Appendix A14

Electronic Discovery: Being Prepared for Litigation

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I. Introduction

As the amount of electronically stored information (ESI) being created and stored by corporations continues to grow, corporate legal departments are being challenged to address e-discovery obligations in cost-effective and efficient ways. Corporations are utilizing technology and are developing more and more systems and programs to run their operations. Also, corporate use of social media has added another complicating wrinkle to managing a legal department's e-discovery obligations.

There was a time when in-house attorneys might have relied on information technology (IT) staff to manage their e-discovery obligations. That is not so today. Attorneys are expected and obligated to understand the technology that affects their practice. The Sedona Conference, an organization that has provided guidance on e-discovery issues to attorneys and the judiciary, has issued a set of guidelines noting that the "ultimate responsibility for ensuring the preservation, collection, processing and production of electronically stored information rests with the party and its counsel."[1] In recent years, the ABA

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1. The Sedona Principles: Second Edition Best Practices Recommendations & Principles for Addressing Electronic Document Production, cmt. 6d (June 2007), https://thesedonaconference.org/publication/The%20Sedona%20Principles.

revised its Model Rules of Professional Conduct to state that "[t]o maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology."[2]

Counsel need to understand their company's document management protocols and they need to be prepared to preserve documents and data when there is a reasonable expectation that litigation or a regulatory investigation will be commenced. In-house counsel who educate themselves and become knowledgeable about their company's technology infrastructure can be an asset to an organization and work with their teams to streamline the collection and review process and comply with e-discovery obligations in an efficient manner.

II. Information Management

In order to be prepared for a possible litigation, it is crucial for a company to have in place sound information management practices. This ensures that when litigation or the threat of litigation arises, the company will know where to find relevant documents and may be better equipped to manage the cost of identifying, collecting, and reviewing such data. It is essential for counsel to know where and how all forms of information are stored. Counsel must also be able to identify and understand data from their corporate proprietary systems and be able to identify live and archived data sources. In an information management plan, it is also crucial to understand that policy for data sources of former employees.

One of the best ways to manage a company's documents is to create a data map of all ESI that is being maintained at the company. Especially in light of the obligations of counsel to be abreast of the latest technology affecting their practice, in-house counsel responsible for information management should know where and how their company's ESI is stored and should have detailed summaries of all of the networks, systems, programs, and databases. There should be an understanding of the types of ESI that exist (emails, Microsoft Office documents, PDFs, text messages, etc.), where such data is located (laptops, desktops, servers, backup tapes, iPads, smartphones, etc.), and how and where it is backed up.

Counsel should attempt to have some knowledge of all ESI that is within the company's "possession, custody or control."[3] ESI is deemed to be within a company's "control" if the company has a legal right to obtain the information from a person (for example, as provided

2. MODEL RULES OF PROF'L CONDUCT r. 1.1, cmt. 8.
3. FED. R. CIV. P. 34(a)(1).

for in a contract between that person and the company),[4] or if the company has the practical ability to obtain the information.[5] This analysis will be different depending upon the state in which a company operates.

As companies adopt new technologies to increase efficiency, they create and potentially store more and more information. Courts have recognized and give effect to this reality, and have required companies to preserve and produce ESI that is stored or communicated using a variety of new technologies.[6] New technologies that in-house counsel are grappling with include the cloud,[7] text messages,[8] applications ("apps"), social media, and Internet of Things devices.[8.1] A company's

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4. Dugan v. Lloyds TSB Bank, PLC, No. 12-cv-02549-WHA (NJV), 2013 U.S. Dist. LEXIS 126369, at *4 (N.D. Cal. Sept. 4, 2013); Ubiquiti Networks, Inc. v. Kozumi USA Corp., No.: 12-cv-2582 CW (JSC), 2013 U.S. Dist. LEXIS 53657 (N.D. Cal. Apr. 15, 2013); Pasley v. Carus, Case No. 10-cv-11805, 2013 WL 2149136 (E.D. Mich. May 26, 2013); Barton v. RCI, LLC, 2013 WL 1338235 (D.N.J. Apr. 1, 2013) (unpublished); Enron Corp. Sav. Plan v. Hewitt Assocs., LLC, 258 F.R.D. 149, 164 (S.D. Tex. 2009); United States v. Approx. $7,400 in U.S. Currency, 274 F.R.D. 646, 647 (E.D. Wis. 2011).

5. New All. Bean & Grain Co. v. Anderson Commodities, Inc., 8:12CV197, 2013 U.S. Dist. LEXIS 64437 (D. Neb. May 2, 2013); Alexander Interactive, Inc. v. Adorama, Inc., 12 Civ. 6608 (PKC) (JCF), 2014 U.S. Dist. LEXIS 2113, at *9 (S.D.N.Y. Jan. 6, 2014); Dig. Vending Servs. Int'l, Inc. v. Univ. of Phx., No. 2:09cv555, 2013 U.S. Dist. LEXIS 145149, at *18 (E.D. Va. Oct. 3, 2013).

6. *See* Robinson v. Jones Lang Lasalle Ams., 3:12-cv-00127-PK, 2012 U.S. Dist. LEXIS 123833 (D. Or. Aug. 29, 2012) ("I see no principled reason to articulate different standards for the discoverability of communications through email, text message, or social media platforms.").

7. A company may be required to produce information both on its own databases in the cloud, and on its employees' personal databases on the cloud. *See* Brown v. Tellermate Holdings Ltd., No. 2:11-cv-1122, 2014 WL 2987051 (S.D. Ohio July 1, 2014) (sanctioning company for failing to preserve and produce information on salesforce.com database that would have shown historical sales performance of plaintiffs who were suing for unlawful termination); Selectica, Inc. v. Novatus, Inc., 2015 U.S. Dist. LEXIS 30460, at *11–12 (M.D. Fla. Mar. 12, 2015) (holding that proprietary information on employee's personal Box account was within employer's control, because employee would in all likelihood have provided the information to the employer if asked).

8. *In re* Pradaxa (Dabigatran Etexilate) Prods. Liability Litig., No. 12-md-2385, 2013 WL 6486921, at *17, *20 (S.D. Ill. Dec. 9, 2013) (sanctioning defendant $931,500 for, among other things, failing to preserve and produce employees' text messages, which were automatically deleted by employees' cellular carriers after specified time period).

8.1. The Internet of Things "involves connecting machines, facilities, fleets, networks, and even people to sensors and controls." Deloitte, *Signals for Strategists*, The Internet of Things, http://dupress.com/articles/the-Internet-of-things. *See also* Small v. Univ. Med. Ctr. of S. Nev., 2014 WL 4079507 (D. Nev. Aug. 18, 2014).

in-house counsel therefore needs to become informed as to how both the company and its employees store and communicate information using these technologies.

If federal litigation is commenced, companies may, within weeks, find themselves in the midst of a meet-and-confer conference under Rule 26(f) of the Federal Rules of Civil Procedure. In the practice commentary to Rule 26(f), it is noted that the rule "requires the parties to confer early in the suit to discuss their discovery needs and possible problems and to jointly prepare a report on that meeting and submit it to the court."[9] It is therefore critical that in-house counsel, outside counsel, and any third-party e-discovery vendors or consultants all have a clear understanding of the company's electronic data and internal document retention policies early on in a case so that they can understand how best to preserve and collect data for that particular matter.

In developing a data map, it is important to involve the corporation's IT department; cooperation between the legal and IT departments should be encouraged during this process. As has been noted in recent case law, failure to properly communicate and coordinate with the company's IT department can be a supporting factor for a judge's imposition of sanctions.[10]

III. Information Retention Policy

In addition to understanding where and how the data is stored, it is also important to have in place a retention policy that governs the retention of data being kept by a company. Having a retention policy in place is important for a variety of reasons. In fact, the first guideline of the Sedona Conference's *Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age* states: "An organization should have reasonable policies and procedures for managing its information and records."[11] It used to be more feasible for companies to save all of their ESI if they wanted to, but that option is becoming more and more untenable as the amount of data being created and stored on a daily basis continues to grow exponentially.

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9. FED. R. CIV. P. 26(f) practice commentary.
10. *See In re* A & M Fla. Props. II, LLC, No. 09-01162 (AJG), 2010 WL 1418861 (Bankr. S.D.N.Y. Apr. 7, 2010) (sanctioning outside counsel for failing to communicate with the client's IT department, failing to become familiar with the client's document retention policies, and failing to "gain a sufficient understanding [of] plaintiff's computer systems resulting in significantly delayed production of relevant documents").
11. The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age (Nov. 2007), https://thesedonaconference.org/publication/Managing%20Information%20%2526%20Records.

That being said, unless a company takes proactive action, often the default measure is to retain all data. It has become clear in e-discovery circles that organizations have been over-retaining ESI even after it is no longer needed for business or legal reasons.

A well-planned retention policy will reduce the data that is being saved, as the company and its employees will know what they can and cannot delete. Reducing the amount of ESI can make collecting data and complying with discovery requests much more manageable. Additionally, policies that require employees to retain certain types of documents, or all documents for a certain period of time, ensure that important documents will be available for investigation when a corporation realizes that it has a claim against another party and wants to initiate litigation.

It is also critical to understand that there is no one-size-fits-all document retention policy. Rather, a company or its consultant must tailor a document retention policy that fits that particular company. As articulated in *Crews v. Avco Corp.*, where the "scope" and "operation" of the retention policy is "unclear" and "unsupported," excuses for nonproduction will be rejected.[12] Some factors to consider include the legal requirements of the different jurisdictions where a company has employees and stores data, any industry-specific document retention requirements that might be in place, and whether there is certain data that a company might not want subject to deletion under a retention policy. Some of the industries that have detailed retention requirements include finance and health care. Broker-dealers have requirements put in place by Dodd-Frank[13] and Sarbanes-Oxley[14] that must be addressed in any retention policy. In addition, health care and pharmaceutical companies have specific retention requirements under the Health Insurance Portability and Accountability Act (HIPAA)[15] and must be aware of the various statutes of limitations affecting their industry.

For document retention policies to work and have their intended effects, implementation of the policies is as important, if not more important, than their creation. Many companies spend money and time putting in place a retention policy, only to neglect enforcement. A survey by Kahn Consulting of corporate employees found that only

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12. Crews v. Avco Corp., 186 Wash. App. 1042 (2015) (unpublished).
13. U.S. Securities & Exchange Commission, *Implementing Dodd-Frank Wall Street Reform and Consumer Protection Act*, www.sec.gov/spotlight/dodd-frank/dfactivity-upcoming.shtml.
14. Ernst & Young, *The Sarbanes-Oxley Act at 10: Enhancing the Reliability of Financial Reporting and Audit Quality* (2012), www.ey.com/Publication/vwLUAssets/The_Sarbanes-Oxley_Act_at_10_-_Enhancing_the_reliability_of_financial_reporting_and_audit_quality/$FILE/JJ0003.pdf.
15. 45 C.F.R. § 160.310(a).

21% of respondents had a good idea of what information needed to be retained or deleted.[16] Once they are in place, it is important for retention policies to be enforced and followed.

IV. Document Preservation

A. Litigation Holds

Corporate legal departments should also have in place an effective litigation hold policy, as failure to properly implement and comply with a litigation hold can subject a company and its attorneys to significant sanctions. A litigation hold is a communication within a company that requires that all materials that relate to the subject of a pending litigation be preserved for possible production.

The necessity of a litigation hold derives from the common-law duty to preserve evidence as soon as litigation is reasonably anticipated, threatened, or pending. This duty often arises before a complaint is filed, particularly for the plaintiff. Once this duty arises, a litigation hold should be issued and put into effect immediately. The task of issuing the hold typically falls on in-house counsel, as outside counsel have often not yet been retained. The requirement of a litigation hold applies whether the corporation is going to be the initiator of the litigation or is the potential defendant. Whether litigation is reasonably anticipated is based on a good faith and reasonable evaluation of facts known at the time.[17] The "reasonably anticipated" standard is an objective one, meaning the duty arises when a reasonable party would reasonably anticipate litigation, whether or not the party actually did.

It may make sense to designate a team, including an IT person, to be responsible for all litigation holds. The team should be prepared to initiate the legal hold process when needed and work with key personnel to identify the custodians of relevant records. This team should also be aware of the places where relevant evidence may exist, including employee files and workspaces, employee homes,

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16. Kahn Consulting, *GRP, E-Discovery, and RIM: State of the Industry–A Kahn Consulting, Inc. Survey in Association with ARMA International, BNA Digital Discovery and E-Evidence, Business Trends Quarterly, and the Society of Corporate and Compliance Ethics* (2012), www.kahnconsultinginc.com/library/KCI-GRC-RIM-EDD-survey.pdf; Kahn Consulting, *How Do You Scale an Information Mt. Everest? The Case for Defensible Disposal* (2012), www.kahnconsultinginc.com/images/pdfs/How_do_you_scale_an_information_Mt_Everest.pdf.
17. The Sedona Conference, The Sedona Conference Commentary on Legal Holds: The Trigger & the Process, 11 SEDONA CONF. J. 265, 271 (2010).
18. [Reserved.]

emails, company servers, desktop and laptop hard drives, backup tapes, tablets, and smartphones. The scope of the litigation hold—that is, the subject matter of the hold and the employees who must comply with it—depends upon the facts of the case. Therefore, it is important to determine what claims and defenses will be at issue as soon as possible so that the parameters of the litigation hold can accurately reflect the issues in the litigation. It is also important to identify the key personnel in the company affected by the litigation hold.

To effect a litigation hold, counsel should send a written document hold notice to all employees in all departments who are reasonably likely to have relevant documents. While courts have disagreed on the appropriateness of an oral litigation hold, it is advisable to always issue a litigation hold in writing.[19] The hold should direct employees to cease the deletion of email and other electronic files that might be responsive to the hold. Companies should also preserve all records of former employees that are in the company's possession, custody, or control. Employees must comply with the litigation hold even if it contradicts the company's ordinary retention policy. Companies should also preserve backup tapes if they are the only source of relevant information or if the relevant information is not available from other more readily accessible sources.

Large companies that face frequent litigation may want to consider technology, such as automated legal hold programs, to assist in the document retention process. They may also wish to consider standardizing hold orders and document collection by having written materials already in place. This makes the process quicker and also helps to avoid taking inconsistent positions in different litigations.

Once a litigation hold is in place, counsel then has a duty to monitor compliance with the hold. During this period, it is vital that counsel continue to play an active role and take "affirmative steps to monitor compliance."[20] For example, counsel should reissue the litigation hold as a reminder to employees. As discussed in *Zubulake v. UBS Warburg LLC*, counsel is expected to communicate with the client, including its IT department, and "become fully familiar with [the] client's document retention policies, as well as

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19. *Compare* Scentsy, Inc. v. B.R. Chase, L.L.C., No. 1:11–cv–00249–BLW, 2012 WL 4523112 (D. Idaho Oct. 2, 2012) ("Generally . . . orally requesting certain employees to preserve relevant documents . . . is completely inadequate."), *with* Centrifugal Force, Inc. v. Softnet Commc'n, Inc., No. 08 Civ. 5463 (CM)(GWG), 2011 WL 1792047 (S.D.N.Y. May 11, 2011) (holding that an oral instruction is sufficient).
20. Zubulake v. UBS Warburg LLC, 229 F.R.D. 422, 435 (S.D.N.Y. 2004).

[the] client's data retention architecture."[21] As previously discussed, in-house counsel should already be familiar with the document retention policies and architecture of the company. It will be expected that in-house counsel can accurately convey all of this information to outside counsel.

Litigation holds must preserve all forms of electronic data. In today's world, it is important for litigation holds to take into account information created and stored on different forms of social media. Social media has become more widely used by companies in recent years, and as a result, it is becoming the subject of the ESI preservation and collection process as well. The 2015 Social Media Marketing Industry Report found that 96% of all businesses with a marketing department used social media as a part of their marketing platform.[22] It is estimated that nearly half of all companies will have been asked to produce information from social media for discovery.[23] Therefore, the litigation hold must take into account these less traditional sources of information, such as Facebook and Twitter and other social media platforms. Courts are beginning to treat social media the same as other sources of ESI and will apply sanctions when social media data is not preserved the same way as other forms of ESI for purposes of a litigation hold.[24]

B. Sanctions Risk

Failure to issue and effectuate a litigation hold can lead to spoliation—the loss or destruction of potentially relevant evidence at a time when the party was under a duty to preserve. Model Rule 3.4 states that a lawyer shall not "unlawfully obstruct another's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do such an act."[25] Rule 37(e) of the Federal Rules of Civil Procedure, which

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21. *Id*. at 432.
22. Michael A. Stelzner, *2015 Social Media Marketing Industry Report: How Marketers Are Using Social Media to Grow Their Businesses*, SOCIAL MEDIA EXAMINER (May 2015), www.socialmediaexaminer.com/social-media-marketing-industry-report-2015/.
23. Gartner Report, *Social Media Governance: An Ounce of Prevention* (Dec. 2010), www.gartner.com/id=1498916/social-media-governance-ounce-prevention.
24. Arteria Prop. Pty Ltd. v. Universal Funding V.T.O., Inc., No. 05-4896 (PGS), 2008 WL 4513696, at *5 (D.N.J. Oct. 1, 2008) (court saw "no reason to treat websites differently than other electronic files"); Lester v. Allied Concrete Co., Nos. CL.08-150, CL09-223 (Va. Cir. Ct. Sept. 1, 2011) (attorney sanctioned $522,000 for having instructed his client to remove photos from the client's Facebook profile, while client was ordered to pay an additional $180,000 for having obeyed the instruction).
25. MODEL RULES OF PROF'L CONDUCT r. 3.4.

governs sanctions for failure to preserve ESI, was "completely" rewritten in the December 2015 amendments in order to provide a uniform standard for when courts can give an adverse inference instruction or impose other sanctions to remedy ESI loss.[26] The revision also explicitly repeals and replaces what had previously been known as Rule 37(e)'s "safe harbor" provision, which barred sanctions when a party lost information as a result of the "good faith" operation of an electronic system.[27] The provision was found to be "ineffective' for a variety of reasons.[28]

It is well-established that a court has the authority to sanction parties for discovery misconduct under "its inherent power to manage its own affairs or under Rule 37."[29] Rule 37(b) explicitly provides courts the authority to issue sanctions to parties who fail to comply with court-ordered discovery.[30] The amended Rule 37(e) also affirmatively grants the court the power to "order measures no greater than necessary to cure the prejudice" if a party has failed to preserve ESI.[31] To do so, the court need only find that the ESI should have been preserved, is lost, and cannot be restored or replaced via additional discovery.[32] Notably, however, the Rule does not identify *when* the duty to preserve begins or what is necessary to meet that duty.[33] The Rule instead leaves that to common law.[34]

The amended Rule 37(e) also rejects the precedent set by the Second Circuit, which had authorized the provision of adverse-inference instructions on a finding of negligence or gross negligence.[35] An adverse-inference instruction is now warranted only when the court finds that a spoliating party "acted with the intent to deprive another party of the information's use in the litigation."[36] Other sanctions, such as dismissal of the action or a default judgment, are still permitted, but also follow the standard in that they apply only if the party that unreasonably failed to preserve information acted "with an

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26. FED. R. CIV. P. 37(e) practice commentary.
27. *Id*.
28. *Id*.
29. *In re* A & M Fla. Props. II, LLC, No. 09-01162 (AJG), 2010 WL 1418861 (S.D.N.Y. Bankr. Apr. 7, 2010) (citing Phoenix Four, Inc. v. Strategic Res. Corp., No. 05 Civ. 4837(HB), 2006 WL 14094313, at *3 (S.D.N.Y. May 23, 2006)).
30. FED. R. CIV. P. 37(b).
31. FED. R. CIV. P. 37(e).
32. *Id*.
33. *Id*.
34. *Id*.
35. Thomas v. Butkiewicus, No. 3:13-CV-747 (JCH), 2016 WL 1718368, at *1 (D. Conn. Apr. 29, 2016) (noting that the new rule rejects cases like Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99 (2d Cir. 2002)).
36. FED. R. CIV. P. 37(e) practice commentary.

intent to deprive another party of the information's use in the litigation"—or, in other words, if the spoliating party had the highest degree of fault.[37] For example, in *Fiteq Inc. v. Venture Corp.*, the court ruled against plaintiff's request for jury instructions for spoliation of evidence where the defendant failed to produce emails related to the litigation due to defendant's "routine housekeeping" as there was no intent to deprive the plaintiff of the evidence.[38] Similarly, in *Orchestratehr, Inc. v. Trombetta*, the court did not grant sanctions against the defendant for deleting emails after the defendant claimed that he deleted his emails on a regular basis, as there was not sufficient evidence to show "intent or bad faith."[39]

Sanctions can come in a variety of forms and in various degrees of severity. The determination of the sanction is a matter of judicial discretion that depends on the facts of the case. Sanctions have included monetary fines, cost shifting, exclusion of evidence, adverse inference instructions, default judgments, striking of pleadings, stay or dismissal of the action, and contempt sanctions. Rule 37(e)(2) provides courts the flexibility to impose sanctions upon finding an "intent to deprive"; the rule intentionally does not attempt to micromanage the court but instead defers to the court's judgment to determine an appropriate sanction.[40] Courts are urged to show restraint, especially when the information lost was not particularly germane to the case.[41] The harsher sanctions, such as adverse inference instructions and default judgments, are less common and require a greater degree of culpability. Upon a finding that the offending party acted with intent, Rule 37(e)(2) authorizes courts to presume that the information lost was unfavorable to the party; or to instruct the jury that it may or must presume that the information was unfavorable; or, lastly, to dismiss the action or enter a default judgment.[42]

C. Proportionality

Proportionality in litigation is not a new principle. The concept of proportionality has existed since the Federal Rules of Civil Procedure were amended in 1983.[43] However, in recent years as the amount of ESI has grown, the incredible amounts spent by parties on e-discovery

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37. *Id.*
38. Fiteq Inc. v. Venture Corp., No. 13-cv-01946-BLF, 2016 WL 1701794 (N.D. Cal. Apr. 28, 2016).
39. Orchestratehr, Inc. v. Trombetta, No. 3:13-cv-2110-P, 2016 WL 1555784 (N.D. Tex. Apr. 18, 2016).
40. FED. R. CIV. P. 37(e) practice commentary.
41. *Id.*
42. *See* FED. R. CIV. P. 37(e)(2)(a)–(c).
43. *See* FED. R. CIV. P. 26(b)(1); FED. R. CIV. P. 26 advisory committee's notes.

and preservation has led to a backlash. The concept of proportionality is increasingly being mentioned in opinions and rules as a way to rein in runaway e-discovery costs. Consequently, the 2015 amendments to the Federal Rules of Civil Procedure, for the first time, directly insert the word "proportional" into the text of Rule 26(b)(1) and codify proportionality as part of the scope of discovery.[44] This amendment was not intended to alter the scope of discovery itself, but instead to restore the "concept" of proportionality back to its original location when introduced in 1983, to increase awareness of the "overlooked" limits and duties.[45]

Rule 26 now states that parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense *and* proportional to the needs of the case.[46] (For comparison, the Rule had previously defined the scope of discovery as reaching all information that was relevant but not privileged.[47]) In-house counsel need to be aware of this concept and be prepared to speak to these points when making discovery requests. For example, in *Noble Roman's, Inc. v. Hattenhauer Distributing Co.*, the court found that the defendant's claims that all deposition topics were relevant was "not good enough" in light of the revised Rule 26(b).[48] The court advised that there needed to be an attempt to demonstrate that the discovery was proportional to the needs of the case, instead of what the court characterized as "beat [ing] the drum of relevancy."[49] While the court will use its discretion based on the available evidence to ascertain whether requested discovery is proportional, both parties, to the extent possible, are expected to present evidence suggesting why it is in fact proportional or not, taking into consideration the factors enumerated in Rule 26(b)(1).[50]

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44. FED. R. CIV. P. 26 practice commentary.
45. *See* FED. R. CIV. P. 26 advisory committee's note (2015) (explaining that the first provisions designed to combat the problem of redundant and disproportionate discovery originally appeared in Rule 26(b)(1) but were moved to Rule 26(b)(2) when the rule was restructured in 1993).
46. FED. R. CIV. P. 26(b)(1).
47. FED. R. CIV. P. 26 advisory committee's notes.
48. Noble Roman's, Inc. v. Hattenhauer Distrib. Co., No. 1:14-cv-01734-WTL-DML, 2016 WL 1162553 (S.D. Ind. Mar. 24, 2016).
49. *Id.*
50. Williams v. Am. Int'l Grp., Inc., No. 15–cv–554–JDW–GMB, 2016 WL 2747020, at *1 n.2 (M.D. Ala. May 2, 2016) (rejecting plaintiff's motion to increase the number of depositions to include a corporate representative because there was insufficient evidence that the additional depositions were proportional to the needs of the case); Oracle Am., Inc. v. Google, Inc., No. 10-cv-03561-WHA (DMR), 2015 WL 7775243, at *2 (N.D. Cal. Dec. 3, 2015) ("Neither party submitted a proper analysis of the Rule 26 proportionality factors. For example, Oracle provided some information about each of the requested custodians to demonstrate relevance. However,

The requesting party, however, is not expected to make an argument that considers each and every proportionality factor, as information asymmetry may deem such an exercise impossible.[51] If proportionality is intentionally misrepresented by the requesting party to achieve malicious ends, courts can impose sanctions on responsible counsel.[52]

The Northern District of California's e-discovery guidelines, put into place in 2012,[54] include guidelines for the discovery of electronically stored information, a checklist for lawyers to utilize during their Rule 26(f) meet-and-confer conference, and a model stipulated order about e-discovery. The guidelines also emphasize the importance of proportionality. In keeping with the revised Rules 26(b)(1) and 26(b)(2)(B), the parties are told to consider the burden or expense of proposed electronic discovery compared with its likely benefit, its significance to the merits, the parties' resources, and other factors.[55] The guidelines also hold that discovery requests for production of ESI and related responses should be reasonably targeted, clear, and as specific as practicable.

D. Cost Shifting

In addition, when seeking to keep the cost of e-discovery at bay, it is important to consider cost-shifting options. Rule 26(c)(1)(B) states that any party, after having conferred in good faith with the opposing party, may seek a protective order for unduly burdensome expenses, at which point the court may issue an order "specifying terms, including time

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Oracle did not fully address any of the proportionality factors, including the importance of the requested discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit."). *See also* Lemberg Law LLC v. Hussin, No. 16-mc-80066-JCS, 2016 WL 3231300, at *6 (N.D. Cal. June 13, 2016) (quashing plaintiff's subpoena of a nonparty based on "pure speculation" that he would contradict a sworn statement, because it was not proportional to the needs of the case).

51. Carr v. State Farm Mut. Auto. Ins. Co., 312 F.R.D. 459, 467 (N.D. Tex. 2015); State Farm Mut. Auto. Ins. Co. v. Fayda, 14 Civ. 9792 (WHP) (JCF), 2015 WL 7871037, at *4 (S.D.N.Y. Dec. 3, 2015).
52. Avnet, Inc. v. Motio, Inc., No. 12 C 2100, 2016 WL 3365430, at *3 (N.D. Ill. June 15, 2016) ("[I]f at the end of the litigation it is clear that defendant used Mr. Moore's reports as a means to needlessly inflict costs on plaintiffs, there are other rules that are available through which plaintiffs may seek relief.").
53. [Reserved.]
54. Northern District of California, Guidelines for the Discovery of Electronically Stored Information (revised Dec. 2015).
55. *Id*. Guideline 1.03.

and place or the allocation of expenses, for the disclosure or discovery."[56] The comment to the 2015 amendment notes, however, that cost shifting is merely being formally recognized in the rule, but that it should not necessarily occur more frequently than it did before the amendment.[57]

Courts will take into consideration the burdens placed upon a party when it is asked to identify, review, and produce ESI. By way of Rule 26(b)(2)(B), it has become more common for courts to enforce or even suggest cost shifting by the parties as a method of keeping down the cost of discovery. Corporate counsel needs to be aware of times when cost shifting is appropriate and should be demanded from the opposing party and also recognize situations where cost shifting is not likely to be ordered by the court. Using Rule 26(b)(2)(C), a court will weigh "the burden or expense of the proposed discovery" against "its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues."[58]

Rule 26(b)(2)(B) also provides that "[a] party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost."[59] Rule 26(b)(2)(B) states that "[t]he court may specify conditions for the discovery" of ESI from not reasonably accessible sources. Many judges have relied on this rule to require cost shifting or cost sharing in lieu of "limit[ing] the frequency or extent" of discovery. Some judges have limited cost shifting or cost sharing to production of ESI from not reasonably accessible sources,[60] while others have extended it to other situations.[61] When seeking to oppose or limit a request for a voluminous amount of e-discovery, counsel should consider that moving or even suggesting to shift the costs of production to the requesting party can prove to be a powerful tool to control e-discovery costs.

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56. FED. R. CIV. P. 26(c)(1)(B).
57. FED. R. CIV. P. 26(c) advisory committee's note to 2015 amendment ("Recognizing the authority does not imply that cost shifting should become a common practice. Courts and parties should continue to assume that a responding party ordinarily bears the costs of responding.").
58. FED. R. CIV. P. 26(b)(2)(B).
59. *Id*.
60. *See In re* Weekley Homes, L.P., 295 S.W.3d 309 (Tex. 2009); W.E. Aubuchon Co. v. Benefirst, LLC, 245 F.R.D. 38 (D. Mass. 2007).
61. *See* Adair v. EQT Prod. Co., 2012 U.S. Dist. LEXIS 75132, at *11 (W.D. Va. May 31, 2012); *see also* Adkins v. EQT Prod. Co., 2012 U.S. Dist. LEXIS 75133, at *9 (W.D. Va. May 31, 2012).

V. Document Collection

Once a litigation has actually been filed or an investigation is being commenced internally or by a regulator, relevant data will need to be collected to be reviewed and eventually produced to the opposing party. ESI can be collected by the client or with the assistance of a vendor. Collection should be prioritized by the most relevant time periods and custodians and there must be a determination of what types of ESI are to be collected. An important aspect of data collection involves preserving the metadata located within the documents, which is the data about the data (fields such as to, from, cc, created date, modified date, etc.). During the course of collecting ESI, it is all too easy to permanently alter or delete important metadata fields. Whatever collection plan is put in place, counsel must ensure that the relevant metadata associated with a particular electronic document is collected. Legal departments should be cautious to properly collect what is needed to make or defend their case and to meet their discovery obligations, but they should also be careful not to over-collect.

A. Self-Collection/Self-Preservation

Self-collection is the situation where a party collects data for a case by itself and without the assistance of any outside party, such as an e-discovery vendor. In certain situations, the custodians are the ones preserving and collecting the data at issue. Companies that perform self-collections may be large corporate or financial institutions that have an in-house forensic team to collect and search data for all litigations and investigations, or much smaller companies just trying to keep down costs. A majority of organizations still practice some form of self-collection and do not utilize an outside vendor.[62] While self-collection is a method that should be considered, especially for companies with regular litigation, there are some risks entailed.

When employees are asked to collect their own documents, there is the potential that documents will be destroyed or not collected. Judge Shira Scheindlin has stated that "most custodians cannot be 'trusted' to run effective searches because designing legally sufficient electronic searches in [the discovery context] is not part of their daily responsibilities."[63] Custodians of information may have too little interest in the litigation to spend the time conducting a thorough search through all of their electronic and nonelectronic data. Relying on litigants to find and turn over responsive ESI can be problematic, especially when

62. Fulbright & Jaworski LLP, *9th Annual Litigation Trends Survey Report* (2013).
63. Nat'l Day Laborer Org. Network v. U.S. Immigration & Customs Enf't Agency, 877 F. Supp. 2d 87, 108 (S.D.N.Y. 2012).

surveys find that only 15% of corporate employees are comfortable with their litigation hold responsibilities.[64]

In recent years, courts have specifically taken aim at self-preservation, especially in the context of asking individual custodians to head up their collection efforts. Courts have criticized such self-collection as inadequate and consider it as a factor when deciding whether to impose sanctions for spoliation.[65] In *Green v. Blitz U.S.A.*, for example, the court ordered sanctions where a single employee of Blitz was in charge of the entire collection process.[66] Not only was the employee neither a lawyer nor IT personnel, he worked in the department that was at issue in the litigation.[66.1] He also never consulted with the IT department and did not make any efforts to search electronic sources. The court ordered Blitz to pay $250,000 to the plaintiff as a civil contempt sanction and $500,000 "civil purging sanction" unless it provided a copy of the court's order to every plaintiff who sued Blitz in the previous two years.[66.2]

When one central IT person or a team organizes the collection internally, it becomes important for the team to have in place processes and practices that are defensible in court should there be a discovery dispute. Spoliation due to mishandled collection procedures is as much of a concern as spoliation deriving from failed preservation efforts. For example, in *Magaña v. Hyundai Motor America*, Hyundai was sanctioned for failing to produce certain key documents because it collected documents only from its legal department and told the court that "no effort was made to search beyond the legal department, as this would have taken an extensive computer search."[67] In imposing sanctions for spoliation, the Washington Supreme Court noted that "a sophisticated multinational corporation, experienced in litigation" has an obligation to maintain a "document retrieval system that

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64. Kahn Consulting, *GRP, E-Discovery, and RIM: State of the Industry–A Kahn Consulting, Inc. Survey in Association with ARMA International, BNA Digital Discovery and E-Evidence, Business Trends Quarterly, and the Society of Corporate and Compliance Ethics* (2012), www.kahnconsultinginc.com/library/KCI-GRC-RIM-EDD-survey.pdf; Kahn Consulting, *How Do You Scale an Information Mt. Everest? The Case for Defensible Disposal* (2012), www.kahnconsultinginc.com/images/pdfs/How_do_you_scale_an_information_Mt_Everest.pdf.

65. *See* Roffe v. Eagle Rock Energy GP, C.A. No. 5258-VCL (Del. Ch. Apr. 8, 2010) (finding unsatisfactory the defendants' self-selection of which files were relevant; stating that "we don't rely on people who are defendants to decide what documents are responsive").

66. Green v. Blitz U.S.A., Inc., No. 2:07-CV-372 (TJW), 2011 WL 806011 (E.D. Tex. Mar. 1, 2011).

66.1. *Id*.

66.2. *Id*.

67. Magaña v. Hyundai Motor Am., 167 Wash. 2d 570, 586 (2009).

would enable the corporation to respond to plaintiff's requests."[68] One way to prepare for defending collection processes is to document all acts taken and processes used to collect data. It is also important for companies to know their capabilities when it comes to collecting and searching documents on their own. If the proper resources are not in place, it is often advisable to seek the assistance of an e-discovery vendor on collections.

B. Vendor Collection

Vendors can be great assets when it comes to collecting, but depending upon the relationship with a vendor, there should be close oversight to determine what data actually needs to be collected. The cost of a vendor collection is often rather minimal when viewed in the context of the total e-discovery or litigation cost. However, if there is no oversight, a vendor could choose to collect more data than needed for a given case and process the data at a high cost to the client. It is important to have in place, or at least have knowledge of, your vendor pricing at the time of collection. It may be in a company's interest to have a more tailored collection, if possible, if it is paying a flat per-GB rate for the data that it will eventually host with a vendor, but if it is paying a smaller per-GB price for data collected and sent to the vendor and another per-GB amount for the data that is being sent out to the review platform and hosted, it could prove beneficial and cost-effective to allow for a broader collection.

Additionally, vendors have begun to offer a "remote collection" option for certain cases. This will allow for an IT person to use a computer remotely to collect the data that is needed in a forensically sound manner. Kits can also be sent to IT personnel to effect the collection process while preserving the appropriate metadata.

It is becoming more common for companies to rely upon vendors for collection of ESI, but even in such instances, it is important for in-house counsel and outside counsel to remember that courts will often ultimately hold the party and/or its attorneys responsible for any spoliation problems.[69] Therefore, counsel must always remain engaged and have an understanding of the technical issues at play in the preservation, identification, collection, review, and eventual production of documents in a given case.

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68. *Id*.

69. Franklin Zemel & Brett Duker, E-Discovery: *You Can't Blame Third Parties for E-Discovery Errors*, INSIDECOUNSEL, Feb. 26, 2013; *see, e.g.*, Berge Helene, Ltd. v. GE Oil & Gas, Inc., 2011 U.S. Dist. LEXIS 19865 (S.D. Tex. Mar. 1, 2011) (imposing cost-shifting sanction and holding counsel responsible for certain deposition expenses as a result of the late production of approximately 70,000 pages of documents which the defendant attributed to an e-vendor error).

VI. Managing and Implementing E-Discovery

The reality is that much of the cost of e-discovery is incurred after the collection stage when data is hosted on a platform, whether the hosting is done by a vendor, by outside counsel, or internally by the company. It is during this stage that companies must remain proactive and work with their outside counsel to efficiently handle the e-discovery required for a given case. Having a team in place throughout the course of a litigation, including someone from the in-house legal department, the in-house IT department, the outside counsel, and the vendor can be invaluable.

A. Handling Discovery and Review

If a company is large and has ongoing and frequent litigation and regulatory investigations that require significant e-discovery services, it should consider having in place one or two e-discovery vendors to ensure consistency and competitive pricing for its e-discovery services, or it should consider bringing in-house some portion of the e-discovery process. Courts have not excused litigants from answering interrogatories requiring complex inquiries in multiple databases. For example, in *Labrier v. State Farm Fire & Casualty Co.*, in recognizing State Farm's interest in keeping its computer system secret, the court placed the burden on State Farm to develop computer programming for the data pull in response to their argument that the data sorting would have to be done "claim by claim."[70]

Some large corporations will handle all portions of e-discovery internally, including collection, culling, hosting, review, and production. However, that takes significant resources and involves some risk. It is more common for companies to put in place internal collection and culling tools so that the data that is sent out for review has been significantly culled, which would result in lower processing and hosting fees. However, even the cost to bring in house early-case-assessment software or predictive-coding software would be significant and would require frequent use to justify the investment.

Another option that many companies have pursued is outsourcing their e-discovery and document review needs to a small number of "preferred vendors." The benefit of this option is that a company can potentially reduce its e-discovery costs by sending most of its work to a small number of vendors and can also put in place processes with those vendors that can be repeated from case to case.

Yet another option is designating one of the company's outside counsel as its e-discovery counsel and enabling them to manage the

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70. Labrier v. State Farm Fire & Cas. Co., 314 F.R.D. 637 (W.D. Mo. 2016).

e-discovery process throughout its cases nationwide, providing some consistency in how e-discovery is handled in all cases. Other companies allow each of their outside counsel to individually handle e-discovery themselves on each case, whether it be hosting the data themselves or with a third-party vendor. This situation can work as well, but in order to keep costs in check, it is important for in-house counsel to be a part of the vendor selection process and to monitor the case throughout and ensure that the most efficient and cost-effective methods are being used.

With regard to document reviews, the options can also run the gamut. Some large corporations host reviews internally; other companies work with one vendor to handle all e-discovery and document review; other companies work with a separate document review or managed review company that will handle the review in consultation with outside counsel; and many companies allow outside counsel to manage the review process either with their internal review team or with personnel from a managed review company. It is also possible for review teams to be onsite at the client, onsite with the law firm, in a low-cost city to save on costs, or based off-shore to further save on costs. There are costs and benefits with each of these options as well as some ethical concerns[71] that should be considered before deciding the best choice for a given company or case.

B. Technology-Assisted Review; Predictive Coding

Companies are also increasingly making use of technology-assisted review (TAR) and predictive coding to assist in culling down the incredibly large number of electronic documents that are initially collected for larger matters. Most companies make use of predictive coding through a vendor, but there are some particularly large companies that have installed this software behind the firewall. TAR and predictive coding are used in lieu of or in conjunction with search terms, which has been the traditional method used to cull down a document set to the most responsive documents.

Predictive coding uses software that can be trained by a human being to distinguish between relevant and nonrelevant documents.[72] It consists of three steps. First, counsel manually reviews an initial "seed set" of documents, coding them as responsive or nonresponsive.

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71. *See, e.g.*, NYC Bar Committee on Professional and Judicial Ethics, Formal Opinion 2006-3 (approving delegation of document review work to overseas personnel so long as the attorney "at every step shoulder[s] complete responsibility for the non-lawyer's work").
72. *See* Warwick Sharp, *Ten Essential Best Practices in Predictive Coding*, TODAY'S GENERAL COUNSEL (Apr./May 2013), www.todaysgeneralcounsel.com/ten-essential-best-practices-in-predictive-coding-2/.

Second, based on this seed set, the software develops a mathematical algorithm to predict the responsiveness of other documents. Third, counsel "trains" the software by reviewing the documents the software has coded and making any necessary corrections to the software's responsiveness determinations. This iterative process is repeated until the algorithm is "perfected" and applied to the rest of the universe of documents. There are other variations of TAR that can be utilized to further streamline reviews, including concept clustering (grouping documents based on content), concept search (or "find more like this"), and email threading (pulling together related email threads).

There are many benefits to using TAR. The most obvious is cost savings. Predictive coding suggests which documents will be irrelevant to the litigation. Depending on the circumstances of the case, counsel can choose not to do a manual review of these documents; it can review only a representative sample of them; or it can have all of them reviewed, but by less expensive reviewers. Any of these alternatives would be less expensive than conducting a manual review of all of the documents. The second benefit of predictive coding is its effectiveness. Some studies show that predictive coding has far better recall and precision than a manual review of all of the documents in a collection.[73]

Over the past few years, both federal and state courts have begun to approve the use of predictive coding technology to search through ESI during the course of discovery.[74] Courts have explicitly endorsed the

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73. Maura R. Grossman & Gordon V. Cormack, *Technology-Assisted Review in E-Discovery Can Be More Effective and More Efficient Than Exhaustive Manual Review*, 17 RICH. J.L. & TECH. 1 (2011); NICHOLAS M. PACE & LAURA ZAKARAS, RAND INST. FOR CIVIL JUSTICE, WHERE THE MONEY GOES: UNDERSTANDING LITIGANT EXPENDITURES FOR PRODUCING ELECTRIC DISCOVERY 55–58 (2012), www.rand.org/content/dam/rand/pubs/monographs/2012/RAND_MG1208.pdf. "Recall" refers to the percentage of total responsive documents in a collection that are in fact coded as responsive by the software. "Precision" refers to the percentage of documents coded as responsive by the software that are in a collection.

74. *See, e.g.*, Gabriel Techs. Corp. v. Qualcomm Inc., No. 08CV1992 AJB (MDD), 2013 WL 410103 (S.D. Cal. Feb. 1, 2013) (holding that costs of TAR could be recovered as part of the costs and attorneys' fees awarded to the prevailing party in patent litigation); Rio Tinto PLC v. Vale S.A., 306 F.R.D. 125, 127 (S.D.N.Y. 2015) ("[I]t is now black letter law that where the producing party wants to utilize TAR for document review, courts will permit it."); Nat'l Day Laborer Org. Network v. U.S. Immigration & Customs Enf't Agency, 877 F. Supp. 2d 87 (S.D.N.Y. 2012) (recommending the use of TAR by the government in responding to Freedom of Information Act requests); Moore v. Publicis Groupe SA, 287 F.R.D. 182 (S.D.N.Y. 2012), *adopted*, 2012 WL 1446534 (S.D.N.Y. Apr. 26, 2012) ("[C]omputer-assisted review is an available tool and should be seriously considered for use in large-data-volume cases where it may save the producing party (or both parties) significant amounts of legal fees in

use of predictive coding combined with other methods of culling, such as the use of Boolean keyword searches.[75] In doing so, they have looked not only to the efficiency and effectiveness of TAR, but also to issues of transparency and cooperation; they have been more willing to endorse the use of TAR where counsel was cooperative and transparent with its adversary regarding the precise way in which it used TAR to respond to its adversary's document requests.[76] In-house counsel would be well advised to consider the use of TAR on their matters and to understand how it can best be utilized.

C. Budgeting for E-Discovery

As the amount of ESI that the average company hosts with a vendor has grown exponentially, so have the costs of discovery. It is estimated that Fortune 500 companies each spend between $20 million and $200 million a year on legal expenses.[77] Thus, it is important to budget for e-discovery expenses and to attempt to keep these costs down.

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document review."); Gordon v. Kaleida Health, No. 08-CV-378S(F), 2013 WL 2250579 (W.D.N.Y. May 21, 2013) (ordering the use of predictive coding after parties could not agree on how to achieve a cost-effective review of 200,000–300,000 emails); Dynamo Holdings Ltd. P'ship v. Comm'r of Internal Revenue, Nos. 2685-11, 8393-12 (T.C. Sept. 17, 2014) (allowing the use of TAR in the Tax Court); EORHB, Inc. v. HOA Holdings, LLC, No. 7409-VCL (Del. Ch. Oct. 15, 2012) (ordering parties to use predictive coding or to show cause why they should not); Glob. Aerospace Inc. v. Landow Aviation, L.P., Con. Case No. CL 61040 (Va. Cir. Ct. Apr. 23, 2012) (rejecting plaintiffs' objections and issuing an order allowing defendant's use of predictive coding); *see also* Bob Ambrogi, *TAR in the Courts: A Compendium of Case Law about Technology Assisted Review*, CATALYST E-DISCOVERY SEARCH BLOG (Nov. 14, 2014), www.catalystsecure.com/blog/2014/11/tar-in-the-courts-a-compendium-of-case-law-about-technology-assisted-review/.

75. *In re* Biomet M2a Magnum Hip Implant Prod. Liab. Litig., No. 3:12-MD-2391 (N.D. Ind. Apr. 18, 2013) (endorsing defendant's use of predictive coding on set of 2.5 million documents, which had been culled from universe of 19.5 million documents using Boolean keyword searches and deduplication).

76. *Compare In re* Actos (Pioglitazone) Prod. Liab. Litig., MDL No. 6:11-MD-2299, 2012 WL 7861249, at *4 (W.D. La. July 27, 2012) (praising protocol that required each side's experts collectively to review and code seed set of documents), *and Moore*, 287 F.R.D. at 187 (lauding defendant's decision to turn over entire seed set of nonprivileged documents to plaintiff and allowing defendant's use of TAR), *with* Progressive Cas. Ins. Co. v. Delaney, No. 2:11-cv-00678-LRH-PAL, 2014 WL 3563467 (D. Nev. July 18, 2014) (denying party's attempt to unilaterally use predictive coding in spite of parties' stipulated ESI protocol that called for party either to perform no relevance review or manual relevance review of all documents).

77. Patrick G. Lee, *Pricing Tactic Spooks Lawyers*, WALL ST. J., Aug. 2, 2011.

Typical e-discovery costs include the cost of collection, forensic analysis of technology, processing and filtering the data, loading the data onto a review database, hosting the data for review, and the review itself. Document review is typically the most expensive part of the process, sometimes amounting to three-quarters of the entire cost. While budgeting for e-discovery can be difficult, a few things should be kept in mind. Counsel should try to budget as early as possible, and, if possible, use similar past cases as a guideline. Still, the budget must be crafted specifically for the case at hand. For example, document-intensive cases will require more review and counsel may want to budget more money toward technology that will cull and limit the data that will need to be reviewed. Additionally, counsel should look at the e-discovery budget in relation to the entire litigation budget.

Once an e-discovery budget has been created, counsel must work with all parties involved, including outside counsel and the vendors, to try to stay under budget by keeping close track of costs on a monthly basis. Adding value by putting in place such budgeting capability and being able to predict future costs based upon former cases can prove invaluable to the legal department and the entire organization.

VII. Conclusion

With the volume of data being created and stored at corporations increasing year after year, in-house counsel needs to keep up with the best practices and methods to keep the costs of e-discovery in check. As the amount of data that is subject to holds and collections continues to grow, it will become more and more important to take advantage of all of the tools at one's disposal and to properly manage the discovery team. Counsel must understand how and where data is stored, the benefits of document retention policies, and the most effective ways of collecting data when needed. It is most important that corporate counsel understand the importance of complying with e-discovery case law and guidelines and to be able to explain to colleagues and management the importance of investing in and putting in place the proper support and protocols to be able to handle e-discovery that a company may have to deal with on a regular basis. In-house counsel must invest time and resources and convince others to do the same to avoid sanctions and ending up on the front page of the paper for the wrong reasons. When a company has in place good document management policies, effective retention policies, and smooth e-discovery processes, it has taken needed steps to be prepared for litigation.

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Ignatius Grande is Senior E-Discovery Attorney in the New York office of Hughes Hubbard & Reed LLP. Mr. Grande develops and implements strategies to ensure that the firm's clients receive the highest quality of litigation support services in a cost-effective manner. He also advises case teams and clients on how to best leverage the latest technologies and e-discovery practices to efficiently guide matters from initial document preservation and collection through to review and production. Mr. Grande is a member of The Sedona Conference Working Group 1 on Electronic Document Retention and Production and serves as co-chair of the New York State Bar Association's Social Media Law Committee. He also teaches a course on e-discovery at St. John's School of Law. He is a graduate of Yale College and Georgetown University Law Center. He began his legal career as a law clerk for the Honorable James M. Munley of the Middle District of Pennsylvania.