The Sedona Conference Journal

Volume 10 2009

Conducting E-Discovery After the Amendments: The Second Wave

Thomas Y. Allman

Recommended Citation: Thomas Y. Allman, *Conducting E-Discovery After the Amendments: The Second Wave*, 10 SEDONA CONF. J. 215 (2009).

For this and additional publications see:
https://thesedonaconference.org/publications

CONDUCTING E-DISCOVERY AFTER THE AMENDMENTS: THE SECOND WAVE

Thomas Y. Allman[1]
Cincinnati, Ohio

This paper focuses on the remarkable "second" wave of decisions rendered in 2008 - 2009 regarding the discovery of electronically stored information ("ESI") in the Federal Courts.

1 Thomas Y. Allman is one of the Editors of *The Sedona Principles – Second Edition* (2007). An earlier version of this paper was presented at the Sedona Conference Mid-Year Meeting, Denver. Colorado (May 14-15, 2009).

I. TRENDS

At least three major themes dominate this second generation of post-2006 Amendment decisions.[2] First, the scope of discovery clearly extends to ephemeral information. Second, cooperation among parties in discovery has emerged as a decisive mandate and, third, counsel, both inside and retained, must accept responsibility, along with and apart from their clients, for discovery compliance.

We briefly discuss each of these trends before turning to the recent decisions regarding discovery of ESI.

A. Expanded Scope

Rule 34(a), as amended by the 2006 Amendments to the Federal Rules, clarifies that electronically stored information is discoverable when "stored in any medium" from which it can be obtained, "translated, if necessary" into a "reasonably usable form."

Thus, even transitory or ephemeral manifestations of electronic information are discoverable. In *Columbia Pictures v. Bunnell*,[3] a party was required to "begin preserving and subsequently produce a particular subset of the data in RAM under [its] control."[4] The District Court emphasized the relevance of the information, the lack of other available means to obtain it – and the ease with which it could be logged and retained.

Thus, relevant information in operating systems, dynamic databases, websites and voicemail ("digital audio files"),[5] for example, can be discoverable whether found on individual or networked hard drives or on personal devices such as cell phones and PDAs.[6]

B. Cooperation

The 2006 Amendments mandate an earlier and meaningful discussion among opposing counsel on key e-discovery issues. As noted in *SEC v. Collins & Aikman*,[7] there is now a real "mandate for counsel to act cooperatively. Rule 37(e) requires "good faith" dealings among counsel[8] and there is a "perceptible trend" for "counsel [to] genuinely attempt to resolve discovery disputes."[9]

The Sedona Conference® has proposed, through its Cooperation Proclamation initiative, that all parties focus on increased cooperation in discovery with advocacy reserved for articulating and pressing the merits of a litigating position.[10]

To facilitate this process of cooperation, Rule 26(f) provides that parties must meet and confer "as soon as practicable" to develop a discovery plan designed to encourage reasonable and balanced approaches to discovery.

A key topic identified for discussion in Rule 26(f) is the steps - if any - a party intends to take to preserve potentially relevant information for purposes of discovery.[11] This is especially important as to information stored in inaccessible sources, since, absent agreement, it is something of a "catch-22" to predict, in advance, whether "good cause" under Rule 26(b)(2)(B) can later be shown for production.

---

2 For useful analysis of the initial decisions rendered immediately after the 2006 Amendments, *see* Douglas L. Rogers, *A Search for Balance in the Discovery of ESI Since December 1, 2006,* 14 Rich. J. L. & Tech. 8 (2008) and Emily Burns, *et al*, *E-Discovery: One Year of the Amended Rules of Civil Procedure,* 64 N.Y.U. Law Rev. 201 (2008).

3 245 F.R.D. 443 (C.D. Cal. 2007), *denying motion to reverse Magistrate Order*, 2007 WL 2080419 (C.D. Cal. 2007).

4 245 F.R.D. 443 at 448.

5 Alan F. Blakley, *Digital Audio Files in Litigation,* 2 J. Legal Tech. Risk Mgmt. 1 (2007).

6 *See, e.g., McClain v. Norfolk Southern,* 2009 WL 701001 (N.D. Ohio March 16, 2009)(cell phone photographs); *Arteria Property v. Universal Funding*, 2008 WL 4513696 (D. N.J. 2008)(websites); *Flagg v. City of Detroit*, 252 F.R.D. 346 (E.D. Mich. 2008)(text messaging devices).

7 2009 WL 94311 (S.D. N.Y. Jan. 13, 2009).

8 *See, e.g., Arista Records v. Usenet.com, Inc.,* 2009 WL 185992, at *16, n.31 (S.D. N.Y. Jan. 26, 2009)(parties should "negotiate in good faith [about] preservation difficulties).

9 *Newman v. Borders*, 2009 WL 931545, at *3, n. 3 (D.D.C. April 6, 2009).

10 The Sedona Conference® Cooperation Proclamation (2008)("The costs associated with adversarial conduct in pre-trial discovery have become a serious burden to the American judicial system."), downloadable at http://www.thesedonaconference.org.

11 Thomas Y. Allman, *The Impact of the Proposed Federal E-Discovery Rules*, 12 RICH. J. L. & TECH. 13, at Paragraph14 (2006)("[T]he paradigm of a producing party acting independently, and somewhat cavalierly, in determining its preservation obligations is modified by the [Amendments]".).

Another key issue for discussion is whether "metadata" will be sought in a case. As noted in *Kentucky Speedway, LLC v. NASCAR*,[12] "whether metadata is relevant or should be produced is [an issue] which ordinarily should be addressed by the parties in a Rule 26(f) conference."[13]

Similarly, discussion should be initiated as early as feasible about methods to limit or cull the information to be produced in discovery. Courts expect parties to reach practical agreement on search terms, date ranges, key players and the like.[14]

Finally, it is advisable to discuss the terms of any confidentiality or non-waiver agreements that may be developed to handle the production – inadvertent or otherwise – of privileged or work-product materials or confidential or trade secret materials. Rule 26(b)(5)(B) and Evid. Rule 502 now provide ample authority, with court approval, to design court orders to manage both procedural and substantive aspects of the issue.

A failure to meet with opposing counsel to resolve discovery problems will have consequences. In *May v. Fed Ex Freight*,[15] a court refused to rule on a motion to compel e-mail filed prematurely where the plaintiff did not meet and confer with defendant and its IT representatives.

C. Counsel Responsibility

Another trend is the increased likelihood that counsel may be held individually or jointly responsible with their client for failures to preserve and produce discoverable ESI.[16] ABA Model Rule 3.4 obligates counsel to make a "reasonably diligent effort to comply with a legally proper discovery request." In *Zubulake v. UBS Warburg ("Zubulake V")*,[17] the court suggested that both inside and outside counsel bear responsibility for client compliance with discovery obligations.

In the case of *In re Rosenthal,*[18] counsel was sanctioned for having omitted to act or to advise his client about duties to preserve information.[19] In *Phoenix Four, Inc. v. Strategic Resources Corp.*,[20] counsel was sanctioned because of her duty to locate and preserve relevant electronic information.

Rule 26(g) is increasingly cited for the obligation of counsel to conduct a "reasonable inquiry" before signing discovery filings. The Rule mandates an award of sanctions, where violations exist, against counsel, client or both of them.

In *Adele S.R.L. v. Filene's Basement, Inc.*,[21] *Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc.*,[22] and *Board of Regents of University of Nebraska v. BASF Corp.*,[23] clients were sanctioned for failures of counsel and their client.

In *R & R Sails Inc. v. Insurance Co. of Pennsylvania*,[24] however, both counsel and client were sanctioned for the Rule 26(g) discovery failures.

Discovery sanctions against counsel have also been assessed under Rule 37 as an incident to counsel "advising" clients regarding discovery matters or under the inherent power of courts to manage their affairs. In *Ajaxo v. Bank of America*,[25] a court sanctioned counsel under Rule 37 for causing "needless discovery motions."

---

12 2006 WL 5097354 (E.D. Ky. 2006).
13 Id. at *8 (failure to notify of demand for metadata until seven months after production of electronic and hard copy of documents).
14 *Siemens v. Jutai*, 2009 WL 800143 (S.D. Fla. March 25, 2009)(restricting search and agreeing on list of search terms).
15 2009 WL 1605211 (M.D. La. June 8, 2009)(ordering meeting to "discuss the burden and expense" before assertion of a motion to compel).
16 *See also Bray & Gillespie Management LLC v. Lexington Insurance,* 2009 WL 546429, at *21 (M.D. Fla. March 4, 2009)(clients have a duty to supervise the discovery conduct of their lawyers).
17 *Zubulake v. UBS Warburg,* 229 F.R.D. 422, 431(S.D.N.Y. July 20, 2004)("the central question" is "whether UBS and its counsel took all necessary steps to guarantee that relevant data was both preserved and produced.").
18 2008 WL 983702 (S.D. N.Y. March 28, 2008).
19 *Id.* at *10 - 11 (counsel failed to advise client to preserve documents and warn against deleting email).
20 2006 WL 1409413 (S.D.N.Y. May 23, 2006).
21 2009 WL 855955 (S.D. N.Y. March 24, 2009).
22 244 F.R.D. 614 (D. Colo. 2007).
23 2007 WL 3342423 (D. Neb. 2007).
24 251 F.R.D. 520 (S.D. Cal. 2008).
25 2008 WL 5101451, at *2 (E.D. Cal. 2008)(ordering reimbursement of fees paid for "needless discovery motion" but not sanctioning client "at this time.").

A mild presumption exists that clients are in the best position to control their counsel and, absent egregious counsel conduct, should bear the discovery sanctions.[26] If needed, "client and counsel can apportion the sanctions amongst themselves, consistent with their respective degrees of culpability."[27]

In *Qualcomm v. Broadcomm*[28] in addition to sanctioning the client, the court referred counsel to the California Bar for investigation of possible ethical violations and also ordered inside and outside counsel to participate in a "Case Review and Enforcement of Discovery Obligations ("CREDO")" Program to "identify the failures in the case management and discovery protocol."[29]

The debate as to how counsel can best adapt to this new emphasis on counsel responsibility for client compliance has been spirited.[30]

II. PRESERVATION

The duty to preserve potentially discoverable information in the form of hard copy or electronically stored information is not spelled out in the Federal Rules and is largely governed by the common law.[31]

The duty arises when a party has notice that evidence is or may become relevant to current or future litigation,[32] a determination which can be highly fact-dependent.[33] The duty to preserve transitory or ephemeral data not routinely retained as a business matter may require a specific demand for preservation. [34]

In *Columbia Pictures v. Bunnell*, *supra,*[35] sanctions for failure to preserve temporary information in RAM were refused because of the failure of the requesting party to make it clear that information would be sought in discovery.[36]

There is no requirement that preservation be accomplished in any particular format, provided that the relevant information can be retrieved and produced at the appropriate time.[37]

A. Litigation Holds

Once a preservation obligation is acknowledged, a potential producing party must undertake some form of affirmative action, a process which has come to be called a "litigation hold."[38]

A "litigation hold" should inform persons with the power to affect the continued existence of electronic information of the need to retain it. A typical approach focuses on key individuals who are likely to have access to information relevant to the claims or defenses.

---

26 *See* Thomas Y. Allman, *Achieving an Appropriate Balance: The Use of Counsel Sanctions in Connection with the Resolution of E-Discovery Misconduct,* 15 Rich. J.L. & Tech. 9, at Paragraphs 34-40 (2009).

27 *Alden v. Mid-Mesabi Associates*, 2008 WL 2828892, at *18 (D. Minn. July 21, 2008)(noting that is is "far too facile to presume" that counsel should be blamed for failure to allow discovery).

28 2008 WL 66932 (S.D. Cal. 2008), *vacated and remanded,* 2008 WL 638108 (S.D. Cal. 2008). *See also Qualcomm v. Broadcom*, 548 F.3d 1005 (Fed. Cir. C.A. December 1, 2008)(affirming in part underlying remedy ordered by District Court).

29 *Id.* at *18-20 (to establish "baseline: for other cases and to "establish a turning point: in "decline in and deterioration of civility, professionalism and ethical conduct in the litigation arena.").

30 *See* Kristine L. Roberts, *Qualcomm Fined for "Monumental" E-Discovery Violations—Possible Sanctions Against Counsel Remain Pending,* LITIG. NEWS ONLINE (2008).

31 *See Silvestri v. GM*, 271 F.3d 583 (4th Cir. 2001).

32 *Zubulake v. UBS Warburg LLC ("Zubulake IV"),* 220 F.R.D. 212, 216 (S.D.N.Y. 2003).

33 Compare *Micron v. Rambus,* 2009 WL 54887 (D.Del, Jan. 9, 2009) with *Hynix v. Rambus*, 2009 (N.D. Cal. Feb. 3, 2009)(conflicting conclusions as "reasonable forseeability" of litigation based on same internal memo).

34 Kenneth J. Withers, *"Ephemeral Data" and the Duty to Preserve Discoverable Electronically Stored Information,* 37 U. Balt. L. Rev. 349, 373-377 (Spring 2008).

35 2007 WL 2080419 (C.D. Cal. 2007), *affirmed sub nom,* 245 F.R.D. 443 (C.D. Cal. 2007).

36 *See also Arista Records v. Usenet.com, Inc.,* 2009 WL 185992, at *15 (S.D. N.Y. Jan. 26, 2009); *Phillips v. Netblue,* 2007 WL 174459 (N.D. Cal. 2007)(no duty to retain hyperlinks).

37 *Quinby v. WestLG AG ("Quinby II"),* 245 F.R.D. 94 (S.D. N.Y. Sept. 5, 2006)(should not punish routine business practices that do no destroy documents or alter them in any material sense"); *but see* DCBAR Op. 341 (Sept. 2007) at B(1)(removal of metadata in litigation context may be prohibited depending upon the type of metadata involved).

38 *Kinnally v. Rogers Corporation*, 2008 WL 4850116 (D. Ariz. 2008).

Courts continue to rely upon *Zubulake v. UBS Warburg ("Zubulake IV")*[39] for the proposition that "as a general rule, inaccessible backup tapes need not be preserved unless they are known to contain documents "of 'key players' to the existing or threatened litigation." For some courts, this remains a viable articulation[40] to determine if the duty had been violated.[41]

However, "[p]reserving all backup tapes is rarely necessary or cost effective."[42] There must be a reason to believe the information on the source would be relevant to the issues.[43]

Meeting preservation obligations should be seen as part of a corporate commitment to an effective compliance program. Increasingly, entities that can afford to do so are dedicating IT personnel and counsel to the task of coordinating and managing the process.

B. Limitations

The "duty to preserve" is not absolute. The outer limits are governed by relevance as mitigated by the "proportionality" principle.[44] When the burdens and expenses involved in a preservation effort are "disproportionate to the potential value" of the information source, the duty does not arise.[45]

Courts are also reluctant to speculate on relevance.[46] Thus, in *Best Buy Stores, L.P. v. Developers Diversified Realty,*[47] a District Judge held that there was no duty to maintain a database in a particularly accessible form "absent specific discovery requests or additional facts suggesting that the database was of particular relevance to this litigation."[48]

Most courts are also reluctant to impose burdensome storage requirements not routinely provided by the party. In *Malletier v. Dooney & Bourke,*[49] for example, a court held there was no duty to install a system to monitor and record chat room conversations.

Moreover, when a duty to preserve ephemeral information is not obvious, a requesting party may not "sandbag" the opposing party by remaining silent and later filing a motion for sanctions.

C. Preservation Orders

Pre-discovery preservation orders do not issue in the absence of evidence that a producing party does not intend to comply with its duty to preserve.[50] In *Ellington Credit Fund v. Select Portfolio Services*,[51] the court refused to issue a blanket preservation order where the court was satisfied that the producing party was aware of its obligations.

In *Texas v. City of Frisco,*[52] the court refused to entertain an action seeking declaration of preservation responsibilities based solely on receipt of a pre-suit preservation demand letter.

Moreover, courts no long honor requests for open-ended *ex parte* or blanket preservation orders absent exceptional circumstances.[53]

39 220 F.R.D 212, 217-218 (S.D. N.Y. 2003)(there is no general duty to preserve backup media used for disaster recovery, subject to an exception for those tapes known to contain discoverable information of key players).
40 *Forest v. Caraco*, 2009 WL 998402 (E.D. Mich. April 14, 2009)(applying the "Zubulake exception").
41 The Committee Note to Rule 37(e) notes that "good faith" may require suspension of automatic recycling when a litigation hold is established.
42 *See* Mary Mack, Dennis Kiker and Tom Mighell, *Effective Management of Litigation Holds and E-Discovery,* 27 NO.4 ACC Docket 36, at 44 (May 2009).
43 *See Toussie v. Count of Suffolk*, 2007 WL 465160 (E.D. N.Y. Dec. 21, 2007)(no duty to preserve without showing of prejudice).
44 Hon. Paul Grimm, Michael Berman, Conor Crowley and Leslie Wharton, *Proportionality in the Post-Hoc Analysis of Pre-Litigation Preservation Decisions*, 37 U. Balt. L. Rev. 381, 404 (Spring 2008)("limitations should be engrafted by analogy").
45 The Sedona Conference® *Commentary on Preservation, Management, and Identification of Sources of Information that are not Reasonably Accessible* (July, 2008), at 14 ("Step Five Analysis – The Proportionality Principle").
46 *Sampson v. City of Cambridge*, 2008 WL 2717757 at *10 (D. Md. 2008)(it is "completely speculative" to assume that email lost constituted relevant evidence).
47 2007 WL 333987 (D. Minn. 2007).
48 *Id.* at *3. The court also held that there was no "good cause" to order restoration of the database since it was not shown that the materials sought were "uniquely available" from the database.
49 2006 WL 3851151 (S.D. NY. 2006).
50 *Gregg v. Local 305 IBEW*, 2008 WL 5171085 (N.D. Ind. 2008).
51 2009 WL 274483 (S.D. N.Y. Feb. 3, 2009).
52 2008 WL 828055 (E.D. Tex. 2008).
53 *See* Committee Note to Rule 26(f)("[a] preservation order issued over objection should be narrowly tailored [and] [*ex parte*] preservation orders should issue only in exceptional circumstances.").

D. Spoliation Sanctions

The failure to preserve ESI can lead to allegations of "spoliation" of evidence. As one Circuit Court of Appeals has affirmed,[54] however, "sanctions should be considered only if the court finds a clear duty to preserve, a culpable failure to preserve and produce relevant ESI, and a reasonable probability of prejudice to the adverse party."

Sanctions can involve harsh remedies such as dismissals or default judgments[55] or lesser sanctions such as adverse inference instructions or monetary sanctions, depending on the circumstances.[56] In *Asher Associates v. Baker Hughes,*[57] the court imposed a "non-dispositive" sanction for failure to preserve the components of a drilling tool and in *Innis Arden Golf Club v. Pitney Bowles*[58] the court did the same in regard to contaminated soil samples.

Prior to the 2006 Amendments, concern was expressed about the fairness of sanctioning the inadvertent or negligent loss of electronically stored information caused by routine business practices.[59]

In partial response, the Advisory Committee added Rule 37(e)[60] which limits, absent "exceptional circumstances," the imposition of rule-based sanctions for losses due to the "routine, good faith" operation of electronic information systems. The clear intent was to separate out the unintentional, even careless or negligent, conduct from intentional misuse of the system features.[61]

In *Doe v. Norwalk Community College*,[62] the rule was not applied because there was no "consistent, 'routine' system in place."

Some courts seem to assume that once a duty to preserve attaches something akin to strict liability follows for any losses.[63] This is particularly true in cases involving automatic deletion of information for business reasons. Despite the widespread adoption of that approach, as documented by a Sedona Conference® Commentary,[64] courts are often suspicious of such policies.[65]

Where spoliation *is* deliberate courts do not - and should not - hesitate to issue sanctions[66] However, cases like *Phillip M. Adams & Associates v. Dell*[67] are surely wrong in criticizing automatic deletion because of the remote possibility that third parties - unidentified but vaguely anticipated - might someday seek them in discovery.

In contrast, in *Escobar v. City of Houston*,[68] the court correctly applied Rule 37(e) in refusing to sanction the failure to interrupt the routine practice of overwriting audio tapes absent any showing that the producing party acted in bad faith. A similar result was reached in *Phillips v. Potter,*[69] where there was no proof of bad faith or malicious intent in employing automatic deletion of email. [70]

---

54 *John B. v. M.D. Goetz*, 532 F. 3d 448, 459 (6th Cir. 2008)(referencing Sedona Principle 14 [2nd Ed. 2007]).
55 *Atlantic Recording v. Howell,* 2008 WL 4080008 (D. Ariz. 2008)("brazen destruction" of evidence).
56 *See Kounelis v. Sherrer,* 529 F. Supp. 2d 503 (D. N.J. 2008)(citing degree of fault and degree of prejudice as key factors).
57 2009 WL 1328483 (D. Colo. May 12, 2009).
58 2009 WL 1416169 (D. Conn. May 21, 2009)(landowner disposed of samples of contaminated property after duty attached).
59 *See* Martin Redish, *Electronic Discovery and the Discovery Matrix,* 51 Duke L.J. 561, 625(2001) ("if done routinely in the ordinary course of business, [destruction of ESI] does not automatically give rise to an inference of knowledge of specific documents' destruction, much less intent to destroy those documents for litigation-related reasons.").
60 Enacted as Rule 37(f) but renumbered as Rule 37(e) in the 2007 "style" amendments.
61 Thomas Y. Allman, *Inadvertent Spoliation of ESI After the 2006 Amendments: The Impact of Rule 37(e)*, 2009 Fed. Cts. L. Rev. 2 2009)(quoting Advisory Committee member to the effect that "good faith" assumes that the party "did not deliberately" permit a system to destroy information).
62 248 F.R.D. 372 (D. Conn. July 16, 2007).
63 *See* Burns *et al, E-Discovery, supra,* 64 NYU Law Rev. 201 at 217(questioning authority which implies strict liability).
64 *See The Sedona Conference Commentary on Email Management Guidelines for the Selection of Retention Policy* (August 2007), 8 The Sedona Conf. J. 239 (2007)(describing variety of acceptable auto-deletion policies).
65 *See, e.g., Connor v. Sun Trust Bank,* 546 F. Supp. 1360 (N.D. Ga. 2008)(concluding that loss of email not archived before automatic deletion must have been intentional since "doubtful" that the witness was not aware of need to preserve).
66 *Kvitka v. Puffin Company,* 2009 WL 385582 (M.D. Pa. Feb. 13, 2009)(intentional deletion of email from laptop).
67 2009 WL 910801, at *14 (D. Utah March 30, 2009)(criticizing email practices which allow individual employees to determine which emails to retain).
68 2007 WL 2900581 at *18 (S.D. Tex. 2007).
69 2009 WL 1362049 at *5 (W.D. Pa. May 14, 2009).
70 *Accord, Petcou v. C.H. Robinson Worldwise*, 2008 WL 542684 (N.D. Ga. 2008).

Other courts ignore Rule 37(e) by relying upon their inherent, not rule-based, sanctioning power.[71] However, this approach is disingenuous, since there is no principled reason to distinguish among the reasons for sanctions based on the source of the sanctioning power.[72]

Not all courts have adopted the unreasonably strict standards alluded to above. As one court put it, "[m]ere negligence in losing or destroying records [after a duty applies] is not enough [to justify sanctions] because it does not support an inference of consciousness of a weak case."[73] In *Adorno v. Port Authority,*[74] the court denied a motion for sanctions because "I am simply not persuaded on this record that a reasonable jury could find that the evidence was harmful to the [party's] defense of the case."

III. PRODUCTION

Courts increasingly exercise significant oversight of the mechanics of e-discovery compliance.[75]

A. Proportionality

All discovery is limited by the "proportionality" principle, currently found in Rule 26(b)(2)(C). This principle provides that a party need not provide discovery when the potential benefits are outweighed by the burdens or costs involved.

Thus, in *Dilley v. Metropolitan Life*,[76] a court refused to require a producing party to access a database in order to respond to an interrogatory where "the significance of the discovery to the issues in the present case is substantially outweighed by the burden."

In *Mancia v. Mayflower Textile Servs. Co.*,[77] the court criticized "kneejerk discovery requests served without consideration of cost or burden to the responding party" and "boilerplate objections" which do not disclose the burdens involved."[78] The court ordered that the parties meet and cooperate with a goal of "attempt[ing] to quantify a workable 'discovery budget' that is proportional to what is at issue in the case."[79]

In *Oxford House v. City of Topeka*,[80] a court denied access to deleted email because "the likelihood of retrieving these electronic communications is low and the cost high." A similar result was reached in *Palgut v. City of Colorado Springs*,[81] where the costs of restoration of backup tapes outweighed the "possible yield of relevant and probative information."

A reviewing court is empowered to deny discovery sought, condition it on payment of some or all of the costs involved[82] or order sampling to provide information on the necessity for further discovery. In *Kay Beer Distributing v. Energy Brands*,[83] the court refused to compel production of ESI collected as part of preliminary search where the costs of a further review for privilege, confidential and relevant information were deemed to be excessive.[84]

---

71 Rule 37(e) speaks of sanctions "under these rules." *See Technical Sales v. Ohio Star Forge*, 2009 WL 728520 (E.D. Mich. March 19, 2009)(Rule 37(e) does not limit spoliation sanctions based on inherent power of courts).

72 *See* Moore's Federal Practice §37A.57 (2008)("a court [should not] sanction a party under its inherent authority unless the sanction would be appropriate under [Rule 37(e)].").

73 *Salvatore v. Pingel*, 2009 WL 943713, at *10 (D. Colorado, April 6, 2009)(refusing to impose sanction for "negligent destruction of Maintenance Log").

74 2009 WL 8574965 (S.D. N.Y. March 31, 2009).

75 *See* Frank Vecell, Thomas Fasone, III, and Cathy Clark, *Litigation Management: And You May Find Yourself In a Large Document Review*, 27 No.4 ACC Docket 82, at *83 (May 2009).

76 2009 WL 756967 (N.D. Cal. March 19, 2009); *see also Nelson v. Farm, Inc.*, 2009 WL 939123 (D. Kan. April 6, 2009)(cautioning that it is not enough to argue requires use of "unreasonable" expenditure of resources).

77 253 F.R.D. (D. Md. 2008).

78 *Id*. at 359.

79 *Id.* at 364.

80 2007 WL 1246200 (D. Kan. 2007).

81 2007 WL 4277564 (D. Colo. 2007).

82 *CBT Flint Partners v. Return Path, Inc.,* 2008 WL 4441920 (N.D. Ga. Aug. 7, 2008)("relevance and importance are [not] proportional" to the costs involved).

83 2009 WL 1649592 (E.D. Wis. June 10, 2009).

84 *Id.* at *5; *compare Spieker v. Quest Cherokee, LLC* 2008 WL 4758604 (D. Kan. 2008)(ducking impact of disproportionate review costs by ordering parties to confer about impact of Rule 502 on reducing privilege costs).

B. Two-Tiered Approach

The 2006 Amendments placed a presumptive limit on production of ESI by enacting Rule 26(b)(2)(B), also known as the "two-tiered" approach, which provides that discovery from inaccessible sources can only be ordered upon "good cause," "subject to the limitations" of Rule 26(b)(2)(C). A party need not initially resort to such sources if they are "identified" to opposing counsel.[85]

Accessibility often turns on the nature of storage media involved.[86] Information stored on local hard drives, networked servers, distributed devices or offline archival sources are immediately accessible without restoration or reconstruction.[87] The Sedona Conference® has suggested additional "data complexity factors" for use in the assessment, however, since even active data can be deemed to be burdensome to utilize and review.[88]

It can be argued that the "two-tiered" approach is cumbersome and that its addition was unnecessary. Although "good cause" is dutifully (and mechanically) referenced in many of the cases, the courts are, in fact, primarily focused on proportionality.[89]

On balance, however, the "accessibility" distinction provides a useful vocabulary for discussion of unnecessary burdens and costs and has apparently been successful in reducing disputes over inaccessible sources.[90]

C. Form or Forms of Production

The amended Federal Rules are silent on the form or forms in which ESI should be produced. The Advisory Committee left the matter for individual case adjudication while making it clear that it was taking no position on the need for metadata in a particular case.[91]

Rule 34(b) thus provides, in the absence of agreement of the parties or a court order, that electronic information should be produced as "ordinarily maintained" (often referred to as "native" format) or in a "reasonably usable" format, which carries with it an obligation to assist the requesting party and not to degrade any existing capability to perform electronic searches.[92]

As noted in *Aquilar v. ICE*,[93] the relevance of and need for metadata (substantive, system or embedded metadata) may vary as between memoranda, email, spreadsheets and hierarchical databases, with different results for each. It is often sufficient to produce memoranda, emails and electronic records in PDF or TIFF format accompanied by a load file containing searchable text and selected metadata.[94]

Spreadsheets and databases may require a different approach.[95] In the case of *In re ClassicStar Mare Lease Litigation,*[96] the court ordered production of information from a complex financial database in native format, not TIFF with load files, because of difficulties in utilizing the latter.

---

85 David K. Isom, *The Burden of Discovering Inaccessible Electronically Stored Information: Rules 26(b)(2)(B) & 45(d)(1)(D),* 2009 Fed. Cts. L. Rev.1, 7-10 (2009)(describing the role of "identification" of inaccessible sources of ESI.).

86 *Zubulake v. UBS Warburg ("Zubulake I"),* 217 F.R.D. 309, 318-320 (S.D. N.Y. 2003)(a distinction that corresponds closely to the expense of production).

87 *The Sedona Conference Glossary: E-Discovery & Digital Information Management 2* (2d ed. Dec. 2007).

88 The Sedona Conference® *Commentary on Preservation, Management and Identification of Sources of Information that Are Not Reasonably Accessible*, at 11 (with chart)(July 2008).

89 *See Panel Discussion, Managing Electronic Discovery: Views from the Judges*, 76 Fordham L. Rev. 1, at *23 (2007)(Courts "pass by" the "almost mechanical burden-shifting procedure" when the value is so outweighed by the burden that the court will not require production).

90 *See* Thomas Y. Allman, *The Two-Tiered Approach to E-discovery: Has Rule 26(b)(2)(B) Fulfilled Its Promise?*, 14 Rich. J. L. & Tech. 7, ¶67 (2008)("Parties are increasingly tempering their demands and reaching practical and effective accommodations under circumstances which did not exist before.").

91 Comment, 93 Cornell L. Rev. 221, 224 (2007)(rule makers were silent because electronic discovery was such a new and changing area of law that the Committee was not confident in setting down a firm and inflexible rule).

92 Committee Note, Rule 34, subdivision (b) (2006).

93 255 F.R.D. 350 (S.D. N.Y. 2008)(containing a comprehensive analysis of the discoverability of metadata from the perspective of existing case law, the Rules and the *Sedona Principles*).

94 *Id.*, at 356 (quoting from *Sedona Principle* 12, Cmt. 12b, Illus. I [imaged production with load files satisfies the goals of Principle 12 since in a usable form, *i.e.*, electronically searchable and paired with essential metadata]); *See also P&G v. S.C. Johnson & Son, Inc.,* 2009 WL 440543 (E.D. Tex. Feb. 19, 2009)(production made in "searchable TIFF").

95 *Id.*, at 362-363 (targeted queries and live demonstration of system operation).

96 2009 WL 260954 (E.D. Ky. Feb. 2, 2009).

The advantage to an imaged format is that it can be easily bates numbered and redacted and does not contain associated metadata or embedded data requiring additional review for privilege.[97]

Meaningful consultation on the most appropriate form or forms of production should take place as early as feasible.[98] In *D'Onofrio v. SFX Sports Group,* Inc.,[99] the failure to clearly request information in its original format with metadata was fatal to a motion to compel.[100]

When the need for production in native format is litigated, the "proportionality principle" applies in assessing the need for metadata. Thus, in *Michigan First Credit Union v. Cumis Insurance Society,*[101] the court sustained an objection to production "along with intact metadata" because "production of this metadata would be overly burdensome with no corresponding evidentiary value."

D. Search & Retrieval

Parties must conduct a diligent search for relevant information using reasonable search criteria when responding to discovery. In *Keithley v. Homestore.Com.,*[102] the court criticized the "lackadaisical attitude" employed and the "egregious failure to diligently search for responsive documents in alternative locations until well after the eleventh hour."

The court in *Ford Motor v. Edgewood*,[103] however, noted that the producing party is often in the best position to design an "appropriate method of searching and culling data."

Search or "culling" of ESI to reduce the amount of information requiring manual review is an important part of the process. Typical best practices include "elimination of system files, de-duplication, culling by date ranges, keyword search, and identification of target subsets."[104]

The use of key words has been endorsed as a search method for reducing the need for human review of large volumes of ESI. As noted in the case of *In re Seroquel Products Liability,*[105] however, it must be "a cooperative and informed process [which includes] sampling and other quality assurance techniques."

Some courts have authorized cost-shifting where a party failed to take the opportunity to participate in formulating search terms.[106]

The failure to use appropriate search technology has been criticized. In *Wingnut Films, Ltd. v. Katja Motion Pictures Corp.*,[107] sanctions were imposed for a failure to "conduct or arrange for a server-wide search for documents containing the phrase "Lord of the Rings" or any other keywords."

Courts are prepared to critically examine the methods used. In *United States v. O'Keefe*,[108] the Court opined that the determination of whether search terms will yield information is a complex question "clearly beyond the ken of a layman" and requires evidence that "meets the criteria of [FRE] 702." In *Victor Stanley v. Creative Pipe*,[109] keyword searching was not deemed to be "reasonable" when the proponent failed to adequately explain the process.

---

97 *See also* Burns *et al, E-Discovery, supra,* 64 NYU Law Rev. 201 at 216 (alluding to the variety of competing ethical conclusions about the propriety of "metadata mining").
98 *Sedona Principle* 12 has now favors production in native format where it is needed in light of the nature of the case. See *Aguilar, supra*, 255 F.R.D. at 356.
99 247 F.R.D. 43 (D.D.C. 2008).
100 *Id.* at 48 (approving observation that "in order to obtain metadata . . .you should specifically ask for it to begin with").
101 2007 WL 4098213 (E.D. Mich. 2007).
102 2008 WL 3833384, at *5 (N.D. Cal. 2008).
103 2009 WL 1416223, at *9(D. N.J. 2009)(relying on Sedona Principle 6 in absence of showing that the party was "purposefully (or even negligently) withholding documents").
104 The Sedona Conference® *Best Practices for the Selection of Electronic Discovery Vendors: Navigating the Vendor Proposal Process* (June 2007 Version), D-3.
105 244 F.R.D. 650, 662 (M.D. Fla. Aug. 21, 2007)(criticizing failure to identify or validate process).
106 *Surplus Source v. Mid America Engine,* 2009 WL 961207 (E.D. Tex. April 8, 2009)(cost of additional run of search terms).
107 2007 WL 2758571 (C.D. Cal. 2007).
108 2008 WL 449729 (D.D.C. 2008).
109 250 F.R.D. 251 (D. Md. May 29, 2008).

In *Disability Rights Council v. WMTA,*[110] the court noted the "recent scholarship" indicating the efficiencies of "concept searching."[111] The Sedona Conference® has covered these and related topics in several publications.[112]

E. Shifting Costs

The Supreme Court held in *Oppenheimer Fund, Inc. v. Sanders*[113] that while a presumption exists that producing parties pay the costs of production, a court may mitigate undue burden by requiring "payment of the costs of discovery."[114]

In making its decision, a court is not bound to apply any particular formula or multi-factor test. In *Guy Chemical Company v. Romaco,*[115] the court rejected the need for rigid formulae in favor of the exercise of sound discretion. In contrast, *Zubulake I,*[116] suggests the employment of a hierarchy of factors.

In *Zubulake III,*[117] the court asserted that "only the costs of restoration and searching should be shifted" and that "the responding party should always bear the cost of reviewing and producing electronic data."[118]

However, the 2006 Amendments do not limit the power of a court to remedy undue burdens. While Rule 26(b)(2)(B) affirmatively notes the power of courts to condition discovery from inaccessible sources on the payment of costs, "[t]he amended rule does not say that judges may only consider cost allocation if the subject of the discovery . . is not reasonably accessible."[119]

Parties must discuss the issue early enough that meaningful evaluation of the need for cost-shifting, if any, can occur *before* any costs are incurred and courts can carefully monitor the nature and extent of the cost-shifting process.[120]

In *CBT Flint Partners v. Return Path, Inc.*,[121] the court required a requesting party to pay for the costs of a privilege review as a condition of compliance with the "extraordinary demands made [for] document production." This was consistent with *Principle 13* of the Sedona Principles (Second Edition), which recommends that the "costs of retrieving and reviewing" electronic information can be shifted in appropriate cases. [122]

In *Chemie v. PPG Industries, Inc.*,[123] the court held that because privilege review in that case was such a "daunting task," the costs of searching for documents and preparing a privilege log would be "open to further discussion [and] [i]t may be that some cost sharing is warranted."

Some courts see the cost of privilege review or culling of information prior to production as a burden which should be assumed by a producing party as a matter of course.[124] In *Brookdale University Hospital v. Health Insurance Plan*,[125] for example, a court rejected a request for fees and vendor costs associated with locating privileged information under the facts of the case.

---

110 242 F.R.D. 139 (D.D.C. June 1, 2007).
111 *See also* Committee Note to Fed. R. Evid. 502(b)(references to use of advanced technology).
112 The Sedona Conference® *Commentary on Search and Information Retrieval Methods* (2007), 8 The Sedona Conf. J. 189 (2008); The Sedona Conference® *Commentary on Achieving Quality* (2009).
113 437 U.S. 340, 358 (1978).
114 *Id.* (a party "may invoke the district court's discretion under Rule 26(c) to grant orders protecting him from 'undue burden or expense.'").
115 243 F.R.D. 310 at *2 (N.D. Ind. 2007)("This Court has discretion [to act] and finds [it] unnecessary to engage in such an analysis.").
116 *See Zubulake v. UBS Warburg LLC,* 217 F.R.D. 309, 320-324 (2003)(announcing a seven factor test).
117 216 F.R.D. 280 (S.D. N.Y. 2003.
118 *Id.*, at 290.
119 The Hon. Lee H. Rosenthal, *A Few Thoughts on Electronic Discovery after December 1, 2006,* 116 Yale L. J. Pocket Part 167 at 180 (2006).
120 *Cason-Merenda v. Detroit Med. Ctr.*, 2008 WL 2714239 (E.D. Mich. 2008).
121 2008 WL 4441920 (N.D. Ga. Aug. 7, 2008)(payment of $300,000 for "costs of the review" because of the failure to demonstrate that the "relevance and importance are proportional" to the costs involved).
122 *Sedona Principle* 13 provides, in relevant part, that "[i]f the information sought is not reasonably available to the responding party in the ordinary course of business, then, absent special circumstances, the costs of retrieving and reviewing such electronic information may be shared by or shifted to the requesting party."
123 218 F.R.D. 416, 422 (D. Del. 2003).
124 *See Covad Communications v. Revonet,* 254 F.R.D. 147, 150 (D.D.C. 2008)(presumption exists that cost of privilege review is assumed by producing party as a matter of course, citing to *Peskoff v. Faber,* 251 F.R.D 59, 61 (D.D.C., 2008)(refusing to shift costs of forensic examination).
125 2009 WL 393644 (E.D. N.Y. Feb. 13, 2009).

While some courts have permitted parties to "purchase" discovery,[126] other cases have cogently cautioned against such a practice.[127] A willingness to pay costs should not automatically entitle a party to discovery.

F. Direct Access and Sampling

Rule 34(a), as amended, explicitly provides that a party may seek to "test or sample" designated documents or electronically stored information.

A typical example occurs when a requesting party seeks direct access because of its concerns over compliance with discovery obligations. Courts typically require proof that the producing party has been unwilling or unable to produce the information sought or that the information is about to be lost. As pointed out in *Butler v. Kmart Corporation*,[128] Rule 34(a) "does not generally give the requesting party [the] right to search the responding party's records," citing the Eleventh Circuit opinion in the seminal case of *In re Ford Motor Co*.[129]

Another example is when a producing party is faced with production from complex databases. In *Zurich American v. ACE*,[130]a Magistrate Judge ordered that a "protocol for sampling" be prepared to secure examples of the information sought. Similarly, in *Aguilar v. ICE*,[131] the court ordered a demonstration of a database operation to help decide whether targeted inquiries would be sufficient.

Courts seem to find ways, however, to routinely permit forensic examinations of laptops, servers and distributed devices where credible allegations of breach of non-compete or unfair competition are involved.[132] In *Bank of Mongolia v. M&P Global,*[133] the court ordered access based merely on inadequacies of production, not any showing of unwillingness to perform or misconduct.

However, a higher standard is often applied when third parties are involved. In *Daimler Truck v. Younessi*,[134] the recipient of a subpoena was permitted to make its own search and was not required to produce its computer for copying.

G. Privileged Information

The sheer volume of electronic information available in the typical case makes it more difficult to conduct a meaningful pre-production review for privileged and confidential information. This has serious cost implications since costly manual review by counsel is often involved.[135]

The Advisory Committee recommended that parties consider appropriate "claw-back" arrangements as well "quick peek" arrangements whereby pre-production privilege review would be limited or eliminated.[136] Rule 26(b)(5)(B) was added by the 2006 Amendments to provide a backup "claw-back" procedure in the absence of an agreement or court order.

Subsequently, Congress passed and the President signed Evidence Rule 502 into law, thereby creating a basis for substantive court action.[137]

126 *See National Union Fire Insurance v. Clearwater Insurance*, 2007 WL 2106098 at *3, n. 10 (S.D. N.Y. 2007)("[I]f Clearwater wishes to pay to restore the data of the back-up tapes, it may do so.").
127 *Cognex Corporation v. Electro Scientific Industries*, 2002 WL 32309413 (D. Mass. 2002)("At some point, [we] need to say 'enough is enough").
128 2007 WL 2406982 (N.D. Miss. 2007).
129 345 F.3d 1315, 1317 (11th Cir. 2003).
130 2006 WL 3771090 (S.D. N.Y. 2006).
131 255 F.R.D. 350, 363 (S.D. N.Y. 2008).
132 *See, e.g., Andrew v. Cassinelli,* 2009 WL 736669 (N.D. Ill. March 18, 2009)(appointing special master to oversee discovery because search by defendant was "deficient"); *compare Mintel v. Neergheen*, 2009 WL 1033357 (N.D. Ill. April 17, 2009)("mere speculation" not enough to justify forensic examination of third party's computers).
133 2009 WL 1117312 (S.D. Fla. April 24, 2009)(arguing that this does not allow "unfettered access" to computer since expert was officer of the court).
134 2008 WL 2519845 (W.D. Wash. 2008).
135 Jack E. Pace III and John D. Rue, *Early Reflections on E-Discovery in Antitrust Litigation: Ten Months Into the New Regime*, 22-FALL Antitrust 67, 69 (Fall, 2007)(costs of privilege review necessary for production of ESI (including metadata) can be staggering).
136 Committee Note, Rule 26(f)(2006).
137 Act of Sept. 19, 2008, PL 110-322, 122 Stat. 3537.

Thus, Rule 502(d)[138] clarifies that non-waiver orders permitting production without any review (the "quick peek" approach) are binding on parties and non-parties alike. While such non-waiver orders have been issued before, they typically have been confined to idiosyncratic cases.[139] In the case of *In re Fannie Mae Securities Litigation*,[140] for example, the D.C. Court of Appeals, mandated the production of privileged materials to opposing counsel as a sanction for delays in producing a privilege log in order to facilitate "faster" resolution of outstanding privilege disputes.

As a practical matter, however, it is virtually impossible to "unring the bell" when privileged or confidential information is disclosed to opposing parties and their counsel.[141] Routine consensual use of "quick-peeks" is therefore quite unlikely.

Courts should resist the temptation to compel parties to forgo pre-production review.[142] The federal rules do not "supersede the lawyer's duty of confidentiality under Model Rule 1.6."[143] Courts should tread lightly when dealing with ethical obligations not to disclose privileged information.[144]

In addition, Rule 502(b)[145] provides a uniform national standard for adjudicating claims of waiver through inadvertent production. In *Rhoads Industries v. Building Materials Corp*.[146] and *Heriot v. Byrne*,[147] production of privileged information did not constitute a waiver since reasonable steps were undertaken to prevent disclosure. The opposite conclusion was reached in *Victor Stanley v. Creative Pipe*.[148]

The preparation of privilege logs, as required by Rule 26(b)(5)(A), is increasingly at the center of concerns over costs and privilege waiver. When both privileged and non-privileged communications are present, only the privileged communications which are adequately identified may be withheld from a chain of emails.[149]

Thus, consensual arrangements designed to reduce the burdens of privilege logs are worthy of serious consideration.[150]

Counsel has the responsibility, under Rule 26(g), to make a "reasonable inquiry" about any search methodology employed prior to signing a response or objection based on the search.[151]

H. Discovery Sanctions

Courts are increasingly prepared to sanction inadequate compliance with discovery obligations involving ESI.[152] Unlike the case of pre-discovery spoliation sanctions,[153] discussed *supra*, specific Federal Rules often provide the rule of decision and Rule 37(e), the so-called "safe harbor" rule, is largely inapplicable.

---

138 Rule 502(d) provides that a federal court may order "that the privilege or protection is not waived by disclosure" and it "is also not a waiver in any other Federal or State proceeding".

139 *Whitaker Chalk Swindle & Sawyer, LLP v. Dart Oil & Gas Corporation*, 2009 WL 464989 (N.D.Tex. Feb. 23, 2009)(compelling initial disclosures of privileged and confidential information despite risks of waiver in state proceedings).

140 552 F.3d 814 (D.C. Cir. Jan. 6, 2009)(involving "deliberative process privilege" without mention of Rule 502).

141 *D'Onofrio v. SFX,* 2009 WL 859293, at *3) (D.D.C. April 1, 2009("it is difficult to unlearn something once it is learned").

142 *See* Testimony of Thomas Y. Allman, Advisory Committee on Evidence Rules, Hearings, Phoenix, Arizona (Jan. 12, 2007) at pps 7-9 (expressing guarded support for limited use of "quick peek" agreements but cautioning against compelling parties to do so without their agreement), *available at* http://www.uscourts.gov/rules/EV_Hearing_Transcript_011207.pdf

143 Mark L. Tuft, *Techno Ethics: Ethical Challenges in Emerging Technology*, ABA GP Solo Magazine (June 2007).

144 *Compare Koch Foods of Alabama LLC v. General Electric Capital Corporation*, 2008 WL 152723 (M.D. Ala., 2008) with *Mass Engineered Design v. Ergotran*, 2008 WL 4873421, at *3-4 (E.D. Tex. 2008)(attorney notes compelled as sanction where ethical rules are violated).

145 Rule 502(b) requires proof of (1) inadvertent disclosure (2) reasonable steps to prevent it and (3) prompt and reasonable steps to rectify the error.

146 254 F.R.D. 216 (E.D. Pa. Nov. 14, 2008)(pre-production reviews largely conducted by automated means).

147 2009 WL 742769 (N.D. Ill. March 20, 2009)(vendor production not monitored nor quality assurance checking conducted).

148 250 F.R.D 251, 262 (D. Md. May 29, 2008)(finding that keyword searching was not "reasonable" given the failure to explain what had been done and why it was sufficient).

149 *See Muro v. Target Corporation* 243 F.R.D. 301 (N.D. Ill. 2007).

150 *See* Jeane A. Thomas, David D. Cross and Courtney Ingraffia Barton, *Reducing the Costs of Privilege Reviews and Logs,* Nat. L. J., March 23, 2009 (cost savings can come from not logging privileged documents which would not be harmful if disclosed).

151 *See Nelson v. Farm, Inc.*, 2009 WL 939123 (D. Kan. April 6, 2009)(requiring affirmative statement of search methods used).

152 *See* Sheri Qualters, *25 Percent of Reported E-Discovery Opinions in 2008 Involved Sanctions Issues*, NAT'L L.J., Dec. 17, 2008, (sanctions for the mishandling of electronic discovery).

153 *Alden v. Mid-Mesabi Associates*, 2008 WL 2828892, at *16 (D. Minn. 2008)(failure to produce ESI "bears a close relationship to the 'spoliation of evidence' and is sanctioned accordingly"); *but see Stanphill v. Health Care,* 2008 WL 2359730 (W.D. Okla. 2008)(a sanction under Rule 37 where documents are not destroyed is not a spoliation claim).

Generally speaking, "mere imperfection" in discovery compliance is not sufficient grounds for sanctions, especially where the deficiencies are not timely called to the courts attention.[154]

Rule 37 requires that the sanctions be "appropriate" and "just" and there is "no bad faith requirement."[155] In *Keithley v. Homestore.Com*[156] and *Adele S.R.L. v. Filene's Basement, Inc.*,[157] for example, the court issued monetary sanctions for late production of information. Courts also cite Rule 26(g) when counsel has failed to make a reasonable inquiry about the scope or diligence of discovery.

However, an entry of dismissal or default is not authorized under either rule without a showing of "willfulness, bad faith or fault."[158]

Courts frequently utilize their inherent power to sanction egregious discovery abuse.[159] In *Qualcomm Inc. v. Broadcom*,[160] the intentionally ignoring of warning signs that a client search was inadequate led to severe sanctions on client and counsel. Other recent cases involving similar misconduct include *Southern New England Telephone Co. v. Global NAPs, Inc.,*[161] *Micron Technology, Inc. v. Rambus Inc.*[162] and *Kipperman v. Onex Corporation*.[163]

In some cases, courts impose sanctions on both counsel and client, although the more typical response is to sanction the party,[164] especially where there is a failure to commit adequate resources to the discovery effort.[165]

However, "where the infraction is the fault of the party's attorney, the appropriate remedy is to shift the costs to the party's counsel."[166] In *Bray & Gillespie Management LLC v. Lexington Insurance Co.*,[167] the court sanctioned lead counsel and his law firm while exonerating the client.

IV. CONCLUSION

The 2006 Amendments were designed, as noted in *Board of Regents v. BASF Corp.,*[168] to promote open and forthright sharing of information to expedite case progress, minimize burden and expense and remove contentiousness as much as possible.

Nonetheless, the costs of e-discovery continue to rise, which carries grave risks and threatens to undermine confidence in the judicial system. In its 2007 decision in *Bell Atlantic Corporation v. Twombly*,[169] the Supreme Court noted that "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings."[170]

It has been argued that the 2006 Amendments are not sufficient to adequately address the rising cost of e-discovery. If this proves to be the case, there may be a need for further amendments to the Civil Rules of Procedure.[171]

---

154 *Swofford v. Eslinger,* 2009 WL 1025223, at *1 (M.D. Fla. April 14, 2009)("The purpose of the discovery rules is to facilitate resolution of cases on their merits . . . [c]reation of satellite litigations or opportunities for seeking sanctions is not a goal of the process.").
155 *Stanphill v. Health Care*, 2008 WL 2359730 (W.D. Okla. June 3, 2008).
156 2008 WL 4830752 (N.D. Cal. 2008).
157 2009 WL 855955 (S.D. N.Y. March 24, 2009)(criticizing "slothfulness" and "discovery passivity").
158 *GSI Group v. Sukup,* 2008 WL 3849695 at *5 (C.D. Ill. Aug. 18, 2008).
159 *See Chambers v. NASCO, Inc.,* 501 U.S. 32, 44-45 (1991). In addition, courts can seek, at least as to counsel, to impose sanctions under the authority of 28 U.S.C. § 1927, which applies when an attorney has multiplied proceedings "unreasonably and vexatiously."
160 2008 WL 66932, at *13 (S.D. Cal. 2008).
161 251 F.R.D. 82, 96 (D. Conn. 2008)(repeated violations of discovery orders).
162 255 F.R.D. 135, 150 (D. Del. 2007)(destruction of documents that party "knew or should have known" would become material).
163 2009 WL 1473708 (N.D. Ga. May 27, 2009).
164 *See* Allman, *The Use of Counsel Sanctions, supra,* 15 Rich. J.L. & Tech. 9 at Paragraphs 51-55 (most courts apply a mild de facto presumption against sanctioning counsel for discovery misconduct, even when the client is relatively blameless).
165 *See, e.g., L.H. v. Schwarzenegger*, 2008 WL 2073958 (E.D. Cal. 2008)(criticizing reliance on one employee to respond to discovery in statewide class action); *accord Rhoads v. Building Materials*, 254 F.R.D. 216, 227 (E.D. Pa. Nov. 14, 2008)(desire to "minimize costs of litigation and to be frugal" no excuse for "failed screening of privileged documents").
166 *Orgler Homes v. Chicago Regional Council of Carpenters*, 2008 WL 5082979 (N.D. Ill. Nov. 24, 2008)(costs of changes in expert report due to late submission of information).
167 2009 WL 546429, at *21 (M.D. Fla. Mar. 4, 2009).
168 2007 WL 3342423 at 5(D. Neb. Nov. 5, 2007).
169 550 U.S. 544, 127 Sup.Ct. 1955 (2007)
170 127 Sup. Ct. at 1967.
171 *See* Final Report of the American College of Trial Lawyers and the Institute for the Advancement of the American Legal System, March 2009, at p. 17.