

## 2011 MID-YEAR E-DISCOVERY UPDATE

To Our Clients and Friends:

This 2011 Mid-Year E-Discovery Update analyzes trends and developments in e-discovery based on our review of 187 e-discovery decisions from the federal courts issued between January 1 and June 15, 2011 (listed [here](#) in an Appendix). We identified those decisions from various sources, including commercial reporting services and publicly available online repositories.

Highlights from our analysis of these decisions include:

- The number of e-discovery decisions continues to increase at a blistering pace. The 187 decisions we identified in the first half of 2011 represents an 82% increase over the 103 decisions we identified at [mid-year 2010](#).
- The number of instances in which litigants sought sanctions in the first half of 2011 was more than double the number in the same period last year (68 at mid-year 2011 versus 31 at mid-year 2010), and sanctions awards have nearly doubled in absolute terms (38 at mid-year 2011 versus 21 at mid-year 2010).
- Notwithstanding this increase, courts awarded sanctions at essentially the same rate as in 2010 (56% of the instances in which a party sought sanctions in the first half of 2011, versus 55% for the full year in 2010).
- Determining when litigation is "reasonably foreseeable" for purposes of triggering the duty to preserve continued to be a fact-specific analysis.
- Courts continued to emphasize that counsel's responsibility to ensure preservation does not end with timely distribution of a legal hold notice.
- Courts continued to demand cooperation and remained keenly aware of counsel's efforts--or lack thereof--to resolve e-discovery disputes before seeking judicial involvement.
- It turns out that there is such a thing as "discovery karma," at least in the 10<sup>th</sup> Circuit, and "ankle-biting" an opponent for alleged discovery glitches may not be appreciated, especially when one's own house is not in order.
- While no reported case addressed the use of predictive coding or other advanced search technologies, there is no doubt that these tools have been noticed, as *The New York Times* and *Forbes* focused on their potential impact in featured articles.

- E-discovery law continued to develop rapidly, and while some areas of law are coming into focus, other areas--including basic issues such as whether a litigation hold notice must be written--continue to be heavily debated.
- Calls for reform of the Federal Rules of Civil Procedure continued, and the Civil Rules Advisory Committee is considering various approaches to address concerns raised at the Duke Conference in 2010.

## ***Introduction***

The overall number of e-discovery-related decisions in the federal courts in the first half of 2011 was remarkably higher than the same period in 2010 (187 decisions at mid-year 2011 versus 103 at mid-year 2010). We believe that this trend of dramatic increases in the number of e-discovery decisions reflects how ubiquitous and important e-discovery has become in litigation.

Of particular note, the instances in which parties sought sanctions in the first half of 2011 (on pace for nearly 140 for the full year) are set to significantly outpace 2010 (100 cases for the full year). Although this increase in sanctions requests has led to a greater number of instances in which courts awarded sanctions, the frequency of courts awarding sanctions (56%) remained relatively constant compared to the full-year 2010 (55%). The increase in sanctions requests may be attributable--at least in part--to the proliferation of highly publicized sanctions decisions in recent years, leading to an increased awareness of how parties may capitalize on an opponent's e-discovery missteps, whether real or merely perceived. Additionally, the increasing prevalence of e-discovery in litigation, coupled with the likelihood of mistakes being made in an area that is fraught with peril, are likely factors.

In the area of preservation, a number of courts in the first half of 2011 deliberated over whether a legal hold notice must be written or whether oral notification is sufficient. Several courts have been unwilling to follow Judge Shira Scheindlin's 2010 *Pension Committee* decision, which held that failure to issue a written legal hold notice constitutes gross negligence *per se* and gives rise to a presumption of spoliation and prejudice to the opposing party. Another hotly litigated issue continues to be when the duty to preserve is triggered. In the first half of 2011, the Federal Circuit dealt with this issue in the latest chapter of the long-running *Rambus* saga.

Courts also continued to remind counsel of their obligation not only to ensure that a legal hold notice is issued in a timely manner, but also to monitor its implementation. In addition, courts continued to grapple with the preservation and authentication of social media, along with whether traditional privacy rights should apply--with most courts holding that there is no reasonable expectation of privacy in social media.

Cooperation remained a significant topic, both in the context of search methodology and form-of-production disputes. Courts continued to be keenly aware of counsel's efforts--or lack thereof--to resolve e-discovery issues before seeking judicial assistance.

One of the most publicized cases in the first half of 2011, *National Day Laborer Organization Network v. U.S. Immigration & Customs Enforcement Agency*, rocked the government's perception of its discovery obligations when responding to Freedom of Information Act ("FOIA") requests. Judge

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Scheidlin made headlines when she held that the government had to preserve and produce metadata when responding to a FOIA request. She made headlines again when she withdrew her opinion, citing the fact that the judicial record had not been fully developed on that issue. Nevertheless, it seems likely that courts and litigants alike will rely (albeit indirectly) on Judge Scheindlin's position on the importance of metadata in any production of electronically stored information ("ESI").

Finally, it is still too early to tell whether 2011 will bring e-discovery reform. Following the Duke Conference in 2010, the Civil Rules Advisory Committee met again in April 2011 to discuss potential federal rule changes. The Committee has planned a "mini-conference" in September 2011 to engage in additional fact finding. States continued to propose and pass amendments to their rules, some of which adopt and some of which reject portions of the 2006 e-discovery amendments to the Federal Rules of Civil Procedure.

We invite you to review our analysis of developments in the e-discovery areas listed below.

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## Sanctions: A Look at the Trends

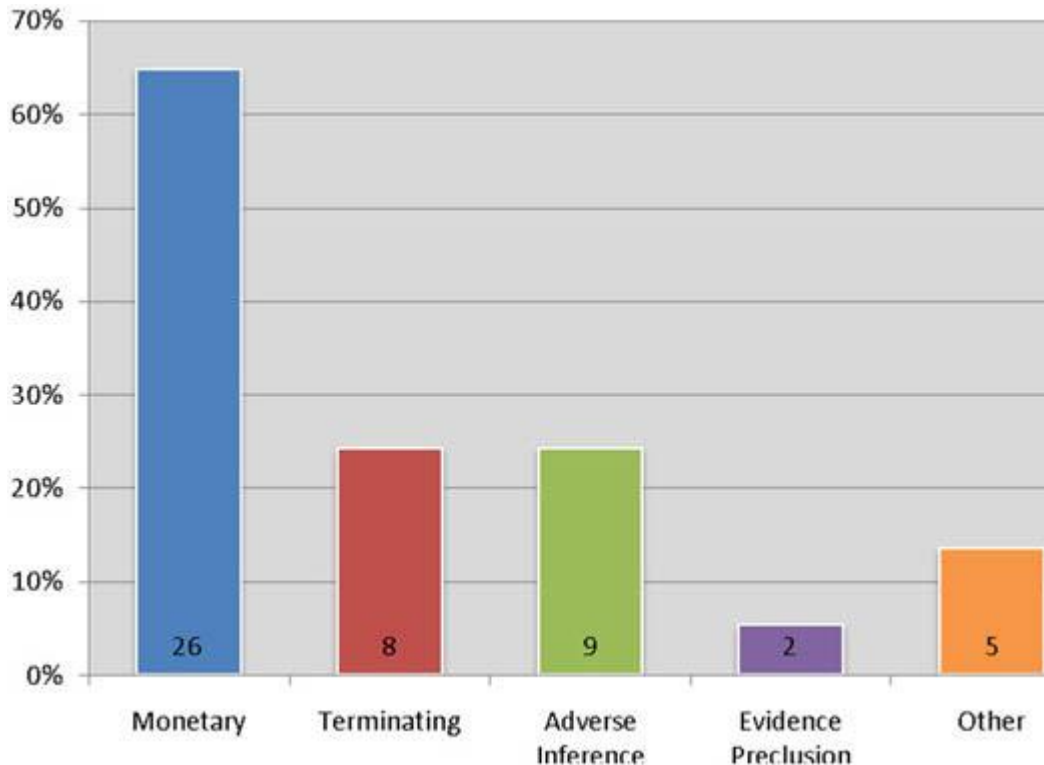
At year-end 2010, we and others reported that the frequency with which courts granted sanctions motions had declined compared to 2009. A few others claimed sanctions had increased (some based on a law review article that reported sanctions trends only through year-end 2009, but which some commentators misinterpreted as including 2010). We cannot, of course, claim to have found every e-discovery sanctions decision filed in every case in every federal courthouse in the country. Even in this Internet era, some decisions--perhaps many--are never reported.

Nevertheless, we believe it is possible to discern trends by employing the same search methodology in each of our mid-year and year-end reports over several years--particularly when looking at the ratio of sanctions granted to requests for sanctions. Additionally, to avoid double-counting, we have only included original trial court decisions in our sanctions case counts. Decisions on appeal and those affirming or overruling the recommendations of a magistrate judge were not counted if the underlying decision was previously reported and included in our statistics (although they were still considered and included in our analysis).

Our count shows that federal trial courts imposed sanctions at almost the same rate as in 2010, but the instances in which parties sought sanctions in the first half of the year has increased--leading to a greater number of sanctions awards in absolute terms. In particular, we found 68 cases decided between January 1 and June 15, 2011, in which parties sought sanctions for e-discovery misconduct. Courts awarded sanctions in 38 cases, or 56% of the time. This percentage is almost identical to the overall rate of sanctions imposed in the cases in the 2010 calendar year (55%) that we identified.

Although the frequency with which courts *granted* sanctions of any type remained relatively constant, the number of reported cases in which parties *sought* sanctions continued on an upward trend--now on pace for nearly 140 in 2011 compared to 100 in 2010. Highly publicized cases in which courts awarded onerous sanctions, coupled with increased awareness of how parties may capitalize on an opponent's e-discovery failures, may explain the trend. The increasing prevalence of e-discovery in litigation is also likely a factor. We note that it is possible that the legal media and commercial and non-commercial reporting services are identifying and reporting more sanctions decisions than in the past. Some combination of all of these factors is likely at play.

## January 1 through June 15, 2011, Sanctions Awarded in E-Discovery By Type and Percentage of Cases Where Sanctions Granted



**Note: Sanctions were awarded in 38 cases. Some involved awards of multiple types of sanctions. In particular, monetary sanctions were often granted in conjunction with another sanction.**

Monetary Sanctions: As has been true every year we have tracked e-discovery sanctions decisions, monetary sanctions were the most frequently awarded type of sanction in the first half of 2011. Of the 38 decisions awarding sanctions that we identified, 26 (68%) granted monetary sanctions. This percentage is very similar to last year's rate for the full year, in which courts in 36 of 55 cases (65%) granted monetary sanctions. In general, courts awarded monetary sanctions to compensate aggrieved parties for the fees and costs incurred in bringing the motion for sanctions and any other injury caused by the discovery misconduct.

For example, in *IOWI, LLC v. Monaco Coach Corp.*, No. 07-3453, 2011 WL 2038714, at \*5 (N.D. Ill. May 24, 2011) (Cox, Mag. J.), the defendant failed to search its network drives and was required to pay half the costs of the forensic search that the plaintiff subsequently conducted. (The defendant was not required to pay the full amount because the search only turned up one responsive email.) Monetary sanctions awards occasionally were very large. *See, e.g., Victor Stanley, Inc. v. Creative Pipe, Inc.*, No. MJG-06-2662, 2011 WL 2552472, at \*2 (D. Md. Jan. 24, 2011) (imposing more than \$1 million in attorneys' fees and costs following September 2010 decision to impose monetary sanctions to recoup fees and costs associated with unnecessary discovery and motion practice due to defendants' spoliation).

In some cases, courts awarded monetary sanctions significantly in excess of the amount needed to compensate the aggrieved party. *See, e.g., Green v. Blitz*, No. 2:07-CV-372 (TJW), 2011 WL 806011, at \*1 (E.D. Tex. Mar. 1, 2011) (imposing \$250,000 in civil contempt sanctions and \$500,000 bond in "purging" sanctions, *i.e.*, sanctions issued to "coerce the defendant into compliance with the court's order"); *Rosenthal Collins Group, LLC v. Trading Techs. Int'l, Inc.*, No. 05 C 4088, 2011 WL 722467, at \*14 (N.D. Ill. Feb. 23, 2011) (imposing a \$1 million penalty and case-terminating sanctions because it was found that plaintiff's agent engaged in "egregious conduct," such as deliberately modifying and destroying a significant amount of evidence).

Adverse Inference and Evidence Preclusion: In the first half of 2011, courts granted adverse inference instructions in 9 of the 38 sanctions cases (24%), roughly the same as in calendar year 2010 (25%). Courts precluded evidence as a sanction in only two cases (5%), which is lower than in calendar year 2010 (11%). Further, courts remain divided on the level of culpability required to impose an adverse inference or evidence preclusion sanction. Certain courts require proof of bad faith before imposing an adverse inference sanction, as "only the bad faith loss or destruction of a document will support an inference of consciousness of a weak case." *McCargo v. Texas Roadhouse, Inc.*, No. 09-cv-02889-WYD-KMT, 2011 WL 1638992, at \*9 (D. Colo. May 2, 2011). For example, in *FTC v. Asia Pacific Telecom, Inc.*, No. 10 C 3168, 2011 WL 2110220, at \*10 (N.D. Ill. May 25, 2011), the court stated that an adverse inference sanction is appropriate for misconduct "on par with behavior that has earned other litigants default judgment or dismissal," a sanction generally reserved for the most egregious bad faith conduct. Other courts required proof of at least gross negligence. *See, e.g., Surowiec v. Capital Title Agency, Inc.*, No. CV-09-2153-PHX-DGC, 2011 WL 1671925, at \*7 (D. Ariz. May 4, 2011) (imposing an adverse inference sanction for gross negligence for failure to preserve a computer after receiving notice of lawsuit). Still others merely required proof of negligence. *See, e.g., Liberman v. FedEx Ground Package Sys., Inc.*, No. 09 CV 2423 (RML), 2011 WL 145474, at \*4 (E.D.N.Y. Jan. 18, 2011) (Levy, Mag. J.).

Case-Terminating Sanctions: We found eight cases in the first half of 2011 in which the court granted terminating sanctions (21% of the 38 cases in which sanctions were granted), compared to a total of 12 cases in all of 2010 (a rate of 22%). In these cases, terminating sanctions were often coupled with monetary sanctions due to the egregious nature of the misconduct. Courts continued to reserve this harshest of sanctions for cases in which the culpable party violated its e-discovery obligations willfully and in bad faith and caused the aggrieved party significant damage. *See, e.g., Philips Elecs. N. Am. Corp. v. BC Tech.*, No. 2:08-CV-639 CW-SA, 2011 WL 677462, at \*62 (D. Utah Feb. 16, 2011) (granting default judgment and monetary sanctions against the defendant for violating the court's discovery order, intentionally deleting relevant files from officers' laptops, and lying to the court about the nature of the deleted data). The type of willful behavior courts found to justify terminating sanctions includes, for example, continually and repeatedly failing to produce relevant documents, ignoring court orders and continually and consistently obstructing the discovery process. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Grafman*, No. 04-CV-2609 (NG)(SMG), 2011 WL 1869387, at \*10 (E.D.N.Y. Apr. 4, 2011).

The widely publicized *Rambus* decisions in the Federal Circuit evidence the fact-dependent--and often discretionary--nature of case-terminating sanctions. Presented with the same conduct in companion cases, the District of Delaware granted case terminating sanctions while the Northern District of

California denied them. The District of Delaware concluded that Rambus had a duty to preserve because it destroyed documents after litigation became reasonably foreseeable. Based on the same facts, the Northern District of California found that litigation was not reasonably foreseeable because litigation was not "imminent" and depended on several contingencies. The Federal Circuit affirmed the District of Delaware's finding of spoliation but held that the trial court had inadequately stated the factual basis for its imposition of case terminating sanctions, which required clear and convincing evidence of bad faith on the part of the producing party and prejudice to the requesting party. *Micron Tech., Inc. v. Rambus Inc.*, No. 2009-1263, 2011 WL 1815975, at \*15-16 (Fed. Cir. May 13, 2011). The Federal Circuit reversed the Northern District of California's decision, holding that the trial court had applied too narrow an interpretation of the "reasonably foreseeable" standard, and that such a duty had arisen in any event before the second of two company "shred days." See *Hynix Semiconductor Inc. v. Rambus, Inc.*, No. 2009-1299, 2009-1347, 2011 WL 1815978, at \*8 (Fed. Cir. May 13, 2011).

Other Sanctions: Courts continued the trend of customizing the sanctions imposed so that they directly remedy or punish the harm caused by the misconduct at issue. For example, in *Green v. Blitz*, 2011 WL 806011, nearly a year after trial, the plaintiff uncovered documents that the defendant had failed to produce and sought to have the case reopened and sanctions imposed. The court not only imposed \$250,000 in civil contempt sanctions and a \$500,000 bond to "coerce the defendant into compliance with the court's order," but also ordered the defendant to file a copy of the order with its first pleading or filing in all new lawsuits for the next five years--a Scarlet Letter-type punishment if there ever was one. See *id.* at \*10-11.

In *DL v. District of Columbia*, No. 05-1437(RCL), 2011 WL 1770468 (D.D.C. May 9, 2011), because the defendant was still in the process of reviewing its documents for privilege during trial, the court imposed a unique sanction waiving the defendant's attorney-client privilege with respect to the late-reviewed documents and required defendant to produce all remaining relevant documents within a week.

In several cases, courts allowed litigants to re-depose witnesses due to inadequate production before the deposition. See, e.g., *Rudnick v. Bank of Am. Na'l Ass'n*, No. 10-cv-00144-WJM-MJW, 2011 WL 1882977, at \*5 (D. Colo. May 16, 2011) (Watanabe, Mag. J.); *Berge Helene Ltd. v. GE Oil & Gas, Inc.*, No. H-08-2931, 2011 WL 798204, at \*5 (S.D. Tex. Mar. 1, 2011). Finally, one court sanctioned a party by denying that party's motion for summary judgment, explaining that the undisclosed documents could bring to light factual disputes. See *Seven Seas Cruises S. De R.L. v. V. Ships Leisure Sam*, No. 09-23411-CIV, 2011 WL 772902, at \*1 (S.D. Fla. Feb. 28, 2011).

## **Preservation and Legal Holds**

A number of cases in the first half of 2011 addressed whether a legal hold notice must always be in writing. In 2010, Judge Shira Scheindlin of the Southern District of New York articulated a bright-line rule in her highly publicized and controversial *Pension Committee* decision. According to Judge Scheindlin, a party's failure to issue a *written* legal hold notice constitutes gross negligence *per se*, supporting an inference that relevant evidence was destroyed, that the opposing party was prejudiced, and that sanctions are justified unless the party rebuts the presumptions. *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456 (S.D.N.Y. 2010). This bright-

line rule clearly delineates sanctionable conduct, but as a number of courts have observed, it leaves little room for judges to consider facts specific to the parties and the case that may justify or even warrant an oral legal hold notice.

A number of courts, even in the Second Circuit and in Judge Scheindlin's own district, have declined to adopt this bright-line rule. The most recent example is *Steuben Foods, Inc. v. Country Gourmet Foods, LLC*, No. 08-CV-561S(F), 2011 WL 1549450, at \*4 (W.D.N.Y. Apr. 21, 2011) (Foschio, Mag. J.), in which the magistrate judge declined to impose sanctions or to hold that spoliation should be presumed based on the plaintiff's failure to issue a written legal hold notice. "In contrast to the facts in *Pension Committee*, [the p]laintiff has produced a substantial number of documents and there is no reason to presume that important documents have been lost as a result of [the p]laintiff's negligence. . . ." *Id.*; see also *Centrifugal Force, Inc. v. Softnet Commc'n, Inc.*, No. 08 Civ. 5463(CM)(GWG), 2011 WL 1792047, at \*11 (S.D.N.Y. May 11, 2011) (Gorenstein, Mag. J.) (declining to sanction a defendant that issued an oral legal hold notice shortly after the duty to preserve attached; only a single non-relevant email was lost).

In *Steuben Foods*, the plaintiff's corporate counsel implemented a legal hold orally through conversations with the company's President, Vice President of Business Development and six other managers and officers. 2011 WL 1549450, at \*1. The court rejected the defendant's argument that relevant documents that were not produced should be presumed lost and sanctions imposed. Instead, based on the nearly 12,000 pages of documents that the plaintiff produced and the absence of any showing that any data had been lost or destroyed, the court found that it would be inappropriate to presume that the plaintiff had a culpable mental state. See *id.* at \*1, \*4-5. Rejecting Judge Scheindlin's *Pension Committee* holding, the court determined that the Second Circuit has not adopted a requirement of a written legal hold notice in any of its case law and noted that "the decisions of district courts, even those located within the same district, are not binding upon other district courts." *Id.* at \*5.

The court in *Steuben Foods* was careful to point out that the plaintiff's relatively small size (400 employees) as well as the limited issues and custodians, "len[t] itself to a direct oral communication of the need to preserve documents" and that "[s]uch considerations have been found persuasive as reasons why a written legal hold is not essential to avoid potential sanctions for spoliation." *Id.* *Steuben Foods* thus suggests that an oral hold notice may be proper depending on case-specific and party-specific facts. Nevertheless, issuing a written legal hold notice is widely regarded as a best practice and doing so can avoid challenges like those in *Steuben Foods*. It also avoids the risk that some judges may follow Judge Scheindlin in holding that failing to issue a written legal hold notice is *per se* gross negligence. (For additional discussion of *Steuben Foods* and the format of legal hold notices, see Gibson Dunn's "[E-Discovery Developments: Court Holds That Oral Preservation Notice Is Not Automatically Sanctionable.](#)")

Decisions in the first half of 2011 also reinforced that the duty to preserve is triggered when litigation is reasonably foreseeable, which may be well before a complaint is actually filed. See, e.g., *Lieberman*, 2011 WL 145474, at \*3 (holding that the duty to preserve survives dismissal without prejudice of an initial action because plaintiff was clearly continuing its investigation); *McCargo*, 2011 WL 1638992, at \*4 (holding that plaintiff's internal formal complaint to his employer that he intended to pursue legal action triggered employer's preservation duty). In the latest chapter in the long-running *Rambus* saga,

the trigger of the preservation obligation was in the spotlight. The Federal Circuit, in one of its most comprehensive decisions relating to the preservation obligation and discovery sanctions, stepped in to reverse a lower court's ruling that litigation was not reasonably foreseeable when the decision to initiate the litigation had not been finalized due to "some contingencies," and resolution of those contingencies was expected. *Hynix Semiconductor Inc.*, 2011 WL 1815978, at \*7 (recognizing that while Rambus had developed a litigation strategy, it had not yet, but "fully expect[ed]" to, budget for litigation and receive board approval and therefore had a duty to preserve). According to the Federal Circuit, litigation need not be "immediate or certain" to trigger the preservation duty. *Id.* at \*8.

In another case, the court held that a preservation duty was triggered when the plaintiff first approached the defendant to license the plaintiff's patent and the defendant sought a formal opinion from patent counsel in response, but that duty then expired once the parties executed a license. *Cacace v. Meyer Mktg. Co.*, No. 06 Civ. 2938(KMK)(GAY), 2011 WL 1833338, at \*2 (S.D.N.Y. May 12, 2011) (Yanthis, Mag. J.). The defendant's preservation duty did not "re-attach" until the license expired and the plaintiff sued the defendant. *Id.* (rejecting argument that the duty to preserve persisted throughout the license term). Notably, the court examined defendant's privilege log to support the conclusion that it did not anticipate litigation between the license's effective date and the date defendant was sued. *Id.*; see also *Velocity Press, Inc. v. Key Bank, N.A.*, No. 2:09 CV 520 TS, 2011 WL 1584720, at \*3 (D. Utah Apr. 26, 2011) ("Although Velocity may have hinted at potential claims . . . [the] possibility of litigation is insufficient to require . . . a litigation hold.").

Similarly, in *In re Delta/AirTran Baggage Fee Antitrust Litigation*, --- F. Supp. 2d ---, No. 1:09-md-2089-TCB, 2011 WL 915322 (N.D. Ga. Feb. 22, 2011), the court looked beyond the fact that the Department of Justice had served Delta with a Civil Investigative Demand ("CID"). Although Delta issued a legal hold after receiving the CID, it did not immediately alter the auto-delete procedures for its email system and backup tapes. Plaintiffs later filed a civil complaint based on the same facts covered by the CID and argued that Delta had engaged in spoliation by not acting quickly enough to alter its email auto-delete and backup tape overwriting procedures. The court held that Delta was not obligated to preserve its emails because it could not have reasonably foreseen the possibility of civil litigation based merely on its receipt of the CID.

Courts continued to emphasize that counsel's responsibility to ensure preservation does not end with timely distribution of a legal hold notice. Rather, attorneys remain responsible to ensure that the party is complying with the hold. See, e.g., *Zimmerman v. Poly Prep Country Day Sch.*, 09 CV 4586(FB), 2011 WL 1429221, at \*17-18 (E.D.N.Y. Apr. 13, 2011) (Pollak, Mag. J.) (holding, in the context of preservation of hard copy documents, that counsel has the duty to "oversee compliance with the [legal hold], [and] monitor[] the party's efforts to retain and produce the relevant evidence"); *Northington v. H & M Int'l*, No. 08-CV-6297, 2011 WL 663055, at \*19 (N.D. Ill. Jan. 12, 2011) (Mason, Mag. J.) (holding the defendant's preservation efforts were unreasonable because the defendant asked self-interested custodians to search their own hard drives and the custodians could delete troublesome documents); *Green*, 2011 WL 806011, at \*3 (designating self-interested employee to spearhead document collection was inappropriate, as shown by that employee's failure to search his own documents). These cases serve as a reminder of the trend we noted last year: courts will hold attorneys responsible for ensuring their clients properly implement legal holds.

Courts also recognized that a duty to preserve some ESI does not necessarily mean a party must preserve *all* ESI. See *E.I. Du Pont De Nemours & Co. v. Kolon Indus., Inc.*, No. 3:09cv58, 2011 WL 1597528, at \*4, \*10 (E.D. Va. Apr. 27, 2011) ("Upon recognizing the threat or anticipation of litigation, litigants are not required to 'preserve every shred of paper, every email or electronic document, and every back up tape,' for '[s]uch a rule would cripple large corporations.'"). Similarly, the Eleventh Circuit held that where evidence was preserved in some sufficiently reliable form, it did not necessarily need to be preserved in its original format. *United States v. Lanzon*, 639 F.3d 1293, 1300-01 (11th Cir. May 4, 2011) (preserving screenshots of actual "chats" not required where detective transcribed the conversations and checked to ensure his transcription exactly matched the chat screens in their entirety). It is possible that *Lanzon's* holding ultimately will be unpersuasive outside its particular circumstances: the court was faced with determining the admissibility in a criminal case of a pedophile's incriminating communications.

### **Inaccessible Information: Don't Just Claim It, Prove It**

Courts continued the 2010 trend of requiring parties to provide increased evidentiary support (including detailed information about time, cost, effort and burden) in support of claims that ESI need not be produced pursuant to Federal Rule of Civil Procedure ("FRCP") 26(b)(2)(B) because it is not reasonably accessible. See *Brokaw v. Davol, Inc.*, No. PC 07-5058, 2011 WL 579039, at \*4-5 (R.I. Super. Ct. Feb. 15, 2011) (deeming data to be inaccessible when an expert's affidavit supplied a detailed break-down of the cost, including attorney review time, incurred to restore 745 backup tapes containing 200 terabytes of data); *Thermal Design Inc. v. Guardian Bldg. Prods., Inc.*, No. 08-C-828, 2011 WL 1527025, at \*1 (E.D. Wis. Apr. 20, 2011) (determining requested information was not reasonably accessible and therefore denying motion to compel discovery of all archived email accounts and shared network drives without any restriction as to custodian because it would cost \$2 million and the producing party had already produced 1.46 million pages of ESI); *Nissan N. Am., Inc. v. Johnson Elec. N. Am., Inc.*, No. 09-CV-11783, 2011 WL 1002835, at \*2-3 (E.D. Mich. Feb. 17, 2011) (Majzoub, Mag. J.) (finding data to be inaccessible in light of a declaration by producing party's employee identifying the reasons the producing party did not restore backups and the estimated cost to do so).

As in the past, courts continued to have little patience for claims of inaccessibility when a party simply failed to search relevant ESI. See *Star Direct Telecom, Inc. v. Global Crossing Bandwidth, Inc.*, 272 F.R.D. 350, 358-59 (W.D.N.Y. 2011) (Payson, Mag. J.) (holding that ESI was not inaccessible "simply" because the producing party "elected not to search for archived [ESI]," particularly in light of failure to inform movant of that decision); *IOWI*, 2011 WL 2038714, at \*4 (holding that producing party could not use inaccessibility as a defense for failing to search for ESI "more thoroughly than they apparently did" when they should have "explain[ed] why such a search would be too burdensome, costly or difficult" at the outset).

### **Proportionality: Balancing Burden Versus Benefit**

Proportionality was a factor in a number of decisions in the first half of 2011. See, e.g., *Thermal Design Inc.*, 2011 WL 1527025, at \*1 (denying motion to compel production where 1.46 million pages were already produced by responding party with significant financial strength because further requests

amounted to a "fishing expedition"); *United States ex rel. McBride v. Halliburton Co.*, 272 F.R.D. 235, 240-41 (D.D.C. Jan. 24, 2011) (Facciola, Maj. J.) (denying motion to compel production and accepting responding party's expert's view that the burden on responding party outweighed any potential benefit of locating "hopelessly insignificant" emails, coupled with the requesting party's failure to demonstrate sufficient need); *Call of the Wild Movie, LLC v. Does 1-1062*, No. 10-455 (BAH), --- F. Supp. 2d ----, 2011 WL 996786, at \*18-20 (D.D.C. Mar. 22, 2011) (granting motion to compel in light of narrow request and importance of data requested, compared with insufficient showing of undue burden); *Hock Foods, Inc. v. William Blair & Co., LLC*, No. 09-2588-KHV, 2011 WL 884446, at \*9 (D. Kan. Mar. 11, 2011) (Sebelius, Maj. J.) (denying in part a motion to compel in light of costs estimated between \$1.2 and \$3.6 million to search 12,000 gigabytes of data in order to answer an overbroad interrogatory). In cases where the requesting party's initial request is overly broad and unduly burdensome, some courts attempted to narrow the request to something more "reasonable." *See id.* \*9 (suggesting the search be narrowed to focus on key executives or the general counsel's files rather than the non-movant's entire universe of clients and files). *See also Diesel Mach., Inc. v. Manitowoc Crane, Inc.*, No. CIV 09-cv-4087-RAL, 2011 WL 677458, at \*2-3 (D.S.D. Feb. 16, 2011) (denying a motion to compel the production of documents in native format due to failure to explain why information contained in native format was necessary to facts of case when those same documents had already been produced as PDFs).

## **Cooperation: "There Is Such a Thing as Discovery Karma"**

As predicted in our 2010 E-Discovery Year-End Report, courts continued to demand cooperation and remained keenly aware of counsel's efforts--or lack of efforts--to resolve e-discovery disputes before seeking judicial involvement. Various decisions resolving form-of-production disputes repeated the call for cooperation among the parties, often not only citing The Sedona Conference's<sup>®</sup> publications (including *The Cooperation Proclamation* and *The Case for Cooperation*), but also quoting the growing list of court decisions emphasizing the need for greater cooperation between litigants. *See, e.g., In re Facebook PPC Adver. Litig.*, No. C09-03043, 2011 WL 1324516, at \*1-2 (N.D. Cal. Apr. 6, 2011) (Lloyd, Mag. J.) (ordering reproduction of documents in a format capable of being searched electronically and observing that the FRCP, case law and commentary "emphasize" that "communication among counsel is critical to a successful [e-]discovery process"). Judge Scheindlin of the Southern District of New York issued, and later withdrew, an opinion addressing the need for cooperation among litigants during the e-discovery process, this time in the context of determining the appropriate form of production. *See Nat'l Day Laborer Org. Network v. U.S. Immigration & Customs Enforcement Agency*, No. 10 Civ. 3488, 2011 WL 381625, at \*1-2, \*8 (S.D.N.Y. Feb. 7, 2011) (noting that the expense of litigation could be "greatly diminished" if lawyers fulfilled their obligation to cooperate and communicate about the form in which ESI would be produced), *withdrawn*, No. 98 (S.D.N.Y. June 17, 2011). For more detail on this decision, see Gibson Dunn's ["E-Discovery Trends: Latest Scheindlin Decision Offers Guidance Regarding Format of Production, Metadata and Rule 26\(f\) Duties."](#)

At least one court was skeptical of the parties' expressed, but seemingly disingenuous, willingness to cooperate to resolve ESI disputes. *See McNulty v. Reddy Ice Holdings, Inc.*, 271 F.R.D. 569, 571 (E.D. Mich. 2011) (Whalen, Mag. J.) ("Both parties claim the high ground on willingness to cooperate in [e-discovery], but amid mutual recriminations of intransigence, apparently no cooperation has

occurred."). Other courts simply called out bickering and lack of communication as the reason for protracted e-discovery motions practice. *See IOWI*, 2011 WL 2038714, at \*1 (describing the court's repeated directives to meet and confer, the parties' continued bickering and the court's multiple interventions); *S. De R.L. v. V. Ships Leisure Sam*, No. 09-234-11-CIV, 2011 WL 181439, at \*6 (S.D. Fla. Jan. 19, 2011) (noting that the ESI dispute was primarily caused by "the parties' mutual failure to communicate and work together in a good faith effort to resolve the areas of dispute").

Noting that "just as our good and bad deeds eventually catch up with us," Judge Gorsuch of the Tenth Circuit Court of Appeals cited The Sedona Conference® publication, *The Case for Cooperation*, for the proposition that FRCP 37 seeks to ensure that discovery misconduct will also catch up to a litigant. *Lee v. Max Int'l, LLC*, 638 F.3d 1318, 1321 (10th Cir. 2011) (saying that "there is such a thing as discovery karma" and affirming the sanction of dismissal for the plaintiffs' repeated discovery misconduct). This case was also notable because it represents one of the infrequent instances where e-discovery was addressed squarely by a circuit court of appeals.

## **Search Methodologies: A Continuation of Previous Trends**

While no cases this year have yet addressed the legal implications of using predictive coding and other advanced search technologies, there is no doubt that these tools are becoming better known. Even the mainstream media started to pay attention to these advanced search methodologies this year. *See* John Markoff, *Armies of Expensive Lawyers Replaced by Cheaper Software*, NY Times, Mar. 4, 2011; Ben Kerschberg, *E-Discovery and The Rise of Predictive Coding*, Forbes Magazine Blog, Mar. 23, 2011.

Where meet-and-confers and cooperation in general fail, some courts showed a willingness to take a more active role in resolving e-discovery disputes. Some even actively crafted search terms. *See Trusz v. UBS Realty Investors, LLC*, 3:09-CV-268, 2011 WL 1628005, at \*7-8 (D. Conn. Apr. 27, 2011) (Margolis, Mag. J.) (dictating specific search terms to be used and date ranges considered for specific custodians in response to a dispute about overly broad search terms); *Wellogix, Inc. v. Accenture, LLP*, No. 3:08-cv-119, 2011 WL 1458632, at \*8 (S.D. Tex. Apr. 15, 2011) (ordering a search for a specific term); *Reid v. Siniscalchi*, C.A. No. 2874-VCN, 2011 WL 378795, at \*10 (Del. Ch. Jan. 31, 2011) (limiting searches by "full name of any known family member," or "by the last name of the relevant individual . . . irrespective of the first name"); *Seven Seas Cruises*, 2011 WL 181439 (ordering defendants to file an affidavit outlining their search process in order to assess the efficacy of Boolean searches).

One court offered a choice to a defendant that complained about broad search terms causing its database to crash--either employ the 15 search terms that plaintiff chose or permit plaintiff's expert to conduct the searches himself. *See Embry v. Acer Am. Corp.*, C09-01808-JW, 2011 WL 250397, at \*3 (N.D. Cal. Jan. 26, 2011) (Lloyd, Mag. J.). Still others required sampling before further meet-and-confer efforts. *See Ingersoll v. Farmland Foods, Inc.*, 10-6046-CV-SJ-FJG, 2011 WL 1131129, at \*19 (W.D. Mo. Mar. 28, 2011) (requiring the parties to conduct sampling of search term results and to confer prior to a second phase of ESI production).

## **Privilege: "Claw-Back" Requires a Reasonable Process**

The inadvertent disclosure of privileged information remains an issue of concern for courts and litigants. During the first half of 2011, courts continued to grapple with whether litigants took "reasonable steps" to prevent the disclosure of privileged information, thereby protecting themselves from a waiver of privilege pursuant to Federal Rule of Evidence ("FRE") 502(b).

Courts reached different conclusions regarding whether the use of standard e-discovery software that works as a database for ESI and can be used to review documents is necessary to meet the reasonableness standard under FRE 502(b). At least one court determined that reasonable steps had not been taken where an attorney failed to use a standard e-discovery review tool. In that case, the attorney had instead reviewed the documents by hand and sequestered the "obviously" privileged documents, but he forgot that he had two sets of the file. When it was time to produce documents the attorney did not inspect the documents that his assistant assembled for production and did not provide the assistant with any instructions to screen for privileged documents. When the assistant produced the documents, she copied the set of documents from the version of the file that had not been reviewed for privilege. As a result privileged materials were produced. *Sidney v. Focused Retail Prop. I, LLC*, --- F.R.D. ----, No. 09 C 6879, 2011 WL 1238920, at \*4-5 (N.D. Ill. Mar. 30, 2011) (Denlow, Mag. J.). Another court, however, determined that a manual document-by-document review was appropriate in a case with a small volume of non-ESI data (130 pages), even where 1.5% of the documents were inadvertently produced. *Valentin v. Bank of N.Y. Mellon Corp.*, No. 09 Civ. 9448, 2011 WL 1466122, at \*2-3 (S.D.N.Y. Apr. 14, 2011) (Francis, Maj. J.) (noting that using the percentage of inadvertently produced documents as a measure of reasonableness is "less meaningful" as the total number of documents produced diminishes).

In one situation where the use of e-discovery software led directly to the inadvertent production, the court determined that the review process was reasonable under FRE 502(b), despite the technical glitch that gave rise to the inadvertent production. *Datel Holdings Ltd. v. Microsoft Corp.*, No. C-09-05535 EDL, 2011 WL 866993, at \*3 (N.D. Cal. Mar. 11, 2011) (Laporte, Mag. J.) (holding that production of privileged documents was inadvertent when "standard" e-discovery software, for unknown reason, cut off the first email in the chain, so that the privileged nature of the email could not be determined from the four corners of the document as reviewed).

Courts also differed on how willing they were to excuse attorney mistakes as "reasonable" under FRE 502(b). Compare *Datel Holdings*, 2011 WL 866993, at \*3 (holding privilege not waived and reasonable steps taken in production of "over 119,000 documents" during a "shortened discovery period" in which the responding party conducted a multi-stage, "fairly robust" privilege review, notwithstanding 177 previously clawed-back documents) and *Cargo v. Kansas City S. Ry. Co.*, Civ. A. No. 05-2010, 2011 WL 1234391, at \*2 (W.D. La. Apr. 1, 2011) (holding privilege not waived and reasonable steps taken where only one other inadvertent disclosure was made during production of more than 200,000 documents since 2005) with *Sidney*, 2011 WL 1238920, at \*5-6 (deeming privilege waived where attorney failed to take reasonable steps to rectify inadvertent production by failing to object to the use of "obviously privileged" documents at deposition and holding that the only time constraints relevant to any reasonableness analysis are that of the case itself and that the attorney's "busy schedule" was of no import).

The timing of the response to an inadvertent disclosure was also a factor that courts weighed in evaluating reasonableness. In one case, a lack of promptness in addressing the inadvertent production of documents led to a waiver of privilege over those materials. *See Martin v. State Farm Mut. Auto. Ins. Co.*, No. 3:10-cv-0144, 2011 WL 1297819, at \*5 (S.D. W. Va. Apr. 1, 2011) (Eifert, Mag. J.) (holding that privilege was waived because the disclosing party "did not act promptly to rectify the inadvertent disclosure" and "did not express any interest in protecting the [inadvertently disclosed privileged materials] until plaintiffs requested additional undisclosed information relating to the subject matter of the letter"); *but see Cell Therapeutics, Inc. v. Lash Group, Inc.*, No. C07-0310JLR, 2011 WL 1930603, at \*2-4 (W.D. Wash. May 18, 2011) (holding that plaintiff's efforts to remedy an inadvertent disclosure known for two years were sufficient in light of the "overriding issue of fairness" because, during those two years, plaintiff changed counsel multiple times and the case was appealed to the Ninth Circuit).

Courts continued to encourage parties to settle future privilege and inadvertent disclosure arguments in advance through the use of two devices: FRE 502(d) protective orders and FRE 502(e) claw-back provisions in agreements between the parties. *See, e.g., Doe v. Nebraska*, Nos. 4:09-cv-3266, 4:10-cv-3005, 8:09-cv-456, 2011 WL 1480483, at \*8 (D. Neb. Apr. 19, 2011) (Zwart, Mag. J.) (stating that the parties should confer "in good faith to determine if an agreement can be reached regarding the scope, type and method of document disclosure," and that the "parties are encouraged to consider using protective orders, or "claw-back" agreements such as those contemplated under Rule 502(d) and (e)").

## **Social Media: Broadly Discoverable, If Authenticated**

Throughout 2011, courts continued to grapple with how to authenticate social media and protect users' privacy by attempting to fit this new source of communication into a traditional discovery paradigm. In an implicit recognition of the increasing importance of ESI from social media sites in the discovery process, e-discovery vendors (e.g., Nextpoint, X1 Technologies and DCSemap) and social media sites (e.g., the "Download Your Information" feature on Facebook) have begun developing technologies to aid in its collection and retention.

Although ESI from social networking sites has been held to be discoverable, it is not generally considered to be self-authenticating. Indeed, some courts suggested that a greater authentication showing may be necessary social media because this data may be easily manipulated. *See, e.g., Griffin v. Maryland*, No. 74, 2011 WL 1586683, at \*1-10, \*4 (Md. Apr. 28, 2011) (overturning murder conviction when State failed to supply the additional extrinsic evidence necessary to properly attribute MySpace profile and postings to the alleged author; simply confirming that the profile photo, nickname and birthday were the author's was insufficient because "anyone can create a fictitious account and masquerade under another person's name or can gain access to another's account by obtaining the user's username and password[]").

The *Griffin* court offered several suggestions to properly authenticate a profile or posting printed from a social networking site, including (1) asking the alleged owner of the account about the profile or posting under oath, (2) searching the alleged owner's hard drive and Internet history to determine whether that computer was used to originate the profile or post and (3) obtaining "information directly from the social networking website that links the establishment of the profile to the person who

allegedly created it, and also links the posting to the person who initiated it." *Id.* at \*9-10. The court observed that additional means for authenticating profiles and postings likely will develop "as the efforts to evidentially utilize information from [social networking] sites increases." *Id.* at \*9; *see also People v. Mills, III*, No. 293378, 2011 WL 1086559, at \*13 (Mich. Ct. App. Mar. 24, 2011) (finding photographs from a MySpace page were not properly authenticated, in part because the proponent of the evidence "ha[d] no way of knowing if the photos were altered in any way").

A frequently litigated issue regarding the discovery of social media was the role of traditional privacy rights in protecting those new methods of personal expression. Courts continued to find that individuals generally do not have a reasonable expectation of privacy, regardless of activated privacy settings, in the information they submit to social networking sites. *See Zimmerman v. Weis Mkts.*, No. CV-09-1535, 2011 WL 2065410, at \*1 (Pa. Com. Pl. May 19, 2011) (finding no reasonable expectation of privacy in social media because "[a]ll the authorities recognize that Facebook and MySpace do not guarantee complete privacy" and ordering the social media user to "provide all passwords, user names and log-in names for any and all MySpace and Facebook accounts" and refrain from deleting or altering existing posts).

Recently, a court held that, under the Electronic Communications Privacy Act ("ECPA"), 18 U.S.C. § 2701 (1986) (also known as the "Stored Communications Act"), individual petitioners lacked standing to challenge a court order requiring Twitter to turn over subscriber information to the United States, implying that the individuals did not have a privacy right in subscriber information. *Compare In re § 2703(d) Order; 10GJ3793*, --- F. Supp. 2d ---, No. 1:11dm00003, 2011 WL 900120, at \*3 (E.D. Va. Mar. 11, 2011) (Buchanan, Mag. J.) (concluding that a government request for message records from Twitter, as opposed to content, is not susceptible to a challenge under the ECPA) *with Mancuso v. Fla. Metro. Univ., Inc.*, No. 09-61984-CIV, 2011 WL 310726 (S.D. Fla. Jan. 28, 2011) (Seltzer, Mag. J.) (holding that an account holder had third-party standing to challenge subpoenas served on Facebook and MySpace because he had a "personal interest" in the information). The court in *In re § 2703(d) Order* also held that the order to Twitter did not violate the First and Fourth Amendments, two constitutional issues that discovery of social media has raised. *Id.* at \*4-5.

## **Cross-Border Discovery: A Complicated Balancing Act**

Consistent with a trend previously observed in our [2010 Year-End Update](#), U.S. courts continued to find that U.S. interest in broad discovery generally trumps foreign privacy laws that would prevent disclosure. *See AstraZeneca LP v. Breath Ltd.*, Civil No. 08-1512 (RMB/AMD), 2011 WL 1421800 (D.N.J. Mar. 31, 2011) (Donio, Mag. J.) (ordering production of communications between Swedish in-house counsel and employees because documents were not privileged under U.S. or Swedish law and U.S. discovery rules, permitting disclosure of trade secrets pursuant to a protective order, outweighed Sweden's interest in protecting trade secrets pursuant to the Swedish Trade Secret Protection Act); *see also In re § 2703(d) Order*, 2011 WL 900120 (rejecting argument that requiring Twitter to disclose a member of the Icelandic Parliament's subscriber information to the U.S. threatens international comity); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. M 07-1827 SI, 2011 WL 723571, at \*3 (N.D. Cal. Feb. 22, 2011) (ordering *in-camera* review of documents pertaining to the European Commission and Japan Fair Trade Commission investigations of Hitachi despite objections that review

would violate European and Japanese laws because of failure to support assertions that review would impair the effectiveness of current and future investigations).

Recognizing that international discovery disputes require U.S. courts to "exercise special vigilance," however, some courts exercised their discretion to require the requesting party to first exhaust the Hague Convention's discovery procedures. *See S.E.C. v. Stanford Int'l Bank, Ltd.*, Civil Action No. 3:09-CV-0298-N, 2011 WL 1378470, at \*3 (N.D. Tex. Apr. 6, 2011) (citing *Société Nationale Industrielle Aérospatiale v. U.S.D.C.*, 482 U.S. 522, 546 (1987)) (ordering receiver to first conduct discovery from foreign nonparty pursuant to the Hague Convention, rather than the FRCP, because comity factors weighed, at least initially, in favor of foreign nonparty).

While most cross-border opinions focus on U.S. litigants seeking discovery from non-U.S. litigants abroad, there are also situations in which non-U.S. litigants use U.S. rules to seek discovery against U.S. parties, as recently illustrated in the case of *Heraeus Kulzer GmbH v. Biomet, Inc.*, Nos. 09-2858, 10-2639, 2011 WL 198117 (7th Cir. Jan. 24, 2011) (reversing the district court's denial of plaintiff's request for discovery in federal district court pursuant to 28 U.S.C. §1782 for use in a foreign trade secrets case). In *Heraeus Kulzer*, the Seventh Circuit allowed a foreign litigant, litigating in a foreign jurisdiction, to obtain U.S.-style discovery from a U.S. corporation pursuant to the U.S. FRCP because there was no evidence of potential abuses that would warrant denial, such as harassing the opposing party. *Id.* at 594-95.

Overall, U.S. courts are showing some willingness to acknowledge the varying discovery and data privacy requirements across jurisdictions, but they still show great deference to U.S. rules and standards for discovery, resulting in litigants being stuck between either disobeying the laws of another nation or disobeying a U.S. court. It may be wise for parties with international discovery issues to communicate these issues to the opposing party and the judge early on in the litigation so that a solution can be reached that balances the requirements of both jurisdictions.

## **Privacy: Inside and Outside the Workplace**

While some predicted a new era of public policy-based deference to the attorney-client privilege in workplace communications following last year's New Jersey Supreme Court decision in *Stengart v. Loving Care*, 990 A.2d 560 (N.J. 2010), that trend has yet to materialize. Instead, the past six months have seen several decisions piercing the attorney-client and other privileges in the workplace.

The *Stengart* opinion suggested that courts would be reluctant to pierce the attorney-client privilege for use of a personal email account on work-owned equipment to make privileged communications, but other courts have shown a willingness to pierce the privilege when the employee communicates with his or her personal attorney through employer-monitored email. *See, e.g., Holmes v. Petrovich Dev. Co.*, 191 Cal. App. 4th 1047, 1051 (Cal. App. Jan. 13, 2011).

In *United States v. Hamilton*, No. 3:11CR13-HEH, 2011 WL 1366481, at \*4 (E.D. Va. Apr. 11, 2011), the court held that an email between husband and spouse, seized by the government as part of a criminal investigation, was not entitled to marital privilege protection because it resided on the server of the defendant's workplace and the workplace maintained a policy that entitled it to inspect communications made over the network. Importantly, the email itself was sent *before* this policy was

put in place, but was retrieved several years *after* the policy was implemented. *See id.* at \*1-2. The court held that because the defendant failed to erase the message after being on notice that his employer could monitor his email, he had no expectation of privacy in his marital communication. *Id.* at \*4; *see also In re Reserve Fund Sec. & Derivative Litig.*, 09-MD-2011, 09-Civ-4346, 2011 WL 2039758 (S.D.N.Y. May 23, 2011) (holding that marital privilege was waived where personal emails were sent from a work account and the workplace regularly monitored email for regulatory purposes and had an acceptable use policy in effect).

Outside of the employer-employee setting, courts have been willing to uphold the attorney-client privilege in communications on a personal email account, even if access to the account was not well-protected. *Parnes v. Parnes*, 80 A.D.3d 948 (N.Y. App. Div. 2011) (no waiver of attorney-client privileged communications stored in personal email account even when account log-in information was left in plain view of third parties).

## **The Government's E-Discovery Obligations**

The U.S. government continued to seek clarification from the courts regarding the contours of its e-discovery obligations as criminal prosecutor, civil litigant and custodian under FOIA. The government also continued to struggle to define the limits on its ability to obtain ESI in an investigative capacity.

### ***Trends in the Criminal Context***

In a recent bulletin for U.S. Attorneys, Andrew Goldsmith, the National Criminal Discovery Coordinator, surveyed e-discovery decisions and noted "a coherent body of case law on appropriate collection, management, and disclosure of ESI has yet to emerge in the criminal context." *See* Andrew Goldsmith, *Trends - Or Lack Thereof - In Criminal E-Discovery: A Pragmatic Survey of Recent Case Law*, U.S. Att'ys' Bull., May 2011, at 2. He reiterated the position of the Department of Justice ("DOJ") that "traditional disclosure requirements and procedures" govern ESI, rejecting any argument that the government has obligations beyond Federal Rule of Criminal Procedure 16, *Brady* and *Giglio*. *Id.* at 4. Although the United States Attorneys' Manual encourages broader disclosures in several ways, Mr. Goldsmith claimed that those guidelines were not legally binding, explicitly rejecting recent scholarship that implied that civil and criminal e-discovery obligations may be merging. *Id.* at 2-3. Mr. Goldsmith emphasized that the government is only required to meet its "basic obligation under Federal Rule of Criminal Procedure 16 ... to make that material available for inspection and copying." *Id.* at 5.

Regarding government-held ESI, courts implied that the government is under no duty to direct a defendant to specific evidence within a larger mass of disclosed material, but the government should do more than simply "dump" voluminous ESI files on criminal defendants. *See, e.g., United States v. Ohle*, No. S3 08 CR 1109(JSR), 2011 WL 651849, at \*4 (S.D.N.Y. Feb. 7, 2011) (holding that the government fulfilled its discovery obligations where it provided a text-searchable database of an admittedly "voluminous" file that was "unduly onerous to access" and where there had been no overt effort to "purposefully confound[]" the defendant's search for exculpatory material); *see also United States v. Shafer*, No. 3:09-CR-249-D(05), 2010 WL 977891, at \*4 (N.D. Tex. Mar. 21, 2011) (no *Brady* violation despite disclosure of 200 terabytes of ESI and 10,000 pages of paper without directing the defendant to relevant evidence given the prosecution's "additional steps," the complexity of the

defendant's case and the absence of evidence that the government tried to hide potentially exculpatory evidence or otherwise act in bad faith). Typically, these government discovery decisions are fact-specific, with the courts placing particular importance on equal access and good faith practices.

## ***Trends in the Civil Context***

As discussed in our [2010 Year-End Update](#), the government's e-discovery obligations in the context of civil litigation are consistent with those of any other civil litigant. The District of Columbia was recently reminded of this fact after being harshly criticized for its "repeated, flagrant, and unrepentant failures to comply with discovery orders." *DL v. District of Columbia*, 2011 WL 1770468, at \*6. The court colorfully admonished that "[t]he District would be well-advised to invest the time it's spent ankle-biting the plaintiffs for various alleged discovery abuses in bringing its own conduct in line with the [FRCP] and this Court's Orders." The court upheld waiver of privilege as an appropriate sanction for the government's failure to timely produce ESI and other documents. *Id.* at \*6.

Several governmental agencies took strides to improve their e-discovery practices in order to meet their obligations as civil litigants. The Securities and Exchange Commission hired an expert to revamp its e-discovery protocols and serve as special counsel in e-discovery matters. *See* Monica Bay, *Giant Steps: Can a Corporate Veteran Help the SEC Learn New E-Discovery Moves?*, Law Tech. News, Jan. 31, 2011, at 1. The DOJ formed a Civil E-Discovery Committee tasked with developing new training programs and "best practices" for e-discovery. Hon. Thomas J. Perrelli, *Introduction to the E-Discovery Issue of the USA Bulletin*, U.S. Att'ys' Bull., May 2011, at 1. Additionally, each branch of the DOJ appointed an attorney dedicated full-time to e-discovery issues, and every individual DOJ office appointed an Electronic Discovery Office Coordinator to serve as a local resource.

## ***Government's FOIA Obligations***

The government's e-discovery obligations under FOIA came under increasing judicial scrutiny as courts considered whether FOIA requires governmental entities to maintain and preserve ESI as they would for civil litigation. Governmental agencies argued that imposing civil litigation standards on FOIA productions is unreasonable and untenable. Unlike civil litigation, where the duty to preserve ESI is triggered upon the "reasonable anticipation" of litigation, FOIA requests can be made by any person at any time. Imposing strict preservation and production standards could potentially require government agencies to maintain ESI indefinitely.

Judge Scheindlin of the Southern District of New York recently weighed in on this debate, dismissing the government's concerns and imposing civil litigation standards on government files produced pursuant to FOIA. *See Nat'l Day Laborer Organizing Network*, 2011 WL 381625, at \*2-5. After the government was granted a temporary stay and appealed this issue to the Second Circuit, however, Judge Scheindlin withdrew her opinion, stating that in "the interests of justice" it was "prudent" to withdraw her opinion because the record was incomplete. *Nat'l Day Laborer Org. Network*, 2011 WL 381625, *withdrawn*, *Nat'l Day Laborer Organizing Network v. U.S. Immigration & Customs Enforcement Agency*, No. 10 Civ. 3488 (SAS) (S.D.N.Y. June 17, 2011). The Sixth Circuit imposed less stringent obligations on governmental entities responding to FOIA requests, holding that regularly requiring complex searches to retrieve and produce ESI would "cripple" governmental agencies and

that "is manifestly not what [FOIA] intends." *See CareToLive v. FDA*, 631 F.3d 336, 343-44 (6th Cir. 2011).

In another FOIA-related development, the Supreme Court recently held that "personal privacy" within the meaning of FOIA exception 7(C) does not extend to corporations. *FCC v. AT&T*, 131 S. Ct. 1177, 1185 (2011). Exception 7(C) exempts the production of law enforcement records, the disclosure of which "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). AT&T argued that this exception prohibited the distribution of records that AT&T turned over during a government investigation. The Supreme Court held that the ordinary meaning of the phrase "personal privacy" is evocative of human concerns and not those associated with corporate entities. *FCC*, 131 S. Ct. at 1179.

### ***Trends in the Investigative Context***

The judiciary continued to struggle to define the proper boundaries of ESI searches. Federal circuits remain split over whether law enforcement officers may search apparently unrelated files while executing computer search warrants. In *United States v. Stabile*, 633 F.3d 219, 240-41 (3d Cir. 2011), the Third Circuit held that the "plain view" exception applies to seizure of evidence during computer searches, but that the exact confines of the doctrine require a case-by-case inquiry. *Id.* at 241 n.16.

In addition to seeking ESI in the subject's own possession, law enforcement increasingly sought information directly from online service providers. And the types of information that service providers may properly disclose to the government continue to grow. As two recent decisions illustrate, IP addresses, data transfer volume and service provider's correspondence and notes relating to customer accounts have all been categorized as non-content records within the meaning of the ECPA, thus immunizing service providers from liability for disclosing those records pursuant to court orders, warrants, subpoenas, statutory authorization or certification. *Sams v. Yahoo!, Inc.*, No. CV-10-5897-JF(HRL), 2011 WL 1884633, at \*4, \*6-7 (N.D. Cal. May 18, 2011) (Yahoo! email user's registration and log-in IP address information are "records"); *In re § 2703(d) Order*, 2011 WL 900120, at \*3 (data transfer volume, source and destination IP addresses, provider's correspondence and notes of records related to Twitter accounts are "records"); *see also* 18 U.S.C. §§ 2703(c)(2), 2703(e).

One area that garnered increased attention is government access to geolocation data. Courts disagreed as to whether and when law enforcement may obtain such information without a warrant. *See, e.g., United States v. Davis*, Crim No. 10-339-HA, 2011 WL 2036463, at \*2-4 & n.1 (D. Or. May 24, 2011) (noting debate among courts regarding location information; warrantless search of network element information permitted under the ECPA); *In re Application of United States for an Order Authorizing the Release of Historical Cell-Site Information*, No. 11-MC-0113 (JO), 2011 WL 679925, at \*1-2 (E.D.N.Y. Feb. 16, 2011) (holding that Title II of the ECPA permits warrantless disclosure of 21 days of historical cell-site information, while month-long monitoring would require a warrant).

Federal legislators are working to provide more clarity on access to geolocation data. Identical Senate and House bills known as the Geolocation Privacy and Surveillance (GPS) Act were introduced in mid-June. S. 1212, 111th Cong. (2011); H.R. 2168, 112th Cong. (2011). The proposed legislation would require law enforcement to get a warrant to obtain geolocation data from wireless or tracking

devices, subject to certain exceptions. *See id.* Similarly, the Electronic Communications Privacy Act Amendments Act of 2011, introduced in May 2011, also would require the government to obtain a warrant to gain access to location data, subject to emergency exceptions. S. 1011, 112th Cong. (2011). We will continue to track legislative developments in this area.

## **E-Discovery Reform: Continued Efforts to Retool a Flawed Process**

Critics of the ESI *status quo* continued to demand more consistent and predictable treatment of ESI across jurisdictions, particularly in the areas of preservation and sanctions standards. At the same time, critics of the ECPA continued to demand more reliable and consistent treatment of communications held in electronic storage. These calls to action have led to increased efforts at both the federal and state levels in the first half of 2011 to develop more consistent standards for the treatment of ESI.

### ***Reform of Federal Rules Progresses in the Wake of the Duke Conference***

As we reported in our [2010 Year-End Update](#), the "Duke Conference" was convened by the Civil Rules Advisory Committee (the "Committee") last year amid numerous calls to reform the discovery process. This year, the Committee continued that work, evaluating whether and how to develop rules regarding preservation and sanctions standards.

The Committee met in April 2011, and it is planning to hold a "mini-conference" in September 2011 to focus specifically on discovery reform. [Draft Minutes, Civil Rules Advisory Committee, Tab 5F \(April 4-5, 2011\)](#). In September, the Committee hopes to hear from individuals with a technical background who can educate the judiciary on the storage, searching and retrieval of ESI, as well as from plaintiff's, defense and in-house counsel regarding their concerns about the treatment of ESI. Presently, the Committee is seeking input from leading organizations such as the American Bar Association and The Sedona Conference<sup>®</sup> regarding how to best effectuate change.

The Committee has not yet agreed that rule amendments will be the most productive way to resolve the current issues related to e-discovery. Rather, the Discovery Subcommittee developed three possible approaches for addressing these concerns: (1) a detailed duty-to-preserve rule; (2) a rule that describes the preservation obligation in general terms; or (3) a sanctions-based rule that "avoids any direct statement of a duty to preserve, but instead describes appropriate responses and sanctions for failure to preserve." *Id.* The third approach was developed when some Committee members expressed concern about the Committee's authority under the Rules Enabling Act (28 U.S.C. § 2072) to develop preservation rules as the duty to preserve generally arises before federal courts have jurisdiction over a case (i.e., before a case has been filed).

If the Committee does not have authority to develop preservation-focused rules, then the sanctions-focused rule at least "will give retrospective guidance on what should be preserved." [Draft Minutes, Civil Rules Advisory Committee \(April 4-5, 2011\)](#). The Committee has considered asking Congress to give it the express authority to create a preservation rule in the event the Committee concludes that the judiciary does not have the authority to enact such a rule. *Id.* A copy of the current working language for the possible rules changes is available [on the US Courts' website](#). Following the mini-conference, the Committee's Discovery Subcommittee plans to recommend a general approach to the full

Committee in November 2011 and then present a detailed proposal ready for the full Committee's consideration at the Spring 2012 meeting. *Id.*

## ***Progress on Reforming the Electronic Communications Privacy Act***

In our [2010 Year-End Update](#), we reported on calls to reform the ECPA. In 2011, those calls led to concrete action.

On April 6, 2011, the Senate Judiciary Committee held a hearing on reforming the ECPA. In his opening statement, Senator Patrick Leahy explained that the ECPA "is hampered by conflicting standards that cause confusion for law enforcement, the business community and American consumer alike. For example, the content of a single email could be subject to as many as four different levels of privacy protections under ECPA, depending on where it is stored, and when it is sent." *The Electronic Communications Privacy Act: Government Perspectives on Protecting Privacy in the Digital Age: Hearing Before the S. Judiciary Committee, 112th Cong. (2011)* (statement of Sen. Patrick Leahy, Chairman, S. Comm. on the Judiciary).

On May 17, 2011, Senator Leahy introduced the "[Electronic Communications Privacy Act Amendments Act of 2011](#)." This legislation proposes to update the ECPA to clarify how data privacy issues should be addressed consistently. The bill addresses five main issues: general consumer privacy, consumer location privacy, tools for law enforcement to obtain electronic records, cyber security and national security.

While Senator Leahy's proposed legislation is still a long way from becoming law, it demonstrates that the calls for reform have been recognized at the federal level, and Congress is beginning to seriously consider reforming the ECPA.

## ***Reform at the State Level***

As in 2010, e-discovery reform continues to be active at the state level. Proposed rules and amendments were introduced in a variety of jurisdictions, and we expect reform efforts to continue apace in the second half of the year.

In many states, the courts, rather than legislatures, are leading current reform efforts. For example, in January 2011 the Delaware Court of Chancery issued the *Court of Chancery Guidelines for Preservation of Electronically Stored Information*. These Guidelines instruct litigants on how to address issues related to ESI and encourage cooperation between parties. (For more information on the Guidelines, see the Gibson Dunn client alert, "[E-Discovery Trends: Delaware Chancery Court Adopts Preservation Guidelines for Electronically Stored Information](#).")

In New York, the E-Discovery Working Group for the New York State Unified Court System continued to address a possible reform of New York e-discovery rules and to discuss educating practitioners about issues related to the preservation, collection and processing of ESI.

In California, although the "The Electronic Discovery Act" was enacted just two years ago, the California Judicial Council is considering additional e-discovery legislation to ensure that the changes

from 2009 are comprehensively applied to the entire California Code of Civil Procedure. Earlier this year, the Council issued "Proposed Clean-Up Legislation on the Discovery of Electronically Stored Information." The proposed legislation clarifies that ESI is discoverable during all stages of the judicial process and provides guidance on how ESI should be treated when a subpoena is issued. The proposed changes would also clarify that the California "safe-harbor" provision, which is analogous to the FRCP standard, is broadly applicable to various sections of the California Code of Civil Procedure. Judicial Council of California, [Invitation to Comment](#), Leg. 11-01, 17 (2011). The Council accepted public comments on the proposed changes through June 20, 2011, and is now considering sponsoring the legislation and seeking enactment. If passed, the legislation likely would become effective on January 1, 2013.

North Carolina made significant reform strides in the first half of this year, passing a comprehensive e-discovery law on June 23, 2011. Act of June 23, 2011, Ch. [S.L. 2011-0199](#) (N.C. 2011) (amending North Carolina Rules of Civil Procedure to clarify the procedure for the discovery of ESI). House Bill 380, was introduced on March 16, 2011, and it was quickly approved by the House, the Senate and Governor Perdue. The new law has some similarities to the FRCP, but also some key differences. For example, the law expressly addresses and partially defines discoverable metadata, explaining that ESI "includes reasonably accessible metadata that will enable the discovering party to have the ability to access such information as the date sent, date received, author, and recipients. The phrase does not include other metadata unless the parties agree otherwise or the court orders otherwise upon motion of a party and a showing of good cause for the production of certain metadata." *Id.* This definition seeks to avoid some of the ambiguity that has emerged in other jurisdictions regarding what metadata must be preserved and produced. The bill also follows a state law trend of making the Rule 26(f) conference optional, whereas it is mandatory under the FRCP.

Finally, breaking with a trend seen in other states that adopt rules similar to the FRCP and strongly rebuking the disarray of numerous and sometimes inconsistent federal e-discovery decisions, the Supreme Court of Pennsylvania's Civil Procedure Rule Committee has proposed e-discovery rule amendments that expressly reject the federal e-discovery scheme. The proposal clarifies that e-discovery in Pennsylvania should "be governed by the same considerations that govern other discovery," and states that ESI disputes should be "resolved pursuant to the general principles of [Pennsylvania] Rule 4011, and not pursuant to the FRCP and the frequent intricate case law developing in the federal courts." Supreme Court of Pennsylvania, Civil Procedural Rules Committee, [Proposed Recommendation No. 249](#) (2011).

## **Conclusion**

In the first half of 2011, the number and sophistication of e-discovery cases continued to grow at an increasingly fast pace. Gibson Dunn will continue to track the latest developments and trends. Look for our updates whenever a major opinion is issued and watch next winter for our 2011 Year-End E-Discovery Update.



*Gibson Dunn & Crutcher's lawyers are available to assist in addressing any questions you may have regarding the issues discussed in this update. The Electronic Discovery and Information Law Practice Group brings together lawyers with extensive knowledge of electronic discovery and information law. The group is comprised of seasoned litigators with a breadth of experience who have assisted clients in various industries and in jurisdictions around the world. The group's lawyers work closely with the firm's technical specialists to provide cutting-edge legal advice and guidance in this complex and evolving area of law. For further information, please contact the Gibson Dunn lawyer with whom you work or any of the following Chairs of the Electronic Discovery and Information Law Practice Group:*

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