The Five Pillars of E-Discovery

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I. INTRODUCTION

Without discovery, modern litigation would be impossible. In just a few years, discovery has migrated from paper to electronic files, resulting in not only an exponential increase in the volume of information available to litigants but the invention of the term “electronic discovery” or e-discovery. “The more information there is to discover, the more expensive it is to discover all the relevant information until, in the end, ‘discovery is not just about uncovering the truth, but also about how much of the truth the parties can afford to disinter.’”¹

Discovery of electronic files is no longer a novelty but a reality in virtually every case. As e-discovery has become the rule rather than the exception, the principles governing successful e-discovery have solidified. Knowing these principles can allow counsel to conduct a more efficient and effective—as well as less costly—discovery process.

This paper explores in detail the five pillars of e-discovery: (1) the duty of cooperation and the Rule 26 “meet and confer” obligation to help the parties understand and control the scope of discovery at the outset of litigation; (2) search and retrieval of electronic documents that are responsive to the discovery agreement; (3) proportionality between the scope of e-discovery and the magnitude of the litigation; (4) cost shifting between the parties to share

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the expense of the e-discovery process; and (5) the impact of e-discovery on privilege and work-product protection claims. As with most complex topics, these subsets of e-discovery are intertwined and often overlap. These five pillars provide the foundation for good legal analysis and decision-making about e-discovery.

II.

THE FIVE Pillars

Although e-discovery is a relatively new development in the practice of law, it is established enough for courts to expect that today’s practitioners will comply with certain guiding principles. In an influential series of cases surrounding the litigation in Zubulake v. UBS Warburg LLC, the court offered extensive guidance on the duties parties owe in the course of e-discovery. There, the Zubulake court stated,

The subject of the discovery of electronically stored information is rapidly evolving. When this case began more than two years ago, there was little guidance from the judiciary, bar associations or the academy as to the governing standards. Much has changed in that time. There have been a flood of recent opinions—including a number from appellate courts—and there are now several treatises on the subject. In addition, professional groups such as the American Bar Association and the Sedona Conference have provided very useful guidance on thorny issues relating to the discovery of electronically stored information. Many courts have adopted, or are considering adopting, local rules addressing the subject. Most recently, the Standing Committee on Rules and Procedures has approved for publication and public comment a proposal for revisions to the Federal Rules of Civil Procedure designed to address many of the issues raised by the discovery of electronically stored information.
Now that the key issues have been addressed and national standards are developing, parties and their counsel are fully on notice of their responsibility to preserve and produce electronically stored information. The tedious and difficult fact finding encompassed in this opinion and others like it is a great burden on a court’s limited resources. The time and effort spent by counsel to litigate these issues has also been time-consuming and distracting. This Court, for one, is optimistic that with the guidance now provided it will not be necessary to spend this amount of time again. It is hoped that counsel will heed the guidance provided by these resources and will work to ensure that preservation, production and spoliation issues are limited, if not eliminated.²

As such, attorneys would be well-served to become familiar with the specific issues that can arise during e-discovery to avoid raising the ire of, and triggering possible sanctions by, the courts.

A. The Duty of Cooperation (Rule 26 — “Meet and Confer” Obligation)

The “meet and confer” obligation is the first pillar of e-discovery. This obligation is established through Rule 26 of the Federal Rules of Civil Procedure, which requires parties to meet before a scheduling order or conference and to prepare a discovery plan.³ The purpose of Rule 26 is to make discovery less contentious, less costly, and less dependent on judicial supervision. Ideally, the discovery plan should include, “among other things, the parties’ views and proposals on disclosure of electronically stored information (“ESI”), including

the form or forms in which it should be produced.”4 Thus, Rule 26 plays an invaluable role in e-discovery.

E-discovery is almost by definition complicated. Experience has proven it can be very expensive, as demonstrated in many cases where searching for and producing such voluminous amounts of documents cannot be accomplished without the supervision of the court. However, the meet and confer requirement of Rule 26 can (and should) be used to defer the involvement of the court on as many issues as possible for as long as possible.

At a Rule 26 conference, the parties’ objective may be to “narrow the range of information sought.”5 Or the parties may use the “meet and confer” to reach an agreement on other issues pertaining to their discovery, such as keywords to be used in searches of electronic data. The requesting party must specify how and in what form it desires the requested documents to be produced.

If the parties reach an agreement during a Rule 26 conference, they should clearly document that agreement in the record, either through pleadings or at oral argument. If the record does not reflect that the parties reached an agreement, a court may determine that one party did not reciprocate the other party’s efforts to compromise. If no agreement is reached, the court may look to whether the parties were willing to compromise and the number of concessions they made when resolving their disagreements.6

Failure to reach an agreement will not necessarily result in failure to comply with Rule 26.7 In Bray & Gillespie Management LLC v. Lexington Insurance Co., the court found that parties’ efforts to prepare a case management report and discuss ESI complied with Rule 26(f), even though they did not reach an agreement.8 While failure to reach an agreement may be acceptable, however, failure to actively participate in the meet and confer session may result in an unfavorable outcome once the court is involved.9

In essence, parties must try to reach an agreement before involving the court. The “meet and confer” obligation necessitates compromise if it is to work as intended, even when compromise seems to be the worst of all options.

B. Search and Retrieval of Data (and Litigation Hold)

The process of searching and retrieving the requested discovery documents comprises the second pillar of e-discovery. Good communication between counsel and client is mandatory

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7 See Bray & Gillespie I, 259 F.R.D. at 582 (M.D. Fla. 2009).
8 Id.
9 See Letter Opinion of Special Discovery Master, supra note 6, at 2.
to ensure that the proper files are searched and the proper documents are produced during the complex process of e-discovery. As stated by the court in *Qualcomm Inc. v. Broadcom Corp.*, 

[for] the current “good faith” discovery system to function in the electronic age, attorneys and clients must work together to ensure that both understand how and where electronic documents, records and emails are maintained and to determine how best to locate, review, and produce responsive documents. Attorneys must take responsibility for ensuring that their clients conduct a comprehensive and appropriate document search.10

Courts have established several critical steps in the proper search and retrieval of documents responsive to an e-discovery request: (1) preservation of documents,11 (2) familiarization with the client’s electronic storage and retention system,12 (3) search and retrieval of preserved documents,13 (4) collection and review of documents,14 and (5) separation of privileged and responsive documents. Counsel must give his or her client “clear instructions . . . to preserve [relevant] information and, perhaps more importantly, [counsel must stress] a client’s obligation to heed those instructions.”15

1. Preservation of Documents

The first step in search and retrieval is ensuring that there are preserved documents to search once discovery requests are made.16 The duty to preserve relevant evidence is a duty owed to the court, rather than to the opposing party.17

No hard and fast rule for all jurisdictions establishes when “the duty to preserve potentially relevant evidence” arises.18 Under the common law, the obligation to preserve evidence begins the moment when litigation is reasonably anticipated, which may occur as

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12 See *Qualcomm Inc. v. Broadcom Corp.* (Qualcomm II), No. 05cv1957-B, 2010 WL 1336937, at *2 (S.D. Cal. Apr. 2, 2010).


16 See *Victor Stanley, Inc.*, 269 F.R.D. at 526 (“While the fact-finder can review only the documents that the parties produce, and production and preservation are not synonymous, production is possible only if documents are preserved.”).

17 *Id.*

18 See *id.* at 512.
early as when a plaintiff begins contemplating litigation or as late as when the defendant is served with the complaint, or some time in between. However, “[t]he mere existence of a dispute does not necessarily mean that parties should reasonably anticipate litigation or that the duty to preserve arises.” The Zubulake court found that the duty to preserve arises “when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation.” For example, in Goodman v. Praxair Services, the court found that the duty arose when the defendants received a demand letter threatening litigation because the letter “provide[d] constructive notice that litigation [was] likely.”

Additionally, the duty to preserve “may arise from statutes, regulations, ethical rules, court orders, . . . a contract, or another special circumstance.” The Zubulake opinions provide the most detailed discussion regarding the duty to preserve sources of “deleted data, data in slack spaces, backup tapes, legacy systems, and metadata,” which also may be considered part of the duty to preserve. However, because the circuit courts do not agree on the duty to preserve, the Zubulake guidance might not be applied uniformly.

Due to the absence of a national standard for document preservation, corporations operating in multiple jurisdictions are forced to create their own policies. According to the court in Victor Stanley, Inc. v. Creative Pipe, Inc.,

- the only “safe” way [for corporations to develop a preservation policy] . . . is to design one that complies with the most demanding requirements of the toughest court to have spoken on the issue, despite the fact that the highest standard may impose burdens and expenses that are far greater than what is required in most other jurisdictions in which they do business or conduct activities.

A party will likely meet its duty to preserve if it acts reasonably and in good faith. For example, the preserving party may act reasonably by “giving out specific criteria on what should or should not be saved for litigation.”

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19 See id. at 521–22.
22 Goodman, 632 F. Supp. 2d at 511.
24 Id. at 524.
25 See id at 523.
26 Id.
27 Id. at 525 (quoting Jones v. Bremen High Sch. Dist. 228, No. 08-C-3548, 2010 WL 2106640, at *6 (N.D. Ill. May 25, 2010)).
2. Familiarization with the Client’s Electronic Document Storage and Retrieval System

Counsel also should learn how the party’s computer and electronic storage system is organized. This familiarization with the client’s system can include locating the client’s e-mail storage system, learning the backup processes for laptops and personal computers, and determining the type of information that the client stores electronically. Counsel should consider the client’s retention policies, such as whether e-mails are automatically deleted and network space devoted to storing employee e-mails. But counsel also should realize that a client’s policies may not be determinative in court. In Fairfax Financial Holdings v. S.A.C. Capital Management LLC, for example, one of the parties contended it was its corporate policy to not delete “substantive business-related e-mails” and that searching backup tapes would thus be a waste of time because “all business-related e-mails for all relevant time periods should be maintained on [the] computers, unless affirmatively deleted in violation of company policy or [they] somehow became corrupt.” The court noted, however, that the party had not presented evidence to show that “critical custodians” had followed this policy and that e-mails were not deleted.

Neither a court nor a litigant is “required to simply accept whatever information management practices a party may have during the e-discovery process. While a party’s information management practices may suit its business purposes, “one of those business purposes must be accountability to third parties.” This is especially important when considering storage of electronic documents in an accessible format.

3. Search and Retrieval of Preserved Documents

As soon as the duty to preserve attaches in the discovery process, the party is obligated to “identify, locate, and maintain information that is relevant to specific, predictable, and identifiable litigation.” Relevant documents include any documents or other tangible items created by or prepared for individuals who are “likely to have discoverable information that the disclosing party may use to support its claims or defenses.”

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30 Id. at 2–3.
32 Id.
34 Id. (quoting Zubulake v. UBS Warburg LLC (Zubulake IV), 220 F.R.D. 212, 217–18 (S.D.N.Y. 2003)).
According to the court in *Pension Committee of the University of Montreal v. Banc of America Securities*, the steps for properly conducting search and retrieval of documents, including ESI, when the duty to preserve has attached are as follows:

1. Issue a written litigation hold;
2. Identify all of the key players and ensure that their electronic and paper records are preserved;
3. Cease deleting email or preserve the records of former employees that are in the party’s possession, custody, or control;
4. Preserve backup tapes when they are the sole source of relevant information or when they relate to key players, if the relevant information maintained by those players is not obtainable from readily accessible sources.

When the duty to preserve arises, a party is “obligated to suspend its routine document retention/destruction policy and implement a ‘litigation hold’ to ensure the preservation of relevant documents.” A litigation hold stipulates that a party preserve any data potentially relating to the legal action. If a party cannot meet its duty to preserve because it “does not own or control the evidence, [the party] still has an obligation to give the opposing party notice of access to the evidence or of the possible destruction of the evidence if the party anticipates litigation involving that evidence.” Counsel should ascertain quickly whether non-parties, such as former employees, might have relevant documents to which the client does not have access.

In addition to seeking all documents, counsel should meet with all prospective witnesses, including the key players, who are defined as “employees likely to have relevant information.” Interviewing everyone involved can prevent the near-impossible task of speculating about who did or did not have knowledge of the subject of the lawsuit. If the corporation

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36  *Id.* at 471.
38  *Id.* at 5–14 (quoting Silvestri v. Gen. Motors Corp., 271 F.3d 583, 591 (4th Cir. 2001)).
39  *See Qualcomm Inc. v. Broadcom Corp. (Qualcomm II),* No. 05cv1958-B, 2010 WL 1336937, at *2 (S.D. Cal. Apr. 2, 2010). “The Court was not presented with any evidence establishing that either in-house lawyers or outside counsel met in person with the appropriate Qualcomm engineers (those who were likely to have been involved in the conduct at issue and who were likely to be witnesses) at the beginning of the case to explain the legal issues and discuss appropriate document collection.” *Id.*
is too large and speaking with every key player is not feasible, some sort of keyword search may be run system-wide.\textsuperscript{42} Documents only have to be retained at this stage, not reviewed.\textsuperscript{43}

When communicating with the key players, counsel should take care to clearly relay their preservation duty.\textsuperscript{44} Additionally, all employees, including the key players, “should be periodically reminded that the preservation duty is still in place”\textsuperscript{45} to ensure uniformity of preservation as well as to account for changes within the company, such as new hires.

While communication with a client is of great importance, counsel should not rely upon the client’s assurances if there is reason to investigate further.\textsuperscript{46} In \textit{Qualcomm Inc. v. Broadcom Corp.}, the court found that if the attorneys for the producing party had insisted upon reviewing the locations that had been searched and the terms used for discovering responsive documents, they would have realized the inadequacy of the search efforts and could have produced additional responsive documents.\textsuperscript{47}

Counsel should agree upon and appoint an attorney to supervise the discovery process and be responsible for “verifying that the necessary discovery had been conducted[,] including ensuring that all of the correct locations, servers, databases, repositories, and computers were correctly searched for potentially relevant documents.”\textsuperscript{48} As stated in the \textit{Zubulake} case, it is \textit{not} sufficient to notify all employees of a litigation hold and expect that the party will then retain and produce all relevant information. Counsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched. This is not to say that counsel will necessarily succeed in locating all such sources, or that the later discovery of new sources is evidence of a lack of effort. But counsel and client must take \textit{some reasonable steps} to see that sources of relevant information are located.\textsuperscript{49}

\begin{itemize}
\item \textsuperscript{42} \textit{See Zubulake V}, 229 F.R.D. at 432.
\item \textsuperscript{43} \textit{See id.}
\item \textsuperscript{44} \textit{See id.} at 433–34.
\item \textsuperscript{45} \textit{Id.} at 434.
\item \textsuperscript{46} \textit{See Qualcomm Inc. v. Broadcom Corp. (Qualcomm I)}, No. 05cv1958-B, 2008 WL 66932, at *13 (S.D. Cal. Jan. 7, 2008) (“\textit{The court finds it likely that . . . one or more of the retained lawyers chose not to look in the correct locations for the correct documents, to accept the unsubstantiated assurances of an important client that its search was sufficient, to ignore the warning signs that the document search and production were inadequate, not to press Qualcomm employees for the truth, and/or to encourage employees to provide the information (or lack of information) that Qualcomm needed to assert its non-participation argument and to succeed in this lawsuit. These choices enabled Qualcomm to withhold hundreds of thousands of pages of relevant discovery and to assert numerous false and misleading arguments to the court and jury. This conduct warrants the imposition of sanctions.”)."
\item \textsuperscript{47} \textit{Id.}
\item \textsuperscript{48} \textit{See Qualcomm Inc. v. Broadcom Corp. (Qualcomm II)}, No. 05cv1959-B, 2010 WL 1336937, at *2 (S.D. Cal. Apr. 2, 2010).
\item \textsuperscript{49} \textit{Zubulake v. UBS Warburg LLC (Zubulake V)}, 229 F.R.D. 422, 432 (S.D.N.Y. 2004).
\end{itemize}
After the duty to preserve relevant information attaches, the parties must not “delete[ ], destroy[ ], and otherwise fail[ ] to preserve evidence.”\textsuperscript{50} While this instruction seems obvious, counsel should note ways in which evidence may be lost, such as keeping business data on personal computers, moving data to an external hard drive, exchanging old servers for newer ones, updating software that renders files created on older software unreadable, or the use of programs that permanently delete data.\textsuperscript{51} The Victor Stanley defendants ran programs such as Disk Cleanup, Disk Defragmenter, Easy Cleaner, and CCleaner,\textsuperscript{52} which not only deleted possibly responsive files but emptied computer recycling bins and deleted records of visited websites.\textsuperscript{53} Failure to preserve data and other evidence may result in a finding of negligence, or even gross negligence or willfulness, if it “result[s] in the loss or destruction of relevant information.”\textsuperscript{54}

The search for responsive documents should begin immediately after receiving the requests from the opposing party. In Bray & Gillespie, hotel records known as “room folios” were at issue. Specifically, Bray & Gillespie did not even begin to look for the room folios until seven months after the court ordered their production, and then the company presented incomplete information to opposing counsel.\textsuperscript{55} The court found that this “deplorable conduct” warranted “severe sanctions . . . for discovery misconduct.”\textsuperscript{56}

The process of searching should also be documented, in case the requesting party inquires about what was and was not produced and why. Each party also has a duty to adequately prepare knowledgeable witnesses regarding the search methods it used; if those methods are questioned, the witnesses will likely have to testify.\textsuperscript{57} Documenting the process of the search also will be helpful if any declarations are required.

Pension Committee of University of Montreal Pension Plan v. Banc of America Securities, LLC offers an excellent example of what not to do during the search and collection phase:

In addition to failing to institute a timely written litigation hold, one or more of these plaintiffs failed to collect or preserve any electronic documents prior to 2007, continued to delete electronic documents after the duty to preserve arose, did not request documents from key players, delegated search efforts without any supervi-

\textsuperscript{50} Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497, 500 (D. Md. 2010).
\textsuperscript{51} See id. at 505, 510–12.
\textsuperscript{52} Id. at 505.
\textsuperscript{53} See id. at 511.
\textsuperscript{55} Bray & Gillespie Mgmt. LLC v. Lexington Ins. Co. (Bray & Gillespie II), 259 F.R.D. 591, 594, 603–05 (M.D. Fla. 2009).
\textsuperscript{56} Id. at 594.
\textsuperscript{57} See Pension Comm. of Univ. of Montreal, 685 F. Supp. 2d at 477.
sion from management, destroyed backup data potentially containing responsive documents of key players that were not otherwise available, and/or submitted misleading or inaccurate declarations.\footnote{Id. at 479–80.}

Another obvious instance of failure to conduct a proper search occurred in the *Qualcomm* case when employees deemed knowledgeable enough to testify during deposition were not asked to search their computers for relevant documents or e-mails.\footnote{See Qualcomm Inc. v. Broadcom Corp. (*Qualcomm II*), No. 05cv1958-B, 2008 WL 66932, at *3. (S.D. Cal. Jan. 7, 2008). “If a witness is testifying as an organization’s most knowledgeable person on a specific subject, the organization has an obligation to conduct a reasonable investigation and review to ensure that the witness does possess the organization’s knowledge.” Id. at *11.} Although a discussion concerning sanctions for failing to preserve ESI is outside the scope of this article, counsel should be aware that failure to properly search, collect, and produce data that is both relevant and responsive could result in sanctions regardless of whether the failure was negligent, reckless, or willful.\footnote{See id. at *7.}

Although keyword searches can help limit the scope and better focus the process of e-discovery, such efforts can likewise pose problems for parties. After several meet-and-confer sessions, the parties in *Fairfax* agreed to produce certain electronically-stored documents and to use search terms aimed at limiting the number of electronic documents that would need to be reviewed and produced.\footnote{Letter Opinion of Special Discovery Master at 1, Fairfax Financial Holdings Ltd. v. S.A.C. Capital Mgmt. LLC, No. MRS-L-2032-06 (N.J. Super. Ct. Law Div. Mar. 19, 2009).} But the parties could not agree on which search terms to use.\footnote{Id.} The court noted that

[i]ronically, while the use of computers and search terms has made it infinitely easier to store and retrieve documents, in terms of determining what documents are relevant, they are still no substitute for old-fashioned manual review. Search terms are merely a screening device. They help to identify potentially relevant and responsive documents. But only the lawyer’s trained eye can determine if they are actually so. Any investigation conducted through the use of search terms inevitably runs the risk of being too broad, or too narrow. There is simply no way to predict from the terms themselves—which are formulated in language only a computer can understand—what the search will ultimately yield. Consequently, no set of search terms will perfectly balance the Moving Defendants’ right to all relevant non-privileged material and the Plaintiffs’ right to be free from overly broad and unduly burdensome discovery.\footnote{Id. at 2 (internal citations omitted).}
In determining which list of search terms to use—the plaintiffs’ or defendants’ original lists or the defendants’ revised list—the court selected the defendants’ revised list, noting that it “eliminate[d], modifie[d], or combine[d] numerous terms to reduce the number of total hits by a significant percentage” and “ma[de] a realistic effort to accommodate Plaintiffs’ concerns about burdensomeness (an effort Plaintiffs did not reciprocate by insisting throughout on their original search term list).”64 The court allowed the plaintiffs to move for a subsequent modification of the order if they found that “the search [wa]s generating an excessive amount of irrelevant information,” but they would have to produce evidence, such as “a sampling of the terms run, the results, and a calculation of the time and money spent,” to prove that the search would be unproductive.65

In sum, keywords and search terms should be considered only after “careful thought, quality control, testing, and cooperation with opposing counsel.”66 Counsel also would be wise to solicit the advice of the key players for words or abbreviations they actually may have used in the documents being searched.67

Finally, the litigation hold is especially important when it comes to backup tapes. Backup tapes are typically used for a specified amount of time (daily, weekly, or monthly) and then deleted and used again. In Victor Stanley, the backup tapes were even more problematic because the system was not properly managed, and “the system failed ‘[a]t least once or twice a week’ when someone forgot to replace the backup tape.”68 Additionally, all users had access to the tapes and could alter or delete data.69 Restoring backup tapes could pose problems for parties responding to discovery requests: software may become obsolete, necessitating conversions to even be able to access the documents; the tapes may be incorrectly labeled; or the records may be kept “in a manner that makes them difficult to retrieve.”70 The Victor Stanley case illustrates the importance of a proper litigation hold because, without one, ESI could be lost or modified at any time.71

Even hiring an ESI consultant is not enough if that person is not given authority to effectively preserve ESI. For example, in Victor Stanley, the defendants retained an ESI consultant for two months for the purpose of preserving “some data” but “did not consult her specifically about implementing an ESI preservation plan or a litigation hold.”72

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64 Id. at 3.
65 Id. at 4.
67 See id. at 136.
69 See id. at 505.
71 See Victor Stanley, 269 F.R.D. at 505.
72 Id.
reasonable measures were taken to prevent potentially relevant data stored on any of [the defendant’s] computer systems from being modified, overwritten, or deleted.”

4. Collection and Review of Documents

Once the written litigation hold has been established to ensure relevant information is not lost or destroyed, the information must be collected and reviewed. Documents must be collected from the key players, but they should also be collected from any employee with involvement in the situation that led to (or will lead to) litigation. Failure to collect records from key players may result in a finding of gross negligence or willfulness, while the loss of non-key employees' records may cause a finding of negligence.

The next step is determining which of those documents obtained during the litigation hold is responsive to the opposing party’s requests. This inquiry includes considering the format in which the document is preserved and must be transmitted to the opposing party. In Bray & Gillespie, Lexington requested that ESI be produced “without deletion or alteration of meta-data, in its native form, and to indicate the computer hardware and the software program(s) needed to translate the information into usable form in the information’s native format.” Because the request specifically stated format requirements, production of the records in non-native format on a disc failed to comply with the parties’ agreement.

The parties should specify the format of the produced documents both to ensure that documents are produced as requested and to confirm that the parties understand their responsibilities. For example, in Bray & Gillespie, the producing party scanned all documents, including those in paper form and those in electronic form; the requesting party objected because it interpreted the agreement to scan documents to apply only to paper documents. The scanned electronic documents did not contain metadata, were not in native format, and had no coding, which would allow searching by certain fields “such as creation date, last modification date, author, or subject,” functions that would have been possible if the data had been produced in its native form.

The producing party can object to the form the requesting party specifies, but if the producing party fails to object until after producing the material in a different form than had

73 Id.


75 See id.


77 Id. at 596–97.


79 Id. at 575.
been specified, later complaints may be futile. Additionally, if a party produces documents in any format other than that requested or that in which they are stored in the normal course of business, the opposing party may question the motives behind production in a different format and persuade a court that the production does not comply with the Federal Rules of Evidence.

If a court finds that the search, retrieval, or production of documents is inadequate, it may order the party to participate in a Case Review and Enforcement of Discovery Obligations (CREDO) program. CREDO is “a collaborative process to identify the failures in the case management and discovery protocol used by [a party] and its in-house and retained attorneys . . . to craft alternatives that will prevent such failures in the future, to evaluate and test the alternatives, and ultimately, to create a case management protocol which will serve as a model for the future.”

The Qualcomm court’s description of the CREDO program is helpful for instructing clients on how to comply with discovery before such a program is necessary. The program recommends sufficient communication between “client and retained counsel, among retained lawyers and law firms, and between junior lawyers conducting discovery and senior lawyers asserting legal arguments.” Additionally, CREDO suggests adequate case management and discovery plans with which all clients, employees, and lawyers are familiar. Such plans include considering the experience and expertise of the attorneys involved in the discovery process, describing the frequency of and parties involved in attorney meetings, identifying who should participate in the development of the case management and discovery plans, forecasting potential conflicts and resolutions between the client and retained counsel in the discovery process, and suggesting required ethical and discovery training for the participants. This format should be altered to fit the circumstances of clients with in-house lawyers or several retained law firms. As used in the CREDO program, it is also important to “identify[] and evaluat[e] data tracking systems, software, or procedures that corporations could implement to better enable inside and outside counsel to identify potential sources of discoverable documents,” such as the correct databases or archives.

5. Separation of Privileged and Responsive Documents

Privileged and responsive documents should be segregated once the search and retrieval and review processes of e-discovery have concluded. Counsel should take great care when responding to requests to ensure that the party does not produce irrelevant, unresponsive,
or even privileged information. While that premise applies to all discovery materials, it is especially prudent with regard to e-discovery because attempting to categorize such large volumes of electronic data could easily result in inadvertent production of data that could have been withheld. If a party agrees to produce documents within a certain category then it must produce all the documents within that category.\(^85\)

In addition to conducting a thorough search, if additional relevant and responsive documents are found post-search, counsel should immediately bring those documents to the attention of the opposing party and the court. Counsel also should commence a new search, either in the same place the new data was found or by using new key words that would have produced the data, to ensure that no other responsive data is missing.

Before production, counsel must perform a “reasonable inquiry” to ensure the client has complied with its discovery obligation. If relevant and responsive documents are found during this inquiry, the attorney must either verify that they were previously produced to the opposing party or must produce them immediately.\(^86\) Any documents found should naturally be read or reviewed by counsel, and failure to do so has created avoidable problems in other cases.\(^87\) “At the end of the day, however, the duty to preserve and produce documents rests on the party. Once that duty is made clear to a party, either by court order or by instructions from counsel, that party is on notice of its obligations and acts at its own peril.”\(^88\)

C. Proportionality

Proportionality is the third pillar of e-discovery. Because of the increasingly large volume of documents involved in a typical case involving e-discovery, counsel should always be mindful of the proportionality requirement of Rule 26(b)(2)(C), which might provide an avenue for decreasing the level of production required. “Whether preservation or discovery conduct is acceptable in a case depends on what is reasonable, and that in turn depends on whether what was done—or not done—was proportional to that case and consistent with clearly established applicable standards.”\(^89\) Rule 26 contains provisions that permit parties to refuse to produce ESI that would be unreasonably burdensome and expensive when compared to the overall scope of the case, including the amount of possible awards.\(^90\)

Factors to be considered in an analysis of whether the costs of production can be justified for a certain case include the following:

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\(^85\) See id. at *9.

\(^86\) Id. at *14.

\(^87\) See id. at *15.

\(^88\) Zubulake v. UBS Warburg LLC (Zubulake V), 229 F.R.D. 422, 436 (S.D.N.Y. 2004).


\(^90\) Id. at 523 (quoting Fed. R. Civ. P. 26(g)(1)(B)(iii)).
“(1) the specificity of the discovery requests; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive information that cannot be obtained from more easily accessed sources; (5) predictions as to the importance and usefulness of further information; (6) the importance of the issues at stake in the litigation; and (7) the parties’ resources.”

While these factors obviously depend on the facts of each case, the *Fairfax* court offers an excellent example of their application. In *Fairfax*, the court considered proportionality after the defendants requested e-discovery from plaintiffs’ 666 backup tapes.92 The plaintiffs estimated that making such a production would cost approximately $10 million.93 Because of this estimate, plaintiffs argued that the data kept on the tapes was not “reasonably accessible because of undue burden or cost,” per Rule 26(b)(2)(B) and New Jersey Rule of Court 4:10-2(f).94 However, this provision is not foolproof, and a court “‘nevertheless may order discovery from such sources if the requesting party establishes good cause.’”95

According to the *Fairfax* court, “[t]he analysis starts with determining whether Plaintiffs satisfied their burden of demonstrating that the requested e-mail discovery is ‘not reasonably accessible because of undue burden or cost.’”96 The court found that this burden was met because backup tapes are typically classified as inaccessible.97 In addition, the plaintiffs provided affidavits from Fairfax’s information technology manager and an e-discovery vendor attesting to the high cost.98 The court also considered the affidavit of the defendants’ e-discovery vendor, who stated that the tapes could be obtained at a lower cost, but the court deemed his statement “purely speculative, as [the vendor] ha[d] not seen or analyzed the tapes in question.”99 The court dismissed the defendants’ argument that the tapes were reasonably accessible because the same tapes had been produced to the Securities and Exchange

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92 *See* Letter Opinion of Special Discovery Master, *supra* note 29, at 3.
93 *See id.*
94 *See id.*
95 *Id.* at 4 (quoting N.J. Ct. R. 4:10-2(f)).
96 *Id.* (quoting N.J. Ct. R. 4:10-2(g)).
97 *Id.*
98 *See id.* at 4–5.
99 *Id.* at 5.
Commission in prior litigation. Because of these findings, the court concluded that “the weight of the evidence favor[ed] the conclusion that the information stored on Plaintiffs’ backup tapes [wa]s not reasonably accessible.”

The Fairfax court did not end its inquiry after determining the backup tapes were not reasonably accessible. Instead, the court next considered whether the requesting party had established such “good cause” to justify production, considering the aforementioned factors. The court provided the caveat, however, that “a court should not treat the ‘good cause’ factors as a checklist and determine which party has the most checks,” but instead should weigh the factors by importance.

Regarding the first factor—specificity of the discovery requests—counsel should use caution in agreeing to search terms based only upon accessible media, as those same terms may be used if media they consider inaccessible is deemed otherwise. In Fairfax, the defendants argued that the search terms were “sufficiently narrowly tailored.” The plaintiffs complained that the search terms would yield too many false hits. The court, however, already had approved those search terms, and “[s]ince the keyword search criteria already approved by [the court] ha[d] been used in the collection, review, and production of information stored on Plaintiffs’ accessible media, the same terms [we]re sufficiently specific for use on information stored on Plaintiffs’ inaccessible media.” The court held that this factor weighed in the defendants’ favor.

The second factor—the quantity of information available from other and more easily accessed sources—is also subject to interpretation. While the 47,000 e-mails that the plaintiffs in Fairfax already had produced without the backup tapes may seem like a large number, the length of the litigation and the number of “corporate parties, their officers, directors, employees, and representatives, and individual parties” involved could lead a court to determine that the number could be considerably higher. In Fairfax, however, the court ultimately held that without evidence of the contents of the backup tapes, it would be “impossible to decide this factor without resorting to rank speculation.”

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100 Id.
101 Id.
102 Id.
103 Id. (quoting Major Tours, Inc. v. Colorel, Civil No. 05-3091, 2009 U.S. Dist. LEXIS 97554, at *14–15 (D.N.J. Oct. 20, 2009)).
104 Id. at 5–6.
105 Id.
106 See id. at 6.
107 Id.
The *Fairfax* court noted that the third and fourth factors—“the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources” and “the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources”—was similarly hindered by lack of evidence.\(^\text{108}\) Although deleted e-mails might have existed on backup tapes, no evidence pointed to whether they actually existed or contained relevant information.\(^\text{109}\)

The fifth factor—predictions as to the importance and usefulness of further information—allows both parties to speculate. The plaintiffs in *Fairfax* asserted that the backup tapes would not contain relevant material that could not be found elsewhere,\(^\text{110}\) while the defendants argued that the e-mails that would support their claims were exactly the type that would have been deleted and, therefore, found in such a search.\(^\text{111}\) The court determined that this factor was a “draw” for both sides as neither side’s argument could be supported without actually accessing the tapes.\(^\text{112}\)

The sixth factor—the importance of the issues at stake in the litigation—was described in *Zubulake v. UBS Warburg LLC*, as “one that will rarely be invoked.”\(^\text{113}\) The *Fairfax* court stated that “[t]his factor should come into play if a case has ‘the potential for broad public impact,’ such as ‘toxic tort class actions, environmental actions, so-called ‘impact’ or social reform litigation, cases involving criminal conduct, or cases implicating important or constitutional questions.’”\(^\text{114}\) The court then concluded that the impact of this case was only on the parties, and the amount of potential damages did not alter that impact.

The seventh factor—the parties’ resources—does not rest solely on the coffers of the parties but is more focused on “whether the burden or expense of the proposed discovery outweighs its likely benefit.”\(^\text{115}\) However, evidence of what the media in question contain is still necessary to determine any benefit.\(^\text{116}\)

If a court cannot reach a conclusion as to proportionality by applying the above factors, a court may order “staged discovery or sampling” of the medium in question “to determine whether there is good cause to order a more expansive search of the information.”\(^\text{117}\) An
actual sample removes speculation in applying the factors because “there will be tangible evidence of what the backup tapes may have to offer . . . [and] tangible evidence of the time and cost required to restore the backup tapes.” Applying this strategy to the Fairfax case, the court ordered the defendants to choose one of the “critical custodians” and ordered the plaintiffs to “restore and produce all responsive and non-privileged e-mails pertaining to that custodian for the requested time periods,” omitting all e-mails already produced.

D. Cost Shifting

Cost shifting is the fourth pillar of e-discovery. Cost shifting occurs when the court requires the party requesting discovery documents to bear some of the financial burden that the answering party incurs in producing the requested documents. Depending on the accessibility of the discovery documents requested, the cost of searching for and producing such a high volume of electronic documents may increase exponentially. Costs can be further driven up by near-automatic objections by the parties to discovery requests. As one court noted, “[t]he failure to engage in discovery as required . . . is one reason why the cost of discovery is so widely criticized as being excessive—to the point of pricing litigants out of court.”

Discovery of electronic documents is considerably more complicated and costly “because otherwise discoverable evidence is often only available from expensive-to-restore backup media.” Courts have relied on “creative solutions” to balance rules that honor the broad scope of discovery requests against those that are more cost-conscious. Cost sharing has emerged as a method that can offset the often unequal financial burdens upon the parties.

As already noted in Part C, courts and the Federal Rules of Civil Procedure provide some escape from overly burdensome and expensive discovery requests. In addition, the Federal Rules of Civil Procedure provide that parties do not have to produce documents in the discovery process when

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
(ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or
(iii) the burden or expense of the proposed discovery outweighs 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 litigation, and the importance of the proposed discovery in resolving the issues.

118 Zubulake I, 217 F.R.D. at 324.
119 Letter Opinion of Special Discovery Master, supra note 29, at 8.
121 Zubulake I, 217 F.R.D. at 316.
122 See id.
Thus, although the presumption is that the responding party will bear the costs associated with complying with discovery requests, if a request fails to meet these proportionality requirements, the requesting party could be called upon to bear some of the costs of its burdensome request. But courts will consider such cost shifting only in response to a motion by the responding party, who must justify the request with “just cause.”

Because “cost-shifting may effectively end discovery” in cases where the parties are not financial equals, the Zubulake court cautioned that courts must closely adhere to the above guidelines laid out in the federal rules.\textsuperscript{124} Using such an analysis, the Zubulake court determined that whether electronic data posed an undue burden or expense on the responding party depended largely on whether the format in which the electronic data is kept rendered it accessible or inaccessible.\textsuperscript{125}

The Zubulake opinion identified five categories of data, ordered by most to least accessible:

1. \textit{Active, online data:} “On-line storage is generally provided by magnetic disk. It is used in the very active stages of an electronic records \[sic\] life—when it is being created or received and processed, as well as when the access frequency is high and the required speed of access is very fast, \textit{i.e.}, milliseconds.” Examples of online data include hard drives.

2. \textit{Near-line data:} “This typically consists of a robotic storage device (robotic library) that houses removable media, uses robotic arms to access the media, and uses multiple read/write devices to store and retrieve records. Access speeds can range from as low as milliseconds if the media is already in a read device, up to 10–30 seconds for optical disk technology, and between 20–120 seconds for sequentially searched media, such as magnetic tape.” Examples include optical disks.

3. \textit{Offline storage/archives:} “This is removable optical disk or magnetic tape media, which can be labeled and stored in a shelf or rack. Off-line storage of electronic records is traditionally used for making disaster copies of records and also for records considered ‘archival’ in that their likelihood of retrieval is minimal. Accessibility to off-line media involves manual intervention and is much slower than on-line or near-line storage. Access speed may be minutes, hours, or even days, depending on the access-effectiveness of the storage facility.” The principal difference between nearline data and offline data is that offline data lacks “the coordinated control of an intelligent disk subsystem,” and is, in the lingo, JBOD (“Just a Bunch Of Disks”).

4. \textit{Backup tapes:} “A device, like a tape recorder, that reads data from and writes it onto a tape. Tape drives have data capacities of anywhere from a few hundred

\textsuperscript{124} Zubulake \textit{I}, 217 F.R.D. at 318.

\textsuperscript{125} \textit{Id.}
kilobytes to several gigabytes. Their transfer speeds also vary considerably. . . . The disadvantage of tape drives is that they are sequential-access devices, which means that to read any particular block of data, you need to read all the preceding blocks.” As a result, “[t]he data on a backup tape are not organized for retrieval of individual documents or files [because] . . . the organization of the data mirrors the computer’s structure, not the human records management structure.” Backup tapes also typically employ some sort of data compression, permitting more data to be stored on each tape, but also making restoration more time-consuming and expensive, especially given the lack of uniform standard governing data compression.

5. **Erased, fragmented or damaged data:** “When a file is first created and saved, it is laid down on the [storage media] in contiguous clusters... As files are erased, their clusters are made available again as free space. Eventually, some newly created files become larger than the remaining contiguous free space. These files are then broken up and randomly placed throughout the disk.” Such broken-up files are said to be “fragmented,” and along with damaged and erased data can only be accessed after significant processing.126

Categories one through three are generally considered to be accessible, while categories four and five are inaccessible.127 Accessible data, or data in a “readily usable” format, includes data that “does not need to be restored or otherwise manipulated to be usable.”128 Inaccessible data, or data that is “not readily usable,” must be restored or reconstructed before it can be used by either party.129 For example, if the data is contained in an active file or on an easily searchable optical disc, “it would be wholly inappropriate to even consider cost-shifting.”130 If the producing party can produce the data cheaply and quickly, that party should bear the associated costs.131 If the data is stored in an inaccessible format, however, and the process of restoring the data would be costly and time-consuming, it is appropriate to at least consider cost shifting.132

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126 Id. at 318–19 (alterations other than “princip[al]” in original) (internal citations omitted).
127 Id. at 319–20.
128 Id. at 320.
129 Id.
130 Id.
131 Id. “For these sources of e-mails—active mail files and e-mails stored on optical disks—it would be wholly inappropriate to even consider cost-shifting. UBS maintains the data in an accessible and usable format, and can respond to Zubulake’s request cheaply and quickly. Like most typical discovery requests, therefore, the producing party should bear the cost of production.” Id.
132 See id.
The Zubulake court used these data categories to help further analyze the cost-shifting request of a plaintiff in a gender discrimination lawsuit. Building upon—but also rejecting—the cost-shifting test developed by the district court in Rowe Entertainment, Inc. v. William Morris Agency, Inc.\textsuperscript{133} the Zubulake court developed its own set of factors to consider in deciding a cost-shifting request. The court also provided some guidance to future courts and parties in ranking the factors:

The first two factors—comprising the marginal utility test—are the most important. These factors include: (1) The extent to which the request is specifically tailored to discover relevant information and (2) the availability of such information from other sources.

The second group of factors addresses cost issues: “How expensive will this production be?” and, “Who can handle that expense?” These factors include: (3) the total cost of production compared to the amount in controversy, (4) the total cost of production compared to the resources available to each party and (5) the relative ability of each party to control costs and its incentive to do so.

The third “group”—(6) the importance of the litigation itself—stands alone, and . . . will only rarely come into play. But where it does, this factor has the potential to predominate over the others. Collectively, the first three groups correspond to the three explicit considerations of Rule 26(b)(2)(iii).

Finally, the last factor—(7) the relative benefits of production as between the requesting and producing parties—is the least important because it is fair to presume that the response to a discovery request generally benefits the requesting party. But in the unusual case where production will also provide a tangible or strategic benefit to the responding party, that fact may weigh against shifting costs.\textsuperscript{134}

In Zubulake, after the backup tapes were sampled and the trial court reviewed the data found and the defendant’s affidavit regarding the time and money spent, the court held that all remaining backup e-mails would be produced with some (but not the bulk) of the costs shifted to the plaintiff, Zubulake.\textsuperscript{135} The total cost of restoring and producing relevant documents from the five backup tapes was $19,003.43.\textsuperscript{136} In considering whether to shift

\textsuperscript{133} 205 F.R.D. 421 (S.D.N.Y. 2002).
\textsuperscript{134} Zubulake I, 217 F.R.D. at 323.
\textsuperscript{136} Id. at 283.
any of the costs to Zubulake, the court “emphasiz[ed] again that cost-shifting is potentially appropriate only when inaccessible data is sought.”

The court looked to the e-mails Zubulake had already produced, which, “taken together, . . . presumably . . . are reasonably representative of the seventy-seven backup tapes.”

Though the e-mails were hostile to Zubulake, they did not provide evidence of gender discrimination. The court also noted UBS’s increase in production, from 100 pages of e-mails (which UBS had deemed a complete set) to 853 pages of e-mails after searching the five sampled backup tapes. The court concluded that these numbers “lead to the unavoidable conclusion that there are a significant number of responsive e-mails that now exist only on backup tapes.” Additionally, evidence existed that one of UBS’s employees may have concealed or deleted “especially relevant e-mails” after imposition of the litigation hold. The court found that while some of the new e-mails or their contents could be found in other places, “a good deal of [the data] is only found on the backup tapes.”

As to factors one and two—that is, the extent to which the request is specifically tailored to discover relevant information and the availability of the information from other sources—the court found that the sample restoration demonstrated that “Zubulake’s discovery request was narrowly tailored to discover relevant information.” The court further found that, because certain relevant e-mails were only available on the backup tapes, “direct evidence of discrimination may only [have] be[en] available through restoration.” The court concluded that the existence of such evidence was speculative, but “because UBS b[ore] the burden of proving that cost-shifting [wa]s warranted, the marginal utility test tip[ped] slightly against cost-shifting.”

In considering the next three factors—the cost of production compared to the amount in controversy and the resources of each party as well as the relative ability and incentive of each party to control costs—the court noted that both parties’ damage estimates suggested a potential verdict of several million dollars. The court concluded that a cost of $165,954.67 for restoring the remaining seventy-two backup tapes was “surely not ‘significantly disproportionate’ to the projected value of th[e] case.”

137 Id. at 284.
138 Id. at 285.
139 See id. at 286.
140 See id. at 286–87.
141 Id. at 287.
142 Id.
143 Id.
144 Id.
145 Id.
146 Id. at 288.
147 Id. at 287–88.
With regard to the resources of the parties, the court noted that Zubulake was an individual while UBS was a large corporation. Additionally, the court pointed out that, while Zubulake’s former salary was incredibly high, at the time of the opinion she had been unemployed for two years and was suing her former employer, likely rendering her “not . . . particularly marketable.” The court also considered the fact that Zubulake valued her claim at $19 million, suggesting she could “have the financial wherewithal to cover at least some of the cost of restoration[.]” and the likelihood that her attorneys would be willing to front larger expenses in light of the possible multi-million dollar verdict. The court held that this factor weighed against, but did not rule out, cost shifting.

The court also made note of the fact that UBS was allowed to choose the vendor charged with restoring the tape, and that it was possible that a less-expensive vendor could have been selected instead. Once the vendor is hired, however, “costs are not within the control of either party.” Therefore, this factor was determined to be neutral to both parties.

Factor six, which considers the importance of the issues at stake in the litigation, very rarely comes into play. The court noted that discrimination issues in the workplace are “hardly unique.” The court then found that this factor also was neutral. The court found that the seventh factor, concerning the benefits of the information to each party, weighed in favor of cost shifting. While the court agreed with Zubulake’s assertion that UBS would possibly find evidence favorable to its arguments at trial or for summary judgment, “there can be no question that Zubulake stands to gain far more than does UBS, as will typically be the case.”

Ultimately, the Zubulake court determined that “[b]ecause some of the factors cut against cost shifting, but only slightly so—in particular, the possibility that the continued production will produce valuable new information—some cost-shifting [wa]s appropriate in this case, although UBS should pay the majority of the costs.” The court based this finding on the fact that there was “plainly relevant evidence that [wa]s only available on UBS’s backup tapes.”

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148 Id. at 288.
149 Id.
150 Id.
151 Id.
152 Id. The court also noted that “because these backup tapes are relatively well-organized—meaning that UBS knows what e-mails can be found on each tape—there is nothing more that Zubulake can do to focus her discovery request or reduce its cost. Zubulake has already made a targeted discovery request and the restoration of the sample tapes has not enabled her to cut back on that request.” Id.
153 Id. at 289.
154 Id.
155 Id.
In considering how much of the cost of restoration should be shifted to Zubulake, the court noted that the results of the seven-factor test required UBS to pay the bulk of the costs. “A share that is too costly may chill the rights of litigants to pursue meritorious claims,” the Zubulake court reasoned. The court also considered the speculative nature of whether the search would produce any relevant documents of value before ultimately concluding that twenty-five percent of the cost should be assigned to Zubulake. The court required Zubulake to pay for only that portion of the discovery costs that involved searching and restoring the inaccessible backup tapes sought in the discovery request. It further clarified that once the backup tapes had been restored, an act defined as “making inaccessible material accessible,” then the responding party bore the cost of reviewing and producing the electronic data. The court explained its decision with an eloquent analogy:

Documents stored on backup tapes can be likened to paper records locked inside a sophisticated safe to which no one has the key or combination. The cost of accessing those documents may be onerous, and in some cases the parties should split the cost of breaking into the safe. But once the safe is opened, the production of the documents found inside is the sole responsibility of the responding party. The point is simple: technology may increasingly permit litigants to reconstruct lost or inaccessible information, but once restored to an accessible form, the usual rules of discovery apply.

The court ordered UBS to produce, at its own expense, “all responsive e-mails that exist[ed] on its optical disks or on its active servers” (data in accessible format), and all responsive e-mails “from any five backup tapes selected by Zubulake.” UBS was directed to document its search in detail as to time and money spent and relevant material found so that the trial court could apply its cost-shifting analysis to determine whether further discovery of the backup tapes was needed and whether cost-shifting would be appropriate.

Efforts to encourage a cost-sharing order should never affect the quality of ESI produced. In Bray & Gillespie Management LLC v. Lexington Insurance Co., the court found that because Bray & Gillespie caused problems with its production of ESI, Bray & Gillespie would have to “bear the burden of whatever it takes to get’ the ESI produced in a usable format,” a sanction that effectively eliminated any possibility of cost sharing.

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156 Id.
157 Id.
158 Id. at 290.
159 Id. at 291.
161 See id. at 324.
Once cost shifting has been allowed, however, the court will not reallocate the distribution of costs on a whim. In a later proceeding of the *Zubulake* case concerning spoliation sanctions, the court declined Zubulake’s request that the court reallocate the costs shifted to her in the prior proceeding because her basis for this request—missing tapes and e-mails—was already considered in the earlier proceeding in which the court had allocated the costs between the parties.163

E. Privilege and Work-Product Protection Claims

The fifth pillar of e-discovery involves the production of privileged and protected documents. Due to the large volume of material involved and the ease with which documents can be mistakenly transmitted, erroneous disclosure of privileged communications is a risk in the e-discovery process. So great is this risk, in fact, that the Federal Rules of Evidence have been altered to provide additional protections for privileged communications. As noted by the court in *Coburn Group, LLC v. Whitecap Advisors LLC*, “[w]here discovery is extensive, mistakes are inevitable.”164 Therefore, the importance of privilege in e-discovery cannot be understated.

Federal Rule of Evidence 502 states that “when privileged information is inadvertently disclosed, ‘the disclosure does not operate as a waiver in a Federal or State proceeding if: (1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error.’”165 Rule 502 “specifies the circumstances under which a privilege is waived despite the claim that the privileged document was inadvertently produced.”166 To determine whether waiver has occurred, a court must first determine whether the document is privileged and then whether the privilege has been waived.167

Rule 502 brought “uniformity across the circuits to their once differing treatment of the effect of certain inadvertent disclosures of privileged materials”168 and established the aforementioned three-part test to determine if the inadvertent disclosure constitutes a waiver.169 The emergence of e-discovery contributed significantly to the development of this new rule; the large volume of electronic documents led to higher costs of production due to the many hours spent “analyzing every piece lest the inadvertent production of one be deemed

166 Id. at 51.
167 See id.
168 Id. at 52 (citing Fed. R. Evid. 502 advisory committee’s note).
169 Id.
a waiver not only as to the piece inadvertently disclosed but as to all others that relate to
the same subject matter.”\footnote{Id. at 52 n.1 (citing Fed. R. Evid. 502 advisory committee’s note).} However, Rule 502 does not grant a free pass to parties who
choose not to take reasonable precautions against disclosure of such privileged documents.
Furthermore, while Rule 502 does not indicate specifically who has the burden of proving
waiver, the prior rule placed the burden on the party claiming privilege to show that it did
not waive attorney-client privilege.\footnote{Id. at 53.}

1. Is the Information Privileged?

When analyzing whether a party has waived protection from discovery for a privileged
document, a court will first consider whether the document was privileged in the first place.
Attorney-client privilege has traditionally been viewed as a way to protect a client’s con-
fidential communications to a representing attorney, encouraging openness, honesty, and,
ultimately, better representation.\footnote{See id. at 51.} In certain jurisdictions, a court also might conclude that
communication from an attorney to a client is privileged, so long as the party claiming
privilege “‘demonstrate[s] with reasonable certainty that the attorney’s communication’
. . . ‘rested in significant and inseparable part on the client’s confidential disclosure.’”\footnote{Id. (quoting In re Sealed Case, 737 F.2d 94, 99 (D.C. Cir. 1984)).}

Like attorney-client privilege, the work-product doctrine protects those documents
created by an attorney in the course of the representation of a client, with the purpose
aimed at ensuring the best possible representation. The test for whether a document can
be considered work product and qualify for protection “is ‘whether the material sought to
be protected from discovery was prepared in anticipation of litigation.’”\footnote{Coburn Group, LLC v. Whitecap Advisors LLC, 640 F. Supp. 2d 1032, 1036 (N.D. Ill. 2009) (quoting Allendale Mut. Ins. Co. v. Bull Data Sys., Inc., 145 F.R.D. 84, 86 (N.D. Ill. 1992)).} For example,
the Coburn court, in considering whether an e-mail released in the course of discovery
was work product, considered not only the content and title of an e-mail—“Requests on
Coburn Filing”—but that it was sent four months after the lawsuit was filed.\footnote{Id. at 1037.} The court
noted that even though the e-mail did not contain “opinion work product [and] there [was]
no disclosure of an attorney’s mental impressions, conclusions, opinions or theories,” the
e-mail was work product because it contained an attorney’s responses to questions regarding
the lawsuit and “[i]n order to formulate those responses, [the attorney] collected, selected
and organized certain information.”\footnote{Id.} The court also noted that the manner in which the
documents are prepared, not necessarily the contents of those documents, governs whether
the work-product privilege attaches; if the same content is found in documents that are not

\footnote{Id. at 1037.}
work product, those documents are discoverable. The court therefore concluded that the e-mail would be protected unless the privilege was waived or the opposing party “made the showing of ‘substantial need’ required by Rule 26(b)(3)(A)(ii).”

2. Inadvertent Disclosure

If a document is found to be protected from disclosure by attorney-client privilege or the work-product doctrine but is disclosed anyway during the discovery process, a court will next consider whether that disclosure was inadvertent rather than a waiver of the privilege. “Inadvertent disclosure” is not defined by Rule 502. Prior to the rule, however, courts considered the number of documents produced, “the level of care with which the review for privilege was conducted and even the actions of the producing party after discovering that the document had been produced.”

Some courts have found that the new rule simply considers “if the party intended to produce a privileged document or if the production was a mistake.” In Amobi v. District of Columbia Department of Corrections, for example, the court refused to consider the amount of information reviewed or the time taken to prevent the disclosure to establish whether disclosure was inadvertent, viewing such an approach as melding two distinct concepts: inadvertence and reasonable efforts taken to prevent disclosure. “One speaks to whether the disclosure was unintended while the other speaks to what efforts were made to prevent it.” The Amobi court instead interpreted “inadvertent” to mean “an unintended disclosure.”

In analyzing inadvertence, the Coburn court asked only “whether the party intended a privileged or work-product protected document to be produced or whether the production was a mistake.” In applying this test, the court noted sections (a)(1) and (b)(1) of Rule 502, which contrast a waiver that is “intentional” with a disclosure that is “inadvertent.” The court found that production of an e-mail protected by the work-product doctrine was a mistake, and thus, inadvertent. The number of documents produced during discovery in the Coburn case—40,000—qualified as substantially large.

177 See id.
178 Id.
180 Amobi, 262 F.R.D. at 53.
181 Id.
182 Id.
184 Id.
185 Id. at 1038.
186 See id. at 1039.
The Coburn court also did not adopt an approach advocated by the receiving party that would have found a waiver due to the use of non-lawyers in reviewing discovery documents. The process utilized in Coburn involved the lead attorney supervising two experienced paralegals, who worked subject to a protocol that required them to take extensive steps to segregate responsive and privileged documents. The opposing party criticized giving such an important task to paralegals, but the court “declin[ed] to hold that the use of paralegals or non-lawyers for document review is unreasonable in every case,” and specifically found that because of the large volume of documents, “use of experienced paralegals who were given specific direction and supervision by a lawyer who is lead counsel in the case was not unreasonable.”

Because the e-mail contested in Coburn was protected work product and the court found no waiver, the plaintiff’s only avenue for retaining the e-mail was to prove that it “ha[d] ‘substantial need for the materials to prepare its case and c[ould not], without undue hardship, obtain their substantial equivalent by other means.’” But the court found that the plaintiff was seeking the e-mail as a way to seek sanctions and impeach its opponents rather than for the e-mail’s contents, and so determined the plaintiff had not made a proper showing to meet the requirements of Rule 26(b)(3)(A)(ii).

Although Rule 502 resolved some of the major disputes over what constitutes inadvertent disclosure, issues still remain for courts to resolve over what constitutes an inadvertent disclosure that can protect a privilege from being waived in the discovery process. One consistency is the courts’ reluctance to adopt a bright-line rule one way or the other. For example, the defendants in Amobi disclosed to the opposing side an attorney’s memorandum regarding arbitration proceedings. The Amobi plaintiffs argued that if a lawyer disclosed the allegedly privileged document, “then it clearly was not mistaken and not inadvertent,” and if it was produced by a non-lawyer, then the defendants “did not take reasonable steps to protect privilege.” The court, however, dismissed this argument because “[c]oncluding that a lawyer’s mistake never qualifies as inadvertent disclosure . . . would essentially reinstate the strict waiver rule in cases where lawyers reviewed documents, and it would create a perverse incentive not to have attorneys review documents for privilege.”

On the other hand, courts have been equally reluctant to adopt a wholesale stance against waivers of the privilege, especially when based on arguments that they need to consider the hardship that permitting waivers would create for a party. “Every waiver of the attorney-client

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187 See id.
188 Id.
189 Id at 1041 (quoting FED. R. CIV. P. 26(b)(3)(A)(ii)).
190 See id. at 1042.
192 Id. at 54.
193 Id.
privilege produces unfortunate consequences for the party that disclosed the information,”
stated the court in Victor Stanley. “If that alone were sufficient to constitute an injustice,
there would never be a waiver.”

3. Reasonable Efforts

Following a determination that a disclosure was inadvertent, a court will next consider
whether the party claiming the privilege took reasonable steps to protect release of the privi-
leged document. When addressing an e-discovery waiver, this factor is of great importance.
Factors that may be considered include “the reasonableness of precautions taken, the time
taken to rectify the error, the scope of discovery, the extent of the disclosure, the number of
documents to be reviewed, the time constraints for production, and the overriding issue of
fairness.” However, these factors were intentionally not codified in the rule “because the
analysis should be flexible and should be applied on a case by case basis.”

Due to the case-by-case nature of a possible court review, the importance of document-
ing the process cannot be overstated when the party is reviewing responsive material for
privileged information. If a party cannot describe its efforts, a court cannot determine whether
those efforts were reasonable. When large quantities of ESI data are involved, even the
software used can become crucial. The document inadvertently produced in Amobi was a
four-page paper document. The court noted that, in arguing for the document’s protection,
the defendants failed to inform the court of the total number of documents produced, “so the
court cannot determine the magnitude of the error in producing this one document.” The
Amobi defendants also failed to explain “what they did when they got the documents, how
they segregated them so that the privileged documents were kept separate from the non-
privileged, and how, despite the care they took, the privileged document was inadvertently
produced.”

Use of text searches to distinguish privileged from non-privileged information also
may pose problems in convincing a court that reasonable precautions were taken to prevent
privileged information from reaching the opposing party. The plaintiffs in Victor Stanley, not

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195 See Amobi, 262 F.R.D at 54.
196 Id. (citing Fed. R. Evid. 502 advisory committee’s note at Subdivision (b)); see also Coburn Group,
197 Amobi, 262 F.R.D. at 54 (citing Fed. R. Evid. 502 advisory committee’s note at Subdivision (b)).
198 Id. at 54–55.
199 See id. at 54.
200 Id.
201 Id.
202 Id.
the defendants, noted that the documents produced to them contained potentially privileged or work-product protected documents. The plaintiffs properly segregated those documents and notified defense counsel, who promptly claimed that the documents were produced inadvertently. Defendants’ privilege review involved subjecting text-searchable documents to a keyword search while non-text-searchable documents were manually reviewed. But, due to time constraints, only the titles of the non-text-searchable documents were reviewed for indications of privilege. The court was skeptical of this argument because the defendants did not indicate which documents inadvertently produced slipped through because of errors in the keyword search versus human error in the title-page review.

The Victor Stanley court noted the lack of information regarding the keywords used during the privilege review, how those keywords were developed, “how the search was conducted, and what quality controls were employed to assess their reliability and accuracy.” The individuals who developed the keywords did not present any qualifications for “designing a search and information retrieval strategy that could be expected to produce an effective and reliable privilege review.” The defendants also failed to provide the court with other information, such as “whether the search was a simple keyword search, or a more sophisticated one, such as one employing Boolean proximity operators; or whether they analyzed the results of the search to assess its reliability, appropriateness for the task, and the quality of its implementation.”

As demonstrated above, “all keyword searches are not created equal.” The Victor Stanley defendants also failed to sample any of the files that the keyword search yielded to determine if the search results were reliable and did not contain privileged information. “Common sense suggests that even a properly designed and executed keyword search may prove to be over-inclusive or under-inclusive, resulting in the identification of documents as privileged which are not, and non-privileged which, in fact, are.”

Moreover, the Victor Stanley plaintiffs disputed the contention that the files were not easily searchable. The court agreed with this assertion and found that the defendants

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204 Id. at 256.
205 Id.
206 Id.
207 Id.
208 Id. at 259–60.
209 Id. at 256–57.
210 Id. at 257.
211 Id.
212 Id.
waived their claims to protection for 165 produced in discovery by performing an incomplete privilege review that missed so many documents. The court therefore concluded that

[i]n this case, the Defendants have failed to demonstrate that the keyword search they performed on the text-searchable ESI was reasonable. Defendants neither identified the keywords selected nor the qualifications of the persons who selected them to design a proper search; they failed to demonstrate that there was quality-assurance testing; and when their production was challenged by the Plaintiff, they failed to carry their burden of explaining what they had done and why it was sufficient.

The court also reminded defendants that if they had sought a court-approved non-waiver agreement, or clawback agreement, as they initially planned when negotiating the discovery agreement, “they would have been protected from waiver.” A clawback agreement allows the parties to enter an agreement with the court allowing production of certain documents to the opposing party with the understanding that if privileged or work-product protected documents are produced, the producing party will be able to “claw back” those documents. However, the parties should give careful thought before entering into such an agreement in order to avoid agreeing to produce documents (or relinquish a privileged document in-

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213 See id. at 263. The court also provided advice to future parties:

While keyword searches have long been recognized as appropriate and helpful for ESI search and retrieval, there are well-known limitations and risks associated with them, and proper selection and implementation obviously involves technical, if not scientific knowledge. . . . To address this known deficiency, the Sedona Conference suggests as best practice points, inter alia:

Practice Point 3. The choice of a specific search and retrieval method will be highly dependent on the specific legal context in which it is to be employed.

Practice Point 4. Parties should perform due diligence in choosing a particular information retrieval product or service from a vendor.

Practice Point 5. The use of search and information retrieval tools does not guarantee that all responsive documents will be identified in large data collections, due to characteristics of human language. Moreover, differing search methods may produce differing results, subject to a measure of statistical variation inherent in the science of information retrieval.

Practice Point 6. Parties should make a good faith attempt to collaborate on the use of particular search and information retrieval methods, tools and protocols (including as to keywords, concepts, and other types of search parameters).

Practice Point 7. Parties should expect that their choice of search methodology will need to be explained, either formally or informally, in subsequent legal contexts (including in depositions, evidentiary proceedings, and trials).

Id. at 260–62 (internal citations omitted).

214 Id. at 262.

215 Id.
advertently produced) when doing so would be detrimental to their case. Additionally, at least one court has noted that “[s]imply turning over all ESI materials does not show that a party has taken ‘the reasonable steps’ to prevent disclosure of its privileged materials.”

4. Prompt Response to Rectify the Error

In addition to using the foregoing factors to evaluate whether a party has waived privilege in the release of ESI, courts will consider a party’s prompt response to the inadvertent disclosure of privileged information in its favor. In Coburn, the plaintiffs tried to use the defendant’s actions against the defendant where there was a four-month lag time between the inadvertent production and the defendant’s discovery of the mistake, and the defendant delayed filing a motion to challenge the plaintiff’s refusal to return the document. The court dismissed the first contention by stating that the relevant time is “how long it took the producing party to act after it learned that the privileged or protected document had been produced.” The court noted the defendants’ immediate objection to use of the protected document during deposition and the written request the following day for the document’s return. The court also found a five-week delay in challenging the plaintiff’s refusal to return the documents, during which counsel for both sides investigated “the facts and law surrounding the documents,” was not unreasonable.

III. Conclusion

Because of the volume of information produced through e-discovery, the process of collecting, sorting, reviewing, and producing ESI is increasingly outsourced to non-lawyer professionals. The world in which complex litigation arises is dominated by computers, which in turn are ruled (if they do not in fact live autonomously among us) by technical experts. The management of e-discovery, therefore, cannot be fully accomplished without computer and data management experts. The fundamental decisions, however, about process and substance remain the province of lawyers. This article attempts in a small way to define the five pillars of e-discovery that support and inform a lawyer’s fundamental decision-making when tasked with the job of managing e-discovery.

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217 Coburn Group, LLC v. Whitecap Advisors LLC, 640 F. Supp. 2d 1032, 1040 (N.D. Ill. 2009)
218 Id. at 1041.
219 Id.