

**INTRODUCTION TO ELECTRONICALLY STORED INFORMATION (“ESI”)
AND DISCOVERY OF ESI IN FEDERAL COURT LITIGATION**

I. Introduction

- a. ESI and electronic discovery are fast becoming the norm in large civil cases, and will become the norm in almost every single civil case in the near future.
- b. Almost everyone uses a computer at work and at home. More than ninety-five percent of all documents and information now originate as electronic documents.
- c. Among other things, ESI includes e-mail, web pages, word-processing files, and electronic data stored on magnetic disks, optical drives, and flash memory. ESI is dynamic and may be easily changed or altered.
- d. ESI contains information that is not available in paper documents, such as metadata, background notes or comments, and spreadsheet formulas. As a general rule, one should request a full electronic version of documents and emails rather than paper. Be aware, however, that the volume of ESI is usually exponentially greater than paper documents because ESI is stored in multiple versions in multiple locations on multiple devices.
- e. All too often, businesses have abandoned sound document retention and management plans in a rush to automate their companies. Data is often stored on massive networks, local hard drives, and portable storage devices.
- f. The Federal Rules of Civil Procedure were amended in December 2006 to reflect the unique problems and issues that arise in connection with discovery of ESI.
- g. Many of the problems which have arisen in conducting electronic discovery have been related to attorneys’ failure to understand their own clients’ computer systems, document retention and destruction policies, capabilities, and limitations. *See, e.g., Linnen v. A.H. Robins Co.*, 1999 WL 462015 (Mass. Super Ct. June 16, 1999).

II. ESI Issues Arising Prior to Litigation

a. Creation of ESI

- i. Individuals at companies of all sizes create and store electronic data as a routine business practice, especially email and attachments.
- ii. ESI is created in a multitude of ways within a company:
 1. Sending and receiving of emails;

- a. VeriSign (the exclusive registry for .com and .net domains) conservatively estimates that there are about 2.25 billion email queries per day.
2. Creation of Microsoft Word, Excel, PowerPoint, Access, and many other format of documents;
3. Metadata of emails and other forms of documents is ESI (metadata is discussed in more detail below);
4. Saving such documents onto external hard drives, CDs, DVDs, zip drives, thumbs drives, or any other external storage device;
5. Automatic copying of such ESI onto computer backup tapes or hard drives, which many companies create on a regular basis to preserve ESI for emergency disaster recovery;
6. If the company uses a server, information will usually be located on a server as well as the network that connects the individual's computer to the server.

b. ESI Management/Storage and Destruction

- i. While many companies have document retention policies that apply to paper documents, the cost of storing ESI is so low that most companies do not have equivalent policies for ESI.
 1. Emails are the only form ESI that might have a formal policy for how long they should be kept by a user or the company.
- ii. In the computer world, each employee may have many forms of electronic storage where discoverable information may exist: a desktop computer, a home computer, a PDA, as well as floppy disks and other portable storage devices, such as a USB or thumb drive.
- iii. Larger companies may also have network servers for storing massive amounts of data for many PCs and backup data.
- iv. In a computer-based business, instead of outdated documents being routinely destroyed, documents are often created, distributed widely, and seldom removed when outdated.
- v. However, companies often “recycle” back-up tapes on a prescheduled basis. That is, the ESI on the tapes are overwritten with new ESI.

Stopping automatic recycling of stored data comes into issue when a company must implement a litigation hold, which is discussed below.

vi. Some literature suggests that a company should implement a document retention policy that includes electronic documents.

1. How does the company ensure that its employees comply with such a policy?

vii. Key Cases Regarding Records Management

1. *Arthur Andersen, LLP v. United States*, 544 U.S. 696 (2005).
2. *In re Cheyenne Software, Inc., Securities Litigation*, 1997 WL 714891 (E.D.N.Y. Aug. 18, 1997).
3. *Heveafil Sendirian (Sdn.) Berhad (Bhd.) v. United States*, 2003 WL 1466193 (Fed. Cir. Mar. 19, 2003) (order not to be cited as precedent).
4. *Hynix Semiconductor, Inc. v. Rambus, Inc.*, No. C-00-20905 RMW (N.D. Cal. Jan. 4, 2006).
5. *Kozlowski v. Sears, Roebuck & Co.*, 73 F.R.D. 73 (D. Mass. 1976).
6. *Landmark Legal Foundation v. EPA*, 272 F. Supp. 2d 59 (D.D.C. 2003).
7. *Public Citizen v. Carlin*, 184 F.3d 900 (D.C. Cir. 1999).
8. *Rambus, Inc. v. Infineon Technologies AG*, 220 F.R.D. 264 (E.D. Va. 2004).
9. *Renda Marine, Inc. v. United States*, 58 Fed. Cl. 57 (Fed. Cl. 2003).
10. *United States v. Quattrone*, No. 04-5007-cr (2d Cir. Mar. 20, 2006).

c. Computer Forensics and Recovery of “Lost” Information

i. Computer forensics, which is often used in complex litigation, is incredibly **expensive**.

1. When one considers employing computer forensics, it is generally because one is looking for deleted and hidden files and metadata in a company's or individual's electronic data storage areas or making expensive clones of computer hard drives and storage drives.
2. Computer forensics help attorneys identify, acquire, and restore electronic data. For example, application of computer forensics can help acquire historical or archival ESI from tape drives or outdated computer systems.

ii. What is computer forensics?

1. Computer forensics applies computer science principles and standardized methodologies to collect, preserve, analyze, and present computer-related evidence for the legal process.
2. Computer forensics requires specialized expertise and goes beyond mere data collection or preservation that an end-user or system support personnel can accomplish.
3. A computer forensics expert can retrieve "deleted" information, can restore backup tapes, and can uncover more metadata (as well as removed or "scrubbed" metadata) than an end-user can.
4. "Certified Computer Examiner" is a title awarded by the International Society of Forensic Computer Examiners. Also, a "Master Certified Computer Examiner" is available. Usually, someone holding an "EnCE" certification, an EnCase® Certified Forensic Examiner, is also a qualified individual. However, like everyone else, there is no substitute to vigorously checking references before retaining a person to work on your case.

iii. Recovery of lost or "deleted" information

1. Information that an end-user deletes from his or her computer system is not actually deleted.
2. Data is hard to destroy and often times just as hard to preserve.
3. Deleting a computer document merely renames the file, making it available for overwriting, if the space is needed in the future.

4. Restoring deleted files is generally not an overly difficult task for a computer forensics expert, but it can be expensive and issues of cost-shifting in discovery may come into play (discussed below).
5. A “sector for sector” or forensic or mirror copy of the hard drive will pick up any deleted files or file fragments that remain.
 - a. Imaging of a computer hard drive is an expensive process, and adds to the burden of litigation to both parties.
 - b. Examination of a hard drive requires an expert for both the producing party and the receiving party.
 - c. This usually results in the generation of massive amounts of irrelevant nonresponsive ESI, as well as potentially privileged information.
 - d. Courts often impose complex and expensive protocol to screen out ESI that should not be part of discovery. See e.g., *Playboy Enters. v. Welles*, 60 F.Supp.2d 1050, 1054 (S.D. Cal 1999).
 - e. To date, federal district courts faced with the issue of copying a hard drive in civil litigation have adopted fairly stringent procedures to protect privilege and privacy concerns.

iv. Key Cases Regarding the use of Computer Experts

1. *Balboa Threadwork, Inc. v. Stucky*, 2006 WL 763668 (D. Kan. Mar. 24, 2006).
2. *Barton v. State*, 2007 WL 1775565 (Ga. App. June 21, 2007).
3. *Calyon v. Mizuho Securities USA, Inc.*, 2007 WL 1468889 (S.D.N.Y. May 19, 2007).
4. *Gates Rubber Co. v. Bando Chemical Industries, Ltd.*, 167 F.R.D. 90 (D. Colo. 1996).
5. *Harbuck v. Teets*, 2005 WL 2510229 (11th Cir. 2005).
6. *Northwest Airlines v. Local 2000*, No. Civ. A.00-08 (D. Minn. Jan. 11, 2000).

7. *Peskoff v. Faber*, 2007 WL 2416119 (D.D.C. August 27, 2007).
8. *Playboy Enters. v. Welles*, 60 F.Supp.2d 1050, 1054 (S.D. Cal 1999).
9. *Roberts v. Canadian Pacific R.R. Ltd.*, 2007 WL 118901 (D. Minn. Jan. 11, 2007).
10. *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*, 51 Fed. R. Serv. 3d (West) 1106, *aff'd*, 53 Fed. R. Serv. 3d (West) 296 (S.D.N.Y. 2002).
11. *Simon Property Group, L.P. v. mySimon Inc.*, 194 F.R.D. 639 (S.D. Ind. 2000).
12. *Tempo Electric Heater Corp. v. Temperature Engineering Co.*, 2004 WL 1254134 (N.D. Ill. June 3, 2004).
13. *Trammell v. Anderson Coll.*, 2006 WL 1997425 (D.S.C. July 17, 2006).
14. *United States v. Flyer*, 2007 WL 2051373 (D.Ariz. July 13, 2007).
15. *Wild v. Alster*, 377 F. Supp. 2d 186 (D.D.C. 2005).
16. *YCA, LLC v. Berry*, 2004 WL 1093385 (N.D. Ill. May 7, 2004).

III. The 2006 Amendments to the Federal Rules of Civil Procedure and Accompanying Issues in ESI

a. 2006 Amendments to the Federal Rules of Civil Procedure (“FRCP”) Relating to Electronic Discovery

i. FRCP 16: Pretrial Conferences; Scheduling; Management

1. 16(b): provides that a scheduling order may include provisions for disclosure and discovery of ESI.
2. 16(b) also provides that a scheduling order may include agreed upon procedures for post-production privilege and work product claims.

ii. FRCP 26: General Provisions Governing Discovery; Duty of Disclosure

1. 26(a)(1)(A)(ii): ESI is now specifically within the scope of initial disclosures under this Rule.
 2. 26(b)(2)(B): provides circumstances under which ESI can be discovered when it is claimed to be “not reasonably accessible.”
 3. 26(f): requires the parties to confer early in the case about disclosure of ESI.
- iii. FRCP 33: Interrogatories to Parties
1. 33(d): The option to produce business records in response to an interrogatory now expressly includes ESI.
- iv. FRCP 34: Production of Documents; Electronically Stored Information, and Things and Entry Upon Land for Inspection and Other Purposes
1. 34(a)(1)(A): ESI is also now expressly within the scope of production requests.
 2. 34(b)(1)(C): This provision provides that the requesting party may specify the form in which ESI is to be produced.
 3. 34(b)(2)(D): A response to a request for ESI may contain an objection thereto, and if the objection is to the requested form, the responding party must state in which form it intends to respond.
 4. 34(b)(2)(E)(i): This provision states that ESI will be produced as they are kept in the usual course of business or organized and labeled to correspond to specific discovery requests.
 5. 34(b)(2)(E)(ii) This provision provides that ESI can be produced either in a form in which it is usually maintained or in a “reasonably useable” form.
 6. 34(b)(2)(E)(iii): A party need not produce ESI in more than one form.
- v. FRCP 37: Failure to Make Disclosures or Cooperate in Discovery; Sanctions
1. 37(e): this new “safe harbor” provision provides that absent “exceptional circumstances,” a party will not be subject to

sanctions for the loss of ESI as a result of “routine, good faith operation of an electronic information system.”

- a. Larger companies are going to digital storage drives and away from tape drives for backup of network systems.
 - i. Digital drives are regularly re-written (or overwritten) with each backup.

vi. FRCP 45: Subpoena

1. Now treats ESI from non-parties in a manner similar to that from parties.

b. Meet and Confer Requirements under the Federal Rules

i. Relevant Rule(s):

1. FRCP 16(b)
2. FRCP 26(f)

- ii. The new Rules specifically require parties to meet early and confer about ESI production and discovery issues. The Advisory Committee Notes state that early court involvement may “help avoid difficulties that might otherwise arise.”
- iii. This conference is an important opportunity for the parties to discuss the form(s) in which ESI will be produced, what information each party has in electronic form and where it is located, the anticipated schedule for production, preservation responsibilities, etc.

iv. Key Cases Regarding the Meet and Confer Requirement

1. *Concord Boat v. Brunswick Corp.*, 1996 WL 33347247 (E.D. Ark. Dec. 23, 1996).
2. *Gambale v. Deutsche Bank*, 2002 WL 31655326 (S.D.N.Y. Nov. 21, 2002).
3. *Hopson v. Mayor and City Council of Baltimore*, 232 F.R.D. 228 (D. Md. 2005).
4. *Thompson v. Jiffy Lube Int’l, Inc.*, 2006 WL 1174040 (D. Kan. May 1, 2006).

c. Scope of Electronic Discovery

i. Relevant Rule(s):

1. FRCP 26(a)(1)(A)(ii)
2. FRCP 26(b)(2)(B)
3. FRCP 33(d)
4. FRCP 34(a)(1)(A)

ii. Considerations in determining the scope of electronic discovery:

1. Who are the custodians of relevant information?
 2. Who is knowledgeable about the client's electronic storage system? (IT personnel)
 - a. Attorneys should consider preparing such a person for a 30(b)(6) deposition, as well as deposing an equivalent witness from the opposing side, as such depositions are being used more often to seek information about IT systems to develop further discovery. *Turner v. Resort Condominiums, Int'l.*, 2006 WL 1990379 (S.D. Ind. July 13, 2006).
 3. Where is relevant information located?
 - a. In *Linnen v. A.H. Robins Co.*, 1999 WL 462015 (Mass. Super Ct. June 16, 1999), the court awarded sanctions against the defendant for counsel's failure to fully investigate the location and extent of the client's computer system.
- iii. An attorney is obligated to do a significant investigation to be able to disclose to the opposing parties a description, etc., of all electronically stored information. *Phoenix Four, Inc. v. Strategic Resources Corp*, 2006 WL 1409413, *5 (S.D.N.Y. May 23, 2006). This places greater obligation on litigation counsel to become familiar with its client's document retention policies and electronic storage systems.
- iv. A party is not obligated to produce ESI that is "reasonably inaccessible" because of "undue burden or cost." FRCP 26(b)(2)(B).

1. This generally refers to ESI stored on backup tapes that are only created to restore a computer system in case of a disaster or on outdated “legacy” systems that are no longer used.
2. The Rule requires a showing that the data is reasonably inaccessible due to undue burden or cost. Even if the party seeking protection makes this showing, the court may still order this discovery for “good cause.”
 - a. “Good cause” is not explicitly defined in the Rule, but the Rule does provide a set of factors to consider in (b)(2)(C).
- v. Parties may be required to make computer systems available for inspection or copying, but only upon a showing that the search will locate responsive information, that there would be minimal interference and confidentially would be protected. *Fennell v. First Step Designs, Ltd.*, 83 F.3d 526, 532 (1st Cir. 1996).
- vi. Similarly, under 34(a)(1), a party may request an opportunity to test or sample the opponent’s ESI. However, the Advisory Committee Notes state that the issues of burden and intrusiveness must be weighed in regards to such a request.
- vii. Electronic Mail (“email”)
 1. Email is by far the most frequently discovered form of ESI.
 2. Due to the volume of email messages and the lack of a logical filing system of email, it may be beneficial for parties in litigation to agree on email search protocol.
 3. Email can be located in several locations: the sending computer, the receiving computer and the servers in between the two computers. The sending and receiving computer could be a cell phone, PDA (e.g., Blackberry, Palm Treo), laptop, or desktop computer.
- viii. Key Cases on the Issue of Scope of Discovery of ESI
 1. *Anti-Monopoly, Inc. v. Hasbro, Inc.*, 1995 WL 649934 (S.D.N.Y. Nov. 3, 1995).
 2. *Benton v. Dlorah, Inc.*, 2007 WL 2225946 (D.Kan. August 1, 2007)

3. *Bethea v. Comcast*, 218 F.R.D. 328 (D.D.C. 2003) (mem.)
4. *Bob Barker Co. v. Ferguson Safety Prods., Inc.*, 2006 WL 648674 (N.D. Cal. Mar. 9, 2006).
5. *Bullis v. Nichols*, 2005 WL 1838634 (W.D. Wash. Aug. 1, 2005).
6. *Byers v. Illinois State Police*, 53 Fed. R. Serv. 3d (West) 740 (N.D. Ill. June 3, 2002).
7. *Commodity Futures Trading Comm. v. Equity Fin. Group LLC*, 2005 WL 225789 (D.N.J. Sept. 9, 2005).
8. *Compuware Corp. v. Moody's Investors Services, Inc.*, 2004 WL 2931401 (E.D. Mich. Dec. 15, 2004).
9. *Cumis Insurance Co. v. Diebold, Inc.*, 2004 WL 1126173 (E.D. Pa. May 20, 2004).
10. *Electrolux Home Prods., Inc. v. Whitesell Corp.*, 2006 WL 355453 (S.D. Ohio Feb. 15, 2006).
11. *Fennell v. First Step Designs, Ltd.*, 83 F.3d 526, 532 (1st Cir. 1996).
12. *Fenster Family Patent Holdings, Inc. v. Siemens Medical Solutions USA, Inc.*, 2005 WL 2304190 (D. Del. Sept. 20, 2005).
13. *Fischer v. UPS*, 2006 WL 1046973 (E.D. Mich. Apr. 19, 2006).
14. *In re Ford Motor Co.*, 345 F.3d 1315 (11th Cir. 2003).
15. *Hagemeyer North America Inc. v. Gateway Data Sciences Corp.*, 222 F.R.D. 594 (E.D. Wis. 2004).
16. *Marcin Engineering, LLC v. Founders at Grizzly Ranch, LLC*, 219 F.R.D. 516 (D. Colo. 2003).
17. *McPeek v. Ashcroft*, 202 F.R.D. 31 (D.D.C. 2001).
18. *McPeek v. Ashcroft*, 212 F.R.D. 33 (D.D.C. 2003).
19. *Medical Billing Consultants, Inc. v. Intelligent Medical Objects, Inc.*, 2003 WL 1809465 (N.D. Ill. Apr. 4, 2003).

20. *Miller v. IBM*, 2006 WL 995160 (N.D. Cal. Apr. 14, 2006).
21. *Nicholas v. Wyndham International, Inc.*, 373 F.3d 537 (4th Cir. 2004).
22. *Nova Measuring Instruments Ltd. v. Nanometrics, Inc.*, 417 F. Supp. 2d 1121 (N.D. Cal. 2006).
23. *Procter & Gamble Co. v. Haugen*, 2005 WL 2660487 (10th Cir. Oct. 19, 2005).
24. *Quinby v. WestLB LG* (“*Quinby I*”), 2005 WL 3453908 (S.D.N.Y. Dec. 15, 2005).
25. *Quinby v. WestLB LG*, 2006 WL 59521 (S.D.N.Y. Jan. 11, 2006).
26. *Rozell v. Ross-Holst*, 2006 WL 163143 (S.D.N.Y. Jan. 30, 2006).
27. *SEC v. Beacon Hill Asset Management LLC*, 2004 WL 1746790 (S.D.N.Y. Aug. 3, 2004).
28. *Shank v. Kitsap County*, 2005 WL 2099793 (W.D. Wash. Aug. 30, 2005).
29. *Stallings-Daniel v. Northern Trust Co.*, 52 Fed. R. Serv. 3d (West) 1406 (N.D. Ill. 2002).
30. *Strasser v. Yalamanchi*, 669 So. 2d 1142 (Fla. Dist. Ct. App. 1996).
31. *Thompson, et al. v. Jiffy Lube International, Inc.*, 2006 WL 1174040 (D. Kan. May 1, 2006).
32. *Tilberg v. Next Management Co.*, 2005 WL 2759860 (S.D.N.Y. Oct. 24, 2005).
33. *Treppel v. Biovail Corp.*, 2006 WL 278170 (S.D.N.Y. Feb. 6, 2006).
34. *Williams v. Massachusetts Mutual Life Insurance Co.*, 226 F.R.D. 144 (D. Mass. 2005).
35. *Wright v. AmSouth Bancorporation*, 320 F.3d 1198 (11th Cir. 2003).

d. Preservation of ESI

- i. The duty to preserve ESI begins, just as with paper documents, when the client reasonably anticipates litigation, receives pre-litigation correspondence, or receives service of a complaint, answer, or discovery request. See *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003) (“*Zubulake IV*”).
- ii. The issue with preservation of ESI, as opposed to paper documents, is the many forms in which it comes and many places in which it is stored: work PCs, external storage devices, PDAs, home PCs, as well as more difficult to access forms, such as backup tapes, archival information and legacy information.
- iii. Some courts are entering preservation orders to specifically require parties to preserve electronic information, but the absence of such an order does not eliminate the preservation duty.
- iv. The scope of a party’s duty to preserve ESI is perhaps the most important issue in regards to an attorney’s duty to his or her client.
 1. The most basic duty in preserving ESI is the litigation hold: once a party anticipates litigation, it must “suspend its routine document retention/destruction policy and put in place a ‘litigation hold’ to ensure the preservation of relevant documents.” *Zubulake IV* at 218.
 2. The extent of this hold has been addressed in the *Zubulake* line of cases from the Southern District of New York.
 - a. The court stated that as a general rule, a party need not preserve all backup tapes. *Id.* at 217. That is, the litigation hold does not automatically extend to difficult-to-access backup tapes.
 - b. However, parties are still under a duty to preserve “unique, relevant evidence that might be useful to an adversary” when it anticipates litigation. *Id.*
 - c. The court carved out a further exception that backup tapes must be preserved if the company can identify where “key players” ESI is stored on backup tapes. *Id.* at 218.

- d. Whose ESI must be preserved? The court stated that the ESI and tangible documents of any person likely to have discoverable information as well as any person who prepared information for the person. *Id.* at 217-18.
 - e. What must be retained? A party must retain “all relevant documents (but not multiple identical copies) in existence at the time the duty to preserve attaches, and any relevant documents created thereafter.” *Id.* at 218.
- v. Key Cases in the Issue of Preservation:
1. *Cache La Poudre Feeds, LLC v. Land O' Lakes, Inc.*, 2007 WL 684001 (D. Colo. Mar. 2, 2007)
 2. *Capricorn Power Co. v. Siemens Westinghouse Power Corp.*, 220 F.R.D. 429 (W.D. Pa. 2004).
 3. *In re Celexa and Lexapro Prods. Liab. Litig.*, 2006 WL 3497757 (E.D. Mo. Nov. 13, 2006).
 4. *Clare v. Coleman (Parent) Holdings, Inc.*, 2006 WL 14091347 (Fla. App. 4th Dist., May 24, 2006).
 5. *Columbia Pictures Industries v. Justin Bunnell*, No. 06-1093 FMC (JCx) (C.D.Cal. May 29, 2007).
 6. *Consolidated Aluminum Corp. v. Alcoa, Inc.*, 2006 WL 2583308 (M.D. La. July 19, 2006).
 7. *Danis v. USN Communications*, 53 Fed. R. Serv. 3d 828 (N.D. Ill. 2000).
 8. *Del Campo v. Kennedy*, 2006 WL 2586633 (N.D. Cal. Sept. 8, 2006).
 9. *E*Trade Securities LLC v. Deutsche Bank NG*, 230 F.R.D. 582 (D. Minn. 2005).
 10. *In re eBay Seller Antitrust Litigation*, 2007 WL 2852364 (N.D.Cal. Oct. 2, 2007).
 11. *Frey v. Gainey Transp. Servs., Inc.*, 2006 WL 2443787 (N.D. Ga. Aug. 22, 2006)

12. *GTFM v. Wal-Mart Stores Inc.*, 49 Fed. R. Serv. 3d (West) 219 (S.D.N.Y. 2000).
13. *Harrison v. Jones, Walker, Waechter, Poitevent, Carrere & Denegre, L.L.P.*, 2004 WL 2984815 (E.D. La. Dec. 9, 2004), 2005 WL 517342 (Feb. 24, 2005).
14. *Healthcare Advocates, Inc. v. Harding, Earley, Follmer & Frailey*, 2007 WL 2085358 (E.D.Pa. July 20, 2007)
15. *Hypro, LLC v. Reser*, 2004 WL 2905321 (D. Minn. Dec. 10, 2004).
16. *JPMorgan Chase Bank, N.A. v. Neovi, Inc.*, 2006 WL 3803152 (S.D. Ohio Nov. 14, 2006)
17. *Keir v. Unumprovident Corp.*, 2003 WL 21997747 (S.D.N.Y. Aug. 22, 2003).
18. *King Lincoln Bronzeville Neighborhood Assoc. v. Blackwell*, 2006 WL 2591393 (S.D. Ohio Sept. 11, 2006).
19. *Krunwiede v. Brighton Assocs., LLC*, 2006 WL 1308629 (N.D. Ill. May 8, 2006).
20. *Landmark Legal Foundation v. EPA*, 272 F. Supp. 2d 59 (D.D.C. 2003).
21. *Liggett v. Rumsfeld*, 2005 WL 2099782 (E.D. Va. Aug. 29, 2005).
22. *In re Merrill Lynch & Co. Research Reports Securities Litigation*, 2004 WL 305601 (S.D.N.Y. Feb. 18, 2004).
23. *Metropolitan Opera Ass'n, Inc. v. Local 100, Hotel Employees & Restaurant Employees International Union*, 212 F.R.D. 178 (S.D.N.Y. 2003).
24. *In re Napster, Inc. Copyright Litigation*, 2006 WL 3050864 (N.D. Cal. Oct. 25, 2006)
25. *In re NTL, Inc. Sec. Litig.*, 2007 WL 241344 (S.D.N.Y. Jan. 30, 2007).
26. *New York State National Organization for Women v. Cuomo*, 1998 WL 395320 (S.D.N.Y. July 14, 1998).

27. *Phillips v. Netblue, Inc.*, 2007 WL 174459 (N.D. Cal. Jan. 22, 2007).
28. *Propath Services, LLP v. Ameripath, Inc.*, 2004 WL 2389214 (N.D. Tex. Oct. 21, 2004).
29. *In re Prudential Insurance Co. of America*, 169 F.R.D. 598 (D.N.J. 1997).
30. *Pueblo of Laguna v. United States*, 60 Fed. Cl. 133 (Fed. Cl. Mar. 19, 2004).
31. *Ridge Chrysler Jeep, LLC v. Daimler Chrysler Servs.*, 2005 WL 4708362 (N.D. Ill. Sept. 6, 2006).
32. *School-Link Techs., Inc. v. Applied Res., Inc.*, 2007 WL 677647 (D. Kan. Feb. 28, 2007)
33. *Sonnino v. University of Kansas Hospital Authority*, 220 F.R.D. 633 (D. Kan. 2004).
34. *Thompson v. Jiffy Lube Int'l, Inc.*, 2007 WL 608343 (D. Kan. Feb. 22, 2007)
35. *Treppel v. Biovail Corp.*, 2006 WL 278170 (S.D.N.Y. Feb. 6, 2006).
36. *United Medical Supply Co. v. United States*, 2006 WL 2615846 (Fed.Cl. Sept. 8, 2006)
37. *United States v. Boeing Co.*, 2005 WL 2105972 (D. Kan. Aug. 31, 2005).
38. *Wiginton v. Ellis*, 2003 WL 22439865 (N.D. Ill. Oct. 27, 2003).

e. Spoliation

- i. The risk of spoliation with regard to ESI is greater than with paper documents due to the nature of electronic storage. Data is deleted or overwritten routinely without any action from the computer's operator. Also, metadata (which is data about data) is altered just by opening an electronic document.
- ii. "Spoliation is 'the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or

reasonably foreseeable litigation.” *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 430 (S.D.N.Y. 2003) (“*Zubulake V*”) (quoting *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir.1999)).

- iii. Evidence of spoliation can lead to sanctions or an inference instruction that the spoliated evidence would have been unfavorable to the destructing party. *Id.* at 431.
- iv. The court emphasized that implementing a litigation hold is not enough to avoid sanctions for spoliation; an attorney must oversee compliance with the litigation hold. *Id.* at 432.
- v. Metadata
 1. Metadata is typically defined as “data about data”; it is the data that underlies the document electronic information that the computer user is creating. It can give information about the author, date of creation, and modifications that have been made.
 2. Metadata is most often discussed in regards to electronic spoliation because it is very easy to inadvertently spoil metadata: simply opening a document changes metadata. This is especially a risk in the necessary attorney review of ESI before production; attorneys may inadvertently change or destroy metadata.
 3. It is not required by the Rules that metadata always be produced. It depends on the circumstances and how relevant the metadata may be. In fact, the trend seems to be against producing metadata, as it is usually of limited usefulness. *See Wyeth v. Impax Laboratories, Inc.*, 2006 WL 3091331 (D. Del. October 26, 2006); *Kentucky Speedway, LLC v. National Association of Stock Car Auto Racing, Inc.*, 2006 U.S. Dist. LEXIS 92028 (E.D. Ky. December 18, 2006); *Michigan First Credit Union v. Cumis Ins. Society, Inc.*, 2007 WL 4098213 (E.D. Mich. November 16, 2007).
 4. If it is decided that metadata will be produced, there are certain tips to preserve metadata in clients’ files:
 - a. Do not “copy and paste” documents. This will alter the “date created” and “date modified” fields.
 - b. When reviewing ESI for production, do not open individual files.

- c. Instead, attorneys should appropriately copy ESI prior to review to avoid destruction of metadata. There are certain software programs that can accomplish this, such as EnCase®, Symantec™ Norton Ghost™, and Microsoft® Robocopy.
 5. Though not related to discovery rules, courts have noted that metadata is a method by which ESI can be authenticated and thus admitted into evidence. *Lorraine v. Markel American Ins. Co.*, 241 F.R.D. 534, 547 (D. Md. 2007); *Williams v. Sprint/United Management Co.*, 230 F.R.D. 640, 647 (D. Kan. 2005).
 6. Common metadata fields in Microsoft Word are: Last Saved By, Word Count, Page Count, Paragraph Count, Line Count, Character Count, Chars, Byte Count, Presentation Format, Slide Count, Note Count, Hidden Slides, Multimedia Clips, Last 10 Authors, Routing Slip, Track Changes, Fast Saves, Hidden text, Graphics Hyperlinks, Document Variables, Include Fields, File Name, Title, Author, Comments, App Name, Version Date, Created Date, Last Printed, Date Last Saved, Total Edit Time, Template, Shared, Subject, Category, Company, Keywords, Manager.
- vi. Key cases on the issue of spoliation:
1. *ACS Consultant Co., Inc. v. Williams*, 2006 WL 897559 (E.D. Mich. Apr. 6, 2006).
 2. *Adams v. Gateway, Inc.*, Case No. 2:02-CV-106 TS (D. Utah Mar. 6, 2006).
 3. *AdvantageCare Health Partners, LP v. Access IV, Inc.*, 2005 WL 1398641 (N.D. Cal. June 14, 2005).
 4. *Anadarko Petroleum Corp. v. Davis*, 2006 WL 3837518 (S.D. Tex. Dec. 28, 2006)
 5. *Anderson v. Crossroads Capital Partners LLC*, 2004 WL 256512 (D. Minn. Feb. 10, 2004)
 6. *Arista Records, Inc. v. Sakfield Holding Co. S.L.*, 314 F. Supp. 2d 27 (D.D.C. 2004).
 7. *Arista Records v. Tschirhart*, 2006 WL 2728927 (W.D. Tex. Aug. 23, 2006).

8. *Arthur Andersen, LLP v. United States*, 544 U.S. 696 (2005).
9. *Broccoli v. Echostar Communications Corp.*, 2005 WL 1863176 (D. Md. Aug. 4, 2005).
10. *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co.*, 2005 WL 679071 (Fla. Cir. Ct., 15th Cir. Mar. 1, 2005), 2005 WL 674885 (Mar. 23, 2005).
11. *Communications Center, Inc. v. Hewitt*, No. Civ. S-03-1968 WBS KJM (E.D. Cal. Apr. 5, 2005).
12. *Convolve, Inc. v. Compaq Computer Corp.*, 223 F.R.D. 162 (S.D.N.Y. 2004).
13. *Crandall v. The City and County of Denver*, 2006 WL 2683754 (D.Colo. Sept. 19, 2006)
14. *De Espana v. American Bureau of Shipping*, 2007 WL 1686327 (S.D.N.Y. June 6, 2007)
15. *Doe v. Norwalk Cmty. Coll.*, 2007 WL 2066497 (D.Conn. July 16, 2007).
16. *Durst v. FedEx Express*, 2006 WL 1541027 (D.N.J. June 2, 2006).
17. *E*Trade Securities LLC v. Deutsche Bank NG*, 230 F.R.D. 582 (D. Minn. 2005).
18. *Easton Sports, Inc. v. Warrior Lacrosse, Inc.*, 2006 WL 2811261 (E.D. Mich. Sept. 28, 2006).
19. *Floeter v. City of Orlando*, 2007 WL 486633 (M.D. Fla. Feb. 9, 2007).
20. *Hamilton v. Signature Flight Support Corp.*, 2005 WL 3481423 (N.D.Cal. Dec. 20, 2005).
21. *Hynix Semiconductor, Inc. v. Rambus, Inc.*, No. C-00-20905 RMW (N.D. Cal. Jan. 4, 2006).
22. *Krunwiede v. Brighton Assocs., LLC*, 2006 WL 1308629 (N.D. Ill. May 8, 2006).

23. *Landmark Legal Foundation v. EPA*, 272 F. Supp. 2d 59 (D.D.C. 2003).
24. *Leon v. IDX Sys. Corp.*, 2006 WL 2684512 (9th Cir. Sept. 20, 2006)
25. *Lewy v. Remington Arms Co.*, 836 F.2d 1104 (8th Cir. 1988).
26. *Linnen v. A.H. Robins Co.*, 1999 WL 462015 (Mass. Super Ct. June 16, 1999).
27. *Malletier v. Dooney & Bourke, Inc.*, 2006 WL 3851151 (S.D.N.Y. Dec. 22, 2006)
28. *MasterCard International Inc. v. First National Bank of Omaha*, 2004 U.S. Dist. LEXIS 2485 (S.D.N.Y. Feb. 23, 2004).
29. *MasterCard International, Inc. v. Moulton*, 2004 WL 1393992 (S.D.N.Y. June 16, 2004).
30. *May v. Pilot Travel Centers LLC*, 2006 WL 3827511 (S.D. Ohio Dec. 28, 2006)
31. *McGuire v. Acufex Microsurgical, Inc.*, 175 F.R.D. 149 (D. Mass. 1997).
32. *Morris v. Union Pacific Railroad Co.*, 373 F.3d 896 (8th Cir. 2004).
33. *O'Brien v. Ed Donnelly Enters.*, 2006 WL 2583327 (S.D. Ohio Sept. 5, 2006).
34. *Olson v. IBM*, 2006 WL 503291 (D. Minn. Mar. 1, 2006).
35. *Optowave Co. v. Nikitin*, 2006 WL 3231422 (M.D. Fla. Nov. 7, 2006).
36. *Oved & Assocs. Constr. Servs., Inc. v. Los Angeles County Metro. Transp. Auth.*, 2006 WL 1703824 (Cal. Ct. App. June 22, 2006).
37. *Padgett v. City of Monte Sereno*, 2007 WL 878575 (N.D. Cal. Mar. 20, 2007)
38. *Paramount Pictures Corp. v. Davis*, 2005 WL 3303861 (E.D. Pa. Dec. 2, 2005).

39. *Phoenix Four, Inc. v. Strategic Resources Corp.*, 2006 WL 1409413 (S.D.N.Y. May 23, 2006). *PML N. Am., LLC. v. Hartford Underwriters Ins. Co.*, 2006 WL 3759914 (E.D. Mich. Dec. 20, 2006).
40. *Powers v. Thomas M. Cooley Law School*, 2006 WL 2711512 (W.D. Mich. Sept. 21, 2006).
41. *In re Quintas Corp. v. Avaya*, 2006 WL 3072982 (Bankr. D. Del. Oct. 27, 2006)
42. *Recinos-Recinos v. Express Forestry, Inc.*, 2006 WL 2349459 (E.D. La. Aug. 11, 2006).
43. *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d Cir. 2002).
44. *Strasser v. Yalamanchi*, 783 So. 2d 1087 (Fla. Dist. Ct. App. 2001).
45. *Teague v. Target Corp.*, 2007 WL 1041191 (W.D.N.C. Apr. 4, 2007)
46. *The Bedford, LLC v. Safeco Ins. Co. of Am.*, 2006 WL 3616434 (Wash. App. Div. 1 Dec. 11, 2006)
47. *Thompson v. United States HUD*, 219 F.R.D. 93 (D. Md. 2003).
48. *Trigon Insurance Co. v. United States*, 204 F.R.D. 277 (E.D. Va. 2001).
49. *United Med. Supply Co. Inc., v. United States*, 2007 WL 1952680 (Fed.Cl. June 27, 2007)
50. *United States v. Philip Morris USA Inc.*, 327 F. Supp. 2d 21 (D.D.C. 2004).
51. *United States v. Tamez*, 2006 WL 2854336 (S.D.N.Y. Oct. 5, 2006)
52. *Univ. of Pittsburgh v. Townsend*, 2007 WL 1002317 (E.D. Tenn. Mar. 30, 2007)
53. *Wachtel v. Health Net, Inc.*, 2006 WL 3538935 (D.N.J. Dec. 6, 2006)

54. *Welch v. Wal-Mart*, 2004 WL 1510021 (N.D. Ill. July 1, 2004).

55. *Wm. T. Thompson Co. v. General Nutrition Corp.*, 593 F. Supp. 1443 (C.D. Cal. 1984).

f. Cost Shifting

i. Relevant Rule(s):

1. FRCP 26(b)(2)(B)

- ii. While in traditional discovery each party bears its own costs, the new Federal Rules have authorized cost shifting due to the sometimes-burdensome cost of electronic discovery. The Rule essentially codifies the court's ruling in *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003) ("*Zubulake I*").
- iii. The court in *Zubulake I* held that cost shifting is only appropriate where a party requests inaccessible information that imposes undue burden or expense on the responding party. *Id.* at 318. The court outlined a seven-factor test to determine the applicability of cost shifting:
 - 1. The extent to which the request is specifically tailored to discover relevant information;
 - 2. The availability of such information from other sources;
 - 3. The total cost of production, compared to the amount in controversy;
 - 4. The total cost of production, compared to the resources available to each party;
 - 5. The relative ability of each party to control costs and its incentive to do so;
 - 6. The importance of the issues at stake in the litigation; and
 - 7. The relative benefits to the parties of obtaining the information.

Id. at 322.

iv. Key Cases Regarding Cost Shifting

1. *AAB Joint Venture v. United States*, 2007 WL 646157 (Fed. Cl. Feb. 28, 2007).
2. *In re Air Crash Disaster at Detroit Metropolitan Airport*, 130 F.R.D. 634 (E.D. Mich. 1989).
3. *Analog Devices Inc. v. Michalski*, 2006 WL 3287382 (N.C. Super. Nov. 1, 2006).
4. *Bank of Amer. Corp. v. SR Int'l Bus. Ins. Co.*, 2006 WL 3093174 (N.C. Super. Nov. 1, 2006).
5. *Best Buy Stores, L.P. v. Developers Diversified Realty Corp.*, 2007 WL 333987 (D. Minn. Feb. 1, 2007).
6. *In re Brand Name Prescription Drugs Antitrust Litig.*, Nos. 94 C 897, MDL 997, 1995 WL 360526 (N.D. Ill. June 15, 1995) (mem.).
7. *Computer Associates International, Inc. v. Quest Software, Inc.*, 56 Fed. R. Serv. 3d (West) 401 (N.D. Ill. 2003).
8. *Cook v. Deloitte Touche LLP*, 2005 WL 2429422 (S.D.N.Y. Sept. 30, 2005).
9. *Federal Trade Commission v. U.S. Grant Resources, LLC*, 2004 WL 1396315 (E.D. La. June 18, 2004).
10. *Guy Chem. Co. v. Romaco AG*, 2007 WL 1521468 (N.D.Ind. May 22, 2007).
11. *Haka v. Lincoln County*, 2007 U.S. Dist. LEXIS 64480 (W.D. Wis. Aug. 29, 2007).
12. *IO Group, Inc. v. Veoh Networks, Inc.*, 2007 WL 1113800 (N.D. Cal. Apr. 13, 2007).
13. *J.C. Associates v. Fidelity & Guaranty Insurance Co.*, 2006 WL 1445173 (D.D.C. May 25, 2006).
14. *Laurin v. Pokoik*, 2004 U.S. Dist. LEXIS 24010 (S.D.N.Y. Nov. 30, 2004).
15. , 56 Fed. R. Serv. 3d 1159 (W.D. Tenn. 2003).

16. *Multitechnology Services, L.P. v. Verizon Southwest*, 2004 WL 1553480 (N.D. Tex. July 12, 2004).
17. *Murphy Oil USA, Inc. v. Fluor Daniel, Inc.*, 52 Fed. R. Serv. 3d 168 (E.D. La. 2002).
18. *OpenTV v. Liberate Technologies*, 219 F.R.D. 474 (N.D. Cal. Nov. 18, 2003).
19. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978).
20. *Pipefitters Local No. 636 Pension Fund v. Mercer Human Resource Consulting, Inc.*, 2007 WL 2080365 (E.D.Mich. July 19, 2007).
21. *PSEG Power New York, Inc. v. Alberici Constructors, Inc.*, 2007 WL 2687670 (N.D.N.Y. Sept. 7, 2007).
22. *Quinby v. WestLB*, 2006 WL 2597900 (S.D.N.Y. Sept. 5, 2006).
23. *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*, 51 Fed. R. Serv. 3d (West) 1106, *aff'd*, 53 Fed. R. Serv. 3d (West) 296 (S.D.N.Y. 2002).
24. *Semsroth v. City of Wichita*, 2006 WL 3913444 (D. Kan. Nov. 15, 2006).
25. *Toshiba America Electronic Components, Inc. v. Superior Court of Santa Clara County*, 21 Cal. Rptr. 3d 532 (Cal. Ct. App. 2004).
26. *United States v. Amerigroup*, 2005 WL 3111972 (N.D. Ill. Oct. 21, 2005).
27. *In re Veeco Instruments, Inc. Sec. Litig.*, 2007 WL 983987 (S.D.N.Y. Apr. 2, 2007).
28. *Wiginton v. Ellis*, 2003 WL 22439865 (N.D. Ill. Oct. 27, 2003).
29. *Xpedior Creditor Trust v. Credit Suisse First Boston (USA), Inc.*, 58 Fed. R. Serv. 3d 855 (S.D.N.Y. 2003).
30. *Zenith Electronics Corp. v. WH-TV Broadcasting Corp.*, 2004 WL 1631676 (N.D. Ill. July 19, 2004).

g. Form of Production

24

JEFFREY M. SANDERS PLLC
Attorneys and Counselors at Law
20 N. Grand Avenue, Suite 20
Fort Thomas, KY 41075
jms@jsanderslaw.com

www.kyenvironmentallaw.com · www.kentuckyenvironmentallaw.com · www.kyenvironmentallaw.blogspot.com

- i. Relevant Rule(s):
 - 1. FRCP 34(b)
- ii. The amended Rules provide direction on how to produce ESI:
 - 1. First, a requesting party may specify in what form it wishes ESI to be produced. FRCP 34(b)(1)(C). However, a responding party may object to the requested form, and state in what form it will produce the requested information. FRCP 34(b)(2)(D).
 - 2. The Rules state that, as with traditional paper documents, ESI is to be produced either as it is kept in the usual course of business, or organized and labeled to correspond with discovery requests. FRCP 34(b)(2)(E)(i).
 - 3. The Rules go on to explain that ESI can be produced either in the form in which it is usually maintained (“native format”) or in a “reasonably useable” form. FRCP 34(b)(2)(E)(ii).
 - a. This is one of the biggest debates in the production of ESI. Many feel that native format (i.e., a document produced in the same format as the software in which it was created) is the only way to preserve all information (such as metadata) associated with the document. However, “translating” the document into another form, such as a TIF or PDF form, is often easier to use, and many software programs can do so while preserving metadata.
 - i. Native format necessarily implies that the reviewing attorneys will need to have all of the software on which ESI was created in order to review the information. This can be comprised of multiple expensive software programs. Often times, it is impossible because the software used by the producing party is proprietary.
 - b. In addition to being more difficult to use, native file production runs the risk of spoliating metadata, as discussed above.
 - c. The Rule allows either native format production or a translated format, so whichever is more advantageous to the parties should be agreed upon and used.

4. Finally, the rules state that a party need not produce ESI in more than one form. FRCP 34(b)(2)(E)(ii).
 - a. This provision recognizes that in many cases an electronically stored document exists in many forms and in many places, and that a party need not produce identical copies of the same document in different forms.

iii. Computer Experts

1. Most of the literature on discovery of ESI states that parties in such cases must retain a computer expert to assist in the retrieval and production of the information.
2. Such an expert can assess the client's computer system and will be in a position to assist in negotiating the protocols of conducting electronic discovery, since he or she will have the best understanding of the client's technical capabilities.

iv. Key Cases Regarding the Form of Production

1. *Ayers v. SGS Control Services*, 2006 WL 618786 (S.D.N.Y. Mar. 9, 2006).
2. *Bergersen v. Shelter Mutual Insurance Co.*, 2006 WL 334675 (D. Kan. Feb. 14, 2006).
3. *Bob Barker Co. v. Ferguson Safety Prods., Inc.*, 2006 WL 648674 (N.D. Cal. Mar. 9, 2006).
4. *In re Bristol-Myers Squibb*, 205 F.R.D. 437 (D.N.J. 2002).
5. *CP Solutions PTE, Inc. v. General Electric Co.*, 2006 WL 1272615 (D. Conn. Feb. 6, 2006).
6. *Floeter v. City of Orlando*, 2006 WL 1000306 (M.D. Fla. Apr. 14, 2006).
7. *Gilliam v. Addicts Rehab. Ctr. Fund, Inc.*, 2006 WL 228874 (S.D.N.Y. Jan. 26, 2006).
8. *Hagemeyer North America, Inc. v. Gateway Data Sciences Corp.*, 222 F.R.D. 594 (E.D. Wis. 2004).

9. *Hagenbuch v. 3B6 Sistemi Elettronici Industriali S.R.L.*, 2006 WL 665005 (N.D. Ill. Mar. 8, 2006).
10. *In re Honeywell International, Inc.*, 2003 WL 22722961 (S.D.N.Y. Nov. 18, 2003).
11. *Jackson v. City of San Antonio*, 2006 WL 487862 (W.D. Tex. Jan. 31, 2006).
12. *In re Lorazepam & Clorazepate*, 300 F. Supp. 2d 43 (D.D.C. 2004).
13. *McNally Tunneling Corp. v. City of Evanston*, 2001 WL 1568879 (N.D. Ill. Dec. 10, 2001).
14. *Northern Crossarm Co. v. Chemical Specialties, Inc.*, 2004 WL 635606 (W.D. Wis. Mar. 3, 2004).
15. *Nova Measuring Instruments, Ltd. v. Nanometrics, Inc.*, 2006 WL 524708 (N.D. Cal. Mar. 6, 2006).
16. *Physicians Interactive v. Lathian Systems, Inc.*, 2003 WL 23018270 (E.D. Va. Dec. 5, 2003).
17. *In re Plastics Additives*, 2004 WL 2743591 (E.D. Pa. Nov. 29, 2004).
18. *Powerhouse Marks, LLC. v. Chi Hsin Inpex, Inc.*, 2006 WL 83477 (E.D. Mich. Jan. 12, 2006).
19. *In re Priceline.com, Inc. Securities Litigation*, 2005 WL 3465942 (D. Conn. Dec. 8, 2005).
20. *Static Control Components, Inc. v. Lexmark International, Inc.*, 2006 WL 897218 (E.D. Ky. Apr. 5, 2006).
21. *Super Film of America, Inc. v. UCB Films, Inc.*, 219 F.R.D. 649 (D. Kan. 2004).
22. *In re Verisign, Inc.*, 2004 WL 2445243 (N.D. Cal. Mar. 10, 2004).
23. *Williams v. Sprint/United Management Co.*, 2005 WL 2401626 (D. Kan. Sept. 29, 2005).

24. *Zakre v. Norddeutsche Landesbank Girozentrale*, 2004 WL 764895 (S.D.N.Y. Apr. 9, 2004).

h. Propounding and Responding to Electronic Discovery Requests

i. Requesting ESI

1. When deciding whether/how much ESI to request, there are several considerations to be made: the size of the case, the matters at issue, and the time and resources available for the case
2. Attorneys and their client should think about what type of information the opponent is likely to store electronically and what is likely to be needed evidence to prove the case.
3. The requesting party should designate the appropriate form of ESI that it wants from the producing party in a letter or formal discovery request. FRCP 34(b)(1)(C).
4. The requesting party should understand the opponent's computer system(s) and the way targeted key personnel use their computer systems. Parties should consider submitting interrogatories early on to obtain such information.
5. It is important for a requesting party to tightly tailor its ESI requests. Asking for too much ESI from a large corporation will result in an incredibly expensive and time consuming task and it may be impossible to properly review the production, if at all. Also remember that courts can limit overly burdensome discovery. FRCP 26(b)(2)(C)(i), (ii), and (iii).
6. If the case justifies requesting ESI, seriously consider obtaining an expert in computer forensics.
7. Also, parties requesting ESI should follow up on the adequacy of the party's production by asking specific questions at depositions about key individuals' search for ESI.

ii. Responding to ESI Requests

1. If your opponent sends a preservation letter, it is a good idea to respond promptly and with objections, if any.

2. The litigation hold: key in an attorney's duty in responding to electronic discovery requests is to fully advise the client of its duty to preserve, and to make sure that message is communicated to all necessary employees. Counsel should also advise the clients of consequences of failing to preserve, and follow up along the litigation process to make sure the client and employees are following through with their preservation duties.
3. Attorneys must search and fully understand their clients' computer systems.
4. The format of the ESI should be reasonably useable or the producing party may be required to re-do the production. FRCP 34(b)(2)(E)(ii).
5. A party responding to electronic discovery requests may also want to retain a forensics expert to ensure it has searched and retrieved all relevant information.
6. A party responding to discovery requests involving ESI must consider the burdens of privilege review and production of a privilege log.

i. Potential Privilege Waiver in relation to ESI

- i. Relevant Rule(s):
 1. FRCP 16(b)
 2. FRCP 26(f)
- ii. The massive amounts of ESI involved in large cases has brought about serious concerns about the inadvertent production of privileged information, since it is much more difficult to do a thorough review of all information.
- iii. If inadvertent disclosure occurs (of any document, not just ESI), Rules 26(b)(5) and 45(d)(2)(B) require counsel to notify all parties who received potentially privileged documents and to state the grounds for the privilege claim being made.
- iv. The amended rules also encourage the use of non-waiver agreements, which can be incorporated into a scheduling or case-management order. FRCP 16(b) and 26(f).

1. “Claw back” agreements: the parties review material for privilege before production but agree to a procedure for the return of privileged information that is inadvertently produced.
2. “Quick peek” agreement: the responding party provides requested material without a thorough privilege review, but with the understanding that its production does not waive any privilege. The requesting party then designates through Rule 34 the documents it would like produced. The responding party then has the opportunity to specifically review the documents that have been requested and hold back any that are privileged.
3. It is important to note that since the Federal Rules of Civil Procedure do not govern substantive privilege rules, such an agreement may be binding between the parties but may or may not bind third parties.

v. Key Cases Regarding Privilege

1. *Amersham Biosciences Corp. v. PerkinElmer, Inc.*, 2007 WL 329290 (D.N.J. Jan. 31, 2007).
2. *Biby v. Board of Regents of University of Nebraska at Lincoln*, 419 F.3d 845 (8th Cir. 2005).
3. *Collaboration Properties, Inc. v. Polycom, Inc.*, 224 F.R.D. 473 (N.D. Cal. 2004).
4. *Crossroads Systems (Texas), Inc. v. Dot Hill Systems Corp.*, Case No. A-03-CA-754-SS (W.D. Tex. May 31, 2006).
5. *In re Currency Conversion Fee*, , 2003 WL 22389169 (S.D.N.Y. Oct. 21, 2003).
6. *Curto v. Medical World Communications, Inc.*, 2006 WL 1318387 (E.D.N.Y. May 15, 2006).
7. *Fraser v. Nationwide Mutual Insurance Co.*, 352 F.3d 107 (3d Cir. 2003).
8. *Gragg v. Int’l Mgmt. Group (UK), Inc.*, 2007 WL 1074894 (N.D.N.Y. Apr. 5, 2007).
9. *Haynes v. Kline*, 298 F. Supp. 2d 1154 (D. Kan. 2003).

10. *Henry v. IAC/Interactive Group*, 2006 WL 354971 (W.D. Wash. Feb. 14, 2006).
11. *Holland v. GMAC Mortgage Corp.*, 2004 WL 1534179 (D. Kan. June 30, 2004).
12. *Hopson v. The Mayor and City Council of Baltimore*, 232 F.R.D. 238 (D. Md. 2005).
13. *Jicarilla Apache Nation v. United States*, 60 Fed. Cl. 413 (Fed. Cl. 2004).
14. *Kaufman v. SunGard Investment System*, 2006 WL 1307882 (D.N.J. May 10, 2006).
15. *Kingsway Fin. Serv. Inc. v. Pricewaterhouse-Coopers LLC*, 2007 WL 1837133 (S.D.N.Y. June 27, 2007).
16. *Mugworld, Inc. v. G.G. Marck & Assoc., Inc.*, 2007 WL 1745606 (E.D.Tex. June 15, 2007).
17. *Natl. Econ. Res. Assoc. v. Evans*, 2006 WL 2440008 (Mass. Super. Aug. 3, 2006).
18. *Navigant Consulting, Inc. v. Wilkinson*, 220 F.R.D. 467 (N.D. Tex. 2004).
19. *Portis v. City of Chicago*, 2004 WL 1535854 (N.D. Ill. July 7, 2004).
20. *Tessera, Inc. v. Micron Technologies, Inc.*, 2006 WL 7339848 (N.D. Cal. Mar. 22, 2006).
21. *United States v. Rigas*, 281 F. Supp. 2d 733 (S.D.N.Y. 2003).
22. *United States v. Stewart*, 287 F. Supp. 2d 461 (S.D.N.Y. 2003).
23. *United States Fidelity & Guaranty Co. v. Braspetro Oil Services Co.*, 53 Fed. R. Serv. 3d (West) 60 (S.D.N.Y. 2002).
24. *In re Universal Service Fund Billing Practices Litig.*, 232 F.R.D. 669 (D. Kan. 2005).
25. *In re Vioxx Prod. Liab. Litig.*, 2007 WL 2309877 (E.D.La. Aug. 14, 2007).

26. *Wachtel v. Guardian Life Insurance Co.*, 2006 WL 1286189 (D.N.J. May 8, 2006).

27. *New York State Bar Association, Committee on Professional Ethics*, Opinion 749 (December 14, 2001).

j. Discovery from Non-Parties

- i. Relevant Rule(s):
 1. FRCP 45
- ii. Discovery is more likely from non-parties when ESI is involved, since many times third parties will be in possession of a party's ESI.
- iii. The amended Rule 45 treats discovery from non-parties similar to that from parties:
 1. A requesting party may request the form in which ESI is produced, FRCP 45(a)(1)(C);
 2. The subpoenaed party may object to producing ESI in the form requested, FRCP 45(c)(2)(B);
 3. The subpoenaed party may produce the requested ESI as it is kept in the usual course of business or organizes and labeled to correspond to the subpoena requests, the subpoenaed party should produce ESI in native format or a reasonably useable form, and the subpoenaed party need not produce ESI in more than one form, FRCP 45(d).

k. Safe Harbor Provision and Sanctions

- i. Relevant Rule(s):
 1. FRCP 37(e)
- ii. As discussed above, computer systems often delete information on a prescheduled basis.
- iii. The new "safe harbor" provision contained in FRCP 37(e) provides that a party will not be subject to sanctions as a result of the destruction of such information, "absent exception circumstances", "as a result of the routine, good faith operation of an electronic information system."

1. This gives rise to the questions of what constitutes “exceptional circumstances” and “routine, good faith operation”.
- iv. One court has pointed out that failure to halt routine document retention and destruction policy may constitute bad faith. *Wiginton v. CB Richard Ellis*, 2003 WL 22439865, *7 (N.D. Ill. October 27, 2003).
 - v. Key Cases Regarding Sanctions
 1. *3M v. Tomar Elec.*, 2006 WL 2670038 (D. Minn. Sept. 18, 2006).
 2. *Aero Products International, Inc. v. Intex Recreation Corp.*, 2004 WL 417193 (N.D. Ill. Jan. 30, 2004).
 3. *APC Filtration, Inc. v. Becker*, 2007 U.S. Dist. LEXIS 76221 (N.D.Ill. Oct. 12, 2007).
 4. *Claredi Corp. v. SeeBeyond Tech. Corp.*, 2007 WL 735018 (E.D. Mo. Mar. 8, 2007).
 5. *Crandall v. The City and County of Denver*, 2006 WL 2683754 (D.Colo. Sept. 19, 2006).
 6. *Escobar v. City of Houston*, 2007 WL 2900581 (S.D.Tex. Sept. 29, 2007).
 7. *Exact Software N. Am., Inc. v. Infocon, Inc.*, 2006 WL 3499992 (N.D. Ohio Dec. 5, 2006).
 8. *Google Inc. v. Am. Blind & Wallpaper Factory, Inc.*, 2007 WL 1848665 (N.D.Cal June 27, 2007).
 9. *Greyhound Lines, Inc. v. Wade*, 2007 WL 1189451 (8th Cir. Apr. 24, 2007).
 10. *Invision Media Communications, Inc. v. Federal Insurance Co.*, 2004 WL 396037 (S.D.N.Y. Mar. 2, 2004).
 11. *JPMorgan Chase Bank, N.A. v. Neovi, Inc.*, 2006 WL 3803152 (S.D. Ohio Nov. 14, 2006).
 12. *In re Kmart Corp.*, 2007 WL 2198309 (Bkrtcy.N.D.Ill. July 31, 2007).

13. *Kucala Enterprises, Ltd. v. Auto Wax Co.*, 56 Fed. R. Serv. 3d (West) 487 (N.D. Ill. 2003).
14. *Martin v. Northwestern Mutual Life Ins. Co.*, 2006 WL 148991 (M.D. Fla. Jan. 19, 2006).
15. *Marwaha v. SBC Global Services, Inc.*, 2006 WL 2882854 (N.D. Ohio Oct. 6, 2006).
16. *McDowell v. District of Columbia*, 2006 WL 302643 (D.D.C. Feb. 9, 2006).
17. *Mother, LLC v. L.L. Bean, Inc.*, 2007 WL 2302974 (W.D. Wash. Aug. 7, 2007).
18. *Omega Patents, LLC v. Fortin Auto Radio, Inc.*, 2006 WL 2038534 (M.D. Fla. July 19, 2006).
19. *Plasse v. Tyco Elec. Corp.*, WL 2623441 (D. Mass. Sept. 7, 2006).
20. *Procter & Gamble Co. v. Haugen*, 2003 WL 22080734 (D. Utah Aug. 19, 2003) (order).
21. *Qualcomm, Inc. v. Broadcom Corp.*, 2007 WL 2900537 (S.D. Cal Sept. 28, 2007).
22. *In re Sept. 11th Liab. Ins. Coverage Cases*, 2007 WL 1739666 (S.D.N.Y. June 18, 2007).
23. *In re Seroquel Prod. Liab. Litig.*, 2007 WL 2412946 (M.D. Fla. Aug. 21, 2007).
24. *Serra Chevrolet, Inc. v. General Motors Corp.*, CV-01-VEH-2682-S (N.D. Ala. May 20, 2005).
25. *Sheppard v. River Valley Fitness One, L.P.*, 203 F.R.D. 56 (D.N.H. 2001).
26. *Stevenson v. Union Pacific Railroad Co.*, 354 F.3d 739 (8th Cir. 2004).
27. *In re the Twenty-Fourth Statewide Investigating Grand Jury*, 2006 WL 2847420 (Pa. Oct. 6, 2006).
28. *Theofel v. Farey-Jones*, 341 F.3d 978 (9th Cir. 2003).

29. *Tracy v. Financial Insurance Management Corp.*, 2005 WL 2100261 (Aug. 22, 2005).
30. *Tulip Computers International B.V. v. Dell Computer Corp.*, 52 Fed. R. Serv. 3d (West) 1420 (D. Del. 2002).
31. *Univ. of Pittsburgh v. Townsend*, 2007 WL 1002317 (E.D. Tenn. Mar. 30, 2007).
32. *World Courier v. Barone*, 2007 WL 1119196 (N.D. Cal. Apr. 16, 2007).

I. 6th Circuit Cases Regarding Electronic Discovery

- i. *Kentucky Speedway, LLC v. National Association of Stock Car Auto Racing, Inc.*, 2006 U.S. Dist. LEXIS 92028 (E.D. Ky. December 18, 2006):
 1. The magistrate judge denied the plaintiff's motion to compel metadata. *Id.* at *22.
 2. The magistrate addressed the amended Federal Rules and noted that they do not automatically require the production of metadata. *Id.* at *21-22.
 3. Since the metadata in this case was likely not relevant and the cost to the defendant to produce it would be unduly burdensome, the court ultimately followed *Wyeth v. Impax Laboratories, Inc.*, 2006 WL 3091331 (D. Del. October 26, 2006), where the court found that "emerging standards of electronic discovery appear to articulate a general presumption against the production of metadata." *Wyeth* at *22-23.
 4. The court also instructed that whether or not metadata is to be produced should be addressed by the parties in a Rule 26(f) conference. *Kentucky Speedway*, 2006 U.S. Dist. LEXIS 92028 at *23.
 5. The court noted that metadata is usually irrelevant. *Id.* at *24.
- ii. *Michigan First Credit Union v. Cumis Ins. Society, Inc.*, 2007 WL 4098213 (E.D. Mich. November 16, 2007):

1. The court found that the defendant was not in violation of a discovery order for producing documents in PDF form without metadata. *Id.* at *3.
 2. This court also noted that the amended Federal Rules do not automatically require the production of metadata. *Id.* at *2.
 3. The court followed *Wyeth* and *Kentucky Speedway* in finding that most metadata has limited evidentiary value. *Id.*
 4. Since the plaintiff failed to show the lack of relevance of the metadata, the court found that requiring the defendant to produce it would be too burdensome. *Id.* at *3.
- iii. *The Scotts Co. LLC v. Liberty Mutual Insur. Co.*, 2007 WL 1723509, *2 (June 12, 2007):

1. Discovery of Computer System

- a. The court denied the plaintiff's motion for an order requiring the defendant to allow plaintiff's forensics expert to search its computer systems, network servers and databases backup tapes. *Id.* at *3.
- b. The court found that the amendments to the federal rules do not automatically require such intrusive discovery, but "without a qualifying reason," the rules do no more than put electronic discovery on the same footing as paper discovery. *Id.* at *2.
- c. The court also noted that such discovery is expensive and is likely to lead to the production of large amounts of irrelevant information, as well as the production of privileged information. *Id.* at *2-3.

2. Re-Production of Information in Electronic Form

- a. In response to the plaintiff's request that the defendant reproduce in electronic form information it had already produced in hard copy form, the court noted that though the plaintiff did not specify a particular form for the discovery in its requests, the amended federal rules do require that the responding party specify in what form it will make its response. *Id.* at *3-4.

- iv. *Thielen v. Buongiorno USA, Inc.*, 2007 WL 465680 (W.D. Mich. February 8, 2007):
1. The court granted defendant's motion to examine the plaintiff's computer, due to the fact that such a search would turn up undoubtedly relevant information, with several conditions. *Id.* at *2.
 2. The court noted that though the amended Federal Rules do not require a party to produce ESI that is not reasonably accessible, the court may still require the production of the information for good cause. *Id.* at *1.
 3. The court also observed that allowing a party to inspect an opponent's computer opens up issues of privilege information being disclosed. *Id.* at *2.
 4. However, the court allowed the inspection with certain stringent limitations restraining the search to the question at issue. *Id.* at *3.
- v. *Flexsys Americas LP v. Kumho Tire U.S.A., Inc.*, 2006 WL 3526794 (N.D. Ohio December 6, 2006):
1. After the defendants alleged that plaintiff was withholding electronic discovery, the court ordered that the plaintiff search the files of 10 individuals chosen by the defendants for information to produce. *Id.* at 3.
- vi. *Kemper Mortg., Inc. v. Russell*, 2006 WL 2319858 (S.D. Ohio April 18, 2006):
1. The court denied the plaintiff's request for instructions on a litigation hold and division of costs. The plaintiff had retained an expert that had advised it that preserving its ESI would require electronic imaging at a cost of \$4,000.00. The plaintiffs had requested that the defendants pay this cost. *Id.* at *1.
 2. Citing heavily to *Zubulake IV*, the court found that the plaintiff has the duty to preserve independent of any court order. *Id.*
 3. There being no authority for the court to shift the cost of preservation of evidence to the opposing party, the court denied the plaintiff's motion. *Id.* at *2.

vii. *Medtronic Sofamor Danek, Inc. v. Michelson*, 229 F.R.D. 550, 552 (W.D. Tenn. 2003):

1. Analyzing the eight factors from *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*, 51 Fed. R. Serv. 3d 1106 (S.D.N.Y. 2002) (decided before the *Zubulake I* court refined these factors to what they are today as essentially adopted by the amended Rules), the court found that the factors weighed in favor of shifting the costs of restoring backup tapes to the requesting party.

IV. **Kentucky Civil Rule 26.01**

- a. Kentucky has not amended its civil rules to specifically address electronic discovery of ESI
- b. The furthest Kentucky has gone is to amend Kentucky Civil Rule 26 (General Provisions Regarding Discovery) to encourage a party to serve discovery requests or responses in an electronic form, in addition to hard copy form. *See* KY CR 26.01(2).

V. Getting ESI Admitted into Evidence

- a. Once the discovery process is ended, an attorney must ensure that exhibits consisting of ESI are admissible into evidence.
- b. The court in *Lorraine v. Markel American Ins. Co.*, 241 F.R.D. 534 (D. Md. 2007) thoroughly addressed the issues governing admissibility of ESI:
 - i. Note: The *Lorraine* case, decided in May of 2007, cited a myriad of earlier cases dealing with the admissibility of ESI. The case is recommended reading for anyone interested in the topic.
 - ii. The court noted that the Federal Rules of Evidence do not separately address the admissibility of ESI, but that they apply equally to ESI as to traditional forms of evidence. *Id.* at 538, n.5.
 - iii. The court in *Lorraine* identified five evidence rules that must be considered when determining the admissibility of ESI
 1. Is the ESI **relevant** as determined by Rule 401 (does it have any tendency to make some fact that is of consequence to the litigation more or less probable than it otherwise would be);
 2. If relevant under 401, is it **authentic** as required by Rule 901(a) (can the proponent show that the ESI is what it purports to be);
 3. If the ESI is offered for its substantive truth, is it **hearsay** as defined by Rule 801, and if so, is it covered by an applicable exception (Rules 803, 804 and 807);
 4. Is the form of the ESI that is being offered as evidence an **original or duplicate** under the original writing rule, or if not, is there admissible secondary evidence to prove the content of the ESI (Rules 1001-1008); and
 5. Is the probative value of the ESI substantially outweighed by the danger of **unfair prejudice** or one of the other factors identified by Rule 403, such that it should be excluded despite its relevance.
- Id.* (emphasis in original).
- iv. Authentication is the most difficult of these to achieve in regards to ESI

1. The *Lorraine* court stated that, in regards to ESI, attorneys often fail to meet the low standard of making a prima facie showing that the exhibit is what he or she claims it to be. *Id.* at 542.
2. Courts have noted that authentication of ESI may require greater scrutiny than that of hard copy exhibits, but they will not abandon the existing rules of evidence. *Id.* at 542-543 (citing *In re F.P.*, 878 A.2d 91, 95-96 (Pa. Super. Ct. 2005)).
3. Factors that should be considered in evaluating the reliability of computer-based evidence include the error rate in data inputting, and the security of the systems. *Id.* at 544.
4. The *Lorraine* court thoroughly reviews the list of ten non-exhaustive factors in FRE 901(b) of ways to authenticate evidence in regards to ESI. *Id.* at 544-549.
5. The court also notes the 12 types of “self-authenticating” documents listed in FRE 902 that do not require any extrinsic evidence in order to be authenticated. *Id.* at 549-552.
 - a. All of these can be applied to ESI, but courts have specifically recognized three: official publications (902(5)); trade inscriptions (902(7)); and, certified domestic records of regularly conducted activity (902(11)). *Id.* at 551.
6. Finally, the court notes that courts should think “outside the box” in determining whether a particular piece of ESI is authentic. *Id.* at 552.
 - a. For example, one court found that “the act of production [in discovery] is an implicit authentication.” *Indianapolis Minority Contractors Ass'n*, 1998 WL 1988826, *6 (S.D. Ind. May 13, 1998). *Id.*
 - b. The *Lorraine* court also stated that courts can take judicial notice under Rule 201 of certain foundational facts needed to authenticate an electronic record. *Lorraine*, 241 F.R.D. at 553.
7. The *Lorraine* case dealt with the authentication of email, Internet website postings, text messages and chat room content, computer stored records and data, computer animations and computer simulations, and digital photographs.

v. Hearsay is also an important hurdle in admitting ESI

1. To be hearsay, a statement must be made by a **declarant**: in respect to some forms of ESI, there is no declarant and thus the evidence cannot be hearsay (i.e., a “report” generated when a fax is sent, where no person is involved in its creation). *Id.* at 564.
 - a. The question of whether the ESI is a **statement** also arises in making the hearsay determination: “Where the writings are non-assertive, or not made by a ‘person,’ courts have held that they do not constitute hearsay, as they are not ‘statements.’” *Id.* The *Lorraine* case cites to cases where:
 - i. The header and text of a fax are found not to be a statement and thus not hearsay, *United States v. Khorozian*, 333 F.3d 498, 506 (3d Cir. 2003);
 - ii. Portions of emails asking questions are not statements and thus not hearsay, *United States v. Safavian*, 435 F.Supp.2d 36, 41-42 (D.D.C. 2006);
 - iii. Images and text on a website are not statements and thus not hearsay, *Telewizja Polska USA*, 2004 WL 2367740 (N.D. Ill. October 15, 2004).
 - b. ESI is also not hearsay unless offered for its substantive truth. That is, statements within emails are not hearsay unless the email is offered for the statement’s truth. *Lorraine*, 241 F.R.D. at 566.
 - c. The *Lorraine* court points out that other courts have held that “communications between the parties to a contract that define the terms of a contract, or prove its content, are not hearsay, as they are verbal acts or legally operative facts.” *Id.*

vi. Other Cases Regarding Admissibility of ESI

1. *Bazak Int’l Corp. v Tarrant Apparel Group*, 378 F.Supp.2d 377 (S.D.N.Y. 2005).
2. *Bowe v. State*, 785 So. 2d 531 (Fla. Dist. Ct. App. 2001).
3. *Broderick v. State*, 35 S.W.3d 67 (Tex. App. 2000).

4. *EEOC. V. E.I. dupont de Nemours & Co.*, 2004 WL 2347559 (E.D. La. Oct. 18, 2004).
5. *Evans v. Evans*, 610 S.E.2d 264 (N.C. Ct. App. 2005).
6. *In re F.P.*, 878 A.2d 91 (Pa. Super. Ct. 2005).
7. *Hardison v. Balboa Ins. Co.*, 4 Fed. Appx. 663 (10th Cir. 2001).
8. *Harveston v. State*, 798 So. 2d 638 (Miss. Ct. App. 2001).
9. *Inventory Locator Serv., LLC v. Partsbase, Inc.*, 2005 WL 2179185 (W.D.Tenn. Sept. 6, 2005).
10. *Kearley v. Mississippi*, 843 So. 2d 66 (Miss. Ct. App. 2002).
11. *Kupper v. State*, 2004 WL 60768 (Tex. App. Jan. 14, 2004).
12. *Monotype Corp. v. Int'l Typeface Corp.*, 43 F.3d 443 (9th Cir. 1994).
13. *New York v. Microsoft Corp.*, 2002 WL 649951 (D.D.C. Apr. 12, 2002).
14. *People v. Markowitz*, 721 N.Y.S.2d 758 (N.Y. Sup. Ct. 2001).
15. *People v. Stone*, 2006 WL 2893777 (Cal. App. 5th Dist. Oct. 12, 2006)
16. *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp.2d 1146 (C.D. Cal. 2002).
17. *Sea-Land Service, Inc. v. Lozen Int'l*, 285 F.3d 808 (9th Cir. 2002).
18. *Shank v. Kitsap County*, 2005 WL 2099793 (W.D.Wash. Aug. 30, 2005).
19. *SKW Real Estate Ltd. v. Gallicchio*, 716 A.2d 903 (Conn. App. Ct. 1998).
20. *Smoot v. Comcast Cablevision*, 2004 WL 2914287 (Del. Super. Ct. Nov. 16, 2004).

21. *St. Clair v. Johnny's Oyster & Shrimp*, 76 F. Supp.2d 773 (S.D. Tex. 1999).
22. *State v. Cook*, 2002 WL 31045293 (Ohio Ct. App. Sept. 13, 2002).
23. *State v. Levie*, 695 N.W.2d 619 (Minn. Ct. App. 2005).
24. *State v. Lott*, 2005 WL 1652618 (N.H. July 15, 2005).
25. *State v. Tripp*, 2005 WL 1330695 (Mo. Ct. App. June 7, 2005).
26. *State of Wash. v. Ben-Neth*, 663 P.2d 156 (Wash. Ct. App. 1983).
27. *Telewizja Polska USA, Inc., v. Echostar Satellite Corp.*, 2004 WL 2367740 (N.D.Ill. Oct. 15, 2004).
28. *United States v. Bowers*, 920 F.2d 220 (4th Cir. 1990).
29. *United States v. Catabran*, 836 F.2d 453 (9th Cir. 1988).
30. *United States v. Hamilton*, 413 F.3d 1138 (10th Cir. 2005).
31. *United States v. Jackson*, 2007 WL 1381772 (D. Neb. May 8, 2007)
32. *United States v. Meienberg*, 263 F.3d 1177 (10th Cir. 2001).
33. *United States v. Sanchez*, 59 M.J. 566 (A.F. Ct. Crim. App. 2003),
aff'd in part and rev'd in part, 60 M.J. 329 (A.F. Ct. Crim. App. 2004).
34. *United States v. Vela*, 673 F.2d 86 (5th Cir. 1982).
35. *V Cable Inc. v. Budnick*, 23 Fed.Appx. 64 (2nd Cir. 2001).

VI. Conclusion

- a. Electronic discovery is certainly going to be a key part of large civil litigation going forward.
- b. It's important for attorneys working in these types of cases to be aware of the Rules and case law and be able to adequately advise their clients of obligations and possibilities in regards to the discovery of ESI.

References Consulted

Lisa M. Arent, Robert D. Brownstone, William A. Fenwick, *EDiscovery: Preserving, Requesting & Producing Electronic Information* (June 11, 2003), <http://www.fenwick.com/docstore/Publications/Litigation/ediscovery.pdf>.

Steven C. Bennett, *Ethics and Inadvertent Disclosure* (2006), at http://www.jonesday.com/files/Publication/ccd8426e-8154-4477-ba3a-3d9a0e03d2ad/Presentation/PublicationAttachment/add4da10-54e2-4a0c-8c68-4a611e45439f/Ethics%20Article_Steven%20C.%20Bennett.pdf.

H. Christopher Boehning and Daniel J. Toal, *Keep 'Smoking Gun' E-mails From Backfiring*, *New York Law Journal*, October 25, 2007, <http://www.law.com/jsp/legaltechnology/pubArticleLT.jsp?id=1193216624194>.

Charles W. Douglas and Marc E. Raven. “*Quick Peeks*” and *Techno-Geeks: Coping with Electronic Discovery Under the New Federal Rules Amendments*, PLI Order No. 10152 (2006).

Christopher J. DeGross, *Selecting and Working with an E-Discovery Vendor: Lessons from the Field*, *The E-Discovery Standard*, at https://www.lexisnexis.com/applieddiscovery/lawLibrary/newsletter/EDS_Fall06.pdf.

Joan E. Feldman and Rodger I. Kohn, *Collecting Computer-Based Discovery*, *New York Law Journal*, January 26, 1998, http://cyber.law.harvard.edu/digitaldiscovery/digdisc_library_8.html.

Global Digital Forensics, *Common Mistakes Made During a Computer Forensic Analysis* (2005), at <http://www.evestigate.com/common%20mistakes%20made%20during%20a%20computer%20forensic%20analysis.htm>.

Global Digital Forensics, *The Computer Forensic Process – An Overview* (2005), at <http://www.evestigate.com/overview%20of%20the%20computer%20forensic%20process.htm>

Global Digital Forensics, *Email Forensics – Email Discovery* (2005), at <http://www.evestigate.com/Email-Forensics.htm>.

LexisNexis Applied Discovery, *Chain of Custody Log* (September 2004), at https://www.lexisnexis.com/applieddiscovery/lawLibrary/ModelOrders/Sample_ChainOfCustodyLog.pdf.

LexisNexis Applied Discovery, *Embedded Information in Electronic Documents Why Metadata Matters* (2007), at https://www.lexisnexis.com/applieddiscovery/lawlibrary/whitePapers/ADI_MetaData.pdf.

LexisNexis Applied Discovery, *Implementing an Effective Discovery Response Plan* (2007), at https://www.lexisnexis.com/applieddiscovery/lawlibrary/whitePapers/ADI_WP_ImplementingEDiscoveryPlan.pdf.

LexisNexis Applied Discovery, *Quick Guide to Copying Client Data* (2007), at https://www.lexisnexis.com/applieddiscovery/lawlibrary/whitePapers/ADI_FS_QuickGuideCopyingData.pdf.

LexisNexis Applied Discovery, *The Truth About Native File Review* (2006), at https://www.lexisnexis.com/applieddiscovery/lawlibrary/whitePapers/ADI_WP_TruthAboutNativeFileReview.pdf.

LexisNexis Applied Discovery, *Top 10 Tips to Prepare for FRCP Changes* (2006), at https://www.lexisnexis.com/applieddiscovery/lawlibrary/whitePapers/ADI_FS_Top10TipsforFRCP.pdf.

Virginia Llewellyn, *Electronic Discovery Best Practices*, 10 RICH. J.L. & TECH. 51 (2004), <http://law.richmond.edu/jolt/v10i5/article51.pdf>.

Cecil A. Lynn, *Managing International Data for Maximum E-Discovery Preparedness* (Fall 2006), *The E-Discovery Standard*, at <http://law.lexisnexis.com/litigation-news/articles/article.aspx?groupid=eQSqfLggRQQ=&article=gxQ0qXcFQJo=>.

Barbara J. Rothstein, Ronald J. Hedges, and Elizabeth C. Wiggins, *Managing Discovery of Electronic Information: A Pocket Guide for Judges* (2007), Federal Judicial Center, at <http://www.uscourts.gov/rules/eldscpkt.pdf>.

Judge Shira A. Scheindlin, *FAQ's of E-Discovery*, Federal Judges Association Newsletter (November 29, 2006), at [http://www.fjc.gov/public/pdf.nsf/lookup/FAQEDisc.pdf/\\$file/FAQEDisc.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/FAQEDisc.pdf/$file/FAQEDisc.pdf).

Symposium, *The Sedona Conference Best Practices Commentary on the Use of Search & Information Retrieval Methods in E-Discovery*, 8 *The Sedona Conference Journal* (Fall 2007), http://www.thesedonaconference.org/content/miscFiles/Best_Practices_Retrieval_Methods___revised_cover_and_preface.pdf.

Symposium, *The Sedona Conference Commentary on Email Management: Guidelines for the Selection of Retention Policy*, 8 *The Sedona Conference Journal* (Fall 2007), http://www.thesedonaconference.org/content/miscFiles/Commentary_on_Email_Management___revised_cover.pdf.

Kenneth J. Withers, *Computer-Based Discovery in Federal Civil Litigation*, The Federal Judicial Center, [http://www.fjc.gov/public/pdf.nsf/lookup/ElecDi01.pdf/\\$file/ElecDi01.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/ElecDi01.pdf/$file/ElecDi01.pdf).

Kenneth J. Withers, *Electronic Discovery Disputes: Decisional Guidance* (2004), Federal Judicial Center, <http://www.kenwithers.com/articles/casum04.pdf>.