensure that the client has provided all available information and documents which are responsive to discovery requests."); *Zubulake V*, 229 F.R.D. 422, 432 (S.D.N.Y. 2004) ("It is not sufficient to notify all employees of a litigation hold and expect that the party will retain and produce all information. Counsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched.").

[91] *See E-mail Management, supra* note 2, at 240.

[92] *See* WORKING GROUP ON ELEC. DOCUMENT RETENTION & PROD., THE SEDONA CONFERENCE, THE SEDONA CONFERENCE COMMENTARY ON LEGAL HOLDS: THE TRIGGER & THE PROCESS 11 (Conor R. Crowley et al. eds., 2007) [hereinafter LEGAL HOLDS].

[93] *See id.*

[94] *See* Wignut Films Ltd. v. Katja Motion Pictures Corp, No. CV 05-1516-RSWL, 2007 U.S. Dist. LEXIS 72953, at *55 (C.D. Cal. Sept. 18, 2007) ("Counsel must make a reasonable investigation and effort to certify that the client has provided all information and documents available which are responsive to the discovery request.").

[95] *See* LEGAL HOLDS, *supra* note 92, at 11.

[96] *See id.*

individuals will be able to provide additional oversight of their respective department's compliance with the hold.[97] Moreover, by bringing the team together, the client and ESI counsel can discuss possible search terms, address the claims or defenses, identify where such documents would be located, and determine how the records are stored.[98]

[27] Once a team is in place, counsel should complete several steps to ensure compliance or a transparent position. This requires drafting a notice regarding the litigation hold.[99] Counsel should also have employees certify that they received the litigation hold notice, understood the notice, and took all necessary steps to implement the provisions in the notice.[100] Taking these steps ensures that counsel has a transparent and defensible position whether or not opposing counsel or the court challenges its preservation measures.[101]

[28] In-house or ESI counsel must also take control of the discovery process and the scope of litigation before the trial counsel becomes involved.[102] The in-house or ESI attorney has several affirmative duties to ensure compliance with e-discovery rules.[103] The issuance of a litigation hold is the first responsibility.[104] It should be done at the outset of litigation or where litigation is reasonably anticipated.[105] Any threat of litigation, however, should be unequivocal.[106]

---

[97] *See id.*

[98] *Id*.

[99] *See* SCHEINDLIN, *supra* note 4, at, 67.

[100] *See id*. at 71.

[101] *See id*.

[102] Mary Mack et al., *Effective Management of Litigation Holds*, ACC DOCKET, 36, 40 (May 2009).

[103] *Zubulake V*, 229 F.R.D. at 432 (stating that counsel must ensure that "all sources of potentially relevant evidence are placed on hold. . . . To do this, counsel must become fully familiar with her client's document retention policies, as well as the client's data retention architecture."); SCHEINDLIN, *supra* note 4, at 37–38.

[104] *See id.* at 37. SCHEINDLIN, *supra* note 4.

[105] LEGAL HOLD at 1. Texas v. City of Frisco, 2008 WL 828055 (E.D. Tex March 27, 2008) (finding the mere threat of litigation was not enough to initiate a litigation hold). *See* Kenneth J.

[29] The Sedona Conference, a non-profit think tank, set forth several factors to consider in determining whether litigation should be "reasonably anticipated," including:[107]

> The nature and specificity of the complaint or threat; [t]he party making the claim; [t]he position of the party making the claim; [t]he business relationship between the accused and accusing parties; [w]hether the threat is direct, implied or inferred; [w]hether the party making the claim is known to be aggressive or litigious; [w]hether a party who could assert a claim is aware of the claim; [t]he strength, scope, or value of a potential claim; [t]he likelihood that data relating to a claim will be lost or destroyed; [t]he significance of the data to the known or reasonably anticipated issues; [w]hether the company has learned of similar claims; [t]he experience of the industry; [w]hether the relevant records are being retained for some other reason; and [p]ress and[/]or industry coverage of the issue either directly pertaining to the client, or of complaints brought against someone similarly situated in the industry.[108]

These factors should be considered in light of the facts known by counsel when contemplating whether to issue a litigation hold.[109]

[30] A litigation hold ensures that a company preserves relevant information.[110] According to the Sedona Conference, there should be an attempt to narrow the scope of the litigation hold to filter out irrelevant data,[111] and to lower the cost and

---

Withers, *"Ephemeral Data" and the Duty to Preserve Discoverable Electronically Stored Information*, 37 UNIV. BALT. L. REV. 349, 349–50 (2008).

[106] *See generally* Hynix Semiconductor v. Rambus, Inc., 591 F. Supp. 2d 1038, 1061 (N.D. Cal. 2006) (discussing various standards for the foreseeability of litigation).

[107] *See* LEGAL HOLDS, *supra* note 92, at 9.

[108] *Id*. at 11.

[109] *Id*. at 9–10.

[110] *See generally id.* at 12.

[111] *Id*.

the time spent in e-discovery disputes.[112] This might require indexing the documents by category or using software to conduct an initial review of the documents and remove duplicative and irrelevant data.[113]

[31] In *Swofford,* the court did not consider any of the factors suggested by the Sedona Conference.[114] But the court did not need to undertake such an intensive analysis because counsel did not take the affirmative steps that are required to ensure that the litigation hold was followed.[115] When an officer enters someone's property and shoots them, litigation should be "reasonably anticipated." As such, there is a duty to preserve documents relevant to the incident.[116] Nevertheless, in *Swofford*, counsel failed to take the affirmative steps necessary to ensure that the SCSO complied with the litigation hold.[117]

C. Drawing the Line: A Party Need Not Produce more than Is Asked for

[32] Where litigation is pending or reasonably foreseeable, a party should preserve and identify potential evidence for the use of others to prove relevant claims or defenses.[118] This is not to say, however, that parties are obligated to preserve every shred of relevant evidence.[119] First and foremost, courts review the particulars of the preservation request to determine what the parties are asking the court to do.[120]

[33] The Federal Rules of Civil Procedure permit a party to request the preservation of any documents or information related to a claim or defense,[121] but

[112] LEGAL HOLDS, *supra* note 92, at 12.

[113] *Id.*

[114] *See Swofford*, 671 F. Supp. 2d at 1279.

[115] *Id.* at 1278.

[116] *Id.*

[117] *Id.*

[118] *See Zubulake V*, 229 F.R.D. at 430.

[119] *See id.* at 432.

[120] *See generally* FED. R. CIV. P. 26(b)(1).

[121] *See id.*

the scope of preservation is limited.[122] For example, the producing party need not preserve documents if doing so would be cumulative, unduly burdensome, or prohibitively costly.[123] A court also has discretion to set forth a preservation order from which the both parties can rely upon to move the case forward.[124]

[34] On the one hand, where a court, prompted by a motion from the producing party, deems a preservation request too broad, it may intervene and limit the scope of the preservation.[125] On the other hand, where a request is deemed too narrow, courts generally will not issue a broader preservation order.[126] For example, in *Newman v. Borders*, the defendant moved the court to order the plaintiff to provide someone knowledgeable of its e-mail system for deposition.[127] In ruling against the defendant, the court stated that the deposition notice failed to include "e-mail" or "electronically stored information" as potential topics for questioning.[128]

[35] Curiously, the *Swofford* court considered a deputy's "less than candid" testimony regarding a conversation he held via instant messaging (an ephemeral or fleeting medium) in considering whether sanctions were warranted.[129] Unlike the plaintiff in *Newman,* the plaintiff in *Swofford* specifically asked for e-mails in his first request for production of documents and other electronic evidence in his second request for production of documents.[130] In light of the lack of preservation efforts and the deputy's testimony, the *Swofford* court authorized an adverse

[122] *Id.*; *see, e.g.*, Computek Computer & Office Supplies, Inc. v. Walton, 156 S.W. 3d 217 (Tex. App. 2005) (an injunction against defendant from deleting all files is overly broad).

[123] *See* FED. R. CIV. P. 26(b)(2)(C).

[124] *Id.*

[125] *See id.*

[126] *See, e.g.*, Newman v. Borders, Inc., et al., 257 F.R.D. 1, 2–3 (D.D.C. 2009).

[127] *Id*. at 2.

[128] *Id*. at 3

[129] *Swofford*, 671 F. Supp. 2d. at 1284.

[130] *See id.* at 1278; Newman, 257 F.R.D. at 2.

inference regarding the contents of e-mails deleted from the defendant's computer.[131]

D. Ephemeral Data: Do I Really Have To Preserve Fleeting Technology?

[36] Ephemeral or transient data refers to data that are fleeting—kept for only a short period of time and not retained on a computer.[132] Common examples include unsaved instant message conversations, information stored in Random Access Memory (RAM), and temporary files momentarily stored in a computer's cache.[133]

[37] In *Columbia Pictures v. Bunnell*,[134] a district court addressed whether Server Log Data temporarily stored on a computer was discoverable.[135] The court ordered the defendant to produce the Server Log Data, but permitted the redaction of computer Internet Protocol (IP) addresses.[136] Relying upon judicial precedent and Rule 34 of the Federal Rules of Civil Procedure, and its advisory committee notes, the *Columbia Pictures* court reasoned that IP addresses that are "fixed" or temporarily stored in RAM are electronically stored information.[137] In a footnote, however, the *Columbia Pictures* court noted that its holding was narrow, stating that it ordered production of the ephemeral data only because it was unique and directly on point to the ongoing litigation.[138]

---

[131] *Swofford*, 671 F. Supp. 2d at 1285.

[132] *See* Withers, *supra* note 105, at 360–363.

[133] *See id.*

[134] No. CV 06-1093FMCJCX, 2007 WL 2080419 (C.D. Cal. May 29, 2007).

[135] *Id.* at *1 & n.3.

[136] *Id.* at *14.

[137] *Id.* at *4–5 (citing MAI Systems Corp. v. Peak Computer, Inc., 991 F.2d 511, 518–19 (9th Cir. 1993)).

[138] *Id.* at *13 n.31 ("The court emphasizes that its ruling should *not* be read to require litigants in all cases to preserve and produce electronically stored information that is temporary stored only in RAM. The court's decision in this case . . . is based in significant part on the nature of this case, the key and potentially dispositive nature of the Server Log Data which would otherwise be unavailable, and defendants' failure to provide what this court views as credible evidence of undue burden and cost.").

[38] Other courts, however, have held that ephemeral data are not discoverable.[139] In *Healthcare Advocates v. Harding, Earley, Follmer & Frailey*, the plaintiffs alleged that the defendants were liable for failing to copy or otherwise preserve information temporarily stored in cache files.[140] Applying a retrospective analysis, the court disagreed, reasoning that the plaintiffs made no effort to destroy the information because the cache files were automatically deleted.[141] Similarly, in *Convolve v. Compaq*, a district court held that information contained on oscilloscope readings was too fleeting to preserve.[142]

[39] *Columbia Pictures*, *Healthcare Advocates*, and *Convolve* all declined to issue sanctions for the failure to preserve ephemeral data.[143] But the *Swofford* court abandoned such reasoning.[144] It found an adverse inference was appropriate for failing to preserve computer files pertaining to instant message conversations.[145] Such consideration of instant messages for discovery is uncommon.[146] As such, the *Swofford* court's decision is curious (especially given that the plaintiff made a generic request for the preservation of "electronic evidence").[147]

---

[139] *See generally* Healthcare Advocates, Inc. v. Harding, Earley, Follmer & Frailey, 497 F. Supp. 2d 627 (E.D. Pa. 2007); Convolve v. Compaq, 223 F.R.D. 162 (S.D.N.Y 2004).

[140] *Healthcare Advocates*, 497 F. Supp. 2d at 639–40.

[141] *Id.* at 641.

[142] *See Convolve*, 223 F.R.D. at 177.

[143] *See Healthcare Advocates*, 497 F. Supp. 2d at 641; *Columbia Pictures*, 2007 WL 2080419 at *1; *Convolve*, 223 F.R.D. at 169.

[144] *See Swofford*, 671 F. Supp. 2d at 1282–84.

[145] *Id.* at 1284.

[146] *See* Withers, *supra* note 105, at 363 (noting that instant message conversations are technologically fleeting but may still need to be preserved for discovery).

[147] *See Swofford*, 671 F. Supp. 2d at 1278.

E. Sanctions Are Not Common Against In-house or ESI Counsel.

[40] Typically, courts order sanctions against a party or its counsel of record pursuant to Rules 26(g) and 37 of the Federal Rules of Civil Procedure.[148] Courts have long held that counsel's failure to oversee discovery merits sanctions.[149] The *Qualcomm v. Broadcom* case provides an example of when sanctions are appropriate. The *Qualcomm* court sanctioned a corporate plaintiff over $8,500,000 for failing to produce 46,000 relevant e-mails and misrepresenting to the court that such e-mails did not exist.[150] For those same reasons, the court referred six members of Qualcomm's outside counsel team to the State Bar of California for investigation of possible ethical violations and ordered them to take a remedial course.[151] And although subsequent rulings in this case have declined to issue bad faith sanctions against the attorneys,[152] the lesson from Qualcomm remains: "Outside counsel, at all levels of authority, who rely on a client's search and retrieval of electronically stored information, are obligated to ask probing questions, audit the search and retrieval, and confirm that all potential sources of information have been investigated."[153]

[41] Courts rarely sanction someone other than the counsel of record or a named party for discovery abuses. In *Swofford*, the SGSO's in-house counsel, failed to reasonably abide by the rules for e-discovery.[154] The *Swofford* court sanctioned the general counsel because he ignored a preservation request, he

[148] *See generally* FED. R. CIV. P. 26(b); FED. R. CIV. P. 37.

[149] *See* Gregory D. Shelton, *Qualcomm v. Broadcom: Lessons for Counsel and a Roadmap for E-Discovery Preparedness,* http://www.williamskastner.com/uploadedFiles/Qualcomm%20v.%20Broadcom.pdf.

[150] *Id.*

[151] *Id.*

[152] Qualcomm Inc. v. Broadcom Corp., No. 05cv1958-B (BLM) (S.D. Cal. Apr. 2, 2010)

[153] *See* Shelton, *supra* note 149.

[154] *Swofford*, 671 F. Supp. 2d. at 1278–79.

represented the defendants, and he failed to take steps to preserve any evidence.[155] Therefore, the court found that he was liable for such discovery abuses.

[42] Similarly, courts rarely sanction parties for the actions of non-parties.[156] For instance, in *Independent Productions Corp. v. Lowe's Inc.*,[157] two corporate officers retired to avoid discovery obligations.[158] Notwithstanding their retirement, the court sanctioned the corporation, finding that the former officers remained its "managing agents."[159] Likewise, applying an "alter ego" variant of the "managing agent" theory, the Seventh Circuit, in *Margoles v. Johns*,[160] sanctioned a father for his son's failure to meet discovery demands (even though his son was not a party to the litigation).[161] Given the holding in *Swofford*, courts might be more inclined to sanction in-house counsel for the same types of discovery abuses.

### F. Life After *Swofford*

[43] *Swofford* will affect how in-house and ESI counsel manage big cases. Given the numerous forms of electronic media and the increasing use of technology in everyday life, the duty to preserve relevant documents is difficult under the best of circumstances and impossible under the worst. *Swofford* will almost assuredly place more of a burden (and more risk) on ESI counsel. Certainly, where the counsel of record can avoid participating in document preservation, he or she will not want to take the monetary and professional risk of wrongly conducting e-discovery. Therefore, in-house and ESI counsel will likely become more popular in the coming weeks, months, and years.

---

[155] *Id.* at 1287–1288 n.8 ("The Court imposes sanctions against Mr. Lane pursuant to both the Court's inherent authority and 28 U.S.C. § 1927.").

[156] *See generally* OSRecovery, Inc. v. One Groupe Int'l, Inc., 462 F.3d 87, 93–94 (2d Cir. 2006) (enumerating theories for treating a non-party as a party for discovery purposes).

[157] 30 F.R.D. 377 (S.D.N.Y. 1962).

[158] *See id.* at 379.

[159] *Id.* at 380–82.

[160] 587 F.2d 885 (7th Cir 1978).

[161] *See id.* at 888.

## III. DEFENSIBLE PRODUCTION

[44] Properly preserving relevant evidence for trial is just the beginning.[162] Counsel must undertake several steps to ensure an effective document review and satisfactory production of relevant documents to the opposing party.[163] This section addresses the importance of holding a "meet and confer" conference, outlining what steps must be taken to select and review relevant documents, and explaining how to properly produce documents to the opposing party.

### A. Meet and Confer Conference: Use It—It Will Help You Advance Your Case.

[45] Federal Rule of Civil Procedure 26(f) states that "the parties must confer as soon as practicable."[164] The conference gives the parties an opportunity to formulate a discovery plan—a task of such importance that it cannot be overstated.[165] A properly executed discovery plan eases the discovery process, decreases the tension between opposing counsels and advances the case forward to trial in an effective and efficient manner.[166]

[46] Aside from being mandatory, formulating a discovery plan is helpful to every stage of pretrial litigation.[167] A discovery plan must state:

> (A) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made; (B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues; (C) any issues about disclosure or discovery of

[162] *See generally* FED. R. CIV. P. 26(f) advisory committee's note (2006).

[163] *See generally id.*

[164] FED. R. CIV. P. 26(f).

[165] Treppel v. Biovail Corp., 233 F.R.D. 363, 374 (S.D.N.Y. 2006).

[166] *See* THE SEDONA PRINCIPLES, *supra* note 2, at 21 cmt. 3.a.

[167] *See* FED R. CIV. P. 26(f)(2).

> electronically stored information, including the form or forms in which it should be produced; (D) any issues about claims of privilege or of protection as trial-preparation materials, including -- if the parties agree on a procedure to assert these claims after production -- whether to ask the court to include their agreement in an order; (E) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and (F) any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).[168]

Essentially, the rule makers are trying to simplify the formulation of a discovery plan for counsel. Where the parties agree on the timing, scope, and form of disclosures, discovery disputes are less likely to ensue.[169] And with a discovery plan, any such disputes should be easier to resolve.[170]

[47] The "meet and confer" conference is a starting point for cooperation in discovery.[171] At the conference, the parties should agree to the scope of discovery, a sampling protocol for search terms, any claw back or privilege agreements, and means of ensuring that any litigation holds are in place and being properly followed.[172] After the conference, the parties may submit their agreement to the court as a proposed order.[173] Completing these steps will significantly reduce the risk of discovery disputes and encourages moving the case forward to trial to attain a decision on the merits of the case.[174]

[48] But, it is not likely that a single meeting will provide enough time to get everything resolved. Whenever possible, the parties should have multiple meet

---

[168] FED. R. CIV. P. 26(f)(3).

[169] FED. R. CIV. P. 26(f) advisory committee's note (2006).

[170] *Id.*

[171] *See* FED. R. CIV. P. 26(f)(1).

[172] *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 40.25(2).

[173] *Id.*

[174] THE SEDONA PRINCIPLES, *supra* note 2, at 21 cmt. 3.a.

and confer conferences. Moreover, holding multiple conferences promotes a continuous and open dialog between the parties and encourages the resolution of disputes without resorting to discovery motions and sanctions.[175] During subsequent conferences, trial counsel should be heavily involved in determining the kinds of documents that will be used as evidence; the viability of any privilege claims, potential claims or defenses; and the availability of evidence related to such claims or defenses.[176]

B. Document Review: It Only Needs To Be Reasonable, Not Perfect

[49] In *Brown v. Allen*,[177] the Supreme Court noted: "He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search."[178] Although the *Brown* opinion has since been overruled by statute,[179] its lesson remains applicable to e-discovery. Counsel cannot review all electronically stored information, nor should it.[180] The standard for success in a document review is reasonableness, not perfection.[181] A reasonable document

[175] *See id.* ("Some of the issues that parties should seek to resolve early in an action include: (i) the identification of data sources which will be subject to preservation and discovery; (ii) the relevant time period; (iii) the identities of particular individuals likely to have relevant electronically stored information; (iv) the form or forms of preservation and production; (v) the types of metadata to be preserved and produced; (vi) the identification of any sources of information that are not reasonably accessible because of undue burden or cost, such as backup media and legacy data; (vii) use of search terms and other methods of reducing the volume of electronically stored information to be preserved or produced; and (viii) issues related to assertions of privilege and inadvertent production of privileged documents.").

[176] *Id.*

[177] 344 U.S. 443 (1953).

[178] *Id.* at 537.

[179] *See* McLee v. Angelone, 967 F. Supp. 152, 156 (E.D. Va. 1997).

[180] *See* THE SEDONA PRINCIPLES, *supra* note 2, at 17 princ. 2.

[181] *See* Search & Retrieval Scis. Special Project Team, Working Group on Best Practices for Document Retention and Prod,, The Sedona Conference, *The Sedona Conference Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery*, 8 SEDONA CONF. J. 189, 193 (2007) [hereinafter *Search and Retrieval*].

review, therefore, should consist of (i) using searches to identify potentially relevant documents; and (ii) reviewing a random sample of those documents.[182]

1. Identifying Key Documents

[50] While some document reviews are considered small (like the one in *Swofford*),[183] other document productions involve billions or trillions of documents.[184] Counsel should have an idea of the size of a requested production.

> With the amount of production ranging from megabytes to terabytes, counsel and document reviewers cannot be expected to sift through all electronically stored information. However, with an understanding of a company's document retention program, the program's size, and the personnel responsible for the program's implementation, counsel and document reviewers can identify appropriate search terms, discuss projects with outside vendors, and budget accordingly.[185]

Identifying key documents requires counsel to understand what information has been requested. To readily retrieve relevant documents when requested, counsel should be familiar with where documents are stored.

2. Search Terms

[51] A discussion of every search term method is beyond the scope of this article. There are two methods, however, that will briefly be explained here to demonstrate the ability of ESI counsel and vendors across the country. Those methods are keyword searches and concept searches. A keyword search involves using simple words or phrases to find documents containing those words or

[182] *See* THE SEDONA PRINCIPLES, *supra* note 2, at 57 cmt. 11.a.

[183] *See generally Swofford*, 671 F. Supp. 2d 1274.

[184] *See, e.g.*, Adams v. United States, No. 03-0049-E-BLW, 2009 U.S. Dist. Lexis 99027, at *14 (D. Idaho Oct. 22, 2009).

[185] *See* THE SEDONA PRINCIPLES, *supra* note 2, at 21–24 princ. 3.

phrases.[186] A concept search, by contrast, uses semantic word relationships to retrieve all documents pertaining to a particular subject.[187]

[52] Keyword searches, by themselves, are disfavored and possibly indefensible because they require a manual review rather than using statistical sampling.[188] In a 1985 study, a team of attorneys and paralegals compiled a list of keyword searches that they asserted would retrieve 75% of all relevant documents. But it was later determined that the keyword searches only retrieved 20% of all relevant documents.[189] The study found that the nature of the human language renders keyword searches highly ineffective, especially where people use different language or lexicons to describe a particular event.[190] The results imply that keyword searches are not an effective means to find relevant information.[191] Mathematical formulas that use metrics are being developed to improve both access to and retrieval of relevant information.[192] Using such formulas will allow for a more transparent system of what words were pursued and what words produced false positives or negative results.

[53] But even when the parameters are clear, challenging opposing counsel's search terms is an uphill battle that is usually not worth fighting. In *United States v. O'Keefe*,[193] the defendants challenged the keyword search terms used by the government.[194] The district court held that a party contending that search terms are insufficient "will have to specifically so contend in a motion to compel and their contention must be based on evidence that meets the requirements of Rule

[186] *Search and Retrieval, supra* note 181, at 200.

[187] *Id*. at 202.

[188] Asarco, Inc. v. EPA, No. 08-1332, 2009 WL 1138830, at *2 (D.D.C. Apr. 28, 2009).

[189] *See Search and Retrieval, supra* note 181, at 206.

[190] *See id.*

[191] *Id*.

[192] *Id*. at 205.

[193] 537 F. Supp. 2d 14 (D.D.C. 2008)

[194] *Id.* at 23–24.

702 of the Federal Rules of Evidence."[195] The *O'Keefe* court reasoned that "[g]iven this complexity, for lawyers and judges to dare opine that certain search terms or terms would be more likely to produce information than the terms that were used is truly to go where angels fear to tread."[196]

[54] Similarly, in *Equity Analysis, LLC v. Analytics*,[197] the plaintiff sought discovery of documents on the defendant's home computer.[198] As the computer contained personal, private, and privileged information, the plaintiff proposed using keyword searches to limit the search to relevant information.[199] Citing *O'Keefe*, the *Equity Analysis* court noted that the use of search terms is "beyond the ken of a lay person (and a lay lawyer) and requires expert testimony. . . ."[200] The court therefore noted:

> Determining the significance of the loading of a new operating system upon file structure and retention and why the completed forensic search will yield information that will not be yielded by a search limited by file types or keywords are beyond any experience or knowledge I can claim. . . . Accordingly, I am going to require Equity to submit an affidavit from its examiner explaining why the limitations proposed by the plaintiff are unlikely to capture all the information Equity seeks and the impact, if any, of the loading of the new operating system upon Lundin's computer and the data that was on it before the new operating system was loaded.[201]

[195] *Id*. at 24.

[196] *Id*.

[197] 248 F.R.D. 331 (D.D.C. 2008).

[198] *Id.* at 332

[199] *Id.*

[200] *Id*. at 333.

[201] *Id*.

The *Equity Analytics* court held that, with knowledge of the information, it could balance the plaintiff's need to discover the information against the defendant's privacy concerns.[202]

### 3. Sampling

[55] Among other benefits, sampling can improve the efficiency of preservation and production throughout the e-discovery process.[203] Specifically, sampling is a primary method of defending whether or not the production was reasonable, and it is also endorsed by Rule 34 of the Federal Rules of Civil Procedure.[204] Sampling can "narrow the burden of searching voluminous electronically stored information"[205] and can help determine whether further funds should be expended exploring other inaccessible sources, such as backup tapes or deleted data.[206] For instance, sampling has been used to allow parties to test the validity of a 568 page privilege log[207] and to determine whether three years of backup tapes were likely to contain relevant information.[208]

[56] But it is far too simplistic to suggest that sampling is "good." Like a document retention program, sampling must be done correctly or not at all.[209] Where sampling is conducted improperly, the results cannot be extrapolated because doing so would produce unreliable results.[210] In particular, a party must

---

[202] *Id*.

[203] *See Search and Retrieval, supra* note 181, at 209.

[204] *See* FED. R. CIV. P. 34(a).

[205] THE SEDONA PRINCIPLES, *supra* note 2, at 58 cmt. 11.b.

[206] *See* McPeek v. Ashcroft, 212 F.R.D. 33, 35 (D.D.C. 2003 ).

[207] D'Onofrio v. SFX Sports Group, Inc. 256 F.R.D. 277, 279 (D.D.C. Apr. 1, 2009) (allowing the plaintiff's attorney to take a sample of the 9,400 items in the privilege log).

[208] Zubulake v. UBS Warburg LLC (*Zubulake I*), 217 F.R.D. 309, 324 (S.D.N.Y. 2003).

[209] *See In re* Prudential Ins. Co. of Am. Sales Practice Litig., 169 F.R.D. 598, 615 (1997)

[210] *See* James E. Bartlett, II, et al., *Organizational Research: Determining Appropriate Sample Size in Survey Research*, 19 INFO. TECH., LEARNING & PERFORMANCE J. 43, 43 (2001).

establish that a sample is random, within acceptable margins of error, yet large enough to reflect the views of the population.[211]

[57] A sample is merely a snap shot of where a small representative group of the population stands on a particular issue.[212] A sample must be random to be reliable.[213] If the sample is not random, then the results are not truly representative of the population.[214] Furthermore, before conducting the sample, one must decide how confident they would like to be that the sample data can effectively be extrapolated to the entire population.[215] In most cases, 95 percent is an acceptable level of confidence.[216] Based on the confidence level selected, one may then determine the requisite sample size.[217] For example, suppose there is a population of 500 homes. At a 95 percent confidence level, you want to determine the number of homes with termite infestations.[218] To obtain results with a margin of error of 10 percent of homes, you would have to randomly sample 81 homes.[219] Failure to determine the appropriate sample size, whether in reviewing documents or checking houses for termite infestations, might result in sanctions under Rule 26(g) for not making a reasonable inquiry into the accuracy of one's responses to discovery requests.[220] Therefore, in the absence of an agreement to rely on

[211] Working Group on Best Practices for Document Retention and Prod., The Sedona Conference, *The Sedona Conference Commentary on Achieving Quality in the E-Discovery Process,* 10 SEDONA CONF. J. 299, 327 (2009) [hereinafter *Achieving Quality*].,

[212] *See id.*

[213] *Id.*

[214] *See id.*

[215] *See* Bartlett, *supra* note 210, at 43.

[216] *Id.* at 45.

[217] *See generally* Raosoft, Sample Size Calculator, http://www raosoft.com/samplesize.html (last visited May 15, 2010).

[218] THE SEDONA CONFERENCE, *supra* note 232, at 327–28.

[219] *See generally id.* Raosoft, *supra* note 217.

[220] *Achieving Quality, supra* note 211, at 303; *see* FED. R. CIV. P. 26(g).

"judgmental" sampling, sampling requires scrupulous planning before discovery begins.[221]

[58] As applied to electronic discovery, sampling is commonly used to find relevant and responsive documents. But performing its mathematical calculations is complex and sophisticated.[222] Counsel should understand that there are ways to ensure the search terms recall and precision.[223] These metrics can be used to challenge or support a sampling protocol by showing the existence or absence of a bias or error.

### C. Form of Production

[59] Unless a party agreement or court order provides otherwise, parties should preserve information in the form in which it is maintained in the ordinary course of business.[224] Further, where a party has produced information in one form, courts typically will not require production of the same information in another form.[225] Therefore, at some point, the ESI counsel and trial counsel should decide how to best preserve and produce the documents.

[60] Some individuals want everything in paper form. This is impractical and illogical in this day and age. The days of storing everything in a warehouse are all but over. The space and the costs associated with physical storage are almost prohibitive.[226] Today, one can easily scan documents onto a computer and store

---

[221] *Achieving Quality, supra* note 211, at 310 (stating that when judgment sampling, counsel is not expecting his/her results to be statistically accurate but is merely trying to show that his/her judgment is correct).

[222] Roland Bernier, *Avoiding an E-Discovery Odyssey*, 36 N. KY. L. REV. 491, 499 (2009).

[223] *Id*. at 502–03. Precision is the percentage of relevant versus non relevant documents that are retrieved by the search. *Id*. at 502. For example, if 40 documents were relevant and forty were not relevant, the precision of the search would be 50%. *See id*. (The author uses slightly more simplistic numbers; however, the principle expressed is consistent with that of the author.). Recall on the other hand measures relevant documents retrieved against the total relevant documents. *Id.* If there were 80 documents total, and the key word search revealed 40 relevant documents, then the recall would be fourth divided by 80, or 50%. *See id*.

[224] THE SEDONA PRINCIPLES, *supra* note 2, at 60 princ. 12.

[225] *Id.* at 66 cmt. 12.d.

[226] *See Achieving Quality, supra* note 211, at 315.

those documents on a thumb drive.[227] By doing so, ESI or in-house counsel can sample and search the data and print out any important information, thus creating fewer paper records and causing fewer space problems.[228]

## IV. COOPERATION

[61] The Sedona Conference has gained widespread acceptance in its quest for cooperation in discovery, including the recognition of United States Supreme Court Justice Breyer.[229] The Sedona Conference argues that discovery should not "be a place for extended argument and advocacy."[230] Instead, the parties should cooperate during discovery, saving arguments and advocacy for later stages of litigation.[231] Furthermore, counsel should cooperate not only with opposing counsel, but also with other members of his litigation team.[232]

## CONCLUSION

[62] Although courts have reviewed numerous discovery violations, the *Swofford* court was probably the first to sanction in-house counsel.[233] *Swofford* lifted the veil. Counsel of record are no longer the only lawyers potentially liable for discovery abuses.[234] Going forward, there is likely to be a major shift in who manages electronic documents. ESI counsel might be charged with significantly

---

[227] *See id.*

[228] *See id.*

[229] *See* e-Discovery Team, http://e-discoveryteam.com/2009/11/08/a-supreme-court-justice-writes-the-preface-to-a-sedona-conference-journal-on-the-cooperation-proclamation/ (Nov. 8, 2009, 21:14 EST).

[230] *Achieving Quality, supra* note 211, at 304.

[231] *Id.*

[232] CECIL A. LYNN III, PLAYING ON THE SAME TEAM: MANAGING THE RELATIONSHIP BETWEEN INSIDE AND OUTSIDE COUNSEL IN E-DISCOVERY 4–7 (2009), http://www.rcalaw.com/images/managing_relationship_article.pdf.

[233] *See Swofford*, 671 F. Supp. 2d at 1287–88.

[234] *See id.* at 1288.

more work, including the formulation of document retention programs and litigation hold procedures.[235] To avoid sanctions in the wake of *Swofford v. Eslinger*, in-house and ESI counsel must not only be involved in the discovery process, but in assisting with the implementation of any document retention program and ensuring compliance with any litigation holds.[236]

[235] *Id.* at 1287.

[236] *Id.*