

# **The Discoverability of E-Mails: The Smoking Gun of the Modern Era**

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## **ABSTRACT**

The discoverability of e-mails is an area of law that every modern day lawyer must be familiar with in order to avoid the risk of being sanctioned. Over the past years, courts have awarded sanctions to moving parties at a steadily increasing pace. These sanctions have included adverse jury instructions, default judgments, attorney's fees, large monetary fines, and in one instance, a jail sentence. Courts have sent the message that improper conduct will not be tolerated in this developing area of law by not hesitating to order sanctions. Thus, it is essential that modern day lawyers become acquainted with the e-discovery standards of their jurisdiction and grasp the crucial role that the discovery of e-mails plays in virtually every lawsuit. Technology in the digital era is transforming the way individuals communicate and the way we store information. This note serves as a guide for attorneys on how to properly handle the preservation and discovery of e-mails. Following the framework set forth below will ensure that an attorney diligently and competently represents their client, and will alleviate the risk of being sanctioned.

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## I. INTRODUCTION

In *United States v. Microsoft*,<sup>1</sup> the infamous antitrust trial starting in the late 1990s, a key contention was that Microsoft was conspiring against Sun Microsystems.<sup>2</sup> An internal Bill Gates e-mail surfaced in which he asks, “Do we have a clear plan on what we want Apple to do to undermine Sun?”<sup>3</sup> When confronted with a transcript of the e-mail in his videotaped deposition, Gates claimed that he did not remember sending it.<sup>4</sup> However, the e-mail proved to be incredibly damaging to his defense and over time has become the classic example of how an e-mail can serve as convincing evidence of a crime or wrong doing, or a “smoking gun.”

In the modern era of technology, 294 billion e-mails are produced every day creating electronic discovery (hereinafter “e-discovery”) dilemmas for lawyers and judges throughout the country on a regular basis.<sup>5</sup> The technological advancements of the twenty-first century have resulted in an enormous amount of electronically stored information (hereinafter “ESI”) that can become discoverable in virtually any lawsuit. In today’s digital age, e-mail has practically become our default mode of communication. An e-mail address is so vital to an individual’s life that it has evolved into more than a means of communication. Today, an e-mail address represents a digital blueprint of a person’s life, highlighting one’s financial position, business associations, and personal interests. E-mails operate as smoking guns in modern litigation because this medium of communication invokes little precaution with its wording and subject matter. Further, most individuals do not anticipate that their e-mails will become a source of discoverable information in a lawsuit.

According to a recent study, sanctions for e-discovery violations are occurring more frequently than ever.<sup>6</sup> From January 1, 2000, through January 1, 2010, the study indicates that of the 381 federal cases in which sanctions for e-discovery violations were sought, 215

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<sup>1</sup> *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30 (D.D.C. 2000).

<sup>2</sup> *See id.*

<sup>3</sup> Susan Garland, *This Version of Bill Gates Has a Memory Problem* (Nov. 2, 1998, 8 p.m.), <http://www.businessweek.com/Microsoft/updates/up81102a.htm>.

<sup>4</sup> *Id.*

<sup>5</sup> *Internet 2010 in Numbers*, ROYAL.PINGDOM.COM, (Jan. 12, 2011), <http://royal.pingdom.com/2011/01/12/internet-2010-in-numbers>.

<sup>6</sup> *See* Dan H. Willoughby, Jr. et al., *Sanctions for E-Discovery Violations: By the Numbers*, 60 DUKE L.J. 789, 790 (2010).

resulted in sanctions being awarded.<sup>7</sup> Defendants were sanctioned for e-discovery violations nearly three times more than plaintiffs in various cases throughout the country.<sup>8</sup> Some of the sanctions were especially severe and included default judgments, adverse jury instructions, and large monetary fines.<sup>9</sup> The number one reason for imposing sanctions was a failure to preserve electronic evidence, which was followed by a failure to produce ESI when responding to a discovery request.<sup>10</sup>

An attorney's role in handling the discovery of e-mails is a crucial one. Therefore, every attorney must become aware of the vital role e-discovery plays in modern litigation in order to diligently and competently represent their clients. As the technology of the day continues to evolve, modern litigators must adapt and grow with it by becoming proficient in this new area of law. An attorney who fails to pursue the discovery of e-mails risks leaving unexamined a large quantity of information that could have a decisive impact on the outcome of litigation.<sup>11</sup>

This note serves as a guide for attorneys on how to properly handle the preservation and discovery of e-mails and not subject oneself to the risk of being sanctioned. Part II will clarify the level of due diligence required to comply with a discovery request by explaining the rules that frame the law of e-discovery and providing case law supporting the due diligence standard. Part III will address resolving e-discovery disputes, followed by Part IV, the conclusion.

## II. THE DUE DILIGENCE STANDARD

A challenge in the modern era of law is for an attorney to locate and retrieve all pertinent e-mails in connection with an e-discovery request; however, the cost of diligently producing e-mails outweighs the risk of subjecting yourself to sanctions for failing to preserve, produce, or maintain them.

The year 2006 can be considered the beginning of the modern era in e-discovery jurisprudence. In that year, Federal Rules 16, 26, 33, 34, 37, and 45 were amended to directly address ESI in an attempt to bring

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<sup>7</sup> *Id.* at 848.

<sup>8</sup> *Id.* at 803.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *See, e.g.,* Siemens Solar Indus. v. Atl. Richfield Co., No. 93 Civ. 1126, 1994 WL 86368, at \*2 (S.D.N.Y. Mar. 16, 1994).

clarity and standardization to this vague area of law.<sup>12</sup> The amendments addressed a call for reform made by legal scholars<sup>13</sup> and codified federal judicial findings that stated emphatically “it is black letter law computerized data is discoverable.”<sup>14</sup>

### A. Preservation of E-Mails

In the context of e-discovery, an attorney’s duty of due diligence begins with the preservation of e-mails. The determination of the “trigger point,” at which preservation becomes necessary, is very fact sensitive and extremely important.<sup>15</sup> Black letter law has established that the duty to preserve e-mails extends to the period before litigation when a party reasonably should know that evidence may be relevant to anticipated litigation.<sup>16</sup> A plaintiff’s duty is more often triggered before litigation commences, in large part because plaintiffs control the timing of litigation.<sup>17</sup>

Moreover, case law holds that “[a] formal discovery request is not necessary to trigger the duty to preserve evidence.”<sup>18</sup> Thus, the duty exists for a defendant, at the latest, when the defendant is served with the complaint.<sup>19</sup> Such a duty is ongoing, and a party must ensure that relevant e-mails are preserved on a continuing basis.<sup>20</sup> The duty of preservation requires reasonable and good-faith efforts by a party to retain their e-mails.<sup>21</sup> It is imperative that a party preserves their e-

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<sup>12</sup> See FED. R. CIV. P. 16, 26, 33, 34, 37, 45.

<sup>13</sup> Shira A. Scheindlin & Jeffrey Rabkin, *Electronic Discovery in Federal Civil Litigation: Is Rule 34 Up to the Task?*, 41 B.C.L. REV. 327, 346 (2000).

<sup>14</sup> *Anti-Monopoly, Inc. v. Hasbro, Inc.*, No. 94 CIV. 2120, 1995 WL 649934, at \*2 (S.D.N.Y. Nov. 3, 1995) (“Today it is black letter law that computerized data is discoverable if relevant.”); see also *Rowe Entm’t, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 428 (S.D.N.Y. 2002); see also *Zubulake v. UBS Warburg, L.L.C. (Zubulake I)*, 217 F.R.D. 309, 317 (S.D.N.Y. 2003) (“Electronic documents are no less subject to disclosure than paper records.”).

<sup>15</sup> E.g., *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am.*, 685 F. Supp. 2d 456, 466 (S.D.N.Y. 2010) (“It is well established that the duty to preserve e-mails arises when a party reasonably anticipates litigation.”).

<sup>16</sup> *Id.* at 466.

<sup>17</sup> E.g., *Innis Arden Golf Club v. Pitney Bowes, Inc.*, 257 F.R.D. 334, 340 (D. Conn. 2009) (holding that a duty to preserve arose when plaintiff retained counsel in connection with potential legal action but had not yet identified responsible parties).

<sup>18</sup> E.g., *Krumwiede v. Brighton Assocs., L.L.C.*, No. 05-C-3003, 2006 WL 1308629 at \*8 (N.D. Ill. May 8, 2006).

<sup>19</sup> See, e.g., *Nucor Corp. v. Bell*, 251 F.R.D. 191, 197 (D.S.C. 2008).

<sup>20</sup> E.g., *Zubulake v. UBS Warburg L.L.C. (Zubulake II)*, 229 F.R.D. 422, 432 (S.D.N.Y. 2004).

<sup>21</sup> E.g., *Pension Comm.*, 685 F.Supp.2d at 464.

mails after the trigger point in litigation because it has become increasingly clear that modern day courts will not hesitate to sanction lawyers for a failure to adhere to this clearly established standard.<sup>22</sup>

In order to comply with the duty of preservation, an attorney must notify his client to place a “litigation hold” on all relevant e-mails at the trigger point in litigation.<sup>23</sup> Simply meaning, all e-mails that are reasonably accessible and relevant must be preserved.<sup>24</sup> However, authorities are split on whether the duty of preservation extends to e-mails that are not reasonably accessible.<sup>25</sup> For that reason, parties should preserve all of their e-mails unless they have evidence to prove that certain e-mails are not reasonably accessible because it would place an undue burden on the party to produce them.<sup>26</sup> If there is an uncertainty as to whether the party can prove this, then he should be sure to preserve the messages in question.

In the business context, the duty to preserve e-mails is imposed throughout the company, creating an organizational duty of preservation. Counsel should take steps to preserve discoverable information including: (1) issuing a litigation hold at the outset of litigation or whenever litigation is reasonably anticipated and should periodically re-issue the hold so that new employees are aware of it, and so it is fresh in the minds of all employees; (2) communicating directly with the “key players” in the litigation, namely the employees most likely to have relevant information, and periodically remind them of preservation duty; and (3) instruct all employees to produce electronic copies of their relevant active files.<sup>27</sup> If an organization has an e-mail retention or destruction policy, it is obligated to suspend that policy once the duty of preservation has been triggered.<sup>28</sup>

In *Pension Committee of University of Montreal Pension Plan v. Banc of America*,<sup>29</sup> Justice Scheindlin noted that “it is well established that the duty to preserve evidence arises when a party reasonably anticipates litigation.”<sup>30</sup> The court held that in the e-discovery context, a failure to issue a written litigation hold constitutes gross negligence

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<sup>22</sup> *E.g.*, *Zubulake II*, 229 F.R.D. at 436–37.

<sup>23</sup> *Id.* at 431.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 523 (D. Md. 2010).

<sup>27</sup> *Zubulake II*, 229 F.R.D. at 433–34.

<sup>28</sup> *Victor Stanley*, 269 F.R.D. at 524.

<sup>29</sup> *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec.*, 685 F. Supp. 2d 456 (S.D.N.Y. 2010).

<sup>30</sup> *Id.* at 466.

because that failure is likely to result in the destruction of relevant information.<sup>31</sup> Further, the court held that a failure to preserve the e-mails of former employees that are in a party's possession, custody, or control can also support a finding of gross negligence.<sup>32</sup> In the case at hand, the plaintiffs were the spoliators and the court did not hesitate to sanction them by ordering an adverse inference against them, imposing monetary sanctions on each of the spoliators, and awarding the defendants their reasonable costs, including attorneys' fees associated with the spoliation.<sup>33</sup>

The above case illustrates that it is now beyond question that if a party is already embroiled in or reasonably anticipates litigation, that current or prospective litigant, together with its counsel, absolutely must issue a timely, written litigation hold and implement and oversee the execution of that hold diligently and in good faith, or face sanctions.<sup>34</sup>

### **B. Early Attention to E-Mails**

Early attention to ESI is crucial in order to control the scope and expense of e-discovery and to avoid potential disputes.<sup>35</sup> Addressing the issue at the onset of litigation is the most effective way to protect oneself from future sanctions. An attorney must have a specific understanding of his client's electronic storage system prior to meeting with the opposing party. With this information, the parties can develop an e-discovery plan tailored to the capabilities of each party's computer system. At the Rule 26(f) conference, special attention must be paid to e-mails and a good faith attempt should be made to define the scope of e-discovery.<sup>36</sup>

Under the Federal Rules, a Rule 26(f) conference between the parties to draft a discovery plan must include a discussion of any issues relating to disclosure or discovery of ESI, including the forms or form in which it should be produced.<sup>37</sup> Form 35 may include a report

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<sup>31</sup> *Id.* at 465.

<sup>32</sup> *Id.* at 468.

<sup>33</sup> *Id.* at 470-71, 497.

<sup>34</sup> Melissa DeHoney & Jeffrey L. Nagel, *Zubulake Revisited: Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC*, GIBBONSLAW.COM (Jan. 28 2010), [http://www.gibbonslaw.com/news\\_publications/articles.php?action=display\\_publication&publication\\_id=2983](http://www.gibbonslaw.com/news_publications/articles.php?action=display_publication&publication_id=2983).

<sup>35</sup> See generally FED. R. CIV. P. 16, 26, 34, 45 (2006 advisory committee's notes).

<sup>36</sup> See FED. R. CIV. P. 26 (2006 advisory committee's note).

<sup>37</sup> FED. R. CIV. P. 26(f)(3)(C).

to the court regarding this discussion and be submitted prior to the courts' scheduling order.<sup>38</sup> Rule 16 has been amended to state that a scheduling order issued at a pretrial conference may address "disclosure or discovery of electronically stored information."<sup>39</sup>

The parties should lobby for a pretrial order that addresses ESI because in many instances the court's involvement early in litigation can alert the court of potential issues and help avoid difficulties that might otherwise arise later in the discovery process. The parties can potentially save time and money by addressing the discovery of e-mails at the beginning of litigation and avoid costs incurred in the expensive and time-consuming e-discovery process. Furthermore, counsel should consult the local rules of his jurisdiction before a discovery planning conference because they may impose additional or specific requirements concerning ESI.

In *National Day Laborer Organizing Network v. United States Immigration and Customs Enforcement Agency*,<sup>40</sup> Justice Scheindlin explains how important it is to pay early attention to ESI in modern day lawsuits:

Once again, this Court is required to rule on an e-discovery issue that could have been avoided had the parties had the good sense to "meet and confer," "cooperate" and generally make every effort to "communicate" as to the form in which ESI would be produced. The quoted words are found in opinion after opinion and yet lawyers fail to take the necessary steps to fulfill their obligations to each other and to the court... all lawyers -- even highly respected private lawyers, Government lawyers, and professors of law -- need to make greater efforts to comply with the expectations that courts now demand of counsel with respect to expensive and time-consuming document production. Lawyers are all too ready to point the finger at the courts and the Rules for increasing the expense of litigation, but that expense could be greatly diminished if lawyers met their own obligations to ensure that document production is handled as expeditiously and inexpensively as possible. This can only be achieved through cooperation and communication.<sup>41</sup>

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<sup>38</sup> FED. R. CIV. P. 16(b)(3)(B)(iii).

<sup>39</sup> *Id.*

<sup>40</sup> *Nat'l Day Laborer Org. Networks v. U. S. Immigr. and Cust. Enforcement Agency*, No. 10 Civ. 3488, 2011 WL 381625 at \* 31, 32 (S.D.N.Y. 2011).

<sup>41</sup> *Id.* (Opinion and Order withdrawn per order from court June 17, 2011, and has no precedential value. However, Justice Scheindlin's discussion on the importance of paying early attention to ESI is applicable to show the current state of e-discovery law).

### C. Proportionality in E-Discovery

A discovery request for the production of documents aimed at some electronic form is no different, theoretically, from a request for documents contained in an office file cabinet.<sup>42</sup> Likewise, a party may request that the opposing party produce and permit inspection, copying, testing, or sampling of ESI that is in the opposing parties' control or possession.<sup>43</sup> However, as the court noted in *Rodriguez-Torres v. Government Development Bank of Puerto Rico*, "discovery is not meant to serve as a fishing expedition."<sup>44</sup>

The cost of e-discovery has skyrocketed as more and more information is being electronically stored simply because it is cheaper and easier to retain and preserve than paper documents. Therefore, litigants and courts should approach e-discovery differently depending on what is at stake in the case and how complex the issues are expected to be. Courts should apply the concept of proportionality to the scope of e-discovery, and not force discovery when the cost or burden is disproportionately large compared to what is at stake in the litigation.<sup>45</sup> As the court explained in *Rimkus Consulting Group, Inc. v. Cammarata*, "[w]hether 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 standards."<sup>46</sup>

### D. Production of E-Mails

The newly amended Rule 34 includes ESI within the definition of discoverable information. Under the rule, a requesting party may designate the form or forms in which e-mails should be produced.<sup>47</sup> If

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<sup>42</sup> See, e.g., *Linnen v. A.H. Robins Co.*, 1999 WL 462015, at \*6 (Mass. Super. Ct. June 16, 1999).

<sup>43</sup> See, e.g., *Wilson v. City of Zanesville*, 954 F.2d 349, 352–53 (6th Cir. 1992); FED. R. CIV. P. 34(a)(1).

<sup>44</sup> *Rodriguez-Torres v. Gov't Dev. Bank of P.R.*, 265 F.R.D. 40, 44 (D.P.R. 2010).

<sup>45</sup> John L. Carroll, *Proportionality in Discovery: A Cautionary Tale*, 32 CAMPBELL L. REV. 455, 460 (2010).

<sup>46</sup> *Rimkus Consulting Grp., Inc. v. Cammerata*, 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010); *But see Orbit One Commc'ns, Inc. v. Numerex Corp.*, 271 F.R.D. 429, 436 (S.D.N.Y. 2010) (finding the standard set forth in *Rimkus* to be "too amorphous" and holding that, "until a more precise definition is created by rule, a party is well-advised to retain all relevant documents (but not multiple identical copies) in existence at the time the duty to preserve attaches").

<sup>47</sup> FED. R. CIV. P. 34(b)(1)(C).

the requesting party has not specified a form of production, the responding party should let opposing counsel know in advance the form in which he intends to produce his e-mails. Advance notice and communication between the parties will save costs by avoiding potential disputes and duplicate production.<sup>48</sup>

The rule allows the responding party to produce e-mails in the form in which they are ordinarily maintained, or in a reasonably usable format.<sup>49</sup> The right of the requesting party to receive e-mails in their original form could potentially be waived if a specific demand for e-mails to be produced in native format<sup>50</sup> is not made at the beginning of discovery.<sup>51</sup>

If the responding party chooses to object to production of e-mails in the form sought, he must include within his objection the form he intends to produce his e-mails.<sup>52</sup> If the requesting party disagrees with the counterproposal, the parties should diligently attempt to resolve the disagreement. If they cannot, the requesting party may make a motion to compel production in the requested form. However, the court's decision may drive up costs for both parties.

### E. Accessible Versus Inaccessible E-Mails

Rule 26 has been revised under the amendments to provide that a party must produce ESI as part of its required initial disclosures.<sup>53</sup> When a discovery request for the production of e-mails is made, the responding party must produce all e-mails that are reasonably accessible; however, there is no duty on the responding party to

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<sup>48</sup> *Chapman v. General Bd. of Pension and Health Benefits of the United Methodist Church, Inc.*, No. 09 C-3474, 2010 WL 2679961, at \*5 (N.D. Ill. July 6, 2010); *see also* FED. R. CIV. P. 34(b)(2)(D).

<sup>49</sup> *See, e.g., India Brewing, Inc. v. Miller Brewing Co.*, 237 F.R.D. 190, 194 (E.D. Wis. 2006) (“A party may request information in a specific electronic format, but if it instead simply asks for ‘documents’ . . . production in electronic form is not required.”).

<sup>50</sup> *Sedona Conference Glossary: E-Discovery & Digital Information Management (2nd Ed.)*, [http://www.thesedonaconference.org/dltForm?did=TSCGlossary\\_12\\_07.pdf](http://www.thesedonaconference.org/dltForm?did=TSCGlossary_12_07.pdf), at 35 (last visited Mar. 29, 2011) (“Native format” is the format of a file as it was created inside a computer software format, i.e. documents generated in Microsoft Word have a “.doc” native format.).

<sup>51</sup> *See, e.g., Chapman*, 2010 WL 2679961, at \*5 (explaining that the federal rules do not require production of electronic records in native format, when requesting party did not request production in that format; once production was made in hard-copy form, producing party would not be required to re-produce in native form).

<sup>52</sup> FED. R. CIV. P. 34(b)(2)(D).

<sup>53</sup> FED. R. CIV. P. 26(a)(1)(A)(ii).

produce e-mails that are “not reasonably accessible because of undue burden or cost.”<sup>54</sup>

The amended rule creates a two-tiered approach to the production of ESI, making a distinction between information that is reasonably accessible and that which is not.<sup>55</sup> Under the first tier, a party must produce e-mails that are reasonably accessible as long as they are relevant and not privileged.<sup>56</sup> Under the second tier, a responding party does not need to produce e-mails from sources that it identifies as not reasonably accessible because of an undue burden or cost.<sup>57</sup> Whether e-mails are accessible or inaccessible hinges largely on the media through which it is stored.<sup>58</sup> Accessible data is stored in a readily usable format; “although the time it takes to actually access that data ranges from milliseconds to days, the data does not need to be restored or otherwise manipulated to be usable.”<sup>59</sup> Inaccessible data is not readily usable, i.e. information must be reconstructed, lost data must be restored, fragmented data must be de-fragmented, and all before it is usable.<sup>60</sup>

If counsel objects to an e-discovery request aimed at e-mails, the burden is on the objecting party to make the required showing that the e-mails sought are not reasonably accessible.<sup>61</sup> Before a responding party brings a burdensomeness argument before the court, he must make a diligent, good faith effort to produce the e-mails demanded at the lowest possible cost.<sup>62</sup> A party objecting to the discovery of e-mails on the ground that they are not reasonably accessible must be certain not to make general, vague objections.<sup>63</sup> The party should strongly consider retaining an e-discovery expert to certify that the e-mails sought are not reasonably accessible and provide other evidence

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<sup>54</sup> FED. R. CIV. P. 26(b)(2)(B).

<sup>55</sup> See, e.g., *Zubalake v. UBS Warburg, L.L.C. (Zubalake I)*, 217 F.R.D. 309, 315–18; see also FED. R. CIV. P. 26(b)(2).

<sup>56</sup> See, e.g., *Zubalake I*, 217 F.R.D. at 315, 318–22; see also FED. R. CIV. P. 26(b)(2).

<sup>57</sup> *Zubalake I*, 217 F.R.D. at 318.

<sup>58</sup> *Id.* at 318.

<sup>59</sup> *Id.* at 320.

<sup>60</sup> *Id.*

<sup>61</sup> FED. R. CIV. P. 26(b)(2)(B).

<sup>62</sup> See, e.g., *Mikron Indus., Inc. v. Hurd Windows & Doors, Inc.*, No. C-07-532, 2008 WL 1805727, at \*2 (W.D. Wash. Apr. 21, 2008).

<sup>63</sup> See, e.g., *Fed. Trade Comm’n v. Church & Dwight Co.*, 747 F. Supp. 2d 3, 7 (D.D.C. 2010).

to support his objection. Vague and unsupported assertions of undue burden will inevitably be rejected by the court.<sup>64</sup>

Discovery imposes an undue burden or expense when the burden “outweighs its benefit, taking into account the needs of the case, the amount in controversy, the parties’ resources, the importance of the litigation, and the importance of the proposed discovery in resolving the issues.”<sup>65</sup> Some burden on the responding party is to be expected and, simply put, the failure to provide supporting evidence to a burdensome argument will not result in a favorable outcome.<sup>66</sup> To succeed in establishing that the requested discovery will be disproportionately burdensome, a party will be required to provide the court with evidence about the costs or personnel hours that will be required to obtain, review, and produce the requested information.<sup>67</sup>

Courts have found e-mails not to be reasonably accessible because of an undue burden on the responding party.<sup>68</sup> In *Rodriguez-Torres*, the plaintiffs sought through discovery “all e-mail communications and calendar entries describing, relating or referring to plaintiff Vicky Rodriguez, both inbound and outbound from co-defendant GDB’s messaging system servers” for a three-year period spanning from 2007 through 2009.<sup>69</sup> The parties submitted a report which estimated the cost of producing the ESI at \$35,000.<sup>70</sup> The court found that \$35,000 was “too high of a cost for the production of the requested [ESI] in this type of action.”<sup>71</sup> In their prayer for relief, plaintiffs sought \$1.4 million dollars in compensatory damages.<sup>72</sup> The court denied plaintiffs’ motion to compel the production of e-mails, ruling they were not reasonably accessible under Rule 26(b)(2)(B).<sup>73</sup>

#### **F. Protected E-Mails**

Discoverable information is no longer stored in boxes and file cabinets but rather in digital technologies such as e-mail accounts within a computer hard drive. Generally, a party responding to a

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<sup>64</sup> See, e.g., *Mikron Indu., Inc.*, 2008 WL 1805727, at \*2.

<sup>65</sup> *Zubalake v. UBS Warburg, L.L.C. (Zubalake I)*, 217 F.R.D. 309, 318.

<sup>66</sup> *Fed. Trade Comm’n*, 747 F. Supp. 2d at 5.

<sup>67</sup> *Id.* at 4.

<sup>68</sup> E.g., *Rodriguez-Torres v. Gov’t Dev. Bank of P.R.*, 265 F.R.D. 40, 43 (D.P.R. 2010).

<sup>69</sup> *Id.* at 43.

<sup>70</sup> *Id.* at 44.

<sup>71</sup> *Id.*

<sup>72</sup> *Rodriguez-Torres v. Gov’t Dev. Bank of P.R.*, 265 F.R.D. 40 (D.P.R. 2010).

<sup>73</sup> *Id.* at 45.

discovery request for e-mails will have to provide an abnormally large volume of information. The increased amount of data that an attorney must now produce makes it more difficult to determine if such ESI contains privileged information. The Federal Rules address this risk by providing that if a party inadvertently provides privileged or trial preparation information, a party must promptly return, sequester, or destroy the information.<sup>74</sup>

A responding party does not have to produce e-mails that are protected by the attorney-client privilege.<sup>75</sup> “[A]ttorney-client privilege protects communications if: (1) the relation of attorney and client existed at the time the communication was made, (2) the communication was made in confidence, (3) the communication relates to a matter about which the attorney is being professionally consulted, (4) the communication was made in the course of giving or seeking legal advice for a proper purpose although litigation need not be contemplated, and (5) the client has not waived the privilege.”<sup>76</sup>

E-mail communication between an attorney and client must be confidential in order to qualify for the attorney-client privilege.<sup>77</sup> The attorney-client privilege does not apply to e-mails that are informational only, even when sent to or from an attorney.<sup>78</sup> A responding party cannot make a blanket claim of privilege but must provide specific and articulate evidence to show that an e-mail is protected.<sup>79</sup> Such evidence may include producing a test sample of the information sought and explaining how the privilege exists. The courts will not allow responding parties to use a blanket attorney-client privilege objection as a tool to block the discovery of e-mails.<sup>80</sup>

Amended Rule 37 now contains what is commonly referred to as a “safe harbor” provision. The rule states that “absent exceptional circumstances, a court may not impose sanctions under these rules on a

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<sup>74</sup> FED. R. CIV. P. 26(b)(5)(B).

<sup>75</sup> See FED. R. CIV. P. 26(b)(5)(A).

<sup>76</sup> *Isom v. Bank of Am., N.A.*, 628 S.E.2d 458, 462 (N.C. App. 2006).

<sup>77</sup> *A & H Mgmt. Servs. v. Chafflose Corp.*, No. 08-3809, slip op. at 1 (6th Cir. Feb. 3, 2009).

<sup>78</sup> *Isom*, 628 S.E.2d at 462.

<sup>79</sup> See *Sec. & Exch. Comm’n. v. Morelli*, 143 F.R.D. 42, 46 (S.D.N.Y. 1992); see also *Dept. of Econ. Dev. v. Arthur Andersen & Co.*, 139 F.R.D. 295, 300 (S.D.N.Y. 1991) (“Blanket claims asserting attorney client privileges are improper.”).

<sup>80</sup> See *Sec. & Exch. Comm’n. v. Morelli*, 143 F.R.D. 42, 46 (S.D.N.Y. 1992); see also *Dept. of Econ. Dev. v. Arthur Andersen & Co.*, 139 F.R.D. 295, 300 (S.D.N.Y. 1991).

party for failing to provide ESI lost as a result of the routine, good-faith operation of an electronic information system.”<sup>81</sup>

### G. Spoliation of E-Mails

At no point in time should a responding party alter or destroy e-mails. As e-discovery jurisprudence matures, the fact that e-mails were deleted because of carelessness, and not bad faith, will not save a responding party from being sanctioned.<sup>82</sup> The most important duty on the responding party is the preservation of relevant e-mails and to ensure that they are not materially altered or deleted.

“Spoliation of evidence” is the destruction or material alteration of evidence in pending or reasonably foreseeable litigation.<sup>83</sup> In addition to Rule 37, “the right to impose sanctions for spoliation arises from a court’s inherent power to control the judicial process and litigation, but the power is limited to that necessary to remedy conduct which abuses the judicial process.”<sup>84</sup> There are countless cases that demonstrate courts’ willingness to impose sanctions if an attorney fails to prevent his clients from materially altering or destroying e-mails.<sup>85</sup>

The landmark case, *Victor Stanley, Inc. v. Creative Pipe, Inc.*,<sup>86</sup> serves as an example of how prevalent spoliation of e-mails has become in modern litigation. Justice Grimm described this case as, “the single most egregious example of spoliation that I have encountered in any case that I have handled or in any case described in the legion of spoliation cases I have read in nearly fourteen years on the bench.”<sup>87</sup>

In the case, the defendants demonstrated an unwillingness to preserve e-mails that were relevant to litigation. When litigation was reasonably foreseeable the defendants failed to place a litigation hold on their e-mails, deleted e-mails after the plaintiff filed suit, failed to preserve e-mails after the plaintiff demanded their preservation, and

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<sup>81</sup> FED. R. CIV. P. 37(e); *But see, e.g.*, *Driggin v. Am. Sec. Alarm Co.*, 141 F. Supp. 2d 113, 123 (D. Me. 2000) (holding that no showing of bad faith was required, and that mere carelessness resulting in destruction or deletion of e-mails was sufficient to impose sanctions).

<sup>82</sup> *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am.*, 685 F. Supp. 2d 456, 467–68 (S.D.N.Y. 2010).

<sup>83</sup> *Victor Stanley, Inc., v. Creative Pipe, Inc.*, 269 F.R.D. 497, 516 (D. Md. 2010).

<sup>84</sup> *Pension Comm.*, 685 F. Supp. 2d at 465.

<sup>85</sup> *See, e.g., Victor Stanley*, 269 F.R.D. at 541.

<sup>86</sup> *Id.* at 497.

<sup>87</sup> *Id.* at 515.

deleted e-mails after the court issued numerous preservation orders.<sup>88</sup> The court found that the defendants engaged in willful, bad faith misconduct, and implemented an adverse inference that the deleted information was relevant. Further, the court granted monetary sanctions, including fees and costs associated with all e-discovery occurring as a result of the defendant's spoliation, and ordered that the defendant's president be imprisoned for up to two years unless and until he paid plaintiff's fees and costs.<sup>89</sup> This case provides an important lesson to lawyers of the severe consequences that courts will impose if those lawyers partake in the spoliation of ESI.

Aside from the outrageous behavior of the defendants, this case gained national recognition because Justice Grimm provided a twelve-page chart citing e-discovery cases from the various circuits as an attempt to show the split in legal standards that have been established to impose sanctions.<sup>90</sup>

#### **H. Discovery of E-Mails Held by Third Parties**

Rule 45 has been amended to address the production of documents by third parties pursuant to a subpoena. If a subpoena does not specify a form for producing ESI, the person responding must produce it in the form it is ordinarily maintained or in a reasonably usable form.<sup>91</sup> Moreover, the responding party does not need to produce the same ESI in more than one form and does not have to produce e-mails from sources that he identifies as not reasonably accessible because of undue burden or cost.<sup>92</sup>

The Stored Communications Act<sup>93</sup> (hereinafter "SCA") forms part of the Electronic Communications Privacy Act<sup>94</sup> (hereinafter "ECPA") and sets out the provisions for privacy protections, access, use, interception, and disclosure of electronic communications.<sup>95</sup> The law was enacted in 1986 and covers various forms of wire and electronic communications, including e-mails.<sup>96</sup> The SCA addresses voluntary

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<sup>88</sup> *Id.* at 497.

<sup>89</sup> *Id.* at 541 (noting the jail sentence was overturned on appeal).

<sup>90</sup> *Id.* at 542–53.

<sup>91</sup> FED. R. CIV. P. 45(d)(1)(B).

<sup>92</sup> *Id.*

<sup>93</sup> *See* 18 U.S.C. § 2511 (1986).

<sup>94</sup> *See id.* § 2510.

<sup>95</sup> *See id.* § 2511.

<sup>96</sup> *See id.* § 2510(12); *see, e.g.*, *United States v. Councilman*, 418 F.3d 67, 79 (1st Cir. 2005).

and compelled disclosure of stored electronic communications held by third-party internet service providers.<sup>97</sup>

The SCA provides that any “person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service.”<sup>98</sup> The statute provides exceptions under which the provider may divulge the contents of a communication.<sup>99</sup> Two notable and commonly relied upon exceptions are first, allowing the provider to release the requested information upon receiving lawful consent of the originator, and an addressee, an intended recipient, or the subscriber in the case of remote service; and second, allowing the provider to release the requested information upon a court order.<sup>100</sup>

In civil litigation there is a great debate over whether a defendant or third party company must comply with a court order for discovery aimed at e-mails stored by internet service providers.<sup>101</sup> Some courts have held that an internet service provider does not have to produce e-mails within its storage system even when presented with a court order.<sup>102</sup> The Digital Due Process Coalition, which consists of attorneys, law school students, and companies such as Google and Facebook, is fighting emphatically to amend the ECPA in an attempt to bring clarity to this area of law within the realm of the developing e-discovery jurisprudence.<sup>103</sup>

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<sup>97</sup> 18 U.S.C. § 2701 (1986).

<sup>98</sup> *Id.* § 2702(a)(1).

<sup>99</sup> *Id.* § 2702(b).

<sup>100</sup> *Id.* §§ 2701(c), 2518(3); *but see* *Viacom Int’l, Inc. v. YouTube, Inc.*, 253 F.R.D. 256, 264 (S.D.N.Y. 2008) (“ECPA § 2702 contains no exception for disclosure of [the content of] communications pursuant to civil discovery requests.”).

<sup>101</sup> *See, e.g.*, *Thayer v. Chiczewski*, 2009 WL 2957317, at \*5 (N.D. Ill. Sept. 11, 2009) (“[M]ost courts have concluded that third parties cannot be compelled to disclose electronic communications pursuant to a civil, as opposed to criminal, discovery subpoena.”).

<sup>102</sup> *E.g.*, *O’Grady v. Superior Court*, 44 Cal. Rptr. 3d 72, 90–91 (Cal. App. 2006) (finding that contents of communications stored by an internet service provider may not be disclosed to civil litigants even when presented with a civil subpoena).

<sup>103</sup> DIGITAL DUE PROCESS, MODERNIZING SURVEILLANCE LAWS FOR THE INTERNET AGE, <http://digitaldueprocess.org> (last visited May 16, 2012).

### III. RESOLVING ELECTRONIC DISCOVERY DISPUTES

#### A. Motion for a Protective Order

A party responding to a discovery request for the production of e-mails can file a motion for a protective order. The party from whom discovery is sought must show that the e-mails are not reasonably accessible because of undue burden or cost when moving for a protective order.<sup>104</sup> If such a showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause.<sup>105</sup> The requesting party can demonstrate good cause by showing: (1) the information cannot be obtained from another source that is more convenient, less burdensome, or less expensive; (2) the responding party has had ample opportunity to obtain the information; or (3) that the benefit of the information outweighs the burden of its production considering the needs of the case, amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of discovery in resolving the issues.<sup>106</sup>

The court has broad discretion to issue protective orders.<sup>107</sup> The court's power includes, but is not limited to, blocking discovery, setting terms and conditions on discovery, tailoring discovery requests, shifting costs, and ordering sampling or testing to assess likelihood of finding relevant information.<sup>108</sup> The court further noted in *Rodriguez-Torres* that it could order production of the e-mails, despite the excessive cost, if good cause could be shown by the plaintiffs.<sup>109</sup> However, the court concluded that the plaintiffs' request was merely a "fishing expedition" and denied their motion to compel; holding that "just because emails are more likely to lead to inappropriate comments is not a sufficient basis to believe that the [ESI] requested here will lead to the discovery of the information Plaintiffs claim they will discover."<sup>110</sup>

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<sup>104</sup> FED. R. CIV. P. 26(c).

<sup>105</sup> *Id.*

<sup>106</sup> FED. R. CIV. P. 26(b)(2)(C)(i)–(iii).

<sup>107</sup> FED. R. CIV. P. 26(c).

<sup>108</sup> See generally FED. R. CIV. P. 26(c)(1)(A)–(H); see, e.g., *Mikron Indus., Inc. v. Hurd Windows & Doors, Inc.*, No. C-07-532, WL 1805727, at \*2 (W.D. Wash. Apr. 21, 2008).

<sup>109</sup> *Rodriguez-Torres v. Gov't Dev. Bank of P.R.*, 265 F.R.D. 40, 44 (D.P.R. 2010).

<sup>110</sup> *Id.*

If the court finds that the e-mails are not reasonably accessible but nonetheless orders production because the requesting party has shown good cause, then the court should conduct a cost shifting analysis. In *Zubulake v. UBS Warburg, L.L.C.*, Judge Scheindlin set forth a seven-factor test to determine if the cost of production should shift from the producing party to the requesting party. No one factor is determinative and the factors that should be considered are: (1) the extent the requested discovery specifically is tailored to relevant information; (2) the availability of such information; (3) the total amount of production versus the amount in controversy; (4) total cost of production versus each party's available resources; (5) relative ability of each party to control costs and incentive to do so; (6) importance of the issues at stake; and (7) relative benefits to the parties of obtaining the information.<sup>111</sup> The majority rule set forth in *Zubalake* is that cost shifting should only be considered for discovery of e-mails that are not reasonably accessible.<sup>112</sup>

However, a minority of courts across the country have declined to follow the rule that cost shifting applies only to the discovery of e-mails that are not reasonably accessible.<sup>113</sup> In *Multitechnology Services, L.P. v. Verizon Southwest*, the court rejects the argument that cost shifting is only appropriate when ESI is not reasonably accessible, holding that “*Zubulake* is a district court opinion without binding authority.”<sup>114</sup> The court further found that “requiring the parties to evenly shoulder the expense is the most effective resolution because it balances the benefit of the discovery . . . and provides . . . incentive to manage costs it incurs.”<sup>115</sup> The court concluded by stating “it is appropriate to classify the expense [from discovery of ESI] as court costs that can be recovered by the prevailing party.”<sup>116</sup>

## B. Sanctions

As e-discovery jurisprudence continues to be defined, courts are sending the message that improper conduct will not be tolerated by awarding sanctions at a steadily increasing pace. An attorney should move for sanctions if he suspects that opposing counsel has failed to

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<sup>111</sup> *Zubulake v. UBS Warburg, L.L.C. (Zubulake I)*, 217 F.R.D. 309, 322 (S.D.N.Y. 2003).

<sup>112</sup> *Id.* at 318.

<sup>113</sup> *See, e.g., Multitech. Serv. v. Verizon Sw.*, No. 4:02-CV-702-Y, 2004 WL 1553480, at \*2 (N.D. Tex. July 12, 2004).

<sup>114</sup> *Id.* at \*1.

<sup>115</sup> *Id.* at \*2.

<sup>116</sup> *Id.*

preserve or has deleted e-mails that are relevant to pending litigation. Sanctions for a failure to preserve e-mails or the spoliation of e-mails have included costs, attorneys' fees, and fines, which not only compensate the prejudiced party but also punish the offending party for its actions and deter the litigant's conduct.<sup>117</sup> Under certain circumstances, a court may order an adverse inference instruction if a party breaches his duty of preservation or materially alters e-mails.<sup>118</sup> Further, under very severe circumstances, a court has the authority to impose the ultimate sanction and order a default judgment for the spoliation of e-mails.<sup>119</sup>

An attorney breaches his duty of preservation when he displays an unwillingness to preserve e-mails or if he shows a level of carelessness that is disproportionate to clearly established standards.<sup>120</sup> Black-letter law has established that "it is now beyond question that if a party is already embroiled in or reasonably anticipates litigation, that current or prospective litigant, together with its counsel, absolutely must issue a timely, written litigation hold and implement and oversee the execution of that hold diligently and in good faith, or face sanctions."<sup>121</sup> Opposing counsel should move for sanctions if an attorney does not conform to this established duty of preservation.

The Fourth Circuit held that in order to prove spoliation that warrants a sanction, "A party must show: (1) the party having control over the ESI had an obligation to preserve it when it was destroyed or altered; (2) the destruction or loss was accompanied by a culpable state of mind; and (3) the e-mail that was destroyed or altered was relevant to the claims or defenses of the party that sought discovery of the spoliated evidence, to the extent that a reasonable fact finder could conclude that the lost e-mail would have supported the claims or defenses of the party that sought it."<sup>122</sup> District courts in the Second, Fifth, Sixth, Seventh, and Ninth Circuits also used these factors to determine if spoliation rises to a level that requires sanctions.<sup>123</sup> The First, Third, and Tenth Circuit test to determine sanction-worthy spoliation is: (1) was there spoliation, and (2) if so, what sanctions are

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<sup>117</sup> *Victor Stanley, Inc., v. Creative Pipe, Inc.*, 269 F.R.D. 497, 536 (D. Md. 2010).

<sup>118</sup> *Id.* at 521.

<sup>119</sup> *Id.* at 535.

<sup>120</sup> *See Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec.*, 685 F. Supp. 2d 456, 466–67 (S.D.N.Y. 2010).

<sup>121</sup> DeHoney, *supra* note 34.

<sup>122</sup> *Victor Stanley*, 269 F.R.D. at 520–21.

<sup>123</sup> *Id.* at 521.

appropriate, with state of mind only figuring into the second factor.<sup>124</sup> The Federal Circuit “applies the law of the regional circuit from which the case arose” when reviewing sanction orders.<sup>125</sup>

Most circuits agree that in order to impose an adverse jury instruction for spoliation of e-mails, a court must find that the spoliator acted willfully in the destruction of evidence.<sup>126</sup> A court may order an adverse inference instruction for spoliation, which informs the jury that it may draw adverse inferences from the loss or destruction of evidence, by assuming that failure to preserve was because the spoliator was aware that the e-mail would have been detrimental.<sup>127</sup>

The circuits seem to agree that in order to award a default judgment for spoliation of e-mails, a court must be able to conclude either that the spoliator’s conduct was so outrageous as to amount to a forfeiture of his claim or defense, or that the effect of the spoliator’s conduct was so prejudicial that it substantially denied the opposing party the ability to present or defend the claim.<sup>128</sup>

#### IV. CONCLUSION

The discoverability of e-mails is an area of law that every modern-day lawyer must be familiar with in order to avoid the risk of being sanctioned. Over the past years, courts have awarded sanctions to moving parties at a steadily increasing pace. The sanctions for e-discovery malpractice have included adverse jury instructions, default judgments, attorneys’ fees, large monetary fines, and in one instance, a jail sentence.<sup>129</sup> If an attorney adheres to the following standard when dealing with e-mails throughout the course of litigation, then he should not face sanctions for e-discovery malpractice.

An attorney’s duty of due diligence in e-discovery starts well before a formal discovery request is filed. He must first inform his clients of his duty of preservation. A party’s duty of preservation is triggered when he reasonably anticipates litigation.<sup>130</sup> At this point in time, counsel must inform his clients to issue a written litigation hold

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<sup>124</sup> *See id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 535.

<sup>127</sup> *Id.* at 535–36.

<sup>128</sup> *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 534–35 (D. Md. 2010).

<sup>129</sup> *See Willoughby, Jr. et al.*, *supra* note 6.

<sup>130</sup> *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am.*, 685 F. Supp. 2d 456, 466 (S.D.N.Y. 2010).

in order to preserve all e-mails. The litigation hold must suspend the party's retention/deletion program until the lawsuit has ended.<sup>131</sup> Further, counsel is required to oversee the execution of the hold diligently and in good faith to ensure its effectiveness.<sup>132</sup>

While the litigation hold is in effect, the party cannot partake in the spoliation of e-mails. As e-discovery jurisprudence continues to develop, it is clear that courts will not hesitate to enforce sanctions when spoliation of e-mails occurs. The fact that e-mails were deleted because of carelessness, and not bad faith, will not save a responding party from being sanctioned.<sup>133</sup> Within the realm of e-discovery, one of the most important duties an attorney owes to his client is to educate them of the severe consequences that can occur if they fail to preserve their e-mails, or if they materially alter or delete them.

An attorney must take the Rule 26(f) discovery planning conference seriously. The conference should be used as an opportunity to address e-mails early in litigation, to define the scope of e-discovery, to decide on the form in which e-mails will be produced, to establish a proportional e-discovery plan as an attempt to control cost, and to notify the court of disputes that may arise in the e-discovery context. The results of this discussion should be reported to the court and a request should be made to have the court's pretrial scheduling order state what e-mails should be produced and in which form.<sup>134</sup> By addressing these issues at the discovery planning conference, an attorney will save his client from unnecessary costs that can occur during the expensive and time consuming e-discovery process.

An attorney responding to an e-discovery request for e-mails should produce them in the form agreed to by the parties, ordered by the court, specified by the requesting party, or if no form is specified, in a form in which it is ordinarily maintained or a form that is reasonably usable.<sup>135</sup> Should the responding attorney object to production of e-mails in the form sought, he must include within his objection the form in which he intends to produce his e-mails.<sup>136</sup> If the requesting party disagrees with the counterproposal, the two sides will inevitably turn to the court to decide the issue. The court's involvement to determine the form of production drives up the cost of

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<sup>131</sup> *Id.*

<sup>132</sup> DeHoney, *supra* note 34.

<sup>133</sup> *Pension Comm.*, 685 F. Supp. 2d at 467–68.

<sup>134</sup> FED. R. CIV. P. 16(b)(3)(B)(iii).

<sup>135</sup> *See* FED. R. CIV. P. 34(b)(2)(E).

<sup>136</sup> FED. R. CIV. P. 34(b)(2)(D).

litigation and is precisely why the two sides should agree on the form of production for e-mails at the discovery planning conference.

When responding to an e-discovery request, an attorney must produce all e-mails that are reasonably accessible and non-privileged.<sup>137</sup> The responding attorney does not have to produce e-mails that are not reasonably accessible because of an undue burden or cost.<sup>138</sup> The attorney cannot make a blanket claim that e-mails are not reasonably accessible, but rather they must provide the court with evidence showing the way the e-mails are stored and the personnel hours it would take to produce them.<sup>139</sup> Further, an e-discovery expert should also be consulted to confirm that the e-mails are actually inaccessible. If the court requires the production of non-reasonably accessible e-mails because the opposing side shows good cause, the attorney should insist that cost shifting be applied.<sup>140</sup>

Following this framework and establishing an open and continuous dialog with the court and opposing counsel should ensure that the attorney diligently and competently represented his clients and not subject him to possible sanctions. It is essential that modern-day lawyers become acquainted with the e-discovery standards of their jurisdiction and grasp the crucial role that discovery of e-mails plays in virtually every lawsuit. Modern technology is transforming the way individuals communicate and the way information is stored and courts are sending the message that improper conduct and ignorance will not be tolerated in this developing area of law by awarding sanctions at an alarmingly increasing pace.

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<sup>137</sup> See, e.g., *Zubulake I*, 217 F.R.D. at 315, 318–22; FED. R. CIV. P. 26(b)(2).

<sup>138</sup> *Id.*

<sup>139</sup> See, e.g., *Fed. Trade Comm'n v. Church & Dwight Co.*, 747 F. Supp. 2d 3, 4 (D.D.C. 2010).

<sup>140</sup> *Zubulake v. UBS Warburg, L.L.C. (Zubulake I)*, 217 F.R.D. 309, 318 (S.D.N.Y. 2003).

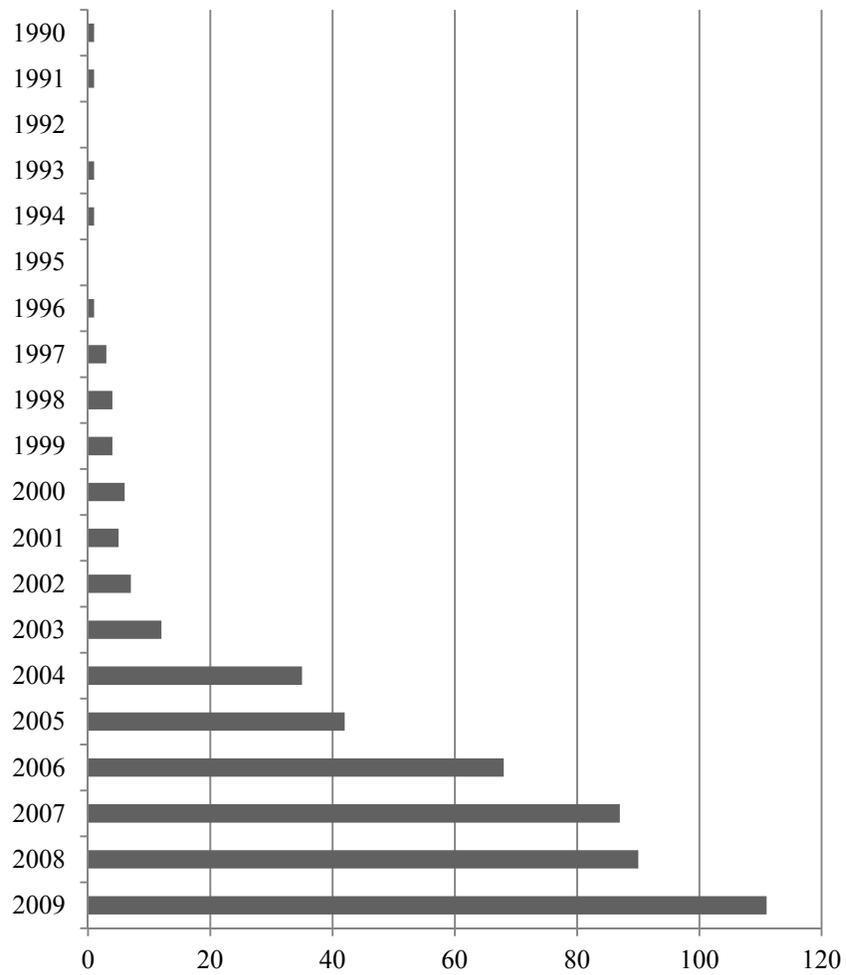
## APPENDICES

Appendix A: E-Discovery Sanction Statistics<sup>141</sup>

Year	Total Written Rulings	Total Cases	Cases with Sanction Awarded	Cases with Adverse Jury Instruction	Cases with Dismissal of Sanctions	Plaintiff Sanctions	Defendant Sanctions	Percentage of Plaintiff Sanctions
2009	111	97	46	12	5	12	32	26.1%
2008	90	71	42	15	6	11	30	26.2%
2007	87	66	39	8	6	7	32	17.9%
2006	68	55	32	5	7	6	26	18.8%
2005	42	36	18	5	2	5	14	27.8%
2004	35	29	21	5	3	7	14	33.3%
2003	12	9	6	5	2	1	5	16.7%
2002	7	6	3	0	0	1	2	33.3%
2001	5	5	5	0	0	1	4	20.0%
2000	6	5	3	1	0	0	3	0.0%
1999	4	4	3	1	0	0	3	0.0%
1998	4	4	3	0	1	1	2	33.3%
1997	3	3	1	0	0	0	1	0.0%
1996	1	1	1	0	0	0	1	0.0%
1995	0	0	0	0	0	0	0	0.0%
1994	1	1	0	0	0	0	0	0.0%
1993	1	1	1	0	1	1	0	100.0%
1992	0	0	0	0	0	0	0	0.0%
1991	1	1	1	0	1	0	1	0.0%
1990	1	1	1	0	1	0	1	0.0%
<b>Total</b>	<b>479<sup>142</sup></b>	<b>395</b>	<b>226</b>	<b>57</b>	<b>35</b>	<b>53</b>	<b>171</b>	<b>23%</b>

<sup>141</sup> Willoughby, Jr. et al., *supra* note 6, at 848 (Table created by the author. Information obtained from source.).

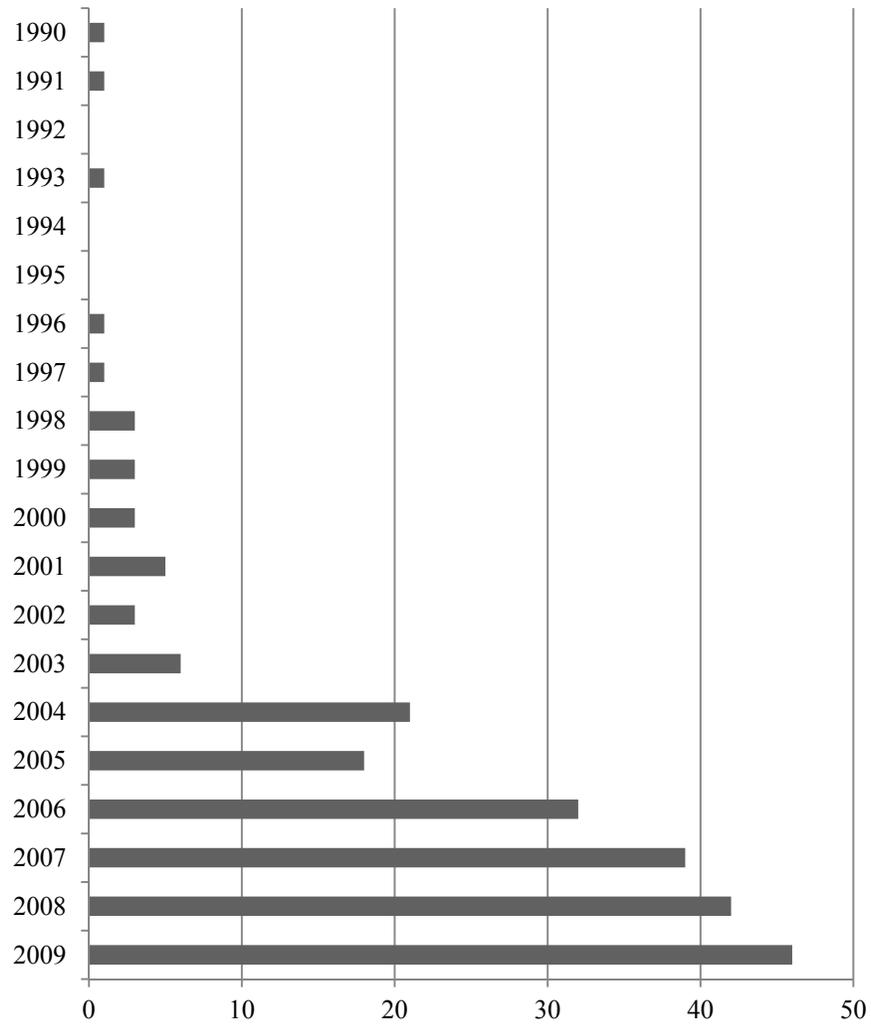
<sup>142</sup> Total written federal rulings.

**Appendix B: Annual No. of E-Discovery Sanction Cases<sup>143</sup>****Total Written Rulings**

<sup>143</sup> Willoughby, Jr. et al., *supra* note 6, at 848 (Chart created by the author. Information obtained from source.).

**Appendix C: Annual No. of E-Discovery Sanction Awards<sup>144</sup>**

**Cases with Sanctions Awarded**



<sup>144</sup> *Id.* (Chart created by the author. Information obtained from source.).