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Electronic Discovery and the Amended Federal Rules of Civil Procedure

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Originally published in the *Wisconsin Lawyer*, Vol. 79, No. 12, December 2006.

The use of computer applications for all manner of business functions has exploded over the last 15 years. Some commentators estimate that more than 90 percent of information now is created electronically.¹ As much as 70 percent of electronic information may never reach hard copy.² Businesses and individuals now commonly rely on computer technology to conduct their affairs; thus, if a business becomes involved in litigation, important evidence may exist only in electronic form.

As Wisconsin Supreme Court Chief Justice Shirley Abrahamson recently observed: "Discovery, preservation, and production of electronic data is one of the leading legal issues facing not only corporate America but also government."³ Courts, lawyers, and commentators increasingly have expressed concern over the peculiar complexities and costs involved in discovery of electronic information. In particular, many believe that the general procedural rules have not kept pace with the dramatic progression of technology.

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The federal courts now have taken a large step forward in an effort to fill that gap. On Dec. 1, 2006, several amendments to the Federal Rules of Civil Procedure took effect, the culmination of six years of work to address the difficulties faced by the federal courts in applying rules devised for paper production to the burgeoning use of electronic information. (In this article, all references to "Rule" or "Rules" are to the Federal Rules of Civil Procedure.)

Rule 34 and Rule 26(a)(1) are revised, making electronic information explicitly subject to discovery.⁴ Rule 33(d) now expressly includes electronically stored information within the scope of "business information" that potentially must be produced in response to an interrogatory. However, electronic disclosure will not suffice as a response if the recipient's ability to locate relevant material is impaired. Rule 45 adapts the permitted subject matter of subpoenas to reflect the amendments.

In addition to modernizing textual references, the amendments also provide mechanisms specifically designed to address the unique difficulties posed by electronic discovery, including the costs and delays often associated with production of electronic information.

The Amendments to the Federal Rules

1) Focus on Electronic Discovery Issues at the Earliest Stages: Rules 16 and 26.

To focus attention on electronic sources of information, Rule 26(a)(1) now includes a new category of discoverable material: "electronically stored information."⁵ Rule 26(f) requires parties to discuss "any issues relating to preserving discoverable information" at the mandatory conference of counsel held before the Rule 16 initial court scheduling conference.⁶ The advisory committee believed that early discussion of this topic was essential because routine computer operations regularly change or delete information.⁷

Rule 26(f) also calls on the parties to address information sources and the issue of inaccessible data, and the burden and cost of obtaining information from particular sources of potentially discoverable material.⁸ The parties also are explicitly directed to discuss the form discovery will take.⁹ The discovering party may request the format in which it wishes to receive the information. Absent such a designation, the party from which the information is sought may give notice of the format(s) it intends to use.¹⁰ Failure to specify format at this stage exposes parties to the risk of having to reproduce the information in more than one format.

Rule 16(b) now provides for pretrial scheduling orders to include provisions for electronic discovery, and the process by which such discovery will occur.

2) Handling Requests for Electronic Information and Claims of "Inaccessibility": Rules 26(b)(2)(B), 34(a), and 34(b).

Rule 26(b)(2)(B) enshrines a two-tiered methodology for addressing requests for electronic information under Rule 34. A party responding to a discovery request must first identify information available from accessible sources and determine whether this information will satisfy the discovery request. If satisfaction is uncertain, the responding party must determine whether any of the harder-to-access sources need to be searched. The responding party is, however, required in its response to identify the nature and content of any source it claims is inaccessible. Requesting parties may seek, for good cause, a court order to compel discovery from inaccessible sources. Because it may be difficult to show that good cause exists, Rule 34(a)(1) allows requesting parties to seek an opportunity to test or sample inaccessible sources. Courts also may order sampling *sua sponte*. Sampling requests are subject to a balancing test for burdensomeness under Rule 26(b)(2)(B) and (b)(2)(C).

When a requesting party seeks electronic information that is not accessible to the responding party, the costs of retrieving and reviewing such electronic information may be shifted to the requesting party. Because of this cost-shifting potential, the responding party must identify sources and their contents sufficiently clearly to enable the requesting party to estimate the costs of recovery and the probability of finding pertinent information.

The requesting party has a right to specify the format electronic discovery is to take.¹¹ Attorneys should develop familiarity with different formats of electronic data so they can make a careful and informed decision about which format best fits a particular discovery scenario. The expected volume of information, the nature of the sources of the information, and the technology resources available to the requesting party, are likely to vary with each case and client. Generally, a decision will have to be made whether to seek discovery in native format, "paper-like" format, a conversion format, or a mix thereof. When an appropriate format is identified, it probably is best practice to specify the form by its extension.¹²

Discovery requests may not be duplicative, unless the requesting party is willing to pay for duplication, but requests may stipulate a different format for different types of information within a request. The requesting party should always consider the searchability of each type of information requested, and how to demonstrate the continuing integrity of the information disclosed to it. The correct choices may significantly enhance the value of discovery, while reducing the costs incurred by the client.

If the requesting party does not exercise its right to specify the form of discovery, or the requested format is successfully challenged as being unduly burdensome, Rule 34(b) provides a default rule.

Discovery must be offered either in a form in which the responding party maintains the information in the ordinary course of business, or in a "form or forms that are reasonably useable."¹³ Thus the responding party can select a format that it does not use in the normal course of business, if this format is serviceable for discovery purposes, but if the formats it uses are not generally used in commerce, the respondent is likely to bear the burden of translating the discovery information into a reasonably useable format.¹⁴

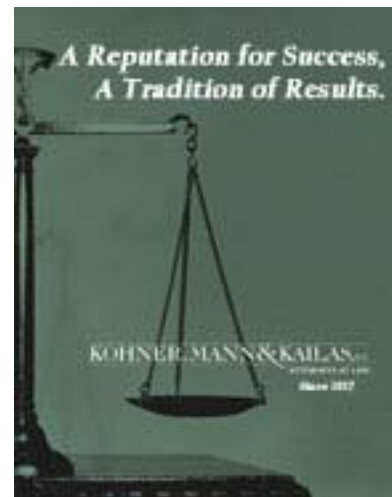
"Reasonably useable" is a variable standard. Although a responding party must meet the "generally useable in commerce" standard, a respondent is not required to produce information in a format that exceeds the utility of the formats in which the information is ordinarily kept. Similarly, responding parties need not convert electronic information simply because the requesting party operates unique systems. What a respondent may *not* do is produce discovery information in a format that makes it more difficult for the recipient to use the material in litigation - for example, by reducing searchability or removing metadata.¹⁵ The benchmark seems to be whether the respondent has removed from the electronic information a useful attribute that it possesses.¹⁶

Under amended Rule 34(b), a responding party may object to a requested format for production, providing its reasons and stating the format it intends to use. The requesting party then has the burden to seek an order under Rule 37(a) to require a particular format for the electronic information provided.¹⁷

3) Procedure for Post-Production Assertion of Claims of Privilege and Work Product: Rules 26(b)(5), 26(f)(4), and 16(b), and Proposed Rule of Evidence 502.

Rule 26(f)(4) is a new provision addressing the committee's concern that "reviewing electronically stored information for privilege and work product protection adds to the expense and delay, and risk of waiver, because of the added volume, the dynamic nature of the information, and the complexities of locating potentially privileged information."¹⁸ Metadata and deleted materials, not generally visible on-screen, were given as examples of areas in which problems may be faced.¹⁹ In an effort to reduce the cost and delay of prior screening, the rules now enable parties to agree that claims of privilege may be asserted *after* electronic information is produced.

The amended rules provide a framework for, and encourage, parties to agree voluntarily to measures that will allow disclosure of electronically-stored information but will maintain the privileged nature of the information. Usually, disclosure results in waiver of privilege. Under the default approach established by Rule 26(b)(5), if any privileged information is disclosed in response to a discovery request, the responding party may notify recipients, who must then promptly return, destroy, or sequester the information.²⁰ If the recipient disputes the claim of privilege, the information subject to the claim may be deposited under seal with the court so that the claim can be determined.²¹



Parties have some latitude in formulating agreements; they may opt to delay review for privilege until after discovery without waiving privilege. This has the advantage of minimizing delay before initial disclosure.²² "[O]ther arrangements are possible as well."²³ If the parties have agreed on a basis for post-production assertion of privilege, the agreed basis may now be included in a Rule 16(b)(6) order.²⁴ Parties should use Form 35 to record the nature of such an agreement.²⁵

The suspension of waiver issue is as much controlled by the rules of evidence as by the rules of procedure. Accordingly, the Judicial Conference Committee on the Federal Rules of Evidence also has reviewed the issue of attorney/client privilege and the work product doctrine in relation to discovery.²⁶ Under proposed Rule of Evidence 502, inadvertent production of protected material will not constitute waiver if the disclosure was "made in connection with federal litigation or federal

administrative proceedings - and if the holder of the privilege or work product protection took reasonable precautions to prevent disclosure and reasonably prompt measures" to rectify the error on becoming aware of the disclosure.²⁷ An agreement concerning the effect of disclosure on privilege or work product protection will be binding on the parties to that agreement, and on other parties if it is reflected in a court order. Amended Rule 26 provides for this type of agreement, and amended Rule 16(b)(6) provides for such an agreement to be reflected in a court order.

Proposed Rule of Evidence 502 is intended to provide a "predictable, uniform set of standards under which parties can determine the consequences of a disclosure" of protected materials during the pre-trial conference phase.²⁸ Thus, the rule is designed to support a key goal of the civil procedure amendments: to reduce the early cost of, and significant delay to, discovery arising from the need to screen electronic information.

Although the civil procedure amendments took effect on Dec. 1, proposed Rule 502 is unlikely to be finalized immediately. Further, the federal courts cannot create a rule of evidence that is binding on state courts,²⁹ raising the possibility that a state court could refuse to abide by a federal ruling that was pre-served, and hence find privilege to have been waived, and thereby undermine the objective of providing a predictable, uniform rule.³⁰ It is therefore likely that the amendment to Rule 502 will require direct statutory enactment by Congress before a party can be certain that an agreement to bar waiver in one proceeding will not be held invalid in another proceeding.³¹

4) Sanctions in Electronic Discovery Disputes: Rule 37(f).

Rule 37(f) provides some degree of protection against the imposition of sanctions for the inability to produce electronically-stored information when such data is lost as a result of a good faith, routine operation of an electronic information system. As illustrations of routine operations, the Rules Committee cited routine renewal of disaster recovery ancestor files, programs that update metadata as the file is used, and the automatic overwriting of deleted files.³² This rule does not create a safe haven for intentional destroyers of information.³³

A suspension of routine operations to preserve evidence often is termed a "litigation hold." Rule 37(f) does not speak explicitly to the duty to preserve or to the scope of a litigation hold, but notes that actions to implement such holds do suggest good faith. The parties may agree on litigation holds during pre-trial discussions on data preservation mandated by the amended Rule 26(f). Failure to implement a hold once a party is on notice of the information's pertinence to the case might be considered evidence of bad faith.³⁴

If a loss of data occurs in good faith, the revised rule permits sanctions only "in exceptional circumstances."³⁵ The party seeking sanctions must show that, good faith or not, the loss is "highly prejudicial to it."³⁶ Even then, sanctions should be only the minimum required to remedy the prejudice: the object of sanctions is to provide a remedy and not to punish or deter.³⁷ Severe sanctions generally are restricted to situations in which bad faith or reckless behavior is found in the loss or destruction of electronic information.³⁸ Negligence generally is not sufficient.³⁹

The scope of the safe harbor is limited to any loss of information resulting from routine operations that occurs before good faith efforts to impose a litigation hold can yield results. The safe harbor limitation raises two issues: What triggers the duty to impose a litigation hold, and what is the proper scope of a given hold? Unfortunately, the amendments do little to clarify these issues. It is clear that even pre-litigation events can trigger the duty to preserve.⁴⁰ In effect, the common law position seems to be that the duty is triggered at the point at which a reasonable person would reasonably contemplate the likelihood of litigation. There also is significant danger that a party's inability to show adequate prior preparation and planning, including documenting systems, storage policies, media, and procedures, to prevent a loss of electronic data increasingly will provide fertile grounds for assertions of bad faith.

Implications for Internal and External Lawyers

The amendments add to the growing number of new duties imposed on attorneys by recent case law addressing electronic discovery procedures. These duties require a knowledge of information technology and its application that has not previously been recognized as part of the general legal skill-set.⁴¹

Electronic discovery has become pervasive. Discovery of email "now occurs in nearly 100% of federal civil ... cases and major employment disputes."⁴² Discovery often is tremendously expensive: "The cost of responding to a discovery request can be in the millions of dollars."⁴³ Electronic discovery needs have spawned an industry of specialists who work with law firms and their clients to manage their discovery obligations. It is estimated that this infant industry earned revenues of \$1.2 billion in 2005.⁴⁴ According to a November 2005 survey, only 14 percent of in-house legal department lawyers believed they had the tools and processes available to handle an electronic discovery request.⁴⁵

Despite the specialized, technical nature of electronic information and discovery, failure to preserve electronic information relevant to litigation may result in harsh sanctions for lawyers and clients, including financial penalties, exclusion of witnesses or pleadings, adverse inference instructions, dismissal, and default judgment.⁴⁶ Sanctions have been sought in many federal and state cases; around 65 percent of these requests have been granted, with sanctions granted against defendants 80 percent of the time, and most often for nonproduction, although false claims of nonexistence of electronic information also figure significantly.⁴⁷

Duties to preserve electronic information are on-going.⁴⁸ After imposing a litigation hold, lawyers often are expected to oversee their clients' compliance with the hold by taking affirmative actions, for example, making certain that all sources of potentially relevant information are identified and included in the hold.⁴⁹ To oversee compliance, lawyers must become familiar with their clients' document retention policies, speak with information technology personnel, and communicate with the "key players" in the litigation.⁵⁰ Lawyers may be required to demonstrate not only that compliance was properly conceived, but that counsel took steps such as conducting random audits to ensure compliance by key players.⁵¹

In addition to ensuring that information is preserved, lawyers increasingly are expected to know how to identify information subject to a litigation hold, preserve it, and search it for privilege without in any way altering it. Simply collating records may not suffice: forensic review of duplicated sources now may become the standard expected, because forensic review leaves intact, in the form of metadata, desirable information that collation may destroy. A lawyer who opens a file to review it for discovery or who cuts and pastes information potentially destroys metadata. Such seemingly benign actions - often conducted in an attempt to comply with discovery - may overwrite or erase file paths and amend data and thereby invite allegations of spoliation.⁵²

The interaction of routine operations and good faith protection arguably has created a duty on the part of corporate counsel to address retention policies. A lawyer who fails to advise a client or employer of the risks of retaining data longer than commercial or statutory necessity requires may have placed his or her client in a more difficult position in regard to discovery requests. However, when litigation is reasonably anticipated, advice to implement a destruction policy, if acted upon, risks malpractice for lawyers and spoliation sanctions against the client.⁵³

Once litigation is anticipated, trial lawyers have a duty to assist in determining the scope of data preservation and then to play an active role in ensuring competent, diligent, and ethical compliance with discovery obligations by the client and its employees.⁵⁴ Trial lawyers are obligated to communicate with in-house counsel to identify key players, and they retain a duty to review documents received from the client for indications that other, as yet undiscovered, documents may exist.⁵⁵ Lawyers who fail to gain an understanding of the nature and content of electronic information held by a client, and to advise that client of the legal significance of data retention and the appropriate characteristics of a routine disposal policy, may risk malpractice.⁵⁶

The level of understanding expected of lawyers regarding electronic issues will only increase under the federal rule amendments. Parties now must come to pre-trial conferences able to discuss what electronic information they possess, the steps taken to preserve information, and the practicalities of accessing it.⁵⁷ Requesting parties need to articulate their objectives clearly. Courts may deny broad or vague discovery requests that do not facilitate identification of potentially relevant electronic information.⁵⁸ Lawyers must understand and should identify the format in which they want to receive electronic discovery. Failure to do so may leave the choice to the responding party.⁵⁹ Duplicative requests may lead to cost-shifting in favor of the producing party.⁶⁰

Managing all these duties effectively will be greatly enhanced by an electronic discovery plan that is developed and updated by lawyers, in active collaboration with their clients. Lawyers should offer training for in-house attorneys, information technology leaders, and senior managers on the legal duties and obligations relating to electronic information,⁶¹ before developing a plan that encompasses, among other things:

- identifying data sources in use (including PDAs, laptop computers, home offices, thumb drives, mobile phones, and any other electronic device capable of retaining information);
- determining the operating systems, applications, and databases the company uses and has previously used, dates of use, and access to discontinued software;
- reviewing and amending records management policies. Aside from regulatory and existing litigation requirements, the plan should identify the operational life of different types of information. Consider preventing employees from using personal storage media. Many applications can automatically delete files that are unused for a certain period. For applications that cannot, consider implementing a policy whereby only the file originator may retain a file past its initial use.
- identifying key individuals (players), both at the corporate level and by operational area, and determining where these individuals store data;
- documenting the company's file-naming and save-location procedures;
- creating an inventory of back-up archives and their location, and identifying the individuals responsible for archiving and storage;
- determining for each type of data repository, including archives, what issues would be posed if recovery is required;
- compiling a database of employees, former employees, and consultants who have access to and privileges within systems, including any external contactors that handle data, and the time periods each person has access to the system;
- researching the suitability of outsourcing to an electronic discovery consultant, and if outsourcing is suitable, investigating which providers have expertise in the types of information technology that the client employs, and the character of litigation likely to arise.
- designating specific individuals responsible for maintaining information of the types noted in the bullets above and for coordinating the implementation of litigation holds with external counsel and with any external consultants;⁶²
- detailing procedures for notifying responsible individuals, including external counsel, once a duty to preserve is suspected to arise, and specifying procedures for rapid, good faith implementation of an appropriate litigation hold;
- agreeing on methods, such as an audit, by which external counsel can verify enforcement of litigation holds; and
- designing training for supervisory staff and other people who have access to critical electronic data concerning what to do when notified of a litigation hold that affects them.

The need to act is pressing: "those companies that have not already begun evaluating the rule changes in conjunction with their IT departments may find themselves in a difficult position in 2007."⁶³ The steps outlined above should enable a realistic early assessment of the costs and chronology of electronic discovery production, thereby facilitating a more informed and rapid response and helping lawyers and clients to navigate the ever-increasing challenges posed by electronic discovery.

Conclusion

The federal amendments on electronic discovery provide compelling confirmation that lawyers must adapt their practices and develop new skills. Federal courts began to treat the amendments as persuasive even before their text was finalized.⁶⁴ It is highly likely that the new federal standards will strongly influence state jurisdictions as states grapple with the same issues and determine the duties of lawyers faced with electronic discovery concerns. Accordingly, Wisconsin practitioners should move quickly to master their new obligations and duties in this fast-changing environment.

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Endnotes

¹See, e.g., *Roundtable Discussion - Electronic Discovery, Part 1*, Wis. L.J., May 5, 2004; Eric A. Taub, *Deleting May Be Easy, But Your Hard Drive Still Tells All*, N.Y. Times, April 5, 2006.

²See, e.g., Andy Zangrilli, *20 Questions with an Electronic Evidence Expert*, Modern Practice, August 2002.

³*Custodian of Records v. Wisconsin (In re John Doe Proceeding)*, 2004 WI 65, ¶ 61, 272 Wis. 2d 208, 244, 680 N.W.2d 792 (Abrahamson, C.J., concurring).

⁴Under the old Rule 34, "data compilations" were defined as a subset of documents. *Report of the Civil Rules Advisory Committee*, (PDF) May 27, 2005, at 23 (hereinafter "Rules Report").

⁵*Id.*

⁶*Id.* at 24.

⁷The parties should discuss the "balance between competing needs to preserve relevant evidence and to continue operations critical to on-going activities" during pre-trial conferences planning discovery. *Id.* at 34 (note to Rule 26(f)).

⁸*Id.*

⁹Fed. R. Civ. P. 26(f)(3). Rule 34(b) directs the responding party to choose a discovery format if the discovering party fails to specify one.

¹⁰Rules Report, *supra* note 4, at 34.

¹¹*Id.* at 76 (notes to Rule 34).

¹²There are myriad extensions, each representing a separate file format, of which .doc, .pdf, .tif, .csv, and so on, are common examples. Further information on file extensions can be found on the Internet, an example being at <http://filext.com/>.

¹³Rules Report, *supra* note 4, at 67.

¹⁴*Id.*

¹⁵Metadata commonly includes information of great value to a requesting party, including (but not limited to): the names of people who have saved the document, the owner of the computer used last, the server or drive that the document was saved on, revisions and prior versions, and identification tags for Web material. Robert Almoney & Larry Hickman, *Smoking Guns*, www.legalisdocs.com/press.htm.

¹⁶A federal court in Wisconsin recently held that a respondent is under no duty to place the requestor in a better position than is the producing party with regard to searchability, and that paper discovery, duly organized to mimic electronic searching, does not diminish searchability (metadata not having been requested). *India Brewing Inc. v. Miller Brewing Co.*, 237 F.R.D. 190 (E.D. Wis. 2006).

¹⁷Rules Report, *supra* note 4, at 25.

¹⁸ *Id.* at 34.

¹⁹ *Id.* at 25. The report concedes that the volume and informality of email and other types of electronic communication render privilege determinations particularly difficult. Further problems stem from information deleted but not destroyed, or which never was ordinarily visible, such as metadata describing the history, tracking, or other aspects of an electronic document. *Id.* at 35-36 (note to Rule 26(f)).

²⁰ *Id.* at 57-58, Rule 26(b)(5)(b).

²¹ *Id.* Rule 26(b)(5) does not actually speak to the issue of when waiver occurs. Rule 26(f)(4) creates a voluntary opportunity for the parties to stipulate that waiver will not occur in initial discovery related to electronic information.

²² Rules Report, *supra* note 4, at 28 (note to Rules).

²³ *Id.*

²⁴ *Id.* at 24-25. Rule 26(f)(4) addresses the opportunity to reach such agreements.

²⁵ *Id.*

²⁶ *Report of the Advisory Committee on Evidence Rules*, May 15, 2006, www.ediscoverylaw.com/federal-rules-amendments-new-evidence-rule-502-addressing-privilege-waiver-to-be-published-for-public-comment-in-august-2006.html.

²⁷ *Id.* at 1-2 (proposed amended Rule 502(b)).

²⁸ *Id.* at 10 (note to Rule 502).

²⁹ *Id.*

³⁰ "Without such a definitive ruling, no prudent party would agree to follow the procedures recommended in the proposed rule." *Hopson v. Mayor & City Council of Baltimore*, 232 F.R.D. 228, 234 (D. Md. 2005).

³¹ Congress used its legislative powers to regulate state class actions under the Class Action Fairness Act (2005), 119 Stat 4. *Report of the Advisory Committee on Evidence Rules*, *supra* note 26, at 10 (note to proposed Rule 502).

³² *Rules Report*, *supra* note 4, at 83.

³³ *Id.* at 84-85.

³⁴ *Id.* at 85.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ Prior case law often held negligence sufficient to justify significant sanctions. *See, e.g., Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99 (2d Cir. 2002) (holding that sanction of adverse inference may be appropriate in some cases involving negligent destruction of evidence because each party should bear risk of its own negligence). Under the amendments, negligence is not sufficient for sanctions to be imposed absent exceptional circumstances, and even then sanctions should be imposed only to the minimum degree necessary to offset the prejudice found.

⁴⁰ *See, e.g., Applied Telematics v. Sprint Comms. Co.*, 1996 U.S. Dist. Lexis 14053 (E.D. Pa. Sept., 17, 1996) (receipt of discovery request and/or filing of complaint); *Keir v. Unumprovident Corp.*, No. 02CIV8781 (DLC), 2003 WL 21997747 (S.D.N.Y. Aug., 22, 2003) (preservation order); *Arthur Anderson LLP v. United States*, 544 U.S. 696 (2005) (service of subpoena); *Testa v. Wal-Mart*, 144 F.3d 173 (1st Cir. 1998) (complainant threatens litigation); *Binzler v. Marriott Int'l Inc.*, 81 F.3d 1148 (1st Cir. 1996) (attorney requests information on behalf of client); *Broccoli v. EchoStar Comms. Corp.*, 229 F.R.D. 506 (D. Md. 2005) (complaint by employee to direct supervisor); *In re Cell Pathways Inc. Securities Litigation, II*, 203 F.R.D. 189 (E.D. Pa. 2001) (receipt of preservation letter).

⁴¹ Both "lawyers and judges must become better educated about electronic information and discovery thereof." *In re John Doe Proceeding*, 2004 WI 65, ¶ 63, 272 Wis. 2d 208, (Abrahamson, C.J., concurring).

⁴² Linda Volonino, *Electronic Evidence and Computer Forensics*, 12 Comm. Ass'n of Info. Sys. 27 at 11 (2003), *citing* Flynn & Kahn, *E-Mail Rules*, Amacom (2003), <http://cais.isworld.org/articles/12-27/article.pdf>.

⁴³ *Hopson*, 232 F.R.D. at 239.

⁴⁴ Socha-Gelbman Electronic Discovery Survey Results (2006).

⁴⁵ By EDDix, a market analyst, *cited in* Scott Gawlicki, *Data Mining*, InsideCounsel.com, May 5, 2006.

- ⁴⁶See, e.g., *Coleman (Parent) Holdings Inc. v. Morgan Stanley Inc.*, No. CA 03-5045 AI, 2005 WL 674885 (Fl. Cir. Ct. March 23, 2005); *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003) (*Zubulake IV*).
- ⁴⁷Shira A. Scheindlin & Kanchana Wangkeo, *Electronic Discovery Sanctions in the Twenty-First Century*, 11 Mich. Telecomm. Tech. L. Rev. 71, 75 (2004).
- ⁴⁸*Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004) (*Zubulake V*).
- ⁴⁹*Id.*
- ⁵⁰*Id.*
- ⁵¹*Id.*
- ⁵²See *Quick Guide to Copying Client Data*, LexisNexis Applied Discovery (2005).
- ⁵³*Rambus Inc. v. Infineon Techs. AG.*, 222 F.R.D. 280 (E.D. Va. 2004).
- ⁵⁴*Cardenas v. Dorel Juvenile Group Inc.*, No. CV.A. 04-2478 KHV-DJW, 2006 WL 1537394, at *7 (D. Kan. June 1, 2006).
- ⁵⁵*Id.*
- ⁵⁶See, e.g., *Hopson v. Mayor & City Council of Baltimore*, 232 F.R.D. 228 (D. Md. 2005); *Phoenix Four Inc. v. Strategic Resources Corp.*, No. 05 CIV. 4837 (HB), 2006 WL 1409413 (S.D.N.Y. May 23, 2006) (counsel has duty to search for information, not merely to accept client's assertions it does not exist).
- ⁵⁷Fed. R. Civ. P. 26(f).
- ⁵⁸See, e.g., *Wright v. AmSouth Bancorp.*, 306 F.3d 1198 (2d Cir. 2003).
- ⁵⁹Fed. R. Civ. P. 26(f); see also *India Brewing Inc. v. Miller Brewing Co.*, 237 F.R.D. 190 (E.D. Wis. 2006).
- ⁶⁰See, e.g., *Quinby v. WestLB AG*, No. 04Civ.7406 (WHP)(HBP), 2006 WL 2597900 at 45 (S.D.N.Y. Sept. 5, 2006) (quoting *Wiginton v. CB Richard Ellis Inc.*, 229 F.R.D. 568, 574 (N.D. Ill. 2004) (availability from other sources supports cost shifting)).
- ⁶¹*Electronic Discovery Action Plan*, LexisNexis Applied Discovery.
- ⁶²The authors based this section in part on discussions of discovery planning in: Michele C.S. Lange, *Am I Committing Malpractice by Not Considering Electronic Data in My Cases?* Law Practice Today, 2004, and *Electronic Discovery Action Plan*.
- ⁶³Michael A. Gold & Nevin Sanli, *Data Duty*, Chief Executive, September 2006.
- ⁶⁴See, e.g., *Convolve Inc. v. Compaq Computer Corp.*, 223 F.R.D. 162 (S.D.N.Y. 2004); *Hopson v. Mayor & City Council of Baltimore*, 232 F.R.D. 228 (D. Md. 2005).