



FEDERAL COURT
DECISIONS INVOLVING
ELECTRONIC
DISCOVERY
JAN. 1, 2009-
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Federal Court Decisions Involving Electronic Discovery January 1, 2009 – September 15, 2010

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1100 West, LLC v. Red Spot Paint & Varnish Co., Inc., 2009 WL 1605118 (S.D. Ind. June 5, 2009). 1100 West LLC (“West”) filed an environmental liability action, claiming its business site was severely contaminated by pollution from a nearby property owned by Red Spot Paint & Varnish Company (“Red Spot”). West obtained documents from the Environmental Protection Agency through a Freedom of Information Act request, including records related to Red Spot’s property that were responsive to its discovery requests but had not previously been produced by Red Spot. West sought to compel the production of these documents and for discovery sanctions against Red Spot, asserting that Red Spot and its attorneys had purposely withheld responsive documents and citing testimony establishing the inaccuracy of Red Spot’s claims about the completeness of production. Red Spot denied the charges, claiming the evidence was not material to the central issue in the case and that reliance on the direction of counsel shifted any liability for discovery failures to its attorney. The court granted Red Spot’s motion to compel. The court held that the Red Spot’s FRCP 30(b)(6) witness incorrectly decided facts for herself instead of disclosing all aspects of information at her disposal. The court also held that the Red Spot’s attorneys were liable for failing to guide their client to make disclosures. The court issued a default judgment against Red Spot and ordered Red Spot to pay the West’s attorney fees and costs.

In re A&M Florida Properties II, LLC, 2010 WL 1418861 (Bankr. S.D.N.Y. Apr. 7, 2010). In this adversarial proceeding (which was transferred from Florida state court after an entity of the plaintiffs’ parent company filed a voluntary petition under Chapter 11 of Title 11 of the Bankruptcy Code) the defendant, which had been suspicious of the plaintiffs’ cooperation during the discovery process, believed the plaintiffs had purposely deleted certain responsive, non-privileged internal emails from their systems, and moved the court to compel the production of such documents and to sanction the plaintiffs and

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their counsel by dismissing the litigation, or in the alternative, by an adverse inference instruction. The plaintiffs' counsel asserted that he ordered a "company-wide" search of all employees' emails from their live inboxes, but he inadvertently did not produce archived files from his clients' systems. He confessed that he had only recently, after believing in good faith that he had produced all responsive documents, learned the difference between files stored in archives and files stored in live inboxes. The court denied the defendant's motions and held that while the plaintiffs and their counsel could have handled the discovery process better, there was no intentional destruction of evidence, but rather the plaintiffs' attorney "[s]imply did not understand the technical depths to which electronic discovery can sometimes go." In order to obtain an adverse inference instruction for the late production of evidence, the moving party must establish that: "(i.) The party having control over the evidence had an obligation to timely produce it; (ii.) the party that did not timely produce the evidence acted with a 'culpable state of mind'; and (iii.) the tardily produced evidence is "relevant" to the party's claim or defense." The Second Circuit recognizes that "[a] showing of ordinary negligence demonstrates the culpability necessary to justify an adverse inference instruction." While finding the requisite "culpable state of mind," the court ruled that dismissing the action or ordering an adverse inference instruction for the late production of evidence would be unjustly harsh in this case, especially considering the defendant eventually obtained the documents it sought. The court ruled that monetary sanctions were appropriate and ordered the plaintiffs and their counsel to reimburse the defendant its half of the cost of the certified computer forensic technician the parties jointly retained to search the plaintiffs' systems. In addition, the plaintiffs and their counsel were ordered to reimburse the defendant for the costs associated with bringing the motion for sanctions and the motion to compel.

AccessData Corp. v. ALSTE Tech., 2010 WL 318477 (D. Utah Jan. 21, 2010). In this breach of contract action arising out of the sale of computer software, the court rejected a defendant's argument that discovery requests for production of electronic and other information would violate German law. The court declined to compel the requesting party to comply with the Hague Convention. The court also required the defendant to make a second production of ESI originally produced as scanned PDF-format images, although the requesting party had not specified a particular form or forms for production, noting that "[i]n the court's experience, scanned PDFs, as opposed to electronically-produced PDFs, are not reasonably usable."

Acorn v. County of Nassau, 2009 WL 605859 (E.D.N.Y. Mar. 9, 2009). In this civil right case, the plaintiffs moved for sanctions against the County for its failure to implement a legal hold. The court concluded that the defendant had a duty to preserve evidence in June 2005, but it did not take any steps to preserve until September 2006. The court found the County's failure to execute a proper litigation hold amounted to gross negligence. The court held, however, that the "plaintiffs have not sufficiently demonstrated that any destroyed or lost materials would have been favorable to them and thus, to the extent plaintiffs' motion seeks an adverse inference instruction is denied." The court imposed monetary sanctions on the defendants for the grossly negligent

conduct in failing to implement a litigation hold and awarded the plaintiffs the costs of making the motion, including reasonable attorneys' fees.

Adele S.R.L. v. Filene's Basement, Inc., 2009 WL 855955 (S.D.N.Y. Mar. 24, 2009).

In a trademark infringement suit, the plaintiff sought monetary sanctions against the defendant for failing to perform adequate searches and repeatedly making false assertions that discovery was complete. The court held that sanctions were available and that the defendant's desire to shield adverse information was a likely motive for their inadequate production, but noted that motive was unnecessary in determining the appropriate monetary sanction. On another issue, the court denied the plaintiff's request for reimbursement of costs for extracting and reviewing raw data from backup tapes produced by the defendants, ruling that the plaintiffs failed to establish that such costs would normally have been assumed by the defendants under FRCP 26(b)(2).

Adhi Parasakthi v. West Pikeland, 2010 WL 1185452 (E.D. Pa. Mar. 17, 2010).

In this action arising out of a land use dispute, the defendant had produced ESI to the plaintiff as attachments to email. After apparent "technical difficulty" in accessing the ESI, the plaintiff argued that the defendant's production was deficient. The court suggested that the defendant "either provide [p]laintiff with an index..., attempt to electronically send the information in another format, or simply print the electronic information and deliver it by mail."

Adorno v. Port Auth. of N.Y. and N.J., 2009 U.S. Dist. LEXIS 27505 (S.D.N.Y. Mar. 31, 2009).

In this racial discrimination case, the plaintiffs moved for sanctions for the defendants' failure to implement a litigation hold and preserve certain relevant documents. The court held that there was not a sufficient showing to support an adverse inference instruction, as any failure to preserve documents was mere negligence, that the plaintiffs did not carry their burden in showing that the failure to produce documents was prejudicial, that there was other demographic information available, and that the hiring memos sought were only one-line statements of whether the individual was interested in a promotion.

Ak-Chin Indian Cmty. v. U.S., 85 Fed. Cl. 397 (2009); *motion for reconsideration denied*, 85 Fed. Cl. 636 (2009).

In an action brought by the plaintiff Indian tribe against the United States for breach of trust, the Tribe sought an order compelling production of documents. The documents in issue had been transferred to the American Indian Records Repository and indexed using an "off-the-shelf commercial software package." The court concluded that the documents, "[o]nce ... disassembled ... and reorganized to comport with the filing system" were no longer kept "in the usual course of business," that the filing system did not facilitate a meaningful review, and that the United States was required to organize and label the documents to correspond with the Tribe's requests. The court also held that the United States, in answer to the Tribe's interrogatories, could not avail itself of the option to produce business records.

***In re Air Cargo Shipping Services Antitrust Litig.*, 2010 WL 1189341 (E.D.N.Y. Mar. 29, 2010).** The plaintiff in this antitrust action moved to compel the defendant French airline to produce non-ESI records. The parties agreed the records were relevant, that the records were subject to a French blocking statute, and that production would expose the defendant to prosecution in France. However, the records had already been produced to the Department of Justice and used in a criminal prosecution of the defendant. The court granted the motion but declined to proceed through the issuance of letters rogatory of the Hague Convention, noting the delay associated with that process. In a subsequent decision, ***In re Air Cargo Shipping Services Antitrust Litig.*, 2010 WL 2976220 (E.D.N.Y. July 23, 2010)**, the court addressed another defendant’s argument that a South African blocking statute prohibited it from producing information. The court found, among other things, that the information sought was highly relevant, that the discovery requests were specific, and that the United States had a fundamental interest in enforcing its antitrust laws through private litigation. The court dismissed any fear of South African prosecution as speculative because there was no evidence that the statute had ever been enforced and the defendant was itself a South African government agency. Accordingly, the court directed the parties to confer on a production schedule.

***Alamar Ranch, LLC v. County of Boise*, 2009 WL 3669741 (D. Idaho Nov. 2, 2009).** In this action under the Fair Housing Act, the plaintiff subpoenaed an attorney who represented over 100 nonparty objectors. During an inspection of the nonparties’ attorney’s records, the plaintiff’s attorney was inadvertently given access to privileged documents. Ruling on the nonparties’ attorney’s motion for the return of the documents, the court held that work product protection was unavailable, as the moving attorney did not represent a party to the action *sub judice*. The court then found that most of the communications were subject to the attorney-client privilege but that one client had waived the privilege as to email communications made over her employer’s email system because of her “constructive knowledge” of the employer’s email policies. However, because that knowledge did not extend beyond the employee, other clients did not waive their privilege when the employee was copied on email to the attorney or received email from other clients. Returning to the inadvertently produced documents, the court concluded that a “best practice” would have been for the attorney to log the documents even though not required to do so under FRCP 45 and that certain documents were privileged and others not. The court declined to find that there had been a waiver.

***Aliki Foods, LLC v. Otter Valley Foods, Inc.*, 2010 WL 2982989 (D. Conn. July 7, 2010).** After a string of contentious discovery disputes in this breach of contract action, the defendant moved for a terminating sanction in response to the plaintiff’s failure to comply with discovery orders. First, the defendant requested the production of ESI in September, but the plaintiff, as the court noted, “stonewalled” the defendant for several months. In June of the following year, the court ordered the plaintiff to produce the requested documents within one week. The plaintiff failed to comply and claimed its efforts were frustrated by the failure of a hard drive, which the court noted “just happened to coincide with the entry of the Court’s [June discovery] Order.” The court ordered a forensic examination of the plaintiff’s hard drive, but since the plaintiff asserted it was unable to cover the cost of the forensic exam, the court ordered the cost to be borne by

the defendant. After the entry of the court's order, the plaintiff and its principal entered into a security agreement with a third party and voluntarily turned over the computer to the third party "without making any effort whatsoever to have the forensic examination conducted beforehand." Finally, the plaintiff refused to comply with the court's order that it submit relevant and accurate financial information in connection with its previous assertion that it could not afford the costs associated with the forensic exam. The court noted that "dismissal is a last resort to be avoided if at all possible, there does not appear to be any alternative ... that would properly punish [the plaintiff], deter others from attempting similar conduct in the future, compensate [defendant] for the prejudice case by [plaintiff]." Accordingly, the court granted the defendant's motion for terminating sanctions and directed the clerk to "dismiss the case with prejudice and to close the file."

Am. Fam. Mut. Ins. Co. v. Gustafson, 2009 WL 641297 (D. Colo. Mar. 10, 2009). In an employment matter alleging misappropriation of trade secrets, the requesting party alleged the producing party, a former employee, had retained customer lists and other information in violation of his contract and applicable laws. The requesting party sought an Electronically Stored Information Discovery Plan under which it would inspect a mirror image of the producing party's hard drive. The court granted the requesting party's motion and established a detailed protocol for discovery. The protocol directed that the producing party should redact privileged data from the hard drive and provide a log of such data to the requesting party. Additionally, the protocol directed both parties, along with their forensic experts, to confer and establish search terms. Lastly, the protocol directed the requesting party to provide the producing party with a Bates-labeled hard copy of all relevant ESI for review after the search was completed.

Am. Legalnet, Inc. v. Davis, 2009 WL 4796401 (C.D. Cal. Nov. 25, 2009). In this copyright infringement action, the plaintiff sought a preliminary injunction, moved for expedited discovery, and moved for an order preserving evidence. The court noted FRCP 26(d) allowed for expedited discovery before the Rule 26(f) conference on a showing of good cause, but that the plaintiff had not narrowly tailored its requests for information limited to preserving the status quo. In so ruling, the court considered the proportionality of the discovery sought in the context of "good cause" and "reasonableness." The court also denied the plaintiff's request for a preservation order, noting that the plaintiffs had satisfied neither the two-prong nor three-prong standards applied to requests for preservation orders.

Amobi v. District of Columbia Dept. of Corrections, 2009 WL 4609593 (D.D.C. Dec. 8, 2009). In an arbitration to challenge correctional officer's dismissal, the defendants inadvertently produced a memorandum prepared by an attorney. The plaintiffs subpoenaed the attorneys who authored and were copied on the memorandum. On cross-motions arising out of the production and the subpoenas, the court declined to quash the subpoenas, holding that the attorneys could be deposed to determine whether false testimony had been presented at the arbitration. The court also held that the memorandum was not protected by the attorney-client privilege as it contained no confidential information provided by a client, although it constituted work product as it was prepared for the arbitration. Turning to a FRE 502(b) waiver analysis, the court adopted pre-502

law that the holder of a privilege has the burden of proving there has not been a waiver and that “inadvertence” should be analyzed separately from “reasonable” of steps taken to prevent a disclosure. The court also rejected the argument that attorneys can never make an inadvertent production, saying “[l]awyers make inadvertent mistakes; it is judges who never make mistakes.” The court then found that the defendants had not demonstrated that any steps were taken to prevent disclosure and that there had been a waiver. The court then quashed a subpoena served on the United States Attorney on the basis of prosecutorial immunity, deliberative process and privilege.

Anthropologic, Inc. v. Forever 21, Inc., 2009 WL 690239 (S.D.N.Y. Mar. 13, 2009). In this copyright infringement case, the plaintiff requested production of several categories of documents pertaining to allegedly infringing products, which the defendants claimed no longer existed. The plaintiff also sought appointment of an expert to inspect the defendants’ hard drives. The court concluded that the defendants must produce the requested data and documentation, noting that it was inconceivable that such data had not been retained. Because the defendants caused substantial delays and unnecessary expenses, the court required them to “provide any additional documents in their custody and control,” including “not only hard copy documents, but any electronically stored data that comes even arguably within the scope of these four categories.” The court reserved decision on the production of the hard drives until after the electronically stored data was produced.

Aponte-Navedo v. Nalco Chemical Co., 2010 WL 2000317 (D.P.R. May 20, 2010). In this employment discrimination action, the plaintiffs moved to compel ESI from the defendant. Citing FRCP 34(b)(2)(C), the court denied the plaintiff’s motion and held that the ESI inquiries made by the plaintiffs, which would have required the defendant to produce documents of its worldwide operations, were too broad and discovery could not extend beyond employer’s Puerto Rico databases located at its principal place of business in Illinois.

Argus and Assoc., Inc. v. Professional Benefits Serv., Inc., 2009 WL 1297374 (E.D. Mich. May 8, 2009). The plaintiff alleged that the defendant had failed to properly administer a healthcare plan and agreed to provide discovery about those allegations. The court found that the plaintiff had not performed an adequate FRCP 11 investigation and had not been timely in retaining an expert to opine on the defendant’s alleged failure to process claims properly. The court noted that “[i]t might have been a significant task to examine a large volume of data as existed in the present case, but that is simply a burden that a plaintiff assumes when a plaintiff initiates litigation.” Finding that both parties had failed to confer under FRCP 26(f), the court reasoned that if the parties had met, the defendant would have disclosed the existence of a website it used to process its claims. Under these circumstances, the court issued limited sanctions against the plaintiff for its failure to comply with a discovery order.

Arista Records, LLC v. Usenet.com Inc., 2009 U.S. Dist. LEXIS 5185, 2009 WL 185992 (S.D.N.Y. Jan. 26, 2009). Plaintiffs filed a copyright infringement action against Usenet, a worldwide Internet-based file sharing service, alleging that Usenet allowed its

subscribers to both upload and download digital files of copyrighted music on its servers. The plaintiffs moved for sanctions, alleging that the defendants failed to preserve user data and the copyrighted works themselves. Ruling on the motion, the court stated that the point in time “when the duty to preserve evidence arises may, under certain circumstances, be dependent on the nature of the evidence.” Here, the ESI in issue was “transitory,” and “once defendants had actual notice that plaintiffs were requesting the data, defendants had the obligation to preserve it, if possible, or to at least negotiate in good faith what data they could produce.” Nevertheless, certain ESI was irretrievably lost, even as the parties discussed preservation and the defendants to make some production. The court concluded that the defendants had failed to preserve evidence, that they acted in bad faith in taking affirmative steps that would result in the destruction of evidence and that the spoliated evidence was relevant. The court, as a sanction, allowed certain adverse inference instruction, precluded defendants from challenging certain facts, and awarded attorneys fees and costs. The court also struck in part an expert’s declaration for failure to comply with FRE 702 and *Daubert*. In a subsequent decision, **Arista Records, LLC v. Usenet.com, Inc., 2009 WL 1873589 (S.D.N.Y. June 30, 2009)**, the court granted terminating sanctions to the plaintiffs based on the defendant’s discovery misconduct in wiping hard drives, reassigning computers to employees without preserving the relevant data for litigation, deleting relevant emails, and sending employees to Europe to keep them from being deposed.

Armor Screen Corp. v. Storm Catcher, Inc., 2009 U.S. Dist. LEXIS 59927 (S.D. Fla. June 29, 2009). Defendants moved to compel a second production of documents in a form that would not require them to purchase software to view. The court determined that there was a software program available for \$1,700, and the defendants’ failure to exercise reasonable options or discuss this matter in the FRCP 26(f) conference suggested a lack of effort on the part of the defense counsel. The court denied the motion to compel discovery and ordered the moving party to pay the prevailing party’s costs and attorneys’ fees. However, the court noted that the attorneys’ fees requested by the prevailing party were excessive given the generic descriptions of the work the attorneys had done.

Asarco, Inc. v. U.S. Env’tl. Prot. Agency, 2009 WL 1138830 (D.D.C. Apr. 28, 2009). In an environmental compliance action, the plaintiff contended that the defendant exercised bad faith in discovery by employing only one search term. The plaintiff sought a more comprehensive search of ESI, including more search terms. The court granted the request for additional search terms but noted that keyword searches are no longer the “favored methodology.” And although additional discovery was granted, the court questioned whether further discovery would produce a genuine issue of material fact that would preclude granting the pending motion for summary judgment in favor of the defendant.

Asher Assoc., LLC v. Baker Hughes Oilfield Operations, Inc., 2009 U.S. Dist. LEXIS 40136 (D. Colo. May 12, 2009). In this breach of contract dispute, the requesting party sought a spoliation sanction, contending the producing party improperly destroyed two electrical submersible pump systems that represented “[t]he central piece of evidence to [the] litigation.” Citing *Hynix Semiconductor Inc. v. Rambus, Inc.*, 591 F.Supp.2d

1038, 1061 (N.D. Cal. 2006), the court determined that the producing party understood litigation was “reasonably foreseeable” given the tenor of a letter it received from the requesting party, and therefore should have preserved evidence. However, the court did not find that the defendant acted willfully or in bad faith and refused the requesting party’s demand for an adverse inference instruction. The court granted monetary sanctions based upon the producing party’s failure to preserve evidence and precluded certain testimony regarding the condition of the pumps.

Bank of Mongolia v. M & P Fin. Serv., Inc., 2009 WL 1117312 (S.D. Fla. Apr. 24, 2009). In this civil RICO action, the defendants failed to respond to discovery requests, did not search deleted files for discoverable ESI, and could not explain what methodology had been utilized to search for ESI. The court appointed an independent expert to make a mirror image of the defendants’ computer system and established a protocol for the expert and the parties to follow in searching the image.

Bellinger v. Astrue, 2009 WL 2496476 (E.D.N.Y. Aug. 14, 2009). In an individual employment discrimination lawsuit against the Social Security Administration involving allegations of gender discrimination, the plaintiff sought broad discovery regarding all similarly situated employees of the New York Regional Office over a ten-year period. Citing FRCP 26(b)(2)(C), the court denied the requests as burdensome and unlikely to lead to the discovery of admissible evidence, as the complaint concerned the treatment of the plaintiff as an individual, and did not allege a widespread pattern of discrimination. The plaintiff also sought detailed discovery of the defendant’s computer system, litigation hold procedures, and procedures for collecting ESI responsive to prior discovery requests in this action. The court held that the discovery sought was overbroad and not relevant to any genuinely contested issue, and that the plaintiff had not demonstrated any significant, unexplained, or prejudicial failure in the defendant’s production of documents or ESI to warrant compelling further discovery. Finally, in reviewing the docket on this action and finding many instances of counsel failing to “work together productively and treat each other civilly,” the court urged counsel not to use “zealous advocacy” as a shield for “discourteous or combative litigation tactics.”

Bensel v. Allied Pilots Ass’n, 2009 WL 4884052 (D.N.J. Dec. 17, 2009). In this breach of fiduciary duty case, the plaintiffs sought sanctions for the destruction of email and other ESI. The court declined to issue sanctions for concealing evidence, finding that plaintiffs had failed to prove bad faith in the defendants’ failure to preserve information. The court reasoned that while the defendants were lax in imposing litigation holds, allowing for the “routine destruction of certain documents and electronic data,” sanctions were not warranted under Third Circuit case law.

Board of Trustees, Sheet Metal Workers' National Pension Fund v. Palladium Equity Partners, LLC, 2010 WL 2787434 (E.D. Mich. July 14, 2010). A union pension fund sued the holding companies of two former employers who withdrew from the pension for outstanding obligations to the fund. Over a six-month period during discovery, the defendants produced 56,846 paper and electronic documents, representing in 4.3 million pages. A few weeks after the rolling productions were completed the

defendants submitted privilege logs identifying 184 privileged attorney-client documents that had been inadvertently disclosed and requested their return pursuant to a stipulated protective order containing “clawback” and “non-waiver” provisions. The plaintiffs objected, stating the productions were not inadvertent within the meaning of Fed. R. Evid. 502, as that the documents in question had been produced multiple times, came directly from the attorneys involved in the case, were in easily searchable electronic form, and had already been reviewed and relied upon by the plaintiffs in developing their case. The court applied the analysis of Rule 502(b), noting that while the 6th Circuit has not yet developed a set of factors for analysis of inadvertent disclosure, the burden is on the party asserting privilege to demonstrate that reasonable precautions were taken. The court noted that the defendants used a team of sixteen associates supervised by two senior associates to conduct review, and the team spent about 2,500 hours reviewing 8,700 hard copy documents and more than 59,000 electronic documents, including emails. Some of the privileged emails were printed pages snuffed into larger hard-copy non-privileged documents, and others failed to receive the proper “privilege” tag while being reviewed online. The Court found that under the circumstances, the production of these documents was inadvertent under Rule 502 and ordered their return, pending an ultimate determination of their privilege status based on factors other than their inadvertent production.

Bonn v. City of Omaha, 2009 WL 1740783 (D. Neb. June 18, 2009). In a wrongful discharge action, plaintiff sought to compel production of all email associated with the defendants’ two executives and all correspondence between defendants and an associated third party. In response, the defendants alleged that the requested emails had already been searched using relevant key terms, and that the third party emails were “necessarily irrelevant.” Applying FRCP 26(b)(2)(B) and (C), the court held that the cost and burden of further exploration of the defendants’ ESI outweighed the likely benefit of such a search. However, the court rejected the defendants’ contention that the third party communications were irrelevant and ordered the third party to produce all written communication. The defendants were not ordered to produce any further electronic discovery.

Bray & Gillespie Mgmt. LLC v. Lexington Ins. Co., 2009 WL 546429 (M.D. Fla. Mar. 4, 2009). The owner and operator of resorts in Florida filed suit against its insurer to recover damages to its properties caused by three hurricanes. The insurance company disputed whether the damages claimed were the result of three separate “occurrences” under the policy. The plaintiff, in preparation for litigation, downloaded ESI relevant to the damages issue in native format, converted it to TIFF images and, in the process, failed to capture relevant metadata. The defendants objected to the plaintiff’s production of the TIFF images and moved to compel production of the ESI in native format. The court held that the production was not in the form requested by defendants, that the ESI was not in a reasonably useable form, that the plaintiff and its attorney concealed information and made material misrepresentations, and that monetary and other sanctions were warranted against the plaintiff and various of its attorneys. The court noted that the plaintiff, “as the client, has the obligation to supervise its lawyers,” that an inside counsel cannot blindly rely on outside counsel, and that outside counsel acted in bad faith. Finally, the court

advised that it would issue an order to show cause why one attorney should not be personally sanctioned. In a subsequent decision, **Bray & Gillespie Mgmt. LLC v. Lexington Ins. Co., 2009 WL 2407754 (M.D. Fla. Aug. 3, 2009)**, the defendants alleged that both plaintiffs and their counsel failed to produce documents and manipulated ESI to prevent its production. The court held that plaintiffs' continued discovery failure "was calculated to deceive" and prevented the defendants "from conducting discovery regarding some of the facts underlying [the plaintiffs'] alleged business interruption losses." The court found that such conduct merited sanctions, ordering that the plaintiffs would be forbidden from presenting their business interruption claim, and that expert testimony relating to that claim would also be stricken. Later, in **Bray & Gillespie Mgmt., LLC v. Lexington Ins. Co., 2010 WL 55595 (M.D. Fla. Jan. 5, 2010)**, the court imposed sanctions on the plaintiff under FRCP 37 after the court learned "two significant and incredible facts." The plaintiff had never consulted with its software provider in an attempt to retrieve archived ESI relevant to the plaintiff's business interruption claims after one hurricane and the ESI could likely have been retrieved with small effort. Reviewing the range of available sanctions, the court concluded that dismissal of all of the plaintiff's claims for business interruption after multiple hurricanes would be excessive. However, the court also declined to extend discovery, as that would "reward" the plaintiff for its discovery failures. However, the court dismissed the plaintiff's claim for business interruption loss resulting from the one hurricane, imposed attorneys' fees and costs, and ordered the plaintiff to produce all business interruption claim information not yet produced.

Bro-Tech Corp. v. Thermax, Inc., 2008 WL 5210346 (E.D. Pa. Dec. 11, 2008). Bro-tech Corporation and Purolite International, Ltd., sued the defendants for theft of trade secrets and other related causes of action. After a contentious and protracted discovery process, the court appointed a special electronic discovery master to supervise electronic discovery. Defendant Thermax, Inc., initially produced a draft affidavit of one of its executives but soon demanded it back pursuant to a clawback agreement stipulated by the parties and approved by the court. The defendants made a written demand, pursuant to the clawback agreement, that the plaintiffs return and delete all copies of the affidavit. Although the plaintiffs complied with the request, they exercised their right in accordance with the agreement to object to the defendants' designation of the erroneously produced affidavit by moving to compel them to produce the affidavit to the plaintiffs for their use in the suit. The court denied the plaintiffs' motion holding that the plaintiffs did not submit a timely objection to the electronic discovery master within five business days of the receipt of the defendants' written demand for the return of the affidavit, as required by the clawback agreement.

Brookdale Univ. Hosp. & Med. Ctr., Inc. v. Health Ins. Plan of Greater N.Y., 2009 WL 393644 (E.D.N.Y. Feb. 13, 2009). The defendant sought reconsideration of an order requiring them to return or destroy inadvertently produced documents and prohibiting them from making use of the information contained therein. On the motion for reconsideration, the court stated that it is "closing and locking the door" and held that it would not entertain any argument on documents that might have been inadvertently produced by the plaintiff. The court also held that a confidentiality agreement between

the parties was unavailable to the plaintiff as a basis to assert further claims of possible inadvertent waiver, as it had failed to act promptly to raise any such claims. The court also refused to extend the discovery period, noting that it had not authorized new discovery requests and that the plaintiff had failed to raise timely objections to a defendant's production. Lastly, the court directed the parties to meet and confer with regard to the plaintiff's failure to provide certain metadata ("email string headers") to the defendant.

Brown v. Coleman, 2009 U.S. Dist. LEXIS 82302 (S.D.N.Y. Sept. 8, 2009). In this medical malpractice action, the defendants secured an order compelling the plaintiff's expert to produce surgical logs of fat grafting procedures for a three-year period. However, after the order was entered, the expert purposefully destroyed the logs. Citing FRCP 26(b)(2)(C)(iii), the court declined to compel the expert to examine "40,000-50,000" medical files from an "antiquated computer system" to reconstruct the lost information; however, the court, as a sanction for spoliation, precluded the expert from testifying about the number of procedures he had performed. The court also ordered the expert to authorize the release of his employment records, finding that email submitted by the plaintiff was inadequate to confirm positions the expert had allegedly held in the past.

Brown v. KIA Motors Corp., 2010 WL 135127 (W.D. Pa. Jan. 9, 2010). In this action arising out of an alleged automobile safety defect, the court denied the defendant's request to impose an adverse inference on the plaintiff, who could not produce the "original" post-accident digital images his wife had taken of his vehicle. The camera and memory chip on which the original images resided had been destroyed in an unrelated accident, although "poor quality" images had been made available.

Burt Hill, Inc. v. Hassan, 2010 WL 55715 (W.D. Pa. Jan. 4, 2010). In this civil action, the court ordered the defendants to submit ESI and documents for *in camera* review to determine whether the act of production would violate their Fifth Amendment right against self-incrimination. The defendants had conceded the existence and possession of the information and had no basis to object to production under as either irrelevant or privileged.

Calixto v. Watson Bowman Acme Corp., 2009 WL 3823390 (S.D. Fla. Nov. 16, 2009). In this dispute arising out of marketing rights to a patent and trademark, the plaintiff sought to compel the defendant to reconfigure its backup tapes and search for relevant documents. The defendant had undertaken a search for relevant ESI on various media other than backup tapes. While recognizing *The Sedona Principles*, the court framed the issue before it as an "elementary one that must be answered in all discovery matters, regardless of whether the medium of the discovery sought happens to be electronic in nature: whether we can reasonably anticipate that the information to be gleaned from the discovery sought will be relevant and non-duplicative... and, as FRCP 26(b)(2)(B) makes clear, the usual limitations to which all discovery is subject apply with equal force to electronic discovery." Accepting the defendant's estimate that the proposed discovery would cost \$40,000 for restoration and search, as well as additional costs for relevance and privilege review, the court found that the ESI on backup tapes was not

reasonably accessible and that the plaintiff had not shown good cause for the discovery sought. While the court was satisfied that the defendant's search methodology as applied to other media had been reasonable and had resulted in no significant gaps, the defendant was ordered to restore one backup tape that might contain deleted email from one key employee. The court also declined to impose spoliation sanctions on the defendant, even assuming no email was recovered. The court held that federal law governed the imposition of spoliation sanctions and that any sanctions in the matter *sub judice* must be based on inherent power and a finding of "bad faith," which could be found from direct or circumstantial evidence. Here, the email likely contained relevant information and had been intentionally deleted when the employee left, but a litigation hold was not in place at the time and the email was not deleted in an attempt to destroy evidence.

Callan v. Christian Audigier, Inc., 2009 WL 4844422 (C.D. Cal. Oct. 27, 2009). The defendant in this case sought to invoke the clawback provisions of a discovery protective order. Because the order did not explicitly allocate the burden of proof in asserting privilege, the court adopted the "standard practice" of imposing the burden on the party alleging inadvertent disclosure of privileged information. The documents had been included on various media delivered to the plaintiff but were not indexed or otherwise identified so as to enable the plaintiff to locate the documents. Ruling on the merits, and noting FRE 502(b), the court found that the defendants had not established that the production had been "inadvertent." The defendants had not logged the documents, could not identify which privilege applied to any particular document, and did not demonstrate any steps they took to prevent disclosure. Finding that the defendant's motion was meritless, the court awarded fees to the plaintiff pursuant to FRCP 37(a)(5)(B).

Capitol Records v. MP3tunes, LLC, 2009 WL 2568431 (S.D.N.Y. Aug. 13, 2009). The plaintiff music producers alleged that the defendant's website facilitated the unauthorized copying and distribution of their copyrighted music. Citing The Sedona Conference[®] *Cooperation Proclamation*, the court criticized the defendant for failing to cooperate with the plaintiffs in developing a reasonable protocol for searching its ESI, and rejected the defendant's argument of burdensomeness as "overblown." Turning to the plaintiffs' objections of burdensomeness, the court noted that while much of the burden was of the plaintiffs' own making and could be reduced by better electronic records management and use of litigation support tools, it could not ignore the fact that the burdens were real and would therefore declare that the plaintiff's email files sought by the defendant were "not reasonably accessible," shifting the burden to the defendant to demonstrate "good cause" for production. The court also permitted the plaintiffs to conduct manual searches of accessible sources, as opposed to ordering key word searches requested by the defendant, so long as the manual searches are "thorough." Finally, the court directed the search of certain email files using specified search terms, and ordered the parties to confer on the files to be searched.

Cargill, Inc. v. Progressive Dairy Solutions, Inc., 2008 WL 5135826 (E.D. Cal. Dec. 8, 2008). After the court adjudged the defendants to be the prevailing parties in this action, the defendants moved to recover litigation costs and the plaintiffs filed objections to the defendants' Bill of Costs. The court held that "[t]he types of costs that may be

awarded under FRCP. 54(d) are limited to those enumerated in 28 U.S.C. § 1920.” The court allowed costs for, among other things, the video depositions of certain prosecution witnesses the plaintiffs were unwilling to produce at trial, “technology packages” for depositions that were crucial to allow the defendants to perform key work searches and ultimately minimize costs, the electronic scanning of documents, and the preparation of electronic trial demonstratives.

Cartel Asset Mgmt. v. Ocwen Fin. Corp., 2010 WL 502721 (D. Colo. Feb. 8, 2010). In this “extended and contentious” action asserting claims for, among other things, misappropriation of trade secrets, discovery was allowed on damages after a remand from the court of appeals for a new trial on damages. The court issued a protective order that limited the time period for which discovery from the defendants would be allowed. Then, citing to The Sedona Conference[®] *Cooperation Proclamation*, the court admonished counsel to engage in meaningful negotiation pursuant to FRCP 26(c)(1). The court denied a protective order sought by the defendants on grounds that certain ESI was not reasonably accessible under Rule 26(b)(2)(B) as the defendants did not provide specifics as to undue burden or cost. Turning to the plaintiffs’ request for fees and costs on the motion, the court “consider[ed] the interplay between Rules 26(b)(2)(B), 26(c)(1) and 26(g)” and applied the Rule 26(g)(1)(B) “certification” standards to the motion. Finding that the defendants’ conduct was, in large measure, intended to create delay, the court ordered the defendants to show cause why they should not be required to pay the fees and costs incurred by the plaintiffs in responding to the motion. Turning to the plaintiffs’ motion to compel discovery and for contempt, the court noted the plaintiffs’ failure to engage in a meet and confer before bringing the motion. The court elected to address the merits anyway and found that the defendants’ discovery responses were proper, albeit late. The court declined to certify the defendants in contempt and also declined an award of fees and costs to the plaintiffs given their failure to meet and confer. The court also declined to make an award to the defendants: “Neither side has approached discovery with a spirit of cooperation or efficiency. All too often, discovery has devolved into a series of complaints and counter-accusations. It is fitting that each side should bear their own costs and fees.”

Casale v. Kelly, 2010 WL 1685582 (S.D.N.Y. Apr. 26, 2010). In this action challenging the New York Police Department’s enforcement of state loitering statutes previously declared unconstitutional, the plaintiffs moved for discovery sanctions for the defendants’ failure to preserve and produce at least 34 of the over 700 criminal summonses issued to alleged violators of the law since June 2007. The court held that in order to prove spoliation, the moving party must establish three elements: “That the spoliating party (1) had control over the evidence and an obligation to preserve it at the time of destruction or loss; (2) acted with a culpable state of mind upon destroying or losing the evidence; and that (3) the missing evidence is relevant to the moving party’s claim or defense.” The court further reasoned that “[r]elevance and prejudice may be presumed when the spoliating party acted in bad faith or in a grossly negligent manner...However, when the spoliating party was merely negligent, the innocent party must prove both relevance and prejudice in order to justify the imposition of a severe sanction.” The court granted the plaintiffs’ motion for sanctions, awarding attorneys’ fees, because the court found the

City's duty to preserve documents with respect to the loitering statutes arose in at least January 2003 when the City was last sued by an individual wrongfully arrested under the law, that the City was negligent in losing summonses which were the only documents containing the relevant "narrative" portion describing the alleged misconduct, and that the spoliation of such relevant evidence was prejudicial to the plaintiffs' claim. The court also granted the plaintiffs' request for an adverse inference instruction, reasoning that without the summonses, it is likely the record would have revealed no legal basis for the summonses being issued, other than the violation of the unconstitutional loitering statutes, and it would therefore be appropriate to infer that the narratives would not have been favorable to the City.

CBT Flint Partners, LLC v. Return Path, Inc., 2009 WL 5159761 (N.D. Ga. Dec. 30, 2009). The court declined to impose discovery costs on the unsuccessful party and its attorneys in this patent infringement action, holding that although they "exercised poor legal judgment in pursuing this action, there is not clear and convincing evidence that the pre-filing investigation was so pathetic as [to] justify an inference of bad faith." In so holding, the court noted that the losing party had already been sanctioned for discovery abuse in requesting the production of a large volume of ESI. However, the court did impose costs on the losing party pursuant to 28 U.S.C. § 1920 for services performed by the prevailing party's vendor in processing the ESI, holding that "[t]he services are highly technical. They are the 21st Century equivalent of making copies." Moreover, "[t]axation of costs will encourage litigants to exercise restraint in burdening the opposing party with the high cost of unlimited demands for electronic discovery."

CE Design Ltd. v. Cy's Crabhouse North, Inc., 2010 WL 3327876 (N.D. Ill. Aug. 23, 2010). The plaintiffs filed a class action suit under the Telephone Consumer Protection Act, alleging that the defendant engaged in a prohibited "spam" faxing campaign. The defendant moved to dismiss, claiming that the plaintiffs had engaged in improper discovery tactics by paying \$5,000 to obtain evidence from a third party that they refused to produce to the defendant. Specifically, the plaintiffs obtained a copy of the hard drive from the defendant's marketing company containing the faxes, email correspondence, and faxing logs, serving as the basis for this and related actions. The third party, B2B, claims it had produced the hard drive under what it understood as a protective order that would prohibit further dissemination or use in other cases, and the court invited B2B to submit a letter stating its position. The court noted that while B2B would likely be embarrassed or could face liability based on the contents of the hard drive, these factors did not constitute "good cause" for the imposition of a protective order. Turning to the question of whether the plaintiff improperly withheld the hard drive from production, the court held that the data on the hard drive was cumulative or irrelevant to the question before the court at the time, which was limited to class certification. The data were later produced, and plaintiffs will be required to pay the defendant expert's reasonable fees relating to the preparation of a supplemental report. Finally, the court held that there was insufficient evidence that the payment of \$5,000 to B2B to obtain the hard drive was improper or a violation of professional ethics, as the payment did not influence testimony or was it contingent on the outcome of the case.

Cenveo Corp. v. Southern Graphic Sys., 2009 WL 4042898 (D. Minn. Nov. 18, 2009).

In this civil action, the defendant sought production of ESI in native format, but the plaintiff produced ESI in PDF format, claiming that the defendant's request was "ambiguous." Citing to numerous sources, including *The Sedona Conference Journal*[®], the court found that the term "native format" was not ambiguous. The court also found that the plaintiff had failed to object to the defendants' request for native production and had failed to specify the form it intended to use, as required by FRCP 34(b)(2)(D). Finding that the requests were neither overbroad nor unduly burdensome, the court ordered native production. The court also ordered the plaintiff to "provide indexing ... to the extent that its production ... differs from the index previously produced [with the PDF format production]."

Chapman v. General Board of Pension and Health Benefits of the United Methodist Church, Inc., 2010 WL 2679961 (N.D. Ill. July 6, 2010).

In this employment action arising out of the Americans with Disability Act, the plaintiff requested "documents" without specifying the source or form of production, and did not object at first to the receipt of hard-copy documents in response. After changing counsel, she served supplemental requests for the production in native format of specific documents already produced in hard-copy form. The defendant responded that they were unable to find the requested ESI on their computer system. In conference, the defendant stated that the documents were several years old, the system had been upgraded over time, and that the backup data that would require searching in included monthly data collected from more than 100 servers. Nevertheless, the defendant was able to locate some of the ESI requested and provided the plaintiff with screenshots. The plaintiff objected, stating that the ESI produced was incorrectly identified, the screenshots were illegible, and that native format was required to access metadata. The plaintiff filed a motion under Rule 15 to amend her complaint to include a count of intentional spoliation and to request attorney's fees. As an initial matter, the court found that the defendant had already produced the requested documents in hard-copy form and had no further obligation under Rule 34 to produce the same material in native form. The court also found that the plaintiff failed to show that the defendants acted intentionally or in bad faith, characterizing the plaintiff's brief on the matter "as illogical as it is contrived." The court noted that the plaintiff had made no motion to compel the production, and no court order to compel had been violated by the defendant. Finally, the court noted that as the appropriate remedy for the plaintiff would have been under Rule 37 if the facts had warranted it, the plaintiff's resort to Rule 15 to amend her complaint was inappropriate.

Chen v. Dougherty, 2009 WL 1938961 (W.D. Wash. July 7, 2009).

In this successful action under 42 U.S.C. § 1983 involving a First Amendment dispute, the plaintiffs argued that they should be entitled to reasonable attorneys' fees. The court held, however, that plaintiffs' counsel acted as a novice in electronic discovery matters by failing to make a discovery plan for relevant ESI and the award of attorneys' fees should reflect that fact. The court ordered that the plaintiff may recover only \$200 per hour in attorneys' fees.

Cherrington Asia Ltd. v. A & L Underground, Inc., 2010 WL 126190 (D. Kan. Jan. 8, 2010). In this action arising out of a project in Iraq, the plaintiff, who prevailed at trial, sought sanctions against the defendant for an alleged “document dump.” The court held that no discovery sanction could be imposed pursuant to FRCP 26(g), as no signed certification was in issue. The defendant had originally produced an electronic copy of the hard drive of a computer used on for the project, consistent with FRCP 34(b)(2)(E). The court ordered another production in which the files were indexed and that included a search engine. The court refused to address the so-called “document dump,” as the plaintiff had waited at least 15 months to raise any problem with the second production. The court did impose FRCP 37(d)(1)(A) monetary sanctions on the defendant for the “wholly inadequate” preparation of its FRCP 30(b)(6) witnesses.

In re Classicstar Mare Lease Litig., 2009 WL 250954 (E.D. Ky. Feb. 2, 2009). In this multidistrict action, a group of plaintiffs sought to compel a party to produce ESI in native format. After the court ordered production but did not specify the format, the party converted the ESI into TIFF images with load files, but did not provide embedded metadata. The plaintiffs then secured an order for the production of the ESI in native format, but the court allowed the producing party to seek a protective order. Citing to FRCP 34(b) and the *Manual for Complex Litigation, Fourth*, the court concluded that the producing party had met its Rule 34(b) obligation and had not “downgraded” data, but—based on an agreement of counsel—native format production was required. The court also stated that “[s]hould there be any problem retrieving the data or should any corrupt data be found, the parties and the court will cross that bridge when they get to it.” Lastly, as this was a second production and the plaintiffs had not specified a production format in their original request, it was “only fair” to shift production costs to the plaintiff.

ClearValue, Inc. v. Pearl River Polymers, Inc., 2009 U.S. App. LEXIS 6061 (Fed. Cir. Mar. 24, 2009). In a patent infringement case, the producing party appealed a ruling that they had violated FRCP 26(a)(2)(b)(i) and (ii) by not disclosing results of molecular weight testing. The producing party argued that neither Rule 26 nor the discovery order compelled production since its expert witness had forgotten to review the tests before testifying and since the tests were irrelevant to the issue of claim construction. The court upheld the district court’s decision to sanction the producing party for failing to justify their nondisclosure of important discovery. However, the court overturned the imposition of additional sanctions, holding the district court “abused its discretion” by exercising its inherent power to sanction limited discovery violations that were properly—and entirely—addressed under FRCP 37.

Coal. for a Survivable Delta v. Koch, 2009 WL 3378974 (E.D. Cal. Oct. 15, 2009). In this challenge to state sport fishing regulations, the plaintiffs sought 39 emails and other documents withheld from production under the deliberative process privilege. Rejecting the plaintiffs’ argument that the defendants’ delay in asserting the privilege violated a *per se* 30-day deadline imposed by FRCP 26(b)(5)(A) and 34(b)(2)(B) for producing a privilege log, the court found that document production had been voluminous and complex, that the documents in issue had been the subject of a long meet and confer process, and that the privilege had been asserted “as soon as reasonably practicable.” The

court declined to award costs and attorneys fees, finding that the procedural requirements for asserting the privilege had been substantially met.

Coburn Group LLC v. Whitecap Investors LLC, 2009 WL 2424079 (N.D. Ill. Aug. 7, 2009). In this contractual dispute, the court found that three emails protected by the work-product doctrine were inadvertently produced among over 40,000 pages of other documents. The court held that the emails should be returned to the defendant pursuant to FRE 502(b). Rejecting the analysis in *Heriot v. Byrne*, the court applied the three elements of Rule 502(b). First, the court determined that using experienced paralegals to undertake privilege review, but not conducting a “re-review” before production, was not unreasonable. Second, the court found that the producing party had acted promptly in asking for the return of documents upon learning of the inadvertent production. Third, the court found that the email was irrelevant and that the receiving attorney had an ethical obligation to advise the producing party of the disclosure.

Community Bank v. Progressive Cas. Ins. Co., 2010 WL 1435368 (S.D. Ind. Apr. 8, 2010). In this insurance coverage dispute, the plaintiff’s counsel produced privileged documents and the defendant used two of the privileged documents as exhibits in its summary judgment motion and in violation of FRCP 26(b)(5) before the privilege dispute had been resolved. The plaintiff moved for a protective order regarding those documents. The court held that “[w]here, as here, the parties have not previously agreed on how to handle claims of inadvertent production, FRE 502(b) directs the Court to determine whether the party seeking to recover the materials has satisfied all of the Rule’s requirements. Among them, the party must have taken reasonable precautions to prevent disclosure in the first instance.” The court held that the plaintiff did not take reasonable steps under Rule 502(b) because the plaintiff’s counsel had not reviewed the requested documents for privilege before he produced them to the defendant. The court also found that the defendant was well aware that some documents in the production were privileged, as demonstrated by the fact that the privileged documents used by the defendant were originally marked as exhibits in the deposition of the plaintiff’s counsel regarding his production of confidential communications. The court granted in part and denied in part the plaintiff’s motion ruling “[the defendant] is hereby prohibited from relying upon [the plaintiff’s inadvertently produced documents] as substantive evidence in this case. The Court will still permit [the defendant] to use these items for impeachment purposes to promote the truth-seeking function of litigation.” The court also ordered the defendant to pay one-half of the plaintiff’s costs incurred in filing the motion.

Cont’l Group, Inc. v. KW Prop. Mgmt., LLC, 622 F. Supp. 2d 1357 (S.D. Fla. 2009). In an action against a former employee by a condominium management company, the company moved, *inter alia*, for an adverse inference sanction, alleging the employee downloaded proprietary ESI prior to establishing her own competing business. The company requested certain metadata that its forensic expert argued would prove the employee had downloaded the data; however, the data had been destroyed after notice of litigation had already occurred. The court denied the motion for sanctions, citing the employee’s lack of computer knowledge as sufficient excuse to defeat a finding of bad faith necessary to prove spoliation.

Covad Commc’ns. Co. v. Revonet, Inc., 258 F.R.D. 5 (D.D.C. 2009). The plaintiff alleged breach of contract and expropriation of information, and sought production of forensic images of the defendant’s computer databases and email servers. The defendant responded that previous server failures, along with the age of the servers, created too great a risk in implementing the request. Citing FRCP 26(b)(2)(C), the court granted the plaintiff’s request for a forensic image of the computer database, reasoning the imaging was no more burdensome than using a server for everyday business activities and would ultimately benefit both parties. The court held that a parallel search of the defendant’s server for comparison of what was lost in the crash was also appropriate, since the defendant had failed to backup its servers, one of which crashed after the initiation of the case. Citing The Sedona Conference® *Cooperation Proclamation* (2008), the court opined the defendant could have been more cooperative in the initial email search but reserved its decision regarding forensic examination of the servers until after the production of the forensic copy. Subsequently, in **Covad Commc’ns Co. v. Revonet, Inc., 2009 WL 2595257 (D.D.C. Aug. 25, 2009)**, the plaintiff objected to the format of the defendant’s production and its completeness. The court noted that the plaintiff’s objections to completeness had been rendered moot by the previous order for forensic imaging, but required the defendant to answer four specific questions, the answers to which would be considered “certified” under FRCP 26(g)(1). The court also ordered the defendant to resolve discrepancies between its production in native format of all 35,000 emails it had previously produced in hard-copy format. Finally, the court ordered the defendant to reproduce in native electronic format 2,832 documents it had produced in hard copy form, consisting primarily of spreadsheets that the requesting party would have to piece together manually, commenting that “taking an electronic document such as a spreadsheet, printing it, cutting it up, and telling one’s opponent to paste it back together again, when the electronic document can be produced with a keystroke is madness in the world in which we live.” In **Covad Commc’ns. Co. v. Revonet, Inc., 2010 WL 1233501 (D.D.C. Mar. 31, 2010)**, the court was asked to resolve several discovery disputes, one involving the form of production of ESI. The plaintiff moved to compel the production of various types of ESI in native format. The court noted that the defendant’s initial production of 35,000 email messages in hard copy format was “a bit of gamesmanship,” but declined to compel the supplemental production of additional ESI in native format. Citing Principle 12 of The Sedona Principles, the court found that the plaintiff failed to establish that native format production, including metadata, was required by the needs of the case.

Convertino v. United States Dept. of Justice, 2009 WL 4716034, (D.D.C. Dec. 10, 2009). An Assistant United States Attorney alleged that U.S. Department of Justice (USDOJ) had intentionally disclosed information to the press in violation of the Privacy Act. The plaintiff moved to compel the production of a number of documents withheld by USDOJ as privileged. The court found that the documents were protected by the deliberative process privilege and were also protected work product. The court also addressed a separate privilege claim asserted by a former defendant who had retained outside counsel to represent him, and had communicated with his counsel over “his DOJ-provided email address.” Citing FRE 502(b), the court first addressed inadvertence,

holding that the former defendant had not intended for USDOJ to access the email and had deleted the email as these came into his account, not realizing the email remained accessible to USDOJ. The court also found that the former defendant took reasonable steps to prevent disclosure by moving to intervene.

Craig and Landreth v. Mazda Motors, Inc., 2009 WL 2245108 (S.D. Ind. July 28, 2009). In a motion to compel discovery in native format, the defendant contended that it complied with the discovery rules by delivering the documents in PDF format. The court held, citing FRCP 34 and the 2006 Advisory Committee Notes, that the parties should not attempt to make the production more difficult than it need be. To that end, the court noted that the documents must be produced in native format, even if the language of the original request was somewhat ambiguous.

Crispin v. Christian Audigier, Inc., No. 09-09509 (C.D. Cal. May 26, 2010). In this action arising out of an alleged oral contract between the parties, the defendant subpoenaed various social networking Web sites for relevant ESI. The magistrate judge denied the plaintiff's motion to quash. On a review of the magistrate's ruling, the district court distinguished between "remote computing service" and "electronic communications service" (ECS) providers under the Stored Communications Act. The court held that the plaintiff had standing to challenge the subpoenas as it had a "personal right" to the information in issue, and rejected the defendants' argument that civil subpoenas were authorized by the Act. After concluding that the Web sites were ECS providers under the Act, the court determined the information sought by the subpoenas (private messages and postings) was in "electronic storage." Because the Act gave two definitions of that phrase, the court distinguished between email, on the one hand, and postings or comments, the latter being "not protectable as a form of temporary, intermediate storage."

Crown Castle USA, Inc. v. Fred A. Nudd Corp., 2010 WL 1286366 (W.D.N.Y. Mar. 31, 2010). In this action alleging defects in 39 cellular telephone towers owned by the plaintiffs and manufactured by the defendants, the defendants moved for sanctions against the plaintiffs for failing to preserve relevant electronic documents which were ultimately destroyed. Citing *Zubulake IV*, the court ruled that the plaintiffs' duty to preserve evidence arose when several of the plaintiff's executives, including in-house counsel, considered filing a notice of claim with the defendants' insurance carrier months before the lawsuit was actually filed. Although the plaintiffs breached their duty to implement a litigation hold on the emails which were the subject of the motion for sanctions, the court found that the defendants were not "actually or likely prejudiced by the destruction [of them]." However, the court ordered that one of the plaintiffs' former managers (whose emails were destroyed) be re-deposed with respect to his subordinate's emails because the communications contained in his subordinate's still-existing emails could potentially support the defendants' defense. The court held that if the former manager's deposition testimony revealed the likelihood that emails supporting the defendants' defense were not preserved, the court would allow the defendants to renew their request for an adverse inference sanction.

Dahl v. Bain Capital Partners LLC, 2009 WL 1748526 (D. Mass. June 22, 2009). In this antitrust and securities class action, the requesting party sought a motion for entry of order governing discovery format. The court addressed cost shifting, document production, and metadata requests. First, citing FRCP 26(b)(2)(B), the court held that there were no exceptional circumstances warranting cost-shifting. Second, citing FRCP 34, the court held that the shareholders needed to put the converted documents onto a DVD to make them usable. Third, citing Rule 34, the court denied the requesting party's demand for all of the defendant's metadata, suggesting that the requesting party tailor the motion to more specific discovery. Finally, the court held that the spreadsheets and privilege logs should be produced in native format since that was how they were kept in the ordinary course of business.

Dawe v. Corrections USA, 2009 WL 3233883 (E.D. Cal. Oct. 1, 2009). In this civil rights action, the court found that a broad certification by the defendants that they had conducted a diligent search for responsive documents was adequate, as the requests the defendants responded to were themselves broad. The court also denied a motion to compel the defendants to preserve recordings of meetings, concluding that the motion was premised on hearsay and that the issue was not "squarely presented" on the record before it. The court also abrogated an agreement between the parties *not* to create privilege logs and allowed the defendants to inspect the content (including metadata) of a laptop in the possession of an individual codefendant, relying on FRCP 26(b)(1), 34(a)(1)(A), and 34(b)(2)(E), citing allegations that the codefendant had not produced all responsive information, as well as "the level of contention and distrust that permeates this litigation, and ... [the codefendant's] adamant refusal to permit even a limited inspection." Referencing the need to balance burden, expense and intrusiveness, the court preliminarily allocated the inspection costs to the defendants. Finally, turning to email strings as to which privilege was asserted, the court held that strings can be characterized by the most recent email transmission and that separate itemization was not required.

DeBakker v. Hanger Prosthetics & Orthotic East, Inc., 2009 WL 5031319 (E.D. Tenn. Dec. 14, 2009). In this personal injury action arising out of allegedly defective leg braces, the plaintiff sought sanctions based on the defendants' inability to produce records, other than sign-in sheets, of her visits to a facility. Denying the motion, the court found that only one defendant had "control" over the records and that a duty to preserve arose only on the service of summonses. Although that defendant did have a records retention policy and apparently violated it, the court noted that "the mere existence of a document retention policy does not give rise to a duty to preserve every document generated under that policy."

Dilley v. Metropolitan Life Ins. Co., 256 F.R.D. 643 (N.D. Cal. 2009). In this action brought by a long-term disability plan participant challenging the plan administrator's denial of her claim, the defendant sought relief from any further obligation to answer an interrogatory regarding all claims denied over a two-year period. Citing FRCP 26(b)(2)(B), 26(b)(2)(C), 26(c)(1)(A) and 26(c)(1)(D), the court granted the relief, finding that the defendant had already supplied substantial information, that the additional statistical information sought by the plaintiff could not be extracted from the

defendant's database without substantial difficulty and expense—if at all—and that the additional information was not relevant.

Diocese of Harrisburg v. Summix Dev. Co., 2010 WL 2034699 (M.D. Pa. May 18, 2010). In this construction dispute, the defendants alleged the plaintiff failed to preserve back-up tapes relevant to the litigation and moved for sanctions. The court found the plaintiff breached its duty to preserve emails for over 14 months, including eight months after filing its complaint. The court issued an adverse inference jury instruction that it was permitted “to infer, but not required to infer, that the back-up tapes might have contained evidence that is unfavorable to the Diocese of Harrisburg’s position in [the] case. [The jury] may make this inference if [it] find[s] that the information contained on the back-up tapes (including emails) would have been relevant in deciding the disputed facts in [the] case. In deciding whether to make this inference, [the jury] may also consider whether the e-mails would have merely duplicated other evidence already before [the jury]. Any inference [the jury] decide[s] to draw should be based on all the facts and circumstances of [the] case.”

Dolan-Heitlinger v. National Credit Union Admin., 2010 WL 989236 (S.D. Fla. Mar. 16, 2010). This employment dispute began in State court but was removed after a conservator was appointed for the original defendant. The defendant’s expert estimated that the costs to retrieve and review 30,000 potentially responsive documents would be approximately \$80,000-90,000. The conservator resisted production of ESI and preparation of a privilege log until the issue of costs was resolved, as provided by a State court order. The federal court ordered the conservator to respond to discovery requests and produce a log and to assert specific burdensomeness objections.

D’Onofrio v. SFX Sports Group, Inc., 256 F.R.D. 277 (D.D.C. 2009). In this employment termination and gender discrimination suit, which has generated several court opinions, the defendant offered to disclose certain privileged documents for the attorney’s eyes only and allow the plaintiff to take a statistical sample of the 9,400-entry privilege log to test for accuracy. The court held that the plaintiff’s attorney must keep certain documents from its client because the client may be in competition with the defendant in the future and a person cannot “unring the bell” once he or she learns something. Moreover, the court held that the documents surveyed should not extend beyond six months after the date of the plaintiff’s firing because later documents were not likely to be relevant. Subsequently, in **D’Onofrio v. SFX Sports Group, Inc., 2009 WL 859293 (D.D.C. Aug. 17, 2009)**, the defendant claimed that documents on the privilege log were withheld as “privileged/proprietary information.” The court rejected this hybrid designation as grounds to withhold relevant documents, noting that there was a protective order in place and that it would review individual documents alleged to be confidential. After conducting an *in camera* review of the remaining logged documents, the court concluded that many of the documents were irrelevant. The court directed the parties to use “cooperation and intelligence” to limit the scope of production and to avoid useless exchanges between counsel. Continuing the saga of this litigation in **D’Onofrio v. SFX Sports Group, Inc., No. 06-687 (D.D.C. Aug. 24, 2010)**, Magistrate Judge Facciola addressed the plaintiff’s motion for dispositive spoliation sanctions. Before doing so,

however, the court addressed the contentious history of discovery between the parties and the court's prior decisions. The court also distinguished between "punitive or penal" as opposed to "issue-related" sanctions and discussed various sanctions available under its inherent power. The court found that a letter sent by plaintiff's counsel triggered a duty to preserve. The court also confirmed that the defendants had breached that duty (for example, by discarding the plaintiff's computer), although some ESI had been recovered. Absent clear and convincing evidence that the defendants had acted with a purposeful intent to destroy evidence, the court rejected case-dispositive sanctions. The court also declined to award attorneys' fees under its inherent power: Undertaking a proportionality analysis, the court determined that the costs to the defendants in attempting to recover ESI far outweighed any harm done to the plaintiff. Turning to issue-related sanctions, the court declined to order an adverse inference instruction as the plaintiff had failed to prove wrongful intent by clear and convincing evidence. However, the court held that a preclusion remedy might be appropriate and ordered an evidentiary hearing to consider, among other things, whether any lost ESI was relevant. The court also ordered counsel to meet and confer before any hearing. (Note that this decision is, in part, a Report and Recommendation to the district judge).

Eden Isle Marina, Inc. v. United States, 89 Fed. Cl. 480 (2009). The plaintiff assumed an existing lease from the United States Army Corps of Engineers to operate a marina on a lake in Arkansas with the expectation of building additional boat slips on the undeveloped portion of the leasehold, as permitted by the lease. When the Corps of Engineers served the plaintiff with a cease-and-desist letter, the plaintiff sued the United States (the "Government") claiming breach of contract and eminent domain. The plaintiff moved to compel, among other things, emails the Government asserted were privileged communications. First, the court held that the Government's entire string of two emails containing summaries of a discussion during a conference call and forwarded to other Corps of Engineers employees, including the Corps's attorney, was protected by the work-product doctrine because they were prepared by a Corps employee in anticipation of litigation. The court further held that the first email string was not protected by the attorney-client privilege because it merely reported the substance of the conference call and did not seek legal advice and the second email string did not include an attorney as the author or recipient. Second, the court held that certain emails between attorneys representing the Corps of Engineers could not be withheld under the work-product doctrine because the Government had already disclosed the emails on several occasions, including a response to a Freedom of Information Act request and during an environmental investigation.

Edelen v. Campbell Soup Co., 2009 WL 4798117 (N.D. Ga. Dec. 8, 2009). The plaintiff in this employment discrimination action objected to a discovery order by the magistrate judge. The order sanctioned the plaintiff's attorney for failure to comply with two orders to narrow the plaintiff's requests for electronic discovery and barred the plaintiff from taking depositions unless the plaintiff narrowed the requests. The magistrate also established a procedure to challenge privilege assertions. The district judge affirmed the rulings stating, among other things, that "[t]he blanket request of the complete contents of the laptops of numerous company executives is not a request geared

to lead toward the discovery of admissible evidence ... and is on its face overbroad.” In a subsequent decision, **Edelen v. Campbell Soup Company, 2010 WL 774186 (N.D. Ga. Mar. 2, 2010)**, the magistrate judge ordered the plaintiff to return four pages of documents that the defendants had inadvertently produced. Applying FRE 502(b) and FRCP 26(b)(2), the court found that the pages were privileged on their face, the total production consisted of over 2,000 pages, the defendants had used a three-level review process, and the defendants immediately sought the return of the inadvertently produced documents. In another discovery matter, the plaintiff had proposed over 50 search terms, 55 custodians, and a three-year period as well as unlimited searches of email for five custodians over a three-month period. The defendants asserted that these would yield 474,456 pages for one year alone. The magistrate judge had narrowed the defendants’ obligation to provide discovery of ESI by search terms, number of custodians, and time period. The district court affirmed.

EEOC v. Simply Storage Mgmt., LLC, No. 09-01223 (S.D. Ind. May 11, 2010). In this action brought by the EEOC on behalf of two alleged victims of sexual harassment by a supervisor, the defendant employer sought to compel the claimants to produce their postings on Facebook and MySpace (referred to by the court as “internet social networking site (SNS) profiles”) on the grounds that the information was relevant to damages. Citing to FRCP 26(b)(1), the court observed: “the main challenge ... is not one unique to electronically stored information generally or to social networking sites in particular. Rather, the challenge is to define appropriately broad limits—but limits nevertheless—on the discoverability of social communications in light of a subject as amorphous as emotional and mental health, and to do so in a way that provides meaningful direction to the parties.” The court noted that any privacy or confidentiality concerns would be addressed by a protective order. The court observed that *relevant* content was discoverable but that it would be premature for the court to address the adequacy of the EEOC’s discovery responses (and perhaps conduct an *in camera* review) *before* those were made. The court then limited the scope of discovery to a specific time period and to ESI that went to emotion, feeling, or mental state. The information was to include third-party communications to the claimants and visual depictions. The court directed the EEOC to “err in favor of production,” encouraged the parties to cooperate, and left open any challenges to admissibility or return of information at a later date.

E.I. DuPont De Nemours & Co. v. Kolon Indus., Inc., 2010 WL 2105155 (E.D. Va. Apr. 13, 2010). In this action asserting misappropriation of trade secrets, conspiracy, and other business torts, the plaintiff shared confidential information with government investigators. The defendant moved to compel production of the emails containing these communications. The court held that despite the plaintiff’s failure to include a disclaimer in its emails that the information was intended to remain privileged, the plaintiff had a reasonable expectation that information would remain confidential and was therefore not subject to discovery.

In re Fannie Mae Sec. Litig., 552 F.3d 814 (D.C. Cir. 2009). In this appeal taken by the Office of Federal Housing Enterprise Oversight (OFHEO) from a contempt order entered against it for failing to comply with a discovery deadline, the Circuit Court of

Appeals affirmed the contempt order, holding that the District Court had not abused its discretion. Subpoenas had been issued to the OFHEO, a non-party, in civil litigation seeking “records it collected in performing its oversight functions and preparing its investigative report” of Fannie Mae. Following the entry of an order to compel production, a FRCP 30(b)(6) deposition, and a contempt motion arising out of the OFHEO’s failure to produce the requested ESI, the OFHEO entered into an agreement with the subpoenaing parties leading to the designation of over 400 search terms resulting in the identification of 660,000 documents. After further judicial intervention, the OFHEO hired 50 contract attorneys and expended over nine percent of its annual budget in an attempt to comply with the production schedule, but could not do so. The District Court concluded that the OFHEO’s efforts were “not only legally insufficient, but too little too late,” held the OFHEO in contempt, and ordered production without waiver of privilege of all documents not logged by the production deadline. Holding the OFHEO to the stipulated agreement, the Court of Appeals noted that the OFHEO could have refused to enter into the agreement, contested the discovery motions, or defied the adverse ruling, thus preserving its rights under FRCP 45.

Felman Production, Inc. v. Industrial Risk Insurers, No. 09-00481 (S.D. W. Va. Aug. 19, 2010). Here, the court found that individuals affiliated with a Ukrainian entity exercised direct control over the plaintiff’s operations such that they were “custodians” of documents and ESI within the “control” of the plaintiff under Rule 34(a). The court ordered production from these custodians and rejected, among other things, the argument would production would be unduly burdensome.

Fells v. Virginia Dep’t of Transp., 2009 WL 866178 (E.D. Va. Mar. 25, 2009). In this racial discrimination suit, the defendant was awarded summary judgment and costs as the prevailing party. The defendant claimed that the cost of creating electronically searchable documents, including “electronic records initial processing, metadata extraction, and file conversion,” should be included as “costs” under 28 U.S.C. § 1920. However, the court held that it may not award costs for scanning documents, because scanning was not specifically claimed. The court reasoned that taxable costs under Section 1920 did not include processing records, extracting data, and converting files, which served to create searchable documents, rather than scanning and reproducing paper documents in electronic form.

Fendi Adele S.R.L. v. Filene’s Basement, Inc., 2009 U.S. Dist. LEXIS 32615 (S.D.N.Y. Mar. 24, 2009). In this trademark infringement case for counterfeit bags, the plaintiff filed a motion seeking sanctions against the defendant for multiple alleged discovery omissions. Citing FRCP 26(g)(1) and 37(b), the court concluded that defendants repeated and extended discovery failures in locating and producing all of the responsive documents warranted monetary sanctions. The court reasoned that a company of this size and sophistication should be able to maintain and produce more than the sixty documents. However, the court denied plaintiff’s motion to shift plaintiff’s cost of obtaining and reviewing the company’s backup tapes because the plaintiff failed to make its request for an electronic discovery search clear.

Ferron v. Echostar Satellite, LLC, 2009 WL 2370623 (S.D. Ohio July 30, 2009). In this action for violation of a state consumer protection law, the plaintiff sought sanctions against the defendant and its attorneys for failing to preserve web links and graphic images on email. The court denied the motion, finding that hard copies of much of the email had been preserved. The court reasoned that the plaintiff's speculation that "invisible 'electronic information'" had not been preserved was insufficient for the imposition of sanctions, and the plaintiff had failed to demonstrate that any defendant acted in bad faith.

Pharmacy Records v. Nassar, 2010 WL 2294538 (6th Cir. June 7, 2010). The plaintiff filed a copyright infringement action and the discovery process had been, as the Sixth Circuit noted, "acrimonious, to say the least." The district court dismissed the complaint under its inherent power for various discovery abuses by the plaintiff and its attorneys. Affirming the dismissal, the Sixth Circuit cited four factors that would guide its review: (1) bad faith on the part of the sanctioned party, (2) prejudice to the moving party, (3) failure on the part of the sanctioned party to heed court warnings, and (4) the lack of a less drastic sanction. The Sixth Circuit held that the district court applied the correct standards and reached an appropriate conclusion. The district court found, among other things, that the plaintiff and its attorneys: (1) failed to produce an original disc recording central to its case, (2) produced a blank "zip disc" that was established to have been intentionally erased, and (3) produced a computer containing a file dated 2001, but which was later established to have been created on a computer not manufactured until 2003 and backdated. The district court also found the defendants had been prejudiced, as the loss or destruction made it impossible for the action to proceed. Although the district court did not to provide the plaintiff with a warning, the Sixth Circuit held that such a warning was unnecessary, quoting the district court: "A party does not need formal notice to know that spoliation of evidence and misrepresentations may lead to dismissal."

Ford Motor Co. v. Edgewood Props., Inc., 2009 WL 1416223 (D.N.J. May 19, 2009). Edgewood Properties ("Edgewood") sought an order compelling production of all Ford Motor Company's ("Ford") ESI in native format, as opposed to TIFF format, Ford's preferred method. Additionally, Edgewood sought to "confirm the adequacy of Ford's manual document collection process" by employing a third party to perform key word searches on documents outside of the existing ESI. Citing *Aguilar v. Immigration and Customs Enforc. Div. of U.S. Dep't of Homeland Sec.*, 255 F.R.D. 350, 368 (S.D.N.Y. 2008), the court held that Edgewood's request for the entire reproduction of Ford's ESI in native format was unreasonable since the application came eight months after the initial production of discovery. The court also held that Edgewood was not entitled to its request for an additional search since it failed to make a colorable showing that Ford had purposefully or negligently withheld documents.

Ford Motor Co. v. U.S., 2009 U.S. Dist. LEXIS 62318 (E.D. Mich. July 21, 2009). In this motion to compel discovery relating to the overpayment of almost a half billion dollars in taxes over a ten-year period, the plaintiffs contended that the government failed to produce all of the requested discovery or a privilege log. The court held that the government needed to certify that all its disclosures were complete and produce all

relevant non-privileged documents that are reasonably accessible. The court also held that the government must make a privilege log that contains information relating to the emails that were not being disclosed.

Forest Labs, Inc. v. Caraco Pharm. Labs., Ltd., 2009 WL 998402 (E.D. Mich. Apr. 14, 2009). The defendants moved for spoliation sanctions against the plaintiffs for destroying backup tapes. The plaintiffs argued that the trigger date initiating the company’s litigation hold did not arise until 2003, rather than the mid-1990s, as the defendants alleged, and the backup tapes made after 2003 were inaccessible. The court noted that the litigation hold should have started in 2003, because the defendants did not offer any evidence that the plaintiffs were reasonably aware of litigation before that date. The court then held that backup tapes made after 2003 were inaccessible, finding that “defendants [did] not even argue that the backup tapes were used for primary storage or some purpose other than disaster recovery. Therefore, [p]laintiffs’ evidence [that the tapes were inaccessible] stood un rebutted.” However, citing *Zubulake*, the court held that it must hold further hearings to determine if any of the *Zubulake* exceptions apply, which involves determining “what documents were stored on the backup tapes,” the identity of who wrote documents contained on the backup tapes, and if those documents were otherwise available.

FSP Stallion 1, LLC v. Luce, 2009 WL 2177107 (D. Nev. July 21, 2009). The plaintiffs moved to obtain the metadata associated with nine years of historical accounting records and emails relating to the operation of a golf course. The defendants argued that they should not be required to produce all documents in native format unless there is a specific need for such documents. The court agreed in part, but held that the accounting records from the past four years were relevant to the pending dispute and not unduly burdensome to produce, so those documents and the accompanying metadata should be produced.

G2 Productions, LLC v. John Does 1-83, 2010 WL 253336 (D.D.C. Jan. 21, 2010). In this copyright infringement action, the Court found good cause for limited discovery prior to a FRCP 26(f) meet and confer to enable the plaintiff to learn the true names of the defendants. The plaintiff had learned the IP addresses associated with the fictitious defendants as well as the identities of their Internet Service Providers. The court allowed subpoenas to issue to the ISPs, but directed that any information be used “solely” for the purpose of the action. The court also directed any subpoenaed ISP to give notice of the subpoena and to preserve any subpoenaed information pending a timely motion to quash.

Gamby v. First Nat’l Bank of Omaha, 2009 U.S. Dist. LEXIS 7687 (E.D. Mich. Jan. 20, 2009). In this action arising under the Fair Credit Reporting Act, the plaintiff requested production of business operating manuals describing the defendant’s credit policies and procedures. The defendant produced only 10 pages of material, stating that hard copies of the manuals for the relevant time periods no longer existed and that electronic versions had been routinely updated and overwritten. The plaintiff then subpoenaed the defendant’s outside auditor, who acknowledged that it had access to the manuals, but refused to produce them because they were on a “shared server of sorts.” Two years after the plaintiff’s original request, the defendant finally produced an electronic version of the manual after a “screen by screen and folder by folder” review of

documents on the shared drive. Defense counsel admitted to the court that he repeatedly misinformed opposing counsel and the court about the availability of the document and was not personally familiar with his client's information systems. The court found that the defendant had engaged in "monumental incompetence, inexcusable neglect, or purposeful evasion," and recommended default judgment for the plaintiff as to liability and attorneys' fees.

Genworth Financial Wealth Mgmt. v. McMullan, 267 F.R.D. 443 (D. Conn. 2010). The plaintiff, an investment firm, sued former employees alleging that the defendants downloaded the firm's proprietary information and trade secrets in order to solicit clients for their newly established competing business. The plaintiff moved to compel the defendants to submit their computers and other electronic media devices for examination by a court-appointed forensic expert. The plaintiff also moved for a court order for the preservation and production of ESI and for reasonable attorneys' fees and costs. The court granted the plaintiff's motion, finding that the defendants served incomplete discovery responses on the plaintiff, unreasonably refused the plaintiff access to potentially relevant ESI, and possibly spoliated evidence. Because such conduct "necessitated the retention of an expert," the court apportioned 80 percent of the forensic expert costs to the defendants and 20 percent to be paid by the plaintiff.

Gerber v. Down East Cmty. Hosp., 2010 WL 893629 (D. Me. Mar. 12, 2010). At issue in discovery was the scope of work-product protection afforded email between the plaintiffs, their attorneys, and potential witnesses, and how the emails should be disclosed on a privilege log. The court ordered that the privilege log be supplemented to identify whether the listed documents were generated by the plaintiffs themselves, or consisted of their emails with potential witnesses, and to disclose the communications categorically. The court held that work-product protection extended to email communications between the attorneys and witnesses regardless of whether these appeared in an email string or were retained by the witness. The court also found that the defendant had not demonstrated a need for the work-product warranting production. Finally, the court held that there was no obligation under the Federal Rules of Civil Procedure to disclose the names of potential witnesses on the privilege log.

G.K. Las Vegas LTD P'ship v. Simon Property Group, 671 F. Supp. 2d 1203 (D. Nev. 2009). A computer forensics expert was appointed by the court after the defendants learned that ESI might have been "lost" by the plaintiffs. After the appointment, one of the defendants communicated with the expert on the merits. The court, rejecting the defendant's interpretation that the expert was not court-appointed but, instead, was a "party-retained independent expert," found that it could no longer rely on an independent analysis by the expert, disqualified it, and barred the defendant from undertaking an independent forensic examination. The court also denied with prejudice the defendants' motion for spoliation sanctions as the forensic examination had been terminated and the defendants could not prove loss of any ESI.

Global Ampersand, LLC v. Crown Engineering and Constr., Inc., 2009 WL 2982901 (E.D. Cal. Sept. 14, 2009). In this construction dispute, the court found that the defendant failed to comply with discovery requests until after the plaintiff filed a motion to compel. Finding no substantial justification for the defendant's conduct, the court granted the motion to compel and awarded monetary sanctions under FRCP 37(a)(5) and 37(d). It deferred the plaintiff's request for terminating sanctions for spoliation and other discovery abuses until trial before the presiding district judge.

Green v. Beer, 2010 WL 3422723 (S.D.N.Y. Aug. 24, 2010). This was an appeal from the rulings of a magistrate judge. Applying the substantive law of New York, the court held that the defendants had waived the attorney-client privilege by sharing documents with third-persons whose involvement was not needed to secure legal advice. However, the court held that email sent to the defendants by their attorney through the defendants' son was protected: The communications were intended to be confidential and the presence of the son as his parents' agent was necessary as the defendants were not computer literate.

Grey v. Kirkland & Ellis, LLP, 2010 WL 3526478 (N.D. Ill. Sept. 2, 2010). After she was fired from her legal secretary job at a large law firm, the plaintiff sued the firm for wrongful termination, violation of the Electronic Communications Privacy Act ("ECPA") and violation of the Illinois Eavesdropping Act ("IEA"). When the firm warned the plaintiff repeatedly that her excessive amount of personal phone calls from the firm's landline could result in her termination, she began using her cell phone for personal calls during work hours. When the plaintiff was eventually terminated for insubordination, she sued under the ECPA and IEA, alleging the firm engaged in the "systematic interception and surveillance of [her] private telephone conversations." In support of her complaint, the plaintiff alleged that numerous personal phone calls made from her personal cell phone—after being warned of potential termination—appeared on the firm's landline phone bills. When the firm moved for summary judgment, the plaintiff argued that there were, in fact, genuine issues of material fact to be tried, namely that the firm destroyed a computer server that stored electronic records of phone calls made from the firm during the alleged surveillance period. The firm contended that it did not destroy the server, but rather "migrated" the information contained on it—including all relevant call records—to a new server. In addition, the firm argued that the plaintiff lost the cell phone used during the alleged surveillance period and as a result, it was unavailable for inspection by the firm's forensic expert. The court ruled that the plaintiff did not establish that the firm's actions were motivated by "a desire to conceal unfavorable evidence from the court," noting that there were "many reasons why a large law firm might move its digital information and dispense with an old computer server." For this reason, the court declined to infer that the absence of the firm's ESI would have been favorable to the plaintiff's claims and granted the firm summary judgment on the ECPA and IEA claims.

In re Global Technovations, Inc., 2010 WL 2671706 (Bankr. E.D. Mich. July 2, 2010). In this adversary proceeding, the defendant alleged the plaintiff spoliated relevant ESI and moved for sanctions. The court applied *Zubulake v. UBS Warburg, LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004) and *Pension Committee of the Univ. of Montreal Pension*

Plan v. Banc of America Securities, 685 F. Supp. 2d 456 (S.D.N.Y. 2010) in reaching its decision regarding the defendant’s spoliation claims. First, the defendant did not show that the plaintiff acted with a “culpable state of mind” in destroying, losing, or failing to preserve ESI. In addition, there was no evidence of negligence, gross negligence, or bad faith by the plaintiff. The court ruled the evidence showed the plaintiff’s computer system may have been tampered with by someone with access to the company’s virtual private network. Finding that the defendant failed to prove it was prejudiced by the loss or destruction of the ESI, the court held that neither monetary sanctions nor a terminating sanction were appropriate remedies.

Goodman v. Praxair Serv., Inc., 2009 WL 1955805 (D. Md. July 7, 2009). In this *pro se* action brought to recover a “success fee,” the court addressed a number of discovery issues. First, the court held that spoliation motions should normally be brought “as soon as reasonably possible after discovery of the facts that underlie the motion” and before the close of discovery. Next, distinguishing the facts before it from those in *Cache La Poudre Feeds, LLC v. Land O’Lakes, Inc.*, 244 F.R.D. 614 (D. Colo. 2007), the court found that a letter from the plaintiff stating that he would be “forced to litigate” triggered the duty to preserve. Then, analogizing this case to the concept of “control” in FRCP 34(a), the court found that a defendant had insufficient authority over two nonparty consultants to ensure that they preserved relevant information, although employees of the defendant had failed to preserve the same information. The court then concluded that one of the employees had intentionally destroyed evidence that she knew to be relevant. As a result, the court held that an adverse inference instruction was warranted against her employer by operation of agency law. The court also awarded costs, but not fees, to the *pro se* plaintiff.

Gordainer v. Montezuma Water Co., 2010 WL 935665 (D. Colo. Mar. 3, 2010). In this employment action, the magistrate judge denied the plaintiff’s motion to amend a scheduling order to allow her to discover ESI from her former supervisor’s computer. The magistrate judge found the plaintiff had not demonstrated “good cause” for an amendment, as the plaintiff was aware that ESI might exist and her former counsel had agreed that no electronic discovery would be needed. On appeal, the district judge affirmed. The court rejected the arguments that the attorney’s conduct constituted “excusable neglect” and that the alleged crucial nature of the ESI were sufficient to show good cause.

Graves v. Doe, 2010 U.S. Dist. LEXIS 41376 (D. Utah Apr. 27, 2010). The plaintiffs alleged that two unknown defendants accessed and reviewed private emails between the plaintiffs and then distributed the communications to third parties in violation of state and federal laws. The plaintiffs also contend that the defendants libeled the plaintiffs in other emails. The plaintiffs moved for leave to conduct limited discovery in order to properly identify and serve the defendants. Citing *Qwest Communications Int’l, Inc., v. WorldQwest*, 213 F.R.D. 418, 419 (D. Colo. 2003), the court held that good cause exists “in cases where physical evidence may be consumed or destroyed with the passage of time, thereby disadvantaging one or more parties to the litigation” and that good cause existed because the relevant electronic evidence in the possession of third parties may be

altered, erased, or destroyed.” The court accordingly granted the plaintiffs’ motion and permitted immediate discovery on Yahoo!, Inc., Microsoft Corporation, and others associated with the Internet Protocol (“IP”) addresses produced by Yahoo and Microsoft, to obtain the identity of the defendants by serving FRCP 45 subpoenas seeking documents and ESI that identified the defendants.

Green v. Fluor Corp., 2009 WL 1668376 (M.D. La. June 11, 2009). After reviewing a camera phone photograph obtained through discovery, the requesting party sought access to the producing party’s entire phone and email account, arguing the original photograph was of poor quality. The court denied the motion, citing the requesting party’s failure to initially exert its right under FRCP 34(b)(1)(C) to request the particular form of production, thus leaving the decision to the other party. And while the requesting party contended the image was of poor quality, the court noted that it did not attach a copy of the photograph to its motion for review. The court held that under Rule 34(b)(2)(E)(iii) a party is not obligated to produce the same ESI in more than one form.

Green v. McClendon, 2009 WL 2496275 (S.D.N.Y. Aug. 13, 2009). In this breach of contract case stemming from the sale of a painting, the plaintiff moved for sanctions against both the defendant and its counsel, alleging that for the defendant produced documents in an untimely manner after certifying the production was complete and failed to implement and supervise a litigation hold, in particular allowing for the loss of destruction of a relevant electronic spreadsheet. The court denied the plaintiff’s request for an adverse inference, finding that the information could be obtained from a CD that was already produced. However, the court found that awarding attorneys’ fees and the cost of a deposition were appropriate remedies because “[a]uthorizing further discovery concerning the spreadsheet and other electronically-stored documents will allow the plaintiff the chance to determine whether it is in fact missing relevant evidence.” The court then gave “the defendant and her attorney the opportunity to either agree on an appropriate allocation [of fees and costs] or present this issue to [the court] for determination.”

Grider v. Keystone Health Plan Cent., 2007 U.S. Dist. LEXIS 73066 (E.D. Pa. Sept. 28, 2007). In a class action suit against a managed health care plan, the plaintiffs moved for sanctions against the defendant, claiming three years of discovery obstruction and last-minute production of paper and ESI that the defendants had previously claimed did not exist. The court imposed monetary sanctions totally \$5 million on both the defendants and their counsel. On appeal, **Grider v. Keystone Health Plan Cent., Inc., 580 F.3d 119 (3d Cir. 2009)**, the court left undisturbed the district court judge’s findings of fact, including his negative findings on the credibility of attorneys involved. However, it vacated the sanction award because the district court failed to make any finding that the parties or attorneys acted without “substantial justification” under FRCP 26(g)(3) or 37(c)(1). The court of appeals also held that Rule 37(c)(1) sanctions could be imposed only on the parties and that the district judge erred in sanctioning attorneys under 28 U.S.C. § 1927, absent findings of individualized wrongful conduct.

Grochocinski v. Schlossberg, 2009 U.S. Dist. LEXIS 19523 (N.D. Ill. Mar. 11, 2009). In this adversary proceeding brought by a Chapter 7 trustee and arising out of fraudulent transfers of realty, the defendant received a preservation demand from the trustee while a motion to allow access to the defendant's computer system was pending. The defendant then installed a disk cleaning system, destroyed over 16,000 files by overwriting ESI, and installed a program to verify the integrity of the destruction. The bankruptcy court entered default judgment and sanctions against the defendant. On appeal, the district court affirmed, concluding that the circumstances demonstrated at least reckless disregard of the defendant's preservation obligations sufficient to establish bad faith.

Grubb v. Board of Trustees of the Univ. of Illinois, 2010 WL 3075517 (N.D. Ill. Aug. 4, 2010). The plaintiff, a clinical professor of dentistry, was placed on administrative duties by the defendant university and subsequently brought suit against the defendant under the Computer Fraud and Abuse Act ("CFAA"). The plaintiff alleged that just prior to being placed on administrative duties, the defendant's IT department erased sensitive and confidential information from the plaintiff's laptop while removing university software. The laptop, in fact, was not owned by the plaintiff or defendant but by the American Board of Orthodontics ("ABO") which had loaned it to the plaintiff in connection with his academic work. After the defendant's IT department allegedly deleted the plaintiff's confidential files, the ABO advised the plaintiff to stop using the laptop. The ABO gave the plaintiff a new laptop, copied the hard drive from the old laptop onto the new computer, and wiped the hard drive of the old laptop. The defendant moved for spoliation sanctions and argued that the plaintiff "[had] rendered it impossible for the defendant to prove the content or condition of the laptop computer on the date of Defendant's access; what was accessed by Defendant; and whether any data or information ... was impaired by Defendant's access." The court ruled that the defendant was not entitled to sanctions because (1) there was insufficient evidence that the plaintiff had control over the laptop when it was wiped by the ABO; (2) the circumstances associated with handing over the old laptop to the ABO did not support an inference of bad faith; (3) there was no evidence that the plaintiff knew or suspected that the ABO would wipe the laptop; (4) there was no evidence that there was relevant data on the laptop when it was wiped; and (5) as evidence that there was no relevant data on the laptop, the plaintiff was advised to stop using it.

Gucci Am. v. Curveal Fashion, 2010 WL 808639 (S.D.N.Y. Mar. 8, 2010). In this trademark infringement action, the plaintiffs sought to compel compliance with a subpoena served on the New York agent of a foreign corporation doing business in New York. The corporation had a subsidiary in Malaysia, and the subpoena sought production of banking records of the defendants maintained by that subsidiary. The court enforced the subpoena. It found, among other things, that the parent corporation had "control" over the Malaysian subsidiary, that Malaysia's interest in protecting privacy rights was not superior to that of the United States in enforcing a judgment against the defendants, and that there was no likelihood of prosecution in Malaysia.

Harkabi v. Sandisk Corp., No. 08-08203 (S.D.N.Y. Aug. 23, 2010). At issue in this breach of contract action were “the perils of failing to strike the proper balance” between the thoroughness and cost of locating ESI. The plaintiffs had developed software for flash drive technology. After the defendant purchased the plaintiffs’ business and the plaintiffs went to work for the defendant, a dispute arose concerning the use of that technology and the defendant’s obligation to pay escrow funds to the plaintiffs, who were then fired. The defendant had issued laptops to the plaintiffs during their employment and the plaintiffs’ attorney sent a preservation demand, as a result of which litigation hold notices were issued and the laptops preserved for a year. Thereafter, the laptop hard drives were imaged, the laptop ESI supposedly saved to servers, and the laptops recycled. After the defendant produced “everything” in native format, it was discovered that email from the plaintiffs’ files was missing and that the images of the laptops could not be located. Eventually, the defendant admitted that the laptop hard drives had not been saved and that the plaintiffs’ email had not been preserved. The defendant searched its backup tapes and located the missing email, but only after there had been significant delay and expense to the plaintiffs. In ruling on the plaintiffs’ motion for severe sanctions, the court applied the three-part test set forth in *Residential Funding Corp. v. DeGeorge Fin. Corp.* The court found that the defendant had control over the ESI and an obligation to preserve it. The court then found that the defendant had been negligent. Finally, the court found that the missing ESI was relevant. However, the court denied a terminating sanction as the defendant had not acted intentionally in failing to preserve the hard drives; instead, the court announced that it would issue an appropriate adverse inference instruction. As to the email, the court found that any prejudice to the plaintiffs had been “contained,” as the email would be available for depositions and trial. Moreover, that the plaintiffs had done forensics work themselves rather than retain an outside vendor. The court stated that “commercial litigation [should] make[] economic sense,” that “electronic discovery in this case has already put this principle in jeopardy,” and awarded \$150,000 in attorneys’ fees and expenses to the plaintiffs. “If either side believes it necessary to litigate the precise dollar amount . . . , then this Court will entertain further submissions.”

In re Hecker, 2010 WL 654151 (Bankr. D. Minn. Feb. 23, 2010). In this adversary proceeding, the court entered a default judgment against the defendant debtor under FRCP 37(b) for willful failure to comply with an order compelling discovery. The defendant asserted he could not respond to discovery requests because the government had taken his records; however, the government only made forensic images and left the defendant’s computers and servers in his possession. The defendant finally produced an external hard drive with approximately 1.1 million files and folders containing scrambled ESI. With only a month before the scheduled trial, the plaintiff was unable to identify the author, recipient, or date of any of the emails contained on the hard drive. In imposing the terminating sanction, the court found that the plaintiff had been prejudiced and that the behavior of the defendant and his counsel was a “blatant disregard of the court’s orders and the discovery rules.”

Helmert v. Butterball, LLC, 2010 WL 2179180 (E.D. Ark. May 27, 2010). In this action alleging violations of the Fair Labor Standards Act, the plaintiffs filed a motion to compel pursuant to FRCP 37(a) in which they asserted the defendant’s response to their

requests for production of documents was inadequate because the defendant refused to conduct a meaningful search of its ESI. The defendant proposed splitting the cost of the electronic discovery. Citing *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003), the court ruled that a court should consider cost-shifting only when electronic data is relatively inaccessible, such as in backup tapes: “[t]he presumption is that the responding party must bear the expense of complying with discovery requests, but he may invoke the district court's discretion ... to grant orders protecting him from undue burden or expense. . .[i]n such cases, the court should consider: (1) the extent to which the request is specifically tailored to discover relevant information; (2) the availability of such information from other sources; (3) the total cost of production, compared to the amount in controversy; (4) the total cost of production, compared to the resources available to each party; (5) the relative ability of each party to control costs and its incentive to do so; (6) the importance of the issues at stake; and (7) the relative benefits to the parties of obtaining the information. . .[c]ourts should not consider cost shifting when ESI is kept in an accessible format.” The court granted the plaintiff’s motion, in part, by compelling the discovery of only readily accessible ESI. As a result, the defendant’s cost-shifting request was denied.

Henderson v. U.S. Bank, N.A., 2009 WL 1152019 (E.D. Wis. Apr. 29, 2009). In an action for breach of contract and misappropriation of proprietary information against a former employee, the plaintiff sought all computers, drives, and other electronic storage devices from the former employee for imaging. The court denied the motion, finding the employer “cannot simply request all of [the former employee’s] ESI and search it at will.” Instead, the court admonished the plaintiff to request specific categories of information and allow the defendant to inspect its own ESI and produce the discovery.

Heriot v. Byrne, 2009 WL 742769 (N.D. Ill. Mar. 20, 2009). In this action over ownership of copyrights, the plaintiffs inadvertently produced privileged documents. In ruling on the defendants’ motion to bar the plaintiffs from clawing back the documents, the court held that attorney-client privilege and work-product doctrine attached to documents between defendants and their consultants. The court held that FRE 502 applied to the issue of waiver of privilege by inadvertent production, and that existing Seventh Circuit precedent could be used to determine whether the production gave rise to a waiver under Rule 502(b). Among other things, the court found that the plaintiffs had undertaken a reasonable *pre*-production privilege review and that there was no duty to undertake a *post*-production review after a vendor had mistakenly produced the documents. The court also found that the plaintiffs had acted promptly to assert their privilege claims.

High Voltage Beverages, LLC v. Coca-Cola Co., 2009 WL 2915026 (W.D.N.C. Sept. 8, 2009). In this trademark infringement action, the defendant produced 1.7 million documents. After a further demand by the plaintiff, the defendant identified 17 million gigabytes (approximately 1.5 million documents) that an employee had retained for litigation holds in unrelated information. The defendant sought to avoid review of the supplemental production, maintaining that all responsive information had already been produced and that the plaintiff has rejected the defendant’s offer to allow the defendant to

key-word search the ESI to narrow the scope of review. Relying on FRCP 26(b)(2)(C), the court agreed with the defendant. The court accepted the defendant's representation that it had already produced responsive documents and that all three factors of 26(b)(2)(C) warranted the entry of a protective order. The court did, however, direct the defendant to give the plaintiff another opportunity to search the ESI "at defendant's place of business on defendant's computers." Moreover, given the novel question presented, the court declined to award any costs.

Hilton-Rorar v. State and Fed. Communications, Inc., 2010 WL 1486916 (N.D. Ohio Apr. 13, 2010). In this employment action, the defendant moved to compel emails between the two plaintiffs (who were both attorneys) and their counsel. The defendant argued that the emails were discoverable and not subject to the attorney-client privilege because when the emails were exchanged between the plaintiffs and their counsel, the plaintiffs had not yet hired him for representation in case. The court ruled that the emails were protected by either the attorney-client privilege or work-product doctrine because one plaintiff was, at all times relevant, either acting as an agent for their counsel or in consultation with the other plaintiff about selecting a legal representative. The court denied the defendant's motion, holding that the communications between the plaintiffs and their counsel did not amount to a waiver of privilege under FRE 502.

Hodeczak v. Latrobe Specialty Steel Co., 2010 WL 892205 (W.D. Pa. Mar. 9, 2010). In this age discrimination action, the plaintiffs alleged that they were replaced by younger employees and the defendant contended that the plaintiffs were terminated for placing "offensive" or "pornographic" email on its computer system. The plaintiffs argued that the defendant condoned inappropriate email and sought an order compelling the production of a hard drive, digital camera, or memory cards which the plaintiffs claimed would show the photographing of "sexually explicit conduct by another former employee." The magistrate judge refused to issue the order and the district judge affirmed. In so doing, the district judge noted that the defendant had already searched over 400,000 emails for over 200 employees "seeking images or keywords defined in a discovery protocol suggested and ultimately agreed to by [p]laintiffs."

Hynix Semiconductor, Inc. v. Rambus, Inc., 2009 WL 292205 (N.D. Cal. Feb 3, 2009). In this patent infringement action, the court rejected a defense of unenforceability asserted by Hynix based on Rambus' alleged spoliation of evidence. On a motion for reconsideration, or in the alternative to apply issue preclusion, Hynix (as characterized by the district court) sought to "substitute" a contrary ruling of unenforceability made by the District of Delaware in *Micron Tech, Inc. v. Rambus, Inc.*, 2009 WL 5887 (D. Del. Jan. 9, 2009). After considering various factors, the court declined to grant the plaintiff's motion for issue preclusion, holding that non-mutual issue preclusion was not applicable. The court also declined to reconsider its prior order on spoliation, being unpersuaded that litigation with Hynix was reasonably foreseeable by Rambus when it issued its now-infamous "nuclear winter" memorandum.

Innis Arden Golf Club v. Pitney Bowes, Inc., 2009 U.S. Dist. LEXIS 43588 (D. Conn. May 21, 2009). The Innis Arden Golf Club filed an environmental damages case against

neighbor Pitney Bowes, claiming that Pitney contaminated its property. Before filing suit, Innis Arden engaged an environmental consultant to conduct a soil contamination study, who issued an engagement letter that discussed seeking remediation costs from whoever was responsible for the soil damage. An Innis Arden witness later confirmed that all soil samples and electronic records detailing the soil analysis were destroyed at the conclusion of the investigation of contamination on Innis Arden's property, but before suit was filed. The court considered whether Innis Arden was obligated to preserve soil samples and related electronic data for litigation, and, if so, whether its failure to do so warranted sanctions or dismissal. The plaintiff claimed it had discharged its duty to preserve by putting the defendants on notice and it asserted it had no duty to preserve since it never intended to use or rely on the evidence during litigation. Referencing the engagement letter, the court reasoned the plaintiff should have reasonably understood that a duty to preserve evidence arose for litigation that they, themselves, were anticipating. The court held that the plaintiff had failed to put Pitney on adequate notice that the evidence would be destroyed, and that the soil destruction precluded Pitney from running its own tests. Based on Innis Arden's failure to preserve evidence after a duty to do so arose, the inadequate notice regarding the impending destruction of the evidence, and the "significant prejudice" suffered by Pitney, the court determined a sanction of adverse inference did not go far enough. Instead, the court chose to preclude any evidence based on the destroyed soil samples.

Jade Society v. Port Auth. of N.Y. & N.J., 2009 WL 577665 (S.D.N.Y. Mar. 5, 2009). In this racial discrimination suit, the plaintiffs alleged they were systematically blocked from promotion by their employer. They argued the Port Authority should be sanctioned for failing to preserve performance evaluations of the employees who were recommended for promotion. The employer argued that the evaluations were destroyed during the 9/11 attacks. The court held that the evaluations were only one of the factors used in the promotion process and other evidence still existed to allow the jury to decide the case. Additionally, while the court held the failure to backup the evaluations was negligent, it did not believe an adverse inference sanction was justified.

Jacob v. City of New York, 2009 U.S. Dist. LEXIS 8897 (E.D.N.Y. Feb. 6, 2009). In a civil rights action against the New York City Police Department for false arrest, assault, and battery, the plaintiffs filed a motion to compel production of 911 call recordings and for costs associated with a FRCP 30(b)(6) deposition regarding the 911 recordings. A copy of the missing recordings was later obtained from the files of the non-party Civilian Complaint Review Board. While the originals had been destroyed, the court found that the defendants had not acted with the requisite state of culpability to warrant sanctions, and that the costs associated with the deposition would have been incurred in any event. While not imposing sanctions in this case, the court urged the defendant to institute 911 recording preservation procedures for future litigation.

John B. v. Goetz, U.S. Dist. LEXIS 8821 (M.D. Tenn. Jan. 28, 2010). After the filing of a Consent Decree in 1998 intended to vindicate the interests under federal law of the plaintiff class of minor children entitled to screening and other health care, the defendant state officers encountered a number of problems in their compliance efforts. In this

decision, the district court noted that “the core of this ESI discovery controversy is the absence of any effective attempt by the Defendants to preserve and segregate relevant ESI, since the filing of this action in 1998.” The court addressed, in addition the defendants’ failure to implement a timely and effective litigation hold, the use of an independent entity to collect ESI from custodians, the exaggeration of estimated review costs, party control over contractors, the usefulness of “experts only” conferences to address e-discovery issues, not reasonably available ESI, form of production, cost-shifting and proportionality, the importance of nonmonetary factors in ordering production of ESI, privilege logs, and waiver of privilege. In conclusion, the court granted the plaintiffs’ motion to compel the defendants to comply with prior orders and left open the question of sanctions.

Jones v. Bremen High School District 228, 2010 WL 2106640 (N.D. Ill. May 25, 2010). In this employment discrimination case, the plaintiff alleged that she was terminated as retaliation for her charge that she and other black secretaries were subject to disparate treatment in relation to similarly situated white secretaries. The plaintiff moved for sanctions for spoliation, alleging that the defendant failed to preserve relevant documents during the litigation, thereby prejudicing her case. The court found that the defendant was grossly negligent in relying on its employees, whose conduct was in question, to select which of the defendant’s electronic documents were relevant for production and which documents could be deleted from the defendant’s computer system. Although the plaintiff asked the court for an adverse inference instruction, the court denied her request and held that due to a lack of proof that the defendant intentionally destroyed relevant ESI, the sanction against the defendant was limited to precluding the defendant from arguing that the absence of the ESI in support of the plaintiff’s claim meant no evidence existed.

Jones v. Hawley, 255 F.R.D. 51 (D.D.C. 2009). In this class action case brought under the Aviation and Transportation Security Act and Privacy Act of 1974, the defendants argued (and the plaintiffs did not deny) that the plaintiffs failed to hold, search, or produce any responsive documents. The plaintiffs instead argued that there was no harm to the defendants as a result of their conduct. The court reasoned the plaintiffs’ conduct was negligent and went “to the very heart of their claims for damages, and there [was] no substitute for [those documents].” The court held that an adverse inference was appropriate.

Joseph Oat Holdings, Inc. v. RCM Digesters, Inc., 2009 WL 3334868 (D.N.J. Oct. 14, 2009). In this dispute arising out of the collapse of a joint venture, the parties’ computers had remained connected after the collapse. The plaintiff then secretly accessed and copied ESI from the defendant’s system and changed the password. On cross-motions for summary judgment, the court rejected the plaintiff’s argument that it was only seeking to preserve evidence, stating “that duty is to preserve one’s documents. It is not to serve as a method by which to create an accessible database of an adversary’s proprietary information.”

JSR Micro, Inc. v. QBE Ins. Corp., 2010 WL 1338152 (N.D. Cal. Apr. 3, 2010). In this insurance coverage dispute, the court addressed FRCP 30(b)(6) and attorney misconduct during depositions and in communicating with opposing counsel. The court found that the defendant, who had been served with a Rule 30(b)(6) deposition notice, designated an excessive number of employees to be deposed and that the employees were unprepared to testify. Citing The Sedona Conference[®] *Cooperation Proclamation*, the court faulted the defendant for not having met and conferred with the plaintiff to clarify certain terms in the notice. The court admonished defense counsel for misconduct, including “rude and unprofessional language ... it is especially noteworthy in that [the language] was conveyed in writing, albeit via email, a medium that at least provides the author an opportunity to reflect on the contents and exercise self-restraint before pressing the ‘send’ button.”

Kay Beer Distrib., Inc. v. Energy Brands, Inc., 2009 WL 1649592 (E.D. Wis. June 10, 2009). In a lawsuit arising from the breach of an oral distribution agreement, the requesting party sought five DVDs containing the producing party’s emails and other ESI, claiming it was entitled to the information in searchable and usable format along with metadata. The producing party opposed the motion on the grounds that the DVDs contained privileged information, they would be too costly to produce, and that there were few outstanding issues given an earlier summary judgment motion. The court held that the request was overly broad given the limited number of issues remaining in the case. The court noted that the request for every email or ESI that included some variation of the requesting party’s name was not reasonably calculated to lead to discovery of relevant evidence. Citing Principle 12 of *The Sedona Principles: Best Practices, Recommendations & Principles for Addressing Electronic Document Production* (2005), which states “unless it is material to resolving the dispute, there is no obligation to preserve and produce metadata absent agreement of the parties or order of the court,” the court denied the request for production in native format.

KCH Serv., Inc. v. Vanaire, Inc., 2009 WL 2216601 (W.D. Ky. July 22, 2009). In this civil action for software piracy, the court found that a telephone call from the plaintiff’s company president was sufficient to trigger a litigation hold. The call was made to an individual defendant, accused the corporate defendant of using the plaintiff’s software and advised employees of the corporate defendant to delete any software that the corporate defendant did not purchase or install. The defendants complied with the plaintiff’s instructions to remove the software from their active servers, but failed to create a backup for evidence preservation purposes. The court held that the defendants were on notice that the plaintiff was willing and able to sue, should have known that software would be relevant to reasonably anticipated litigation, and therefore had a duty to preserve the evidence.

Kellogg Brown & Root Int’l v. Altanmia Comm. Mktg. Co., 2009 WL 1457632 (S.D. Tex. May 26, 2009). In a dispute over the taxation of costs pursuant to FRCP 54(d)(1) and 28 U.S.C. § 1920, the prevailing party argued that the cost of a consultant to access ESI should be taxed. The court noted a split between the circuits on whether processing of ESI could be taxed as “exemplification” and “storage” under Section 1920. The court

held that data extraction and storage were equivalent to the work of an attorney in responding to discovery requests and were therefore not taxable.

Kilpatrick v. Breg, Inc., 2009 WL 1764829 (S.D. Fla. June 22, 2009). In this medical tort case, the requesting party filed a motion to compel, claiming that the producing party's production of electronic discovery was incomplete. The requesting party believed that circumstantial evidence, coupled with irregularities in the production of evidence, would prove that the producing party concealed the risks associated with a medical procedure that the requesting party underwent. While the court agreed there were documents responsive to the request that had not been produced, it questioned whether those documents remained in the producing party's electronic archives. Additionally, the court believed that the motion, coming very late in the discovery process, might unduly interfere in the producing party's ability to prepare for trial. However, the court granted the motion, allowing the requesting party to hire an outside vendor to confirm the completeness of the electronic document production. The review was to be paid for by the requesting party and subject to conditions, including a limited number of search terms, a limited number of backup tapes to be searched, and a confidentiality agreement.

Kipperman v. Onex Corp., 2009 WL 1473708 (N.D. Ga. May 27, 2009). In a constructive transfer and fraud case with protracted discovery, the requesting party contended that the producing parties had intentionally withheld discovery to prevent it from arguing the case on the merits. The requesting party moved the court to establish a specific schedule for further discovery, or that the court strike the other parties' answer and enter a default judgment. In addition, it asked for an award of attorneys' fees related to its discovery motions, pursuant to FRCP 37(b)(2). In response, the court asked the requesting party to provide it with "a list in chart form of each instance of alleged misconduct on the part of [the producing party] which the court has not yet punished and the financial harm in the form of attorney time and costs to [the requesting party] as a result of this misconduct." With regard to the producing parties, the court noted that "rather than seeking a protective order [they] determined themselves that it would be overly burdensome" to produce the discovery in the court-ordered format. The court found that the producing parties' behavior was sanctionable under FRCP 26 and 37, citing their failure to follow court orders pertaining to transfer-related interrogatories, their lack of diligence in discovery, and "for making blatant misrepresentations about the value of email discovery in this case in an effort to influence the court's ruling." Although the court refused to enter a default judgment, it awarded attorneys' fees and other costs to the requesting party.

Kravetz v. Paul Revere Life Ins. Co., 2009 WL 1639736 (D. Ariz. June 11, 2009). The plaintiff sued his insurance company for unpaid disability benefits. The insurance company sought production of the plaintiff's business hard drive to determine the extent of his disability. The court granted the insurance company's motion, but limited the examination to metadata only. The court ordered a third party review of the metadata to determine the amount of time the plaintiff spent working on his computer, explicitly barring a substantive review of the documents themselves.

Kvitka v. Puffin Co., LLC, 2009 WL 385582 (M.D. Pa. Feb. 13, 2009). In this action, the plaintiff, purchaser and seller of antique dolls, brought suit against the defendants, who allegedly “launched a campaign of character assassination” that led to the plaintiffs being barred from advertising in a trade publication. The defendants moved for spoliation sanctions after the plaintiff failed to produce relevant email. The court found that the plaintiff “acted with the highest degree of fault” in discarding an old laptop that contained relevant email, failed to comply with preservation directions from her attorney, and had ignored the advice of her computer technician that the email might be retrievable. The court also found that the loss of evidence severely prejudiced the defendants. Given these findings, and noting that only a handful of emails had been produced, the court dismissed the plaintiff’s claim and allowed an adverse inference on the defendants’ counterclaims.

Kwon v. Costco Wholesale Corp., 2010 WL 571941 (D. Haw. Feb. 17, 2010). In this personal injury lawsuit stemming from an accident in a warehouse store, the plaintiff moved for default judgment as a sanction for the loss of a surveillance video that allegedly recorded the incident. The court found that the defendant had indeed allowed the video to have been routinely overwritten but declined to find the requisite “willfulness, fault, or bad faith” to support the requested sanction, attributing the loss to a simple failure to follow written procedures. However, because the defendant was on notice of the plaintiff’s claim and failed to take appropriate preservation steps, the court allowed an adverse inference instruction to go to the jury.

Lady Di’s, Inc. v. Enhanced Services Billing, Inc., 2010 WL 723283 (S.D. Ind. Feb. 25, 2010). In this putative class action arising out of alleged improper billing practices by the defendants, the plaintiff sought discovery of ESI from other entities for which the defendants provided billing services. The court allowed the plaintiff to take discovery to substantiate its class allegations but found that, as drafted, the requests were overbroad and unduly burdensome. The court noted that class discovery would “invariably include some merits discovery” and that, even if certification were denied, class discovery might be indistinguishable from merits discovery. The court scheduled a hearing before a magistrate judge on the scope of class discovery and directed the defendants to bring appropriate witnesses.

Laethem Equip. Co. v. Deere and Co., 2009 WL 2777334 (E.D. Mich. Aug. 27, 2009). In this franchise action, sidetracked from trial for some 20 months because of ESI-related disputes, the court reviewed rulings of the magistrate judge on privilege issues. In so doing, the court agreed that FRE 502(b) applied and that the plaintiffs had not waived their privilege claims through inadvertent production. The district judge observed, however, that Rule 502(b) was not the sole source of law on waiver and that Michigan law recognized “waiver by misconduct,” although none was found here. The court agreed with the magistrate judge that the failure to sequentially list items on a privilege log was not suspicious *per se* and rejected objections to rulings below as to the privileged nature of certain documents. Citing *The Sedona Principles* and noting that the parties had engaged in extensive paper discovery while seeking ESI from “marginally accessible media” that might be duplicative, the court required each party to bear the other’s costs,

stating that the “most practical way to curb that bilateral tendency is to require the party seeking discovery to pay for the cost of finding and producing it.”

Lawson v. Sun Microsystems, Inc., 2010 WL 503054 (S.D. Ind. Feb. 8, 2010). After reviewing documents produced by the defendant, the plaintiff was able to unlock password-protected, privileged attachments in two emails in the production. When defense counsel was informed that the plaintiff emailed the privileged ESI to his lawyers, defense counsel moved for sanctions, alleging “wanton” conduct by opposing counsel. A magistrate judge recommended that plaintiff’s counsel be sanctioned monetarily pursuant to the court’s inherent power. Upon objecting to the magistrate’s recommendation, plaintiff’s counsel argued that not only were they not aware that their client intentionally unlocked the password-protected ESI until after it happened, they did not review the privileged ESI for their client’s benefit. The chief judge of the district court agreed with plaintiff’s counsel, ruling that although they were “careless” in supervising their client’s activities and by failing to redact the plaintiff’s emails regarding the privileged ESI, “[c]areless conduct does not equate to ‘wanton’ conduct.” The court accordingly denied the defendant’s motion for sanctions and ordered the magistrate’s report recommending sanctions be modified to reflect its ruling.

Lewis v. Ryan, 2009 WL 3486702 (S.D. Cal. Oct. 23, 2009). In this *pro se* action brought by a prisoner alleging that the state had surreptitiously fed him pork in violation of his religious beliefs, the defendants had been granted summary judgment but, on a motion for reconsideration, the district court directed the magistrate judge to address the plaintiff’s discovery requests. The defendants revealed that responsive documents had been destroyed pursuant to a records destruction policy after a litigation hold had been triggered and the documents had been requested in discovery. The court found by clear and convincing evidence that the defendants had been “at best, reckless and grossly negligent in failing to locate and protect relevant documents” and adopted the recommendation of the magistrate judge that spoliation sanctions be imposed under both FRCP 37 and its inherent authority. Rather than impose any terminating sanction, the court imposed an inference against the defendants that the destroyed documents would show that pork had been served, both in summary judgment and at trial. The magistrate judge, in her report and recommendation, did not reach the question of whether the heightened clear and convincing evidence standard was required.

Maggette v. BL Dev. Corp., 2009 WL 4346062 (N.D. Miss. Nov. 24, 2009). This negligence action stems from a bus accident in which 15 people died while traveling to the defendant’s casino as part of a complimentary package the defendant offered. The court took the defendants to task for their “rebuff” of the plaintiffs’ attempts to obtain information as well as the defendants’ failure to search all sources of potentially relevant ESI. The court also noted the numerous discrepancies in the defendants’ discovery responses and deposition testimony, and expressed doubts that “corporations as large and sophisticated as the defendants, which operate numerous gambling facilities across the country with various operations centers, do not have paper files, electronic files or information or—even in light of Hurricane Katrina—back up measures.” The court directed that an expert “in the field of electronic discovery and who has knowledge of the

gaming industry” be retained at the defendants’ expense to determine whether the defendants had complied with their obligations. Subsequently, in **Maggette v. BL Development Corp., 2010 WL 3522798 (N.D. Miss. Sept. 2, 2010)** during pretrial discovery, the magistrate judge declined to enter an order establishing an agency relationship between the bus company and the defendant, but because the defendant disobeyed a previous court order, the magistrate judge levied monetary sanctions against the defendant and warned it that any further discovery violations would result in dispositive sanctions. The magistrate judge warned the defendant of the threat of dispositive sanctions because [he and the court] “strongly suspected that [the defendant] was concealing information.” Although a special master had already been appointed to investigate allegations that the defendant willfully concealed responsive documents, the court found that the defendant continued to engage in a pattern of bad faith discovery practices—even after being threatened with dispositive sanctions. At the next discovery conference, the court found: (1) a lawyer for the defendant memorialized in an email that the defendant would not allow “at any costs” that an agency relationship be established between it and the bus company (implying it would use unethical tactics in order to avoid dispositive sanctions); (2) the defendant used its paralegal as the “go-to” person for all discovery inquiries from opposing counsel—so that “more senior representatives could claim plausible deniability in the event that a discovery issue arose”; and (3) the defendant used the “tragedy of Hurricane Katrina” as an excuse that certain requested documents stored in its Gulf Coast storage warehouse were destroyed and therefore could not be produced. The special master, however, was able to find within five minutes information that the defendant, a “sophisticated corporation with very significant financial resources, had repeatedly and stridently insisted did not exist for close to five years.” Based on the defendant’s repeated misconduct, the court accordingly found that dispositive sanctions were warranted and stated it would instruct the jury that an agency relationship did exist and the sole issue for the jury’s consideration would be the negligence of the bus company and the damage suffered by the plaintiffs.

Major Tours, Inc. v. Colorel, No. 05-3091 (D.N.J. Aug. 4, 2009). In this action for racial profiling, the court held that the defendant was obligated to produce two litigation hold notices. The court found that the duty to preserve had been triggered in 2003 by a letter to state agencies demanding compensation for profiling and threatening litigation but that the notices had not issued until 2005 and 2007. The plaintiff made a *prima facie* showing that spoliation of some information had occurred in the interim. Subsequently, in **Major Tours, Inc. v. Colorel, 2009 WL 3446761 (D.N.J. Oct. 20, 2009)**, the defendant moved for a protective order in response to the plaintiff’s request for copies of emails stored on backup tapes because the defendant claimed the emails were inaccessible due to the cost and burden of retrieving them. Relying on *Zubulake v. UBS Warburg, LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004), the court ruled the emails were not reasonably accessible, as the plaintiff offered no evidence rebutting the defendant’s estimated cost of \$1.5 million to recover the emails. The court also found that, overall, the factors in determining whether good cause existed for the production of the emails, as outlined in the Advisory Committee Notes to FRCP 26(b)(2)(B), favored the defendant. The plaintiff then moved for reconsideration and when the motion was denied, the plaintiff was granted interlocutory review of the magistrate judge’s decision in **Major Tours, Inc. v. Colorel**,

2010 WL 2557250 (D.N.J. June 22, 2010). On appeal, the plaintiff argued that the defendant's protective order pursuant to FRCP 26(b)(2)(B) should not have been granted if the failure to institute a proper litigation hold was the reason for the inaccessibility of the emails. The court disagreed and held that no bright line rule existed with respect to "a party intentionally permitting relevant evidence to become inaccessible, rather than negligently failing to preserve it. ... [i]f a party permits all the relevant emails to be put on inaccessible media, as [the plaintiff alleges], then the good cause balancing will tilt more strongly in favor of ordering discovery as the inaccessible media will be the only source of relevant emails." The court also denied the plaintiff's claim that the magistrate judge abused his discretion in his application of the good cause factors, and it affirmed the October 20, 2009, decision. The court found that the magistrate correctly determined that, given the amount of relevant evidence produced by the defendant, the backup tapes requested by the plaintiff were "likely to produce evidence of only marginal, cumulative benefit, and at great expense." The court affirmed the magistrate's findings that the evidence produced by the defendant "outweighed the slim likelihood of the discovery of non-cumulative evidence even if there was some unknown degree of negligent spoliation."

Marceau v. Int'l Bhd. of Elec. Workers, Local 1269, 2009 U.S. Dist. LEXIS 28703 (D. Ariz. Mar. 31, 2009). In this exhaustive opinion addressing the defendants' summary judgment motions and the plaintiffs' motion for an adverse inference instruction, the court considered the date on which a preservation obligation was triggered. The corporate defendants had retained a law firm to conduct an internal audit after the general counsel had become aware of allegations of wrongful conduct made by a plaintiff and others. At about the same time the audit was announced, and a week before a litigation hold notice was issued by the corporation, a large volume of documents was destroyed. The court found that the circumstances were sufficient to establish that a duty of preservation had arisen. However, the court also held that genuine issues of material facts existed about, among other things, the relevance of the destroyed records, and denied the motion for an adverse inference without prejudice.

Markert v. Becker Technical Staffing, Inc., 2010 WL 1856057 (E.D. Pa. May 7, 2010). When the plaintiff, who was a top producer at a family-operated staffing firm, inexplicably had his salary drop from \$70,000 to \$40,000, he began to look for other work. While working remotely from home, the plaintiff accessed his work computer through his personal laptop. At some point he logged into his Gmail account and did not log out, causing his personal Gmail inbox to appear on the screen of his work computer. The defendants noticed the plaintiff's personal Gmail inbox on his work computer screen and some of them proceeded to access and read his personal emails, which the defendants believed were attempts to divert business away from their business. After the plaintiff was terminated, he sued the defendants as a business and also individually for, among other things, violation of the Federal Stored Communications Act ("FSCA"). The defendants moved to dismiss. With regard to the FSCA claim, the defendants argued that "it is not a violation of the Act to retrieve e-mails from storage after transmission is complete." The court disagreed and held that the FSCA applies when information is retrieved from electronic storage even after transmission is complete and that it is not

required that the communication be in the process of transmission in order for it to be covered under the FSCA. However, the court held that it was not a violation of the FSCA for another member of the family named as a defendant to read copies the emails after the initial access violation had occurred. Therefore the plaintiff could not state a claim for which relief could be granted and accordingly dismissed the FSCA claim against that defendant.

May v. Fedex Freight Southeast, Inc., 2009 WL 1605211 (M.D. La. June 8, 2009). Plaintiff alleged sexual harassment against her former employer and a co-worker. The plaintiff sought production of the co-worker's personnel file, the employer's policy regarding ESI, all email mentioning her name, and email between her and the defendant co-worker. The employer refused to produce the documents, claiming the email was inaccessibly archived and unsorted. The employer also sought a protective order. Although the parties conferred, they were unable to agree on the wording of the protective order. The court granted the plaintiff's motion for production of the employer's documents but ordered the parties to confer regarding the emails and cautioned that in the absence of an agreement it would require the employer's IT department to provide further details regarding the search.

Medcorp, Inc. v. Pinpoint Technologies, Inc., 2010 WL 2500301 (D. Colo. June 15, 2010). After a special master found that the plaintiff failed to preserve hard drives containing information relevant to the defense, the defendant moved the court to modify its previous order that allowed a jury instruction and expenses to address the spoliation issue, but denied a request for more severe sanctions. The parties and the special master agreed that the standard set for in *Pension Committee of the Univ. of Montreal Pension Plan v. Banc of America Securities*, 685 F. Supp. 2d 456 (S.D.N.Y. 2010) prescribed the appropriate test for awarding spoliation sanctions, leaving the determination to the "sound discretion of the trial judge and [] assessed on a case-by-case basis." Following the *Pension Committee* analysis, the court granted in part and denied in part the defendant's motion. First, because the spoliation of the hard drives occurred in the ordinary course of business and nothing in the record indicated intentional destruction of evidence by the plaintiff, a terminating sanction was not appropriate. Second, because the plaintiff's failure to preserve the ESI was negligent rather than intentional and that the jury instruction effectively addressed the defendant's concerns, the court denied the defendant's request to have facts admitted into evidence indicating that the plaintiff purposefully destroyed the hard drives. Finally, the court reversed, *sua sponte*, the special master's award of \$52,825.06 to the defendant. After carefully reviewing defense counsel's billing records, the court awarded the defendant \$89,395.88 for attorney's fees and reasonable costs incurred in litigating the spoliation issue, but declined to award \$130,000 as requested by the defendant in its motion. Although the defendant was successful on the spoliation issue, the court found that defense counsel spent too much time litigating the motion, reasoning that "[i]t does not [always] follow that the amount of time *actually* expended is the amount of time *reasonably* expended." (emphasis in original).

Melendres v. Arpaio, 2010 WL 582189 (D. Ariz. Feb. 12, 2010). In this civil rights action arising out of the allegedly illegal enforcement of immigration laws against Hispanics by the Maricopa County Sheriff's Office (MCSO), the court imposed sanctions on MCSO for the failure to implement a litigation hold. The court found that no hold notice had been communicated and, if there had been one, it had been insufficient to specify the information to be preserved. Relevant spreadsheets detailing special operations conducted by the MCSO and email were destroyed, although the defendants were attempting to recover email from backup systems. Turning to the nature of the sanctions, the court allowed the plaintiffs to suggest possible inferences concerning the content of destroyed spreadsheets based on the categories of information known from a single preserved sheet. The court deferred the imposition of sanctions for the failure to preserve email pending the MCSO's recovery efforts and the filing of affidavits describing those efforts. The court also deferred a ruling on what date triggered the duty of preservation pending further submissions.

Merck Eprova AG v. Gnosis S.P.A., No. 07-5898 (S.D.N.Y. Apr. 20, 2010). In this action alleging federal and state law violations in connection with the labeling of a nutritional supplement, the plaintiff moved for sanctions, alleging misconduct by the defendant during discovery. The plaintiff alleged the defendant failed to implement a litigation hold, did not diligently search for responsive documents, and intentionally withheld responsive documents. Citing *Pension Committee of the Univ. of Montreal Pension Plan v. Banc of America Securities*, 685 F. Supp. 2d 456 (S.D.N.Y. 2010), the court found that the defendant engaged in discovery misconduct and noted "when one party's compliance with discovery orders is so inadequate that it threatens to undermine the judicial process, a court must consider whether sanctions are necessary in order to preserve the integrity of [the legal system]." The court determined that the defendant's actions, although improper, were not egregious enough to warrant a terminating sanction. Accordingly, the defendant was ordered to pay the costs and attorney's fees the plaintiff expended in connection with negotiating with defense counsel to obtain responsive documents that should have been produced, including the costs associated with the motion for sanctions. The court also ordered the defendant to pay a \$25,000 fine.

Meridian Financial Advisors Ltd. v. Pence, 2010 WL 2772840 (S.D. Ind. July 12, 2010). After a bank sued a communications service provider ("debtor") for amounts due on a revolving credit and security agreement, the court appointed the plaintiff as the receiver for properties and assets of the debtor in favor of the bank. The plaintiff then brought another suit against the board of directors of the debtor ("defendant"). The defendant moved for a default judgment alleging the plaintiff intentionally violated FRCP 26 by failing to disclose the existence of 250,000 "secret emails" in its initial disclosures. The defendant discovered that the plaintiff, as the receiver of the debtor's assets, recovered the relevant—and privileged—emails which had previously been deleted from the debtor's servers, yet failed to disclose them to the defendant. The defendant also alleged that the plaintiff entered into a secret cooperation agreement with a former co-defendant who allegedly provided the plaintiff with privileged information the former defendant obtained while she was jointly represented by the same lawyer as the defendant. Although the court found that the plaintiff violated the attorney-client

privilege by reviewing and not disclosing the privileged emails and abused the judicial process through its relationship with the former co-defendant, the court held that a default judgment was not an appropriate sanction. Instead, the court awarded the defendant attorney's fees associated with his representation during the time the former defendant was secretly cooperating with the plaintiff and precluded the plaintiff from using the undisclosed and privileged ESI in the case.

Micron Tech., Inc. v. Rambus, Inc., 2009 WL 54887 (D. Del. Jan. 9, 2009). In the continuing saga of nationwide patent infringement actions involving microchip manufacturer Rambus as both plaintiff and defendant, the court held a bench trial on competitor Mircon's allegations that Rambus spoliated evidence and was guilty of "unclean hands" in its enforcement of patent claims. The court found that Rambus spoliated evidence by conducting employee "shred days" after a duty to preserve had attached and that Rambus had made misrepresentations with regard to its destruction of evidence. Addressing the appropriate sanction, the court noted that "[t]he required burden of proof to establish spoliation is not a matter of settled law in the Third Circuit," and held that a clear and convincing evidence standard "in the patent area in proving inequitable conduct." The court continued, "[m]ore specifically, once intent and prejudice have been established, the court must determine whether their total weight satisfies the clear and convincing standard of proof. In this regard, the showing of intent (i.e., bad faith) can be proportionally less when balanced against high prejudice." The court concluded that "[t]he spoliation conduct was extensive" and that, in the nonjury context, an appropriate sanction was to declare the patents in issue unenforceable as against Micron.

Mid-State Aftermarket v. MQVP, 2009 U.S. Dist. LEXIS 41914 (E.D. Ark. Apr. 27, 2009). In a trademark infringement case, the requesting party alleged spoliation of 135,000 electronic invoices for a period of two and one-half years immediately prior to the commencement of litigation. The requesting party also alleged the destruction of relevant data due to an improper backup process when the producing party was previously purchased by another company. While the court noted that the disappearance of the electronic invoices was "obviously suspicious," it could not "confidently rule on the issue" of whether the data was intentionally destroyed until a previously unexamined server had been investigated. Accordingly, the court ordered the producing party to give the requesting party access to the unexamined server. The court held that if the requesting party "examine[d] the server and [found] that electronic invoices also [were] missing from that server, the Court [would] entertain further arguments from the parties on the issue of whether to give a spoliation instruction, and, if so, what the instruction would say."

Mintel Int'l Group Ltd. v. Neergheen, 2009 U.S. Dist. LEXIS 32738 (N.D. Ill. Apr. 17, 2009). In this employment case brought under the Trade Secrets Act, the court ruled on several discovery motions before trial. The defendant argued that the plaintiff's expert should not be allowed to testify, because the expert disclosure was not made until weeks after the agreed-upon date. The court held that neither prejudice nor a "trial by ambush" occurred because discovery extended through the next month and the additional

disclosure was harmless. The court also noted that it would not rule on the defendant's second motion for spoliation sanctions for the plaintiff's failure to preserve documents; instead, it would reserve the right to reconsider such a motion after all the evidence is presented. The plaintiff had also moved for spoliation and appealed the magistrate's denial of sanctions, but the court upheld the magistrate's ruling considering expert opinions relating to the defendant's wiping of the computer hard drive, finding that several relevant documents still remained on the drive and that there were no residual traces of wiping software on the computer. Subsequently, in **Mintel Int'l Group Ltd. v. Neergheen, 2010 WL 145786 (N.D. Ill. Jan. 12, 2010)**, the court had conducted a bench trial, finding that defendant had been employed by the plaintiff but left for a competitor, taking media and ESI with him when he left. However, citing to FRCP 37(e) and other authority, the court found that the plaintiff had failed to prove by clear and convincing evidence that the defendant had spoliated evidence, saying "[i]n short, Neergheen's conduct really was 'innocent-looking actions that meld[ed] into what could be construed as 'typical' computer usage,' rather than a pattern that is easily recognized by forensic experts as spoliation." The court also found that the plaintiff had not established a violation of the Computer Fraud and Abuse Act, there being no evidence that the defendant had impaired the integrity of any ESI or that the plaintiff had suffered any "losses" within the meaning of the Act. The court did find that the defendant took trade secrets. However, he made no use of these in violation of Illinois law. The court did enforce restrictive covenants, in part, against the defendant.

Mirbeau of Geneva Lake, LLC v. City of Lake Geneva, 2009 WL 3347101 (E.D. Wis. Oct. 15, 2009). In a highly contentious real estate development zoning dispute, the court denied plaintiff's motion for forensic inspection of the defendant's computer system after ESI had produced in hard copy form. The court held that the plaintiff failed to establish that it would obtain any additional relevant information justifying such an intrusive approach. However, the court noted that it was not entirely satisfied with the defendant's "less than serious" approach to ESI preservation and production. The court stated, "what is more relevant to the Court's analysis is the fact that it appears that the parties have had very few discussions with the goal reaching a middle ground, rather than extremes." The court held that "going forward, the parties need to genuinely communicate with each other, as discovery is supposed to be self-executing. The Court cannot be expected to be cast in the role of babysitter at the slightest discovery problem."

Mohrmeyer v. Wal-Mart Stores East, L.P., 2009 WL 4166996 (E.D. Ky. Nov. 20, 2009). In this slip-and-fall case, the defendant failed to preserve a restroom maintenance log for the date of the alleged accident, although it kept other records. In rejecting the plaintiff's request for sanctions, the court found that the defendant had no reason to anticipate litigation when it destroyed the log, which the court characterized as temporary or transient: "This court is not willing to presuppose the likelihood of litigation for every slip and fall accident that occurs." The court analogized the facts before it to FRCP 37(e), rejecting the proposition that Sixth Circuit precedent (which cited *The Sedona Principles*) required the preservation of all evidence regardless of the speculative nature of possible litigation. Moreover, the court expressed reservations "about plaintiff's apparent lack of

inquiry concerning relevant facts prior to filing a motion seeking the most serious of sanctions.”

***In re Motor Fuel Temp. Sales Practices Litig.*, 2009 WL 959491 (D. Kan. Apr. 3, 2009).** The court denied the defendants’ request to be relieved from reviewing and creating a privilege log covering attorney communications made *after* commencement of litigation. The court held that it had the authority to enter a FRCP 26(c) protective order granting such relief, but found that the defendants had failed to demonstrate undue burden. The court did, however, permit the defendants to give categorical descriptions of privileged documents rather than log by individual document.

***Mohawk Industries, Inc. v. Carpenter*, 130 S. Ct. 599 (2009).** In an employment action alleging retaliatory discharge, the trial court granted the employee’s motion to compel disclosure of information about the employee’s pre-termination interview with the employer’s attorney, which the employer opposed on attorney-client privilege grounds. The employer appealed. The Supreme Court held that the collateral order doctrine is not available to a party which seeks to appeal from an order adverse to privilege. Review of such orders before final judgment—as with other discovery orders—is available through mandamus, interlocutory appeal, or contempt.

***Mt. Hawley Ins. Co. v. Felman Prod., Inc.*, 2010 WL 1990555 (S.D. W. Va. May 18, 2010).** In a complex insurance claim, the Magistrate Judge found, and the District Judge affirmed *sub nom. Felman Production, Inc. v. Industrial Risk Insurers, No. 09-00481 (S.D. W. Va. July 23, 2010)*, that the plaintiffs waived privilege claims asserted over 377 documents, by failing to satisfy the requirements of FRE 502(b) to take “reasonable steps” to screen for relevance and privilege before production. The total production exceeded one million pages and was produced under a protective order containing a clawback provision. However, roughly 30% of the plaintiff’s production consisted of irrelevant and privileged material, ranging from automobile and camera manuals to attorney-client communication, and every document produced by the plaintiffs was designated as “CONFIDENTIAL,” which the Magistrate Judge found to be in violation of the court’s Local Rule 26.4. In its defense, the plaintiff explained that one of its Concordance database files produced built an incomplete index of potentially privileged materials, preventing proper identification, and that the defendants did not comply with the provisions of the clawback agreement. Applying the three-part test of Rule 502(b), the court found that the plaintiff’s disclosure of privileged information was indeed inadvertent and that the plaintiff took reasonable steps, although rebuffed, to retrieve the information once they were notified of the inadvertent disclosure, satisfying Rules 502(b)(1) and 502(b)(3). However, the court found that that plaintiff failed to take “reasonable steps” required under Rule 502(b)(2) to prevent the inadvertent disclosure. Specifically, the court found that the inadvertent disclosures were not caused solely by the failure of the Concordance database to completely index the documents and that the plaintiff and its counsel failed to perform “critical quality control sampling to determine whether their production was appropriate and neither over-inclusive nor under-inclusive...”, citing *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251 (D. Md. 2008) Thus, the defendant’s post-production actions in failing to follow the clawback

procedure and in attaching one critical attorney-client email to a motion filed with the court were irrelevant to the underlying determination that privilege claims had been waived by the plaintiff's production. In addition, the Magistrate Judge noted that that particular attorney-client email was likely not privileged under the crime-fraud exception to the attorney-client privilege rule.

Multiquip, Inc. v. Water Mgmt. Systems LLC, 2009 WL 4261214 (D. Idaho Nov. 23, 2009). In this action, the defendant responded to an email from his attorney. Unfortunately, the defendant's response was also sent to others by operation of the email application's "autofill" function. The response eventually wound up with the plaintiff's Italian counsel. The court applied FRE 502(b) and found that the production was inadvertent. The court also found that the party's disclosure was an "isolated act [that] was reasonable." In so finding, the court distinguished the facts from those in which a party was required to undertake a privilege review. Finally, the court found that reasonable steps were taken to rectify the error as the defendant's attorney asserted the privilege as soon as he became aware of it and demanded that email be "returned" under FRCP 26(b)(5)(B).

Multiven, Inc. v. Cisco Systems, Inc., 2010 WL 2813618 (N.D. Cal. July 9, 2010). In this action alleging multiple claims and counterclaims for, among other things, antitrust violations and copyright infringement, the district court adopted a magistrate judge's recommendation that the parties be ordered to retain a third party vendor to assist in document review that had "no end in sight" and with a discovery deadline approaching. The magistrate judge also recommended that the duties of a special master agreed on by the parties include resolving discovery disputes, selecting a vendor, crafting a search protocol, and establishing deadlines.

MVB Mortgage Corp. v. FDIC, 2010 WL 582641 (S.D. Ohio Feb. 11, 2010). The plaintiff moved to compel discovery of redacted portions of an email thread produced by the defendant. The defendant argued that the redacted portions were attorney-client communications that had been inadvertently sent to the defendant's testifying expert witness. The redacted portions concerned the drafting of a single sentence that was ultimately included in the expert's declaration in opposition to a summary judgment motion. In granting the motion, the Court recognized the "bright-line-rule" in the Sixth Circuit that any document provided to a testifying expert is ordinarily subject to disclosure under FRCP 26(a)(2). Noting FRE 502(b), the court declined to "import" the concept of inadvertent production into the expert area: "[o]nce an expert sees information, even if it is the product of an inadvertent disclosure of something otherwise privileged, that information becomes part of the expert's mental database, and the opposing party is entitled to test how, if at all, knowing that information may have influenced the expert's opinion."

***In re National Century Fin. Enterprises, Inc. Financial Investment Litig.*, 2009 WL 2160174 (S.D. Ohio July 16, 2009).** In this multi-district litigation consolidated for discovery purposes, the court addressed a defense argument that a number of plaintiffs should be sanctioned for failure to preserve relevant information. Considering the

imposition of sanctions under its inherent power, the court held that federal common law governed, that only “egregious” conduct warranted the extreme sanction of dismissal, and that only “bad faith” warranted an adverse inference instruction. The court first considered the conduct of “passive corporate investors.” Although “troubled” by their “cavalier approach to preservation,” the court declined to recommend dismissal. However, the court allowed the defendants to seek an adverse inference instruction at trial if they could demonstrate that the plaintiffs “knowingly disregarded” a duty to preserve. The court also restricted the plaintiffs’ proofs as to late-produced documents. As to other spoliation allegations against specific plaintiffs, the court allowed additional discovery, found that the defendants had not demonstrated prejudice by the loss of information, found that the defendants had not demonstrated that particular documents existed, but authorized the defendants to seek an adverse inference instruction at trial. Turning to the failure of several plaintiffs to produce documents in a timely manner or to serve timely privilege logs, the court found no evidence of a deliberate attempt to conceal evidence and no evidence that a late production was prejudicial but allowed discovery on whether information was deliberately withheld as a foundation for a possible adverse inference instruction.

Naylor v. Rotech Healthcare, Inc., 2009 WL 5206006 (D. Vt. Dec. 23, 2009). In this wrongful termination action, the defendant disclosed an allegedly defamatory email sent by a director of the defendant to a third party. The defendant also failed to produce an email apparently sent by the director to the plaintiff. On motions to amend the complaint, the court allowed a defamation claim to proceed although the action was ready for trial and would require more discovery. On an issue of first impression, the court denied the plaintiff leave to assert a spoliation claim under Vermont law. The court noted that the states were split on allowing such a cause of action, that spoliation was ancillary to a case and that discovery sanctions already offered a range of remedies.

***In re Netbank, Inc. Sec. Litig.*, 2009 WL 2461036 (N.D. Ga. Aug. 7, 2009).** In this securities class action, the defendants objected to production of ESI in native format and offered to produce in TIFF format. Citing to FRCP 34(b)(1)(C), the court ordered native production, rejecting the defendants’ “hypothetical problems” that data might be altered, that the receiving party might be unable to read the native files, and that the inability to Bates number individual pages would preclude “precision of record citations.”

Newman v. Borders, Inc., 257 F.R.D. 1 (D.D.C. 2009). In this racial profiling case stemming from an accusation of shoplifting, the plaintiff requested additional depositions because the defendants’ deponents were not knowledgeable about the company’s document retention program regarding email. The court noted that given the almost universal use of email in business communication, the plaintiff should have put the defendants on notice that it wanted to discuss the company’s document retention program so that the defendants could properly prepare for the deposition. Citing The Sedona Conference[®] *Cooperation Proclamation*, the court held that it is the judge’s obligation to help move the case along since the attorneys’ fees most likely had already dwarfed any recovery that could be awarded. As a result, in lieu of further depositions, the court issued

nine questions that the defendants must answer in an affidavit relating to their document retention program.

NLRB v. Jackson Hospital Corp., 2009 WL 1351415 (D.D.C. May 15, 2009). Within an unfair labor practices action between the National Labor Relations Board (“NLRB”) and the Kentucky River Medical Center (“KRMC”), a dispute arose regarding assertions of privilege. KRMC took issue with NLRB’s assertions of the deliberative process privilege, the informer’s privilege, and the “de facto” attorney-client privilege. NLRB contended that KRMC’s assertions of the attorney-client privilege were inappropriate as applied to “Rules of Engagement” and documents regarding bargaining strategy. The NLRB privilege log contained several hundred email strings, and it asserted the deliberative process privilege, often in combination with other privileges, for over 320 messages. The court held that many of the descriptions of such emails in the privilege log inadequately indicated whether a document was deliberative in nature, and it ordered the messages be produced for an *in camera* inspection. Additionally, the court ordered both parties to confer, draft a protective order, and present it with a proposed schedule going forward.

N. Am. Rescue Prod., Inc. v. Bound Tree Medical, LLC, 2010 WL 187329 (S.D. Ohio May 10, 2010). In this action alleging misappropriation of trade secrets, false advertising, trademark infringement, and unfair competition and trade practices, the defendant moved to compel the plaintiff to produce email communications between the plaintiff, the plaintiff’s counsel, and a third party. It was unclear as to whether the plaintiff’s counsel also represented the third party. Some of the emails had been voluntarily produced by the plaintiff, who claimed the communications were irrelevant. The court granted the defendant’s motion and held that the communications were relevant and that the plaintiff had waived the attorney-client privilege through its voluntary production of the emails. Even assuming that the disclosure was inadvertent, the court ruled the plaintiff would not be entitled to protection under FRE 502 because the plaintiff had not taken reasonable steps to prevent disclosure or to rectify the error.

OCE North America, Inc. v. Brazeau, 2010 US Dist. LEXIS 25523 (N.D. Ill. Mar. 18, 2010). The plaintiff sought a preliminary injunction to prohibit the defendant from breaching a non-competition agreement and sharing its confidential information with a competitor. Denying the injunction, the court rejected the plaintiff’s argument that the content of two emails between the defendant and the competitor evidenced wrongful conduct. The court also rejected the argument that the defendant’s inadvertent retention of three flash drives was sufficient to infer wrongful conduct. Although the defendant failed to preserve relevant Instant Messages, the court also declined to impose an adverse inference on the defendant, as he was unaware he had the ability to do so and, on learning that he did, the defendant promptly took steps to preserve them. There was no evidence of “willfulness, bad faith or fault.” Moreover, “an adverse inference would still be inappropriate because the record suggests the spoliation caused plaintiff little harm.”

Olson v. Sax, 2010 WL 2639853 (E.D. Wis. June 25, 2010). The plaintiff in this employment discrimination action had been terminated for allegedly stealing from her

employer. The plaintiff moved for spoliation sanctions based on the defendant's failure to preserve a video recording of the alleged theft. The video had been stored on a hard drive which overwrote footage on a 29-day cycle. The court found that the defendant's duty to preserve arose when the defendant threatened litigation against the plaintiff and that the video been overwritten after that date. The court, however, denied the plaintiff's motion pursuant to FRCP 37(e) as there was no evidence that the video had been lost in bad faith. In reaching its ruling, the court relied on Seventh Circuit precedent, which required that destruction occur for "the purpose of hiding adverse information."

Passlogix, Inc. v. 2FA Technology, Inc., 2010 WL 1702216 (S.D.N.Y. Apr. 27, 2010). In this contract action arising out of an agreement to develop security-authentication software, the plaintiff alleged the defendants committed a fraud on the court by creating and sending anonymous emails in an attempt to expand the scope discovery, cause the plaintiff competitive harm, and win a favorable settlement. The plaintiff also alleged the defendants engaged in the spoliation of evidence. With regard to the plaintiff's spoliation claim and citing *Zubulake V* and *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of America Securities, LLC*, 685 F.Supp.2d 456 (S.D.N.Y. Jan. 15, 2010), the court found that the principal (and individual defendant) of the corporate defendant had the duty to preserve 143 written communications between him and one of the plaintiff's former employees and that such failure to preserve the communications constituted gross negligence. Because the deletion of the emails in question were relevant to the plaintiff's claim, a \$10,000 sanction was imposed on the corporate defendant with the court noting that as a small company, its principals (the two individual defendants) were responsible for the spoliation. The court also discussed possible attorney misconduct. Defense counsel refused to allow the plaintiff to inquire into the defendants' internal investigation at a deposition on privilege grounds, although counsel was not involved in the investigation. The court declined to issue a separate sanction for the defendants' "possibly erroneous assertion of privilege, as the Court deems [the corporate defendant's] sanction for spoliation of evidence sufficient to prevent future litigation misconduct."

Patterson v. Goodyear Tire & Rubber Co., 2009 WL 1107740 (D. Kan. Apr. 23, 2009). In this employment matter, plaintiff sought production of electronic documents and employee policies, along with an adverse inference sanction for spoliation of attendance records. The employer explained that the electronic data was unavailable due to the company policy of destroying such data after twelve months; however, it provided a hard copy of the requested data. The court denied the plaintiff's motion to compel as untimely and berated both parties for failing to honor the discovery guidelines established by the district court. The court also denied the adverse inference instruction, concluding there was no evidence of intentional destruction. The court did, however, order the employer to search two backup tapes, as it had volunteered.

***In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, 2010 WL 3420517 (E.D.N.Y. Aug. 27, 2010).** The plaintiffs in this multidistrict antitrust action moved to compel defendants MasterCard and Visa to produce documents deemed confidential under European law and relating to a prior European Commission investigation (against the same defendants for violation of European competition law).

The magistrate judge ordered production and the district judge reversed. The court applied the five-part balancing test prescribed by *Aérospatiale*. In addressing the first *Aérospatiale* factor -- importance of the discovery to the litigation -- the court rejected the notion that discovery sought must be “crucial” to the litigation in order to overcome a foreign government’s objection to the discovery. The court held that the test requires comparing the competing interests involved, stating “[t]he balancing test adopted by the Supreme Court . . . allows for the possibility that the requested material may be less than crucial, but still sufficiently important to outweigh a relatively weak foreign interest.” In comparing the competing interests, the court found that the Commission’s interest in confidentiality outweighed the plaintiffs’ interest in the discovery sought. The court distinguished prior case law disposing of discovery objections premised upon the French blocking statute. Whereas the blocking statute purported to generally prohibit disclosure of any documents located in France for use in foreign proceedings, the Commission’s objection to disclosure in this case was based upon a European law making the Commission’s enforcement proceedings confidential. The court found the confidentiality of the Commission’s enforcement proceedings to be “a narrower, more powerful interest.”

Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of America Sec., LLC, 2009 WL 2921302 (S.D.N.Y. Sept. 8, 2009). In a securities fraud case, 96 investor plaintiffs sought to recover losses they sustained in the liquidation of two hedge funds. The defendant filed a motion for sanctions against a plaintiff for alleged failure to preserve relevant documents. Relying on an “advice of counsel” defense, the plaintiff submitted an answer appending several heavily redacted attorney-client communications as exhibits, and submitted three of the exhibits solely to the court *in camera*. The defendant petitioned the court for full access to these documents, claiming that privilege had been waived. The court held that the attorney-client privilege was still intact, first because the disclosures were not voluntary but made under a court order, and second because raising the good faith defense of advice of counsel does not constitute a general waiver of privilege. Nevertheless, the court noted that the plaintiff needed access to the documents to prepare its answer, and that *in camera* submission of the exhibits to the court was inadequate and inappropriate in this situation. The court ordered the disclosure of the documents, stating that such disclosure would not constitute a waiver of privilege, citing FRE 502(d) in a footnote without comment. Subsequently, in **Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., 2010 WL 93124 (S.D.N.Y. Jan. 11, 2010), amended and superseded by Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., 685 F. Supp. 2d 456 (S.D.N.Y. Jan. 15, 2010), amended by Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., No. 05-9016 (S.D.N.Y. May 28, 2010)**, the court issued a major decision on preservation obligations and spoliation sanctions, entitled “Zubulake Revisited: Six Years Later.” Finding that 13 of the plaintiffs had been negligent or grossly negligent in their preservation and collection efforts, the court imposed a range of sanctions, including an adverse inference on the plaintiffs found to be grossly negligent. While no plaintiff was found to have acted intentionally, the court held that any failure to preserve is, at the least, negligence and warrants the imposition of some sanction. The opinion catalogued the actions of the 13 plaintiffs and provided a detailed analysis of the relationship between culpability and the

shifting burden of proof regarding prejudice in spoliation claims. The court criticized the plaintiffs for their failure to issue written litigation hold notices and cautioned against reliance on self-collection by custodians. In an order dated May 28, 2010, the court clarified the scope of collection from custodians for the purposes of preservation, correcting language that had been interpreted as requiring collection from *all* employees of an organization to avoid negligence, to requiring collection from all employees who had any involvement with the issues – as opposed to just “key players” – to avoid negligence.

Peschel v. City of Missoula, 2009 WL 3364460 (D. Mont. Oct. 15, 2009). In this civil rights action, the plaintiff sought sanctions for the “loss” of a video of his arrest. The court held that the defendant city had an obligation to preserve the video, which “obligation continued after Peschel was acquitted [of criminal offenses] since the prospect of subsequent civil litigation was reasonably foreseeable.” Having reviewed Ninth Circuit law on available sanctions and the level of *scienter* required for various sanctions, the court found that the city had been reckless in not preserving or backing up the video and that there had been spoliation. Allegations of the use of excessive force were central to the litigation and the video was the best evidence of what happened at the arrest scene. The court rejected the lesser sanction of a mere presumption and “established” that excessive force had been used, but left other related issues for the jury.

Philip M. Adams & Assoc. v. Dell, Inc., No. 05-00064 (D. Utah). In this complex patent infringement action involving multiple defendants and numerous discovery disputes, the magistrate judge issued three decisions relating to the discovery disputes. In **Phillip M. Adams & Assoc., 2009 WL 910801 (D. Utah Mar. 30, 2009)**, the plaintiff moved for terminating sanctions against one of the defendants, ASUSTEK Computer, Inc. (“ASUSTEK”), claiming that ASUSTEK destroyed source code and emails that would have “conclusively demonstrated” the ASUSTEK’s piracy of the plaintiff’s patented computer software. The plaintiff argued the court should “enter judgment against ASUSTEK for patent infringement ... and schedule a trial for damages.” ASUSTEK argued that the safe harbor prescribed in FRCP 37(e) should apply because its inability to produce the requested emails was attributable to its email servers, which were “not designed for archival purposes,” requiring it to depend on employees preserving only emails of “long term value.” The court held that FRCP 37(e)’s safe harbor against sanctions for parties who demonstrate the existence of a “good faith electronic records management system” did not apply, finding that ASUSTEK’s practice of allowing employees to decide individually whether to archive emails conflicted with ASUSTEK’s practice of regularly backing up financial data, demonstrating that it “[did] know how to protect data it regard[ed] as important.” The court temporarily denied the plaintiff’s motion for terminating sanctions, ruling that the degree of prejudice to the plaintiff could not be determined until the close of discovery. Accordingly, the court directed the parties to provide a briefing on specific outstanding issues at a later date. In **Phillip M. Adams & Assoc., 2010 WL 1901776 (D. Utah May 10, 2010)**, the court addressed a motion to compel discovery from the plaintiff filed by another defendant, Winbond Electronics Corporation (“Windbond”). Windbond requested production of source code in native format. The plaintiff failed to object to the form of production pursuant to FRCP

34(b)(1)(C), and the court therefore ordered it to produce the source code in native format. However, the court further ordered that the plaintiff was permitted to produce responsive information in any form for which Winbond had not specified a production format in its discovery requests. The court then established a protocol for searching the plaintiff's "old" computers to determine if they contained relevant information that the plaintiff argued was not reasonably accessible due to their age. In separate decisions, the court addressed the plaintiff's motions for sanctions against several defendants. In **Phillip M. Adams & Assoc., 2010 WL 2219424 (D. Utah May 26, 2010)**, the plaintiff moved to amend its complaint to assert a claim for misappropriation of the plaintiff's trade secrets and moved for sanctions on defendants Micro-Star International Corporations, Ltd. and MSI Computer Corporation (collectively, "MSI") for spoliating evidence related to the misappropriation claim. The court first denied the plaintiff's motion to assert the new claim, and then denied the plaintiff's request for sanctions, which had been rendered moot as the plaintiff's motion to amend its complaint was denied. Subsequently, in **Phillip M. Adams & Assoc., No. 05-00064 (D. Utah July 21, 2010)**, the court ruled on the outstanding issues from March 30, 2009 order, finding no evidence of bad faith and little prejudice to justify imposing a terminating sanction because, although ASUSTEK's data retention policies were "clearly inadequate," the plaintiff provided minimal evidence that ASUSTEK spoliating evidence. However, because the evidence showed that ASUSTEK attempted to patent the alleged pirated source code several times over five years, the court ruled that the jury could consider those facts and draw inferences of spoliation.

Phillips v. Potter, 2009 WL 1362409 (W.D. Pa. May 14, 2009). The plaintiff brought suit alleging that its employer violated a non-retaliation clause in a prior settlement for claims under Title VII. The plaintiff sought sanctions against the defendant for failing to preserve ESI and for shredding documents. Relying on *Brewer v. Quaker State Oil Refining Corp.*, 72 F.3d 236, 334 (3d Cir. 1995), the court denied the plaintiff's request for sanctions, finding that although the defendant failed to issue a timely litigation hold, negligent conduct alone did not allow for the inference that the missing emails or shredded documents were relevant.

Pinstripe Inc. v. Manpower Inc., 2009 WL 2252131 (N.D. Okla. July 29, 2009). In this motion for an adverse inference stemming from the destruction of documents, the defendant argued that although it failed to implement the litigation hold recommended by national counsel, it later spent over \$30,000 to recover all lost emails, leaving no resulting prejudice to warrant an adverse inference or termination sanctions. Citing the *Zubulake* line of cases, the court held that neither local counsel nor national counsel should be sanctioned, as local counsel did not engage in discovery and national counsel properly drafted the litigation hold procedures and believed that the defendant executed those procedures properly. The court found that the defendant should be sanctioned, but noted that that it did not act in bad faith or with a culpable state of mind to warrant severe sanctions. The court therefore ordered the defendant to pay the cost of any further depositions relating to the failure to implement the hold and pay \$2,500 to the Tulsa Bar Association for the cost of a future seminar on litigation holds.

Preferred Care Partners Holding Corp. v. Humana Inc., 2009 WL 982460 (S.D. Fla. Apr. 9, 2009). In this breach of contract case in which the defendant produced 10,000 documents on the eve of trial, plaintiffs moved for default judgment, arguing that they were prejudiced by the “document dump” and the “print and purge scheme” that deprived them of the ability to utilize the documents to plan their case before trial. Citing FRCP 16 and 37, the court rejected the plaintiffs’ motion and concluded that the defendant’s “shortcomings were neither intentional nor done in bad faith, but rather resulted from the grossly negligent oversights of counsel.” The court held the appropriate remedy is to permit the plaintiffs “to conduct additional limited discovery pertaining to the new information raised by [the defendant’s] supplemental production of documents, as well as [the defendant’s] backup storage of electronic documents” and allow the plaintiffs to attain costs and fees to conduct such discovery.

Proctor & Gamble Co., v. S.C. Johnson & Son, Inc., 2009 U.S. Dist. LEXIS 13190 (E.D. Tex. Feb. 19, 2009). The parties in this action had agreed to document production in searchable TIFF format, but the defendant sought to shift what it claimed would be a \$200,000 cost of OCR conversion to the plaintiff. The court, applying the *Zubulake* factors, rejected the application.

Qualcomm, Inc. v. Broadcom Corp. 2010 WL 1336937 (S.D. Cal. Apr. 2, 2010). At the conclusion of a high-profile patent infringement trial, the court sanctioned plaintiff Qualcomm and six of its outside counsel for withholding critical evidence and failing to conduct an adequate investigation in response to discovery requests. Qualcomm did not appeal the \$8.5 million sanction. The six individual attorneys filed objections and were granted an evidentiary hearing with “almost unlimited opportunity to conduct discovery” into the relationship they had with their client throughout the litigation, after a determination that the self-defense exception to the attorney-client privilege applied. The court found “an incredible breakdown in communication” between Qualcomm and its attorneys, that “no attorney took supervisory responsibility for verifying that necessary discovery had been conducted,” that there was a “lack of agreement amongst the participants regarding responsibility for document collection and production,” an “incredible lack of candor on the part of the principle Qualcomm employees,” and “inadequate follow-up in response to contradictory, or potentially contradictory evidence.” Nevertheless, the court declined to impose sanctions, finding that discovery responses “were made after a reasonable, although flawed, inquiry and were not without substantial justification,” and that “although a number of poor decisions were made, the involved attorneys did not act in bad faith.”

City of Ontario v. Quon, 130 S. Ct. 2619 (2010). The U.S. Supreme Court reversed the Ninth’s Circuit’s ruling in **Quon v. Arch Wireless Operating Co., 529 F.3d 892 (9th Cir. 2008)**, *petition for reh’g denied, 554 F.3d 769 (9th Cir. 2008)*, *cert. granted sub nom. City of Ontario v. Quon, 130 S. Ct. 1011 (2009)* that the City of Ontario, California, violated the Fourth Amendment rights of one its police officers by searching and reading the personal text messages contained on the city-owned pager issued to the officer. While expressly declining to decide whether the officer had a protected Fourth Amendment interest in his text messages, the Supreme Court reversed the Ninth Circuit’s

decision and held that the search conducted by the City was not unreasonable because it was motivated by a legitimate government interest and was reasonable in time and in scope. In 2001, the City contracted with Arch Wireless to provide the City with text messaging services for its police officers. Plaintiff-respondent Jeff Quon (“Quon”), a police officer, was issued a city-owned pager in order to communicate with other officers by text messaging. The City’s computer policy provided that the City “reserves the right to monitor ... all [employees’] network activity ... with or without notice” and that any electronic communication via the City’s computers was restricted to business use. Upon issuance of the text-messaging pagers to its officers, the City made clear to all employees, including Quon, that text messages fell within the City’s computer policy. In addition, the City limited the number of text messages sent and received by each officer. During a subsequent investigation into Quon’s excessive text messaging, the City reviewed Quon’s text messages between August and September 2002 and found that the majority of the text messages were personal and some were even sexually explicit. The City disciplined Quon and he subsequently brought suit. In **Quon v. Arch Wireless Operating Co., 445 F. Supp. 2d 1116 (C.D. Cal. 2006)**, the jury found that although Quon had a reasonable expectation of privacy with respect to his text messages, the City had a legitimate interest when it searched Quon’s text messages to determine whether the City’s limitations on the number of text messages per officer were reasonable and effective for police business. The district court ruled in favor of the defendants, holding that a Fourth Amendment violation did not occur. On appeal, the Ninth Circuit agreed with the district court that Quon had a reasonable expectation of privacy in his text messages but disagreed about whether the search was reasonable, arguing that the City had less intrusive means in conducting its search. The Supreme Court held that the Ninth Circuit erred by applying the wrong analysis in ruling that the City had less intrusive alternatives when it searched Quon’s text messages. In reversing the Ninth Circuit’s decision, the Supreme Court held that no Fourth Amendment violation occurred because, even assuming *arguendo* that Quon had an expectation of privacy with respect to his text messages, the City had a legitimate interest in reviewing his text messages, and the search was reasonable in time and scope because “it was an efficient and expedient way to determine whether Quon’s overages were the result of work-related messaging or personal use ... While it may be reasonable as well for the [the City] to review [text messages] of all the months in which Quon exceeded his allowance, it was certainly reasonable for [the City] to review messages for just two months in order to obtain a large enough sample to decide whether the [text message] limits were efficacious.”

Rahman v. The Smith & Wollensky Rest. Group, Inc., 2009 WL 773344 (S.D.N.Y. Mar. 18, 2009). In this employment discrimination case, the plaintiff moved to re-open discovery because the electronic data requested was presented in a jumbled manner in PDF format. Citing FRCP 34(b)(2)(E), the court held that absent any specific format request, PDF format is presumptively a “reasonably usable form.” The court then opined that the requested documents were produced to the plaintiff on CD-ROMs in three-year batches with each document identified by a unique index number, and as such, the organization was sufficient for discovery purposes.

***In re Rail Freight Fuel Surcharge Antitrust Litig.*, 2009 WL 1904333 (D.D.C. July 2, 2009).** In this class action antitrust case for price-fixing of fuel surcharges, the plaintiffs contended that discovery on both class certification and substantive issues should proceed simultaneously rather than be bifurcated before and after a finding by the court on class certification. The court held that since elements necessary to prove class certification and the merits of the case were inextricably linked, the plaintiffs should be able to attain discovery before class certification; however, this decision did not relieve the parties' obligation to brief the issue of class certification by the date scheduled in the case management order, and therefore the plaintiff and defendant must allocate their discovery priorities accordingly. The court concluded "I appreciate that this is a compromise but I can only hope that like any compromise it will displease both parties equally."

***Rajala v. McGuire Woods, LLP*, No. 08-2638 (D. Kan. July 22, 2010).** The bankruptcy trustee (the "plaintiff") for a debtor corporation brought suit against the debtor's counsel to recover for, among other things, violations of federal and state securities law. The defendant law firm represented the debtor in the process of becoming a public company and the plaintiff alleged the defendant perpetuated a fraudulent scheme involving the sale of unrestricted securities of the debtor. During discovery, the parties were unable to reach an agreement regarding the terms of a joint protective order: the defendant's proposed order contained a clawback provision which the plaintiff opposed. The defendant argued such a provision would prevent contentious and costly discovery as well as inadvertent disclosure of sensitive client information. The plaintiff argued that the defendant counseled the debtor in a previous matter which was directly at issue in the case at bar, and that such a provision would allow the defendant to raise the attorney-client privilege or work-product doctrine to demand the return of any document during the litigation. The court agreed with both parties, in part, noting that the FRE 502 advisory committee notes warn of the dangers of expensive and time-consuming discovery and the waiver of privilege information—especially in actions involving ESI. The court held that the protective order shall contain a clawback provision, but that the proposed provision offered by the defendant shall be modified to limit its application to information protected by the attorney-client privilege and the work-product doctrine. The court accordingly entered an order outlining the parameters of the clawback provision.

***R.C. Olmstead, Inc. v. CU Interface, LLC*, 606 F.3d 262 (6th Cir. 2010).** In this appeal of a summary judgment ruling in a copyright and trade secret infringement action, the Sixth Circuit held the Northern District of Ohio did not abuse its discretion in declining to sanction the defendant for a third party's destruction of the plaintiff's hard drives. The plaintiff, a developer of credit union-related software, sold its software to a credit union. Pursuant to the sales agreement, the credit union was permitted to hire an independent contractor to provide maintenance and support. The credit union hired the defendant, and the plaintiff subsequently filed suit when it learned the defendant had used the software the plaintiff sold to the credit union to develop its own credit union-related software. On appeal, the plaintiff argued the defendant should have been sanctioned for spoliation of evidence because the credit union intentionally destroyed the hard drives containing the plaintiff's source code. The Sixth Circuit affirmed the district court's decision because (1) the defendant was not liable for the intentional destruction

committed by the non-party credit union, and (2) Ohio law recognizes intentional spoliation of evidence as an independent cause of action that may be brought against the primary opposing party or a non-party. Since the plaintiff brought an independent claim of intentional spoliation against the credit union and eventually settled all claims with it, the plaintiff was “not left without a remedy for any harm cause by the [credit union’s] spoliation.”

Realnetworks, Inc. v. DVD Copy Control Assn., Inc., 2009 U.S. Dist. LEXIS 38221 (N.D. Cal. May 5, 2009). The requesting party sought sanctions for spoliation, alleging that the producing party’s employees were aware of the possibility of litigation and manipulated ESI to prevent disclosure. Additionally, the requesting party argued that the opposing party failed to preserve the files of an employee who was terminated immediately before the litigation. The court sided with the producing party on the general duty of preservation, holding that “a general apprehension of lawsuits does not create a duty to preserve all documentation” related to litigation. However, the court sided with the requesting party and imposed sanctions on the producing party for failing to preserve an employee’s files after being on notice of possible litigation, citing *In re Napster, Inc. Copyright Litig.*, 462 F. Supp. 2d, 1060, 1068 (N.D. Cal. 2006).

Rimkus Consulting Grp. v. Cammarata, 2010 U.S. Dist. LEXIS 14573 (S.D. Tex. Feb. 19, 2010). In a major decision certain to be considered in conjunction with—and contrasted to—*Pension Committee v. Banc of America Securities, LLC*, the court imposed sanctions against the defendants for intentional spoliation of relevant ESI after a year of conducting discovery on spoliation rather than the merits of the case. In imposing sanctions, the court canvassed the differing approaches among the federal judicial circuits regarding the degree of scienter necessary for the imposition of sanctions. The court crafted a permissive adverse inference instruction that left the jury to decide whether, in fact, the defendants acted willfully, whether the lost ESI was relevant, and whether the defendants were prejudiced by the loss. The court declined to apply FRCP 37(e), as the ESI was not lost through the routine, good faith operation of a computer system. The court also awarded attorneys’ fees and costs to the plaintiff, including those incurred in investigating spoliation.

Rhodes v. YWCA, 2009 WL 3319820 (W.D. Pa. Oct. 14, 2009). In this *pro se* Equal Pay Act and retaliation action, the plaintiff moved to amend and attached, as an exhibit to the proposed amendment, one of four pages inadvertently produced by the defendants. Applying FRE 502(b), the court found that the pages were privileged, although the court applied a work-product test in doing so. The court also found that “an administrative error” caused the pages to be included in materials to be turned over, only four of some 1,600 pages produced were privileged, and that the defendants took prompt steps to rectify the error by demanding return immediately when they learned of the inadvertent production. The court also denied the plaintiff’s motion to amend, finding that an amendment would be futile upon the return of the inadvertently produced documents to the defendants. The court also addressed defendants’ objections to the plaintiff’s discovery requests, including an interrogatory asking what steps the defendants took to preserve ESI. The court held the question was proper, as was the defendants’ response

that there was no ESI to preserve as anything relevant had been deleted before a duty to preserve arose.

Rodríguez-Torres v. Gov't Dev. Bank, 2010 WL 174156 (D.P.R. Jan. 20, 2010). In this disparate treatment action, the plaintiff moved to compel discovery and for sanctions. The court directed the parties to file a “joint informative motion with all the information necessary for the court to resolve the motions.” Among other things, the defendant objected to production of email over a three-year period in native format. The court found that the ESI was not reasonably accessible, stating “[t]he Court finds that \$35,000.00 is too high of a cost for the production of the requested ESI in this type of action. Moreover, the Court is very concerned over the increase in costs that will result from the privilege and confidentiality review that Defendant GDB will have to undertake on what could turn out to be hundreds or thousands of documents. The volume of such information along with the form in which the information is stored makes privilege determinations more difficult and, correspondingly, more expensive and time-consuming.” The court also found that the plaintiff, by only citing three articles suggesting that email will likely contain inappropriate comments, had failed to show good cause to allow the discovery sought.

Rosenbaum v. Becker & Poliakoff, P.A., 2010 WL 623699 (S.D. Fla. Feb. 23, 2010). In this contentious dispute arising out of an attorney’s move from one law firm to another—and the financial and competitive fallout from the move—the court, among other things, issued “guidelines” about how it would deal with various issues. For example, the court held that the doctrine of “issue injection” precluded the old firm from reliance on attorney-client privilege and work-product to avoid discovery. The court also ordered the old firm to attempt to locate documents on its computer system responsive to an issue using search terms and email addresses and that the old firm could choose to produce in electronic form or hard copy, whichever was least burdensome. The court also relied on the “rule of proportionality” to, among other things, limit the time period covered by the search.

Ross v. Abercrombie & Fitch Co., 2010 WL 1957802 (S.D. Ohio May 14, 2010). Plaintiff in a securities class action moved to compel production of relevant and responsive documents, alleging that the defendant failed, after numerous requests by the plaintiff, to produce the requested ESI. The defendant argued that after it conducted a keyword search of the requested ESI and could not find responsive documents, it had no further obligation to look further or use other means to find the documents. In addition, the defendant had informed the plaintiff that even though it had not implemented a litigation hold over data in its mainframe computer, the requested ESI was of “marginal value” to the plaintiff’s case and would be too costly to locate and produce. Finding that the defendant failed to make a compelling argument that the plaintiff’s discovery request was unduly burdensome, the court ordered the parties to meet and confer to determine, to the extent the defendant believed some of the requested documents still existed, the anticipated cost and labor of producing such ESI. The court also ordered the parties to arrange for a telephone conference with the court if such meet and confer negotiations were unsuccessful.

Sanbrook v. Office Depot, 2009 U.S. Dist. LEXIS 30852 (N.D. Cal. Mar. 30, 2009). In this putative class action, the named plaintiff sought production of documents containing contact information for all third parties that purchased the defendant's "Performance Protection Repair Plan." The defendant argued that the motion should only be granted on the condition that the defendant be allowed to contact customers and give them an opportunity to object to the disclosure of its information. The defendant also objected to the request as "too burdensome." Citing FRCP 34(b)(2)(E), the court granted the plaintiff's motion since "the identity and location of persons having discoverable knowledge are proper subjects of civil discovery." The court noted that the defendant failed to provide any evidentiary support for its claim that the production was "too burdensome." The defendant was ordered to provide the plaintiff with any responsive information that it maintained in electronic format, if not already produced. Additionally, the court held that if the defendant found production of hard copies too burdensome, it was free to provide data in electronic form so long as it was produced in a "form in which it is ordinarily maintained" or "reasonably usable."

Schanfield v. Sojitz Corp. of Am., 2009 WL 577659 (S.D.N.Y. Mar. 6, 2009). In a wrongful termination suit, the plaintiff sent 36 emails soliciting counsel from attorneys, family, and friends. The defendants sought these emails, but the plaintiff maintained the emails were protected under the attorney-client privilege and work-product doctrine. The court held that emails sent to non-attorneys were not protected since the messages failed to indicate that they were prepared in anticipation of litigation. The plaintiff asserted that another set of emails, sent to co-workers in an effort to gain their support in the action against his employer, was protected under the common interest doctrine. The court disagreed, declaring that any email sent to other employees waived the plaintiff's privilege, and without the solicited employees' clear intent to cooperate there was no establishment of a common interest under the doctrine. The court held that a third set of emails—addressed to family members, some of whom were attorneys—was protected by the work-product doctrine since the emails were clearly drafted in anticipation of litigation and were not more likely to be obtained by the employer simply because a family member was a recipient.

Schubert v. Pfizer, Inc., No. 09-00167 (S.D. Iowa June 4, 2010). The defendant in this age discrimination suit moved for terminating sanctions against the plaintiff for violating a discovery order and submitted a request for costs and attorney's fees related to a prior motion to compel. The defendant argued that plaintiff's counsel did not understand the Federal Rules of Civil Procedure, which forced the defendant to file several discovery motions in order to obtain documents it requested many months before, and that the plaintiff violated an order to compel production. The court ruled that the defendant was entitled to reasonable costs and attorney's fee for the time spent by local and out-of-state counsel in the preparation of the motion to compel. The defendant's motion for terminating sanctions was denied, but the court admonished the plaintiff and his counsel that any further unnecessary delay or obstruction of the discovery process would result in additional sanctions, which could include dismissal of the lawsuit. Citing *The Sedona*

Conference[®] *Cooperation Proclamation*, the court urged the parties and counsel to use cooperation and proportionality to save clients both time and money.

SEC v. Badian, 2009 WL 222783 (S.D.N.Y. Jan. 26, 2009). Following an *in camera* review of documents withheld from production in response to a subpoena, the court held that privilege claims had been waived, considering four factors. First, when originally turned over to the Securities and Exchange Commission (SEC) in 2003 during an earlier investigation, no precautions were shown to have been taken to protect against inadvertent disclosure of privileged information. Second, there was a five-year delay in attempting to assert privilege after the original inadvertent disclosure. Third, a “significant number” of documents had been inadvertently disclosed. Fourth, there would be no “fairness” in precluding the SEC from using the documents.

SEC v. Collins & Aikman Corp., 2009 U.S. Dist. LEXIS 3367 (S.D.N.Y. Jan. 13, 2009). In this securities fraud action brought by the Securities and Exchange Commission (SEC), the court addressed “important questions concerning the Government’s discovery obligations in civil litigation.” In ruling on the defendant’s objections to the manner in which the SEC responded to his requests to produce, the court held that the SEC’s production of some 1.7 million documents (10.6 million pages) in categories corresponding to the requests would not violate work-product protection, and, even if it did, the difficulty of searching an unorganized collection of that size would constitute “undue burden” on the requesting party. The court also held that the collection was not assembled in the “usual course of business,” as it resulted from an investigation. Thus, the SEC did not have the option of producing it without the categorical identification. The court also found that “[t]he SEC’s blanket refusal to negotiate a workable search protocol ... is patently unreasonable,” rejecting the SEC’s unilateral decision to limit its search to three divisions in response to certain requests to produce. Noting the proportionality provisions of FRCP 26(b)(2)(C), the court observed that the requests “seem particularly reasonable in an action initiated by the SEC.” The court chided the parties for their failure to engage in a Rule 26(f) process and drew their attention to The Sedona Conference[®] *Cooperation Proclamation*. Additionally, the court found that the SEC’s privilege log was deficient as a guide to its invocation of the deliberative process privilege and directed an *in camera* review. Finally, the court found the SEC’s blanket objection to producing email unacceptable and ordered that the parties meet and confer to develop a means to sample the email.

Secure Energy, Inc. v. Coal Synthetics, 2010 WL 597388 (E.D. Mo. Feb. 17, 2010). In this action for misappropriation, the plaintiffs moved to compel the production of engineering drawings in native format with metadata intact. The drawings had been produced by defendants in paper and PDF form. The court found the motion to be untimely, as the plaintiffs had knowledge of the dispute but failed to move within a deadline set by the court. The court also found that the plaintiffs had not specified a form of production in their request and the forms chosen by the defendants were satisfactory.

Seger v. Ernest-Spencer Metals, Inc., 2010 WL 378113 (D. Neb. Jan. 26, 2010). In this personal injury action, the defendant sought to compel a nonparty to respond to a

subpoena. The nonparty produced documents on a disk, but later asserted privilege claims to a number of the documents. The court found that the nonparty, by failing to object, move to quash, or modify the subpoena in a timely manner, had waived any privilege. Analyzing the nonparty's claim of inadvertent production and citing to FRE 501, the court held that Nebraska law governed the privilege question, and would adopt the "middle of the road" approach to resolve such a claim. Granting the motion, and applying a five-part test announced by the Eighth Circuit in 1996, the court found that the nonparty had produced no evidence of the precautions it had taken to prevent inadvertent production and that it had produced the documents in issue some six months before asserting a privilege claim. The court concluded that the nonparty had made a "knowing and intentional" production of the documents. The court then turned to the nonparty's objections to two requests for the production of ESI. One sought email by names of certain individuals, the other by search terms. The court found that the defendant had established the relevance of the ESI sought by the first request. As to the second, the court found that only 11 of the 24 search terms identified by the defendant would produce relevant information. The court rejected the nonparty's claims of undue burden, finding that the nonparty had overstated cost estimates and had only made conclusory statements. The court left the parties to address "cost-shifting solutions."

Sentis Group, Inc. v. Shell Oil Co., 559 F.3d 888 (8th Cir. Mar. 24, 2009). The plaintiff contended it was improperly persuaded to enter into an operator agreement involving gas stations and convenience stores. After a litigious discovery process, the lower court dismissed the plaintiff's claims with prejudice, ruling that the plaintiff had willfully withheld documents. On appeal, the circuit court held that while some sanction may have been suitable, lesser sanctions were warranted. The court also noted that the defendant had "fann[ed] the flames" of the lower court's displeasure with the plaintiff instead of reasonably seeking discovery. The circuit court remanded the case to the district court, but it gave instructions to assign the case to a different judge to avoid what the court believed was a high level of antagonism in the previous action.

Siani v. State University, 2010 WL 3170664 (E.D.N.Y. Aug. 10, 2010). The *pro se* plaintiff in this employment discrimination action moved for the imposition of spoliation sanctions. The defendants implemented a litigation hold after the plaintiff filed an EEOC charge. However, they asserted work product to documents created at an earlier date when the plaintiff threatened litigation. The court found the assertion triggered a duty to preserve which was breached when several "key players" deleted ESI. Nevertheless, the court denied the motion as the plaintiff failed to show the relevance of the lost ESI through extrinsic evidence.

Siemens Aktiengesellschaft v. Jutai 661 Equipamentos Electronicos, Ltd., 2009 WL 800143 (S.D. Fla. Mar. 25, 2009). In this trademark infringement case, the defendants contended that the plaintiff waived its ability to object to discovery by failing to timely respond to an original 30-day deadline and then to a 15-day extension. Defendants further asserted that even if the objections were timely, they were meritless. Plaintiff maintained that its obligation to respond to the request for production did not extend to ESI. The court concluded that both parties' "all-or-nothing approach" to discovery was incorrect.

The defendant was entitled to conduct some discovery with respect to its affirmative defenses, but some of the language in its request was overbroad. “The parties’ competing proposed orders fail[ed] to explain their inability to compromise on an electronic discovery plan, nor [did] they set forth the bases of their disagreements.” The court struck two of the eight requests as “overbroad” and required the plaintiff to produce the ESI responsive to the defendant’s six remaining requests. The parties were ordered to produce an electronic discovery plan “for the purposes of establishing reasonable limitations on the scope of plaintiff’s obligation to produce responsive ESI; for example restricting the search to certain employees and agreeing upon a list of search terms.”

Smith v. Slifer Smith & Frampton/Vail Associates Real Estate, LLC, 2009 WL 482603 (D. Colo. Feb. 25, 2009). In a real estate transaction dispute, the plaintiffs moved for spoliation sanctions, based on the defense expert’s own report that one of the individual defendants had installed a wiping program on his home computer. Further investigation by the plaintiff’s expert pinpointed the times when the wiping program was used and the extent of files deleted. Further the defendants failed to preserve relevant data on a central server, based on the assumption that it would be duplicative of data on the individual defendants’ computers. The defendants challenged the plaintiffs’ conclusions that the file deletions were intentional or calculated to impede discovery, but the court held that the circumstance “strongly support[ed]” a finding “by a preponderance of the evidence” that the defendants destroyed evidence in bad faith to prevent disclosure, that the missing evidence was likely relevant to the issues in the case, and that the plaintiffs’ ability to litigate their claims had been substantially prejudiced. However, the court did not recommend entry of default judgment, but opted for an adverse inference instruction to the jury and granted leave to the plaintiffs to amend their complaint to add a claim for exemplary damages based on the adverse inference.

Sonomedica, Inc. v. Mohler, 2009 WL 2371507 (E.D. Va. July 28, 2009). This action arose out of the alleged illegal transfer of the plaintiff’s technology. After two nonparties’ failure to comply with an order enforcing a subpoena for the production of documents, the court held them in contempt and referred the matter to the United States Attorney to investigate criminal contempt proceedings. The court found that one nonparty had failed to testify truthfully at deposition, and both had failed to comply with an order requiring them to turn over a computer for forensic examination “without touching it, except to turn it off.” Instead, the court found that the contents of the computer had been altered. The court also awarded the plaintiff its fees and costs, including the cost of the forensic examination.

Southeastern Mechanical Services, Inc. v. Brody, 2009 U.S. Dist. LEXIS 69830 (M.D. Fla. July 24, 2009). The defendants sought spoliation sanctions for the plaintiffs’ negligent failure to implement a litigation hold for a two-week period, resulting in the automatic deletion of documents. Borrowing from Florida’s spoliation law because the Eleventh Circuit had not yet addressed the issue, the court held that mere negligence does not constitute the culpable state of mind to warrant an adverse inference instruction. The court reasoned that spoliation sanctions were not appropriate because the documents were deleted as part of a routine document retention policy. In a subsequent decision,

Southeastern Mechanical Services, Inc. v. Brody, 2009 WL 2883057 (M.D. Fla. Aug. 31, 2009), the plaintiffs moved for terminating sanctions, claiming that the defendants wiped laptops and BlackBerries. The defendants contended that there was no prejudice because the data sought was available on a server. Citing the testimony of several experts, the court held that an adverse inference sanction was appropriate for the defendants' intentional wiping the BlackBerries. The court reasoned that it was troubling that the devices were in "never used" condition, yet the SIM cards showed that there were emails, text messages, and contact information on the devices. Moreover, the court found the server files did not include the emails, text messages, and calendar dates that would have been stored on the Blackberries for a relevant three-week period.

Southern New England Telephone v. Global NAPs, Inc., 2010 WL 3325962 (2d Cir. 2010). The plaintiff sued for breach of contract when the defendant failed to pay for telecommunications equipment it ordered from the plaintiff. The district court held the defendant in civil contempt for intentionally erasing nearly 20,000 responsive electronic files using "anti-forensic software" despite the court's order that the files be disclosed to the plaintiff. In addition, the district court entered a default judgment in the amount of \$5,247,781.45 in addition to costs and fees totaling \$645,761.41 citing the defendant's "willful disregard for the process of discovery." On appeal to the Second Circuit, the defendant argued the district court abused its discretion by imposing sanctions for civil contempt and a default judgment in connection with the defendant's discovery violations. The Second Circuit affirmed the district court's imposition of sanctions because, although the plaintiff suffered no prejudice from the defendant's noncompliance with discovery obligations, the defendant's behavior warranted severe sanctions under FRCP 37. The Second Circuit explained that the three factors prescribed by Rule 37 for imposing sanctions applied to the defendant's behavior: "[sanctions] (1) ensure that a party will not benefit from its own failure to comply; (2) [sanctions] are specific deterrents and seek to obtain compliance with the particular order issued; and (3) they are intended to serve a general deterrent effect on the case at hand and on other litigation." Here, the Second Circuit found, all three factors applied to the defendant's discovery misconduct and therefore the district court did not abuse its discretion in imposing the sanctions.

Spieker v. Quest Cherokee, LLC, 2009 WL 2168892 (D. Kan. July 21, 2009). In this sequel to an earlier decision in this putative class action, **Spieker v. Quest Cherokee, LLC, 2008 U.S. Dist. LEXIS 88103 (D. Kan. Oct. 30, 2008)**, the court revisited the request of the individual plaintiffs for discovery of ESI. The court denied an earlier motion based on the estimated cost of compliance, the failure of the plaintiffs to demonstrate the relevance of the ESI sought to the issue of class certification, and the lack of information to develop a reasonable search protocol. On the renewed motion, the court found that the defendant had agreed to discovery on class certification *and on the merits*, thus making the ESI sought by the plaintiffs relevant. The court also found that the defendant could conduct the search using its own employees, thus making the defendant's reliance of an estimate from a vendor "greatly exaggerated." The court rejected the argument that the ESI sought was not reasonably accessible under FRCP 26(b)(2)(B), that the discovery sought was cumulative, and that interrogatories and FRCP 30(b)(6) depositions were a more efficient means to secure the information sought by the

plaintiffs. However, the court rejected the plaintiffs' suggestion that the defendant could simply turn over its ESI for searching under a Rule 26(b)(5)(B) protective order. Federal Rule of Evidence 502(b) would still require the defendant to conduct a "reasonable" privilege review beforehand.

St. Paul Fire & Marine Ins. Co. v. Schilli Trans. Servs., Inc., 2010 WL 2629485 (N.D. Ind. June 28, 2010). In a dispute arising from an insurance policy, the plaintiff sought ESI from the defendant relating to the underlying claim. When the defendant failed to comply with several discovery requests, the plaintiff, having shown a good faith attempt to confer with defense counsel to resolve the dispute, moved to compel production of the ESI. In response, the defendant argued, among other things, that because it had been out of business since 2003, it would be difficult to locate the information requested. In addition, the production request would have required "hundreds of hours" of reviewing privileged and unprivileged ESI because of the defendant's corporate dissolution. The court noted that under Indiana law, a dissolved corporation is required to "continue its corporate existence ... to wind up and liquidate its business and affairs," but the dissolution does not "prevent commencement of a proceeding by or against the corporation." The court accordingly ordered the defendant to produce the requested ESI and awarded the plaintiff expenses and attorney's fees because the defendant "failed to demonstrate any substantially justified reason for withholding discovery."

Starbucks Corp. v. ADT Security Services, Inc., No. 08-02620 (W.D. Wash. Apr. 30, 2009). In a breach of contract and fraud case relating to ADT's installation of propriety software that was not transferable to other carriers, Starbucks sought to search the relevant ESI from five key regional employees of ADT that Starbucks had worked with and the emails archived from 2003 to 2006 relating to the pending dispute stored on ADT's Plasmon System. The defendant argued that producing ESI from the Plasmon System would be too costly. Citing *Zubulake* and deposition testimony on the nature of the system, the court held that the archived documents would not be unduly burdensome to produce. The court reasoned that "the fact that the company as sophisticated as ADT ... chooses to continue to utilize the Plasmon System instead of migrating its data to its now functional archival system should not work to the plaintiff's disadvantage." As a result, Starbucks was awarded costs and attorneys' fees relating to its motion to compel discovery. Moreover, ADT was ordered to produce the requested data in a reasonably searchable medium.

Stone v. Lockheed Martin Corp., 2009 U.S. Dist. LEXIS 12105 (D. Colo. Feb. 2, 2009). The plaintiff in the early stages of this employment action filed an "Emergency Motion to Preserve Evidence" and attached 147 interrogatories. The defendants filed a motion to stay discovery pending a ruling on its motion to dismiss. Granting the defendants' motion, the court found "[i]t is clear that Plaintiff seeks to conduct extensive discovery in this case resulting in undue burden and expense to all parties," that "the defendant has a likelihood of prevailing on its motion to dismiss," and that no party would suffer substantial or irreparable harm by a stay pending a ruling on the motion to dismiss.

SubAir Sys., LLC v. PrecisionAire Sys., Inc., No. 1:06-cv-02620-RBH (D.S.C. Feb. 19, 2009). In this action, the plaintiff allowed defense counsel to inspect its documents on-site and designate documents for copying by a copy service. However, the plaintiff refused to produce several of the designated documents to the defendant after copying, claiming they were privileged. The defendant moved to compel production of the documents, and the court considered whether the plaintiff had waived its privilege claims by failing to exercise reasonable precautions to prevent disclosure of the privileged documents during the inspection and copying process. The court found that although the plaintiff had identified and segregated the privileged documents, it failed to exercise appropriate supervision over defense counsel in the reading room and failed to object to defense counsel's designation of the documents before copying. The plaintiff therefore was held to have effectively waived its claims of privilege regarding the documents.

Sue v. Milyard, 2009 U.S. Dist. LEXIS 69199 (D. Colo. Aug. 6, 2009). In this strip search case, the plaintiff moved for spoliation sanctions, alleging that the defendant destroyed a videotape of the search. The court held that the videotape was destroyed as part of the defendant's document retention program. The court reasoned that the request for the videotape came just days before the document was set to be purged and by the time the request was received the document had already been purged, demonstrating no bad faith or purposeful destruction by the defendant.

Surplus Source Group, LLC v. Mid America Engine, Inc., 2009 WL 961207 (E.D. Tex. Apr. 8, 2009). This matter arose from the defendants' alleged failure to share profits from the sale of industrial equipment as required by an agreement between the parties. After the defendants had completed an initial search of relevant financial data, the plaintiffs sought more extensive discovery. To conduct the second search, the defendants asked the plaintiffs for guidance. Approximately six weeks later, the plaintiffs' attorney responded with a list of deficiencies regarding the first search. The defendants then solicited specific search terms from the plaintiffs. Approximately two weeks later the plaintiffs provided a list of terms for the second search. However, the defendants had already conducted the second search by that time. The plaintiffs sought to compel a third search using the terms it had submitted. The court held that a third search was warranted; however, the plaintiffs were ordered to pay the defendants' costs, up to the amount spent on the second search.

Swofford v. Eslinger, 2009 WL 3818593 (M.D. Fla. Sept. 28, 2009). In this civil rights action arising out of the shooting of the plaintiff, the court imposed sanctions on the defendants for their failure to preserve, among other things, a laptop computer and email. Concluding that this was a case "of knowing and willful disregard for the clear obligation to preserve evidence," the court found bad faith sufficient for sanctions, including adverse inferences, under its inherent authority. The court also imposed \$10,000 in monetary sanctions against the general counsel of the sheriff's office in his official capacity because he failed, both in that role and as initial counsel to the defendants, to "take affirmative steps to monitor compliance."

Takeda Pharmaceuticals Company Ltd. v. Teva Pharmaceuticals USA, Inc., 2010 WL 2640492 (D. Del. June 21, 2010). Although the Delaware District Court previously imposed a limitation against producing ESI more than five years old in this patent infringement suit, the defendants moved to compel the production of ESI up to 18 years old. The court found that the defendants had shown good cause that ESI concerning that patent-in-suit likely preceded the five-year period. The plaintiffs, however, demonstrated that the ESI sought by the defendants during the entire 18-year period was not reasonably accessible. The court accordingly granted the defendants' motion to compel the production of an additional 13 years of ESI but held that if the plaintiffs employed an outside vendor to assist with the production of the additional 13 years of ESI, the defendants would be required to pay 80 percent of the reasonable cost of employing the vendor and that the plaintiffs would be responsible for the remaining 20 percent.

Tango Transp., LLC v. Transport Int'l Pool, Inc., 2009 WL 3254882 (W.D. La. Oct. 8, 2009). In this action arising out of the plaintiff's demand for storage fees for leased trailers, the defendant replaced its mainframe after discovery requests had been served and failed to preserve relevant email. Although paper discovery was provided by the defendant, searches of some employee email accounts resulted in only a handful of email messages being produced. On the plaintiff's motion for sanctions, the court found that the duty to preserve arose on the filing of the complaint and that the defendant's failure to place a litigation hold on the email accounts of key players was central to possible spoliation. The court questioned whether the defendant acted in "bad faith," it being likely that the same information was available from other sources and was not unique or damaging. However, the court questioned the relevance of any lost email and that the information at issue might be barred from evidence by the parol evidence rule should the leasing agreement between the parties be unambiguous. The court awarded attorneys' fees and costs associated with the re-deposition of any employee of the defendant occasioned by its conduct and for the motion.

***In re* TFT-LCD (Flat Panel) Antitrust Litig., No. 07-1827 (N.D. Cal. Sept. 10, 2009).** A corporation sought to compel the Department of Justice (DOJ) to return an inadvertently produced document included on a hard drive turned over in response to a grand jury subpoena. The document contained an employee's notes about an FBI interview and had been prepared at counsel's direction. Citing FRE 502(b), the court found that reasonable steps had been taken to prevent and rectify the disclosure, although the document had been in DOJ's possession for over 22 months and DOJ had used it to prepare its case. The court declined to address "any collateral consequences" of the disclosure and noted the DOJ's concern that parties might insert "Trojan Horses" into a production to secure some type of immunity from prosecution.

Technical Sales Assocs., Inc. v. Ohio Star Forge Co., 2009 WL 728520 (E.D. Mich. Mar. 19, 2009). In a sales commission dispute, the plaintiff sought sanctions for the alleged destruction of evidence. The defendant sought a contempt motion, arguing the plaintiff breached the confidentiality provisions of a protective order when conducting a computer forensic examination. During its forensic examination, the plaintiff allegedly found evidence that the defendant had deleted approximately 70,000 files. The court

noted that the timing of the data destruction was suspicious, coming immediately before the forensic examination. The court granted the plaintiff's motion and ordered monetary sanctions in the amount of the forensic examination. However, the court reserved its final decision regarding additional sanctions until trial.

Telequest Intern. Corp. v. Dedicated Bus. Sys., Inc., 2009 U.S. Dist. LEXIS 19546 (D.N.J. Mar. 11, 2009). In a breach of fiduciary duty case, the plaintiff sought sanctions against the defendant for spoliation of “materially relevant paper and electronic files during the course of [the] litigation.” The plaintiff alleged that the defendant, a former employee, stole a list of customers and vendors from the plaintiff's company. To substantiate its claim, the plaintiff obtained a copy of the defendant's email that was addressed to one of the plaintiff's employees. The email included the plaintiff's customer and vendor list obtained by the defendant during his employment. The court directed the defendant to produce “any and all computers used by [the defendant and his business] in connection with the sale, purchase, or marketing of telecommunications equipment since January 2006.” The court found that on the date the computer was delivered to the plaintiff, a “Secure Clean” program had “wiped” data from the hard drive, making it unrecoverable using conventional computer forensic tools. The court also noted that the “Secure Clean” program was deleted from the computer on that same day. The court concluded that the defendant's duty to preserve arose well before the order to produce the computers was entered. While acknowledging a split between itself and the Third Circuit regarding whether spoliation must be intentional or negligent for sanctions to be applied, the court recognized that it need not make a determination on which standard to apply because an adverse inference was warranted under either standard.

Textron Financial Corp. v. Eddy's Trailer Sales, Inc., 2009 U.S. Dist. LEXIS 60065 (E.D.N.Y. July 10, 2009). In this Minute Order, the court directed, among other things, that ESI that it had previously ordered to be produced was accessible and that the defendants had not demonstrated any reason to shift costs. However, the court “capped” the defendants' costs at \$10,000 and directed that any costs in excess of that amount be borne by the plaintiff. The court also ordered the parties to confer with regard to the manner of production.

Thayer v. Chiczewski, 2009 WL 2957317 (N.D. Ill. Sept. 11, 2009). In this civil rights action arising out of the plaintiff's participation in an illegal street demonstration, the defendant, the City of Chicago, subpoenaed America Online (“AOL”) for the production of email that the plaintiff admittedly sent from his AOL account. AOL responded to the subpoena with what the court characterized as a “cavalier attitude,” providing conflicting information through its staff and attorneys and through the plaintiff's attorney. The court ordered AOL to show cause why it should not be held in contempt. The court also observed that the plaintiff's counsel had “allowed herself to become an advocate for AOL,” possibly creating a conflict of interest and coming “dangerously close to crossing the line between zealous advocacy and misconduct.” On the merits, the court found that the plaintiff had consented to the disclosure of the email under the Stored Communications Act. The court directed the plaintiff to undertake a pre-production

review of documents provided to him by AOL and to create a privilege log. The court also found that the subpoena was appropriately limited in scope.

Toth v. Calcasieu Paris, 2009 U.S. Dist. LEXIS 16116 (W.D. La. Mar. 2, 2009). In a case alleging abuse by hotel casino security guards and reserve sheriff's department officers during Hurricane Rita, the plaintiffs sought discovery of surveillance videotape and electronic personnel records. The defendants responded that the surveillance cameras were not operational during the storm and that the relevant personnel records either did not exist or were maintained in an out-of-state office. The court held that plaintiffs failed to present evidence that the requested surveillance tape recordings or personnel records existed or that defendants had acted in bad faith, but agreed to reconsider a motion for sanctions should sufficient evidence of culpable destruction be presented at trial.

In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, and Prod. Liability Litig., 2010 WL 2901798 (C.D. Cal. July 20, 2010). This is a preservation order arising out of litigation related to the sale and marketing of Toyota products. The order, extensive and well-crafted, pertains to ESI and "tangible items." The order applies on a "going-forward basis" and leaves open, among other things, pre-Order preservation obligations.

Triple-I Corp. v. Hudson Assoc. Consulting, Inc., No. 06-02195 (D. Kan. May 1, 2009). In this consolidated action arising out of professional and knowledge management service disputes, the court had ordered a party to identify, by Bates number, documents responsive to production requests. In attempting to comply with the order, the party produced unreadable electronic records. Rather than impose sanctions on the producing party, the court ordered the parties to confer in an attempt to make the ESI readable and, failing that, directed the producing party to print the ESI. The court imposed sanctions on the party's attorney in her personal capacity because improper and evasive responses were the result of her "tactical decisions." The court also granted a motion for a protective order over a confidential mediation statement that had been inadvertently attached to an email because the parties—and a local rule—deemed such statements to be confidential. However, the receiving party was not foreclosed from using facts known to it even though the facts might have been listed in the confidential statement.

U-Haul Int'l, Inc. v. Lumbermens Nat'l. Cas. Co., 2009 WL 2461148 (9th Cir. Aug. 12, 2009). Appealing a judgment below, the defendant insurer argued that the trial court erred in admitting into evidence computer-generated payment summaries. In affirming the judgment, the appellate court held that the summaries met the criteria of FRE 803(6) and were therefore admissible as business records. The court also rejected the argument that the summaries were prepared solely for litigation purposes, concluding that the computerized database from which the summaries were derived was kept in the regular course of business. The court also held that the witness offered by the appellee was qualified to testify about the inputting of underlying data into the database and that his testimony about the process of inputting data and compiling the summaries was sufficient to authenticate the summaries under FRE 901. Finally, the court concluded that the summaries were admissible "summaries" of business records under FRE 1006, reasoning

that “the summaries *themselves* constituted the business records. They were the writings at issue, not summaries of other evidence.”

Union Pac. R.R. Co. v. U.S. Env'tl. Prot. Agency, 2010 WL 2560455 (D. Neb. June 24, 2010). The Union Pacific Railroad Company (“Union Pacific”) requested documents pursuant to the Freedom of Information Act (“FOIA”) in connection with an investigation conducted by the U.S. Environmental Protection Agency (“EPA”) which alleged Union Pacific was potentially responsible for lead contamination in the soil of a railroad yard. After the EPA produced the requested documents, Union Pacific identified eight emails indicating an EPA supervisor instructed EPA employees to destroy documents and delete emails relevant to Union Pacific’s FOIA request. Union Pacific moved the court to issue a temporary restraining order enjoining the EPA to preserve relevant ESI. The court found there was an imminent threat of irreparable harm to Union Pacific regarding its ability to collect relevant data pursuant to its FOIA request and to defend itself against the EPA’s claims. More importantly, the court held that it could “draw an inference that the EPA has engaged in a practice of deleting relevant emails in response to Union Pacific’s FOIA request.” The court therefore granted the motion for a temporary restraining order, enjoining the EPA and its employees from deleting or destroying any potentially relevant ESI, and also ordered the EPA to identify, collect, and preserve ESI relevant to the FOIA request as well as designate an ESI expert to “insure the enforcement” of the temporary restraining order.

Union Pump Co. v. Centrifugal Tech. Inc., 2009 WL 3015076 (W.D. La. Sept. 18, 2009). The defendants moved to dismiss after trial. The plaintiff sued the defendants for various wrongful acts, including spoliation of electronic data, and had asserted a direct claim against the defendants’ insurer under a CGL policy. The court held that the Louisiana Supreme Court would recognize a tort of intentional spoliation for the intentional spoliation, but also held that the policy specifically excluded “electronic data” and “intentional acts” from coverage, granting the insurer’s motion for dismissal.

U.S. v. Bd. of County Comm’rs, 2009 U.S. LEXIS 65540 (D.N.M. July 27 2009). In this sexual discrimination case, the United States contended that the defendants waived the attorney-client privilege and the work-product doctrine by failing to produce a privilege log. The court held that the defendants had not waived the attorney-client privilege, but must produce a privilege log within seven days. In relation to other documents, the court ruled that the defendants could not use the attorney-client privilege and work-product doctrine “as a shield to legitimate discovery.” The court ordered costs, not attorneys’ fees, to the United States for its partially successful claim.

U.S. v. Maxxam, Inc., 2009 WL 817264 (N.D. Cal. Mar. 27, 2009). In this *qui tam* action filed under the False Claims Act, the United States sought sanctions, alleging spoliation of a document central to its claim. The court held that the plaintiff failed to establish that the evidence at issue was destroyed or lost after the duty to take reasonable steps to preserve arose and denied the motion for sanctions.

U.S. v. Sensient Colors, Inc., 2009 U.S. Dist. LEXIS 81951 (D.N.J. Sept. 9, 2009). In this environmental action, the defendant argued that the plaintiff waived privilege and work-product claims over a number of documents. First, the court rejected the plaintiff's contention that the parties had agreed in their FRCP 26(f) plan that inadvertent production would not constitute a waiver. The court then conducted an analysis under FRE 502(b)(1) and (2), incorporating a five-part test that predated enactment of the Rule. The court noted that the plaintiff made "a commendable effort to employ a sophisticated computer program to conduct its privilege review" but that, "[u]nfortunately, mistakes occurred." The court found that the plaintiff satisfied Rules (b)(1) and (b)(2) and that, as to its first production of some 45,000 documents, took reasonable steps under Rule 502(b)(3) to rectify the inadvertent production. As to subsequent inadvertent productions, however, the court found a waiver, as the plaintiff failed to act diligently to correct production errors it became aware of with regard to the first production. The court also rejected the defendant's argument that the plaintiff had put certain documents "at issue" and thereby waived privilege and rejected the plaintiff's argument that an email to attorneys was privileged when it sought neither legal opinion nor legal advice.

U.S. Bank Nat'l Ass'n v. Parker, 2010 WL 559135 (E.D. Mo. Feb. 10, 2010). In this action against a former employee for, among other things, breach of a confidentiality and non-solicitation agreement, the plaintiff moved for expedited discovery to conduct a forensic examination of the defendant's cell phone, PDA, and personal computer. A motion to dismiss was pending and therefore, the parties have not met and conferred on discovery pursuant to FRCP 26(f). Applying the "preliminary injunction-style" as well as the "good cause" tests, the court denied the motion for expedited discovery. The plaintiff had not shown any potential for spoliation or prejudice from not being allowed to conduct expedited discovery. The plaintiff offered only speculation that the defendant would solicit the plaintiff's customers and the defendant had given assurances that she would preserve ESI.

Universal Delaware, Inc. v. Comdata Corp., 2010 WL 1381225 (E.D. Pa. Mar. 31, 2010). In this class action, the plaintiffs stipulated to the dismissal of the complaint as to one defendant without prejudice. The stipulation required the former defendant to preserve relevant materials and acknowledged that it might be renamed a party. After the defendant was dismissed from the suit, the plaintiffs subpoenaed ESI from the former defendant and demanded that the former defendant assume the costs of producing it. The former defendant refused to produce the ESI and argued that the plaintiffs' request was unduly burdensome. The plaintiffs moved to compel production of the ESI and the former defendant objected on the grounds that, as a non-party, it should not be obligated to incur the financial burden of a broad electronic review without contribution from the Plaintiffs for the cost of review and production. The court found that ESI sought on backup tapes was not reasonably accessible but could be accessed through creation of a database. Citing to the seven-factor test established in *Zubulake I*, the court ordered the plaintiffs and the former defendant to equally bear the costs for the creation of the database, with the latter responsible for privilege review costs.

Vagenos v. LDG Fin. Serv., LLC, 2009 WL 5219021 (E.D.N.Y. Dec. 31, 2009). In this action brought under the Fair Debt Collection Practice Act, the plaintiff sought to enter into evidence a copy of a recording of an allegedly unlawful phone message from the defendant. The plaintiff's attorney made the copy of the message, but the original was destroyed when the plaintiff switched cell phone providers. The court allowed the plaintiff to offer the copy into evidence at trial as there was no evidence that the original had been destroyed in bad faith so as to preclude admissibility under FRE 1004(1). However, the court did impose an adverse inference instruction, noting that the plaintiff's attorney had "professed surprise that he or his client had any obligation to retain the original at all" and that the plaintiff was responsible for his attorney's bad advice.

Valeo Elec. Sys., Inc. v. Cleveland Die & Mfg. Co., 2009 WL 1803216 (E.D. Mich. June 17, 2009). In a breach of contract action, the defendant alleged that the plaintiff produced thousands of documents without providing a detailed index or appropriate labels for each file. Following a hearing, the court noted that the documents were produced as they were kept in the usual course of business, satisfying the producing party's FRCP 34 burden; the court also found no indication that the documents were modified in a manner that would complicate a review. Citing *3M Co. v. Kanbar, MK*, 2007 WL 1725448 (N.D. Cal. 2007), the court held that a large volume of documents, by itself, does not justify imposing more organizational burdens on the producing party, particularly given that the producing party initially provided two indices to assist in discovery review.

***In re Venom, Inc.*, 2010 WL 892203 (Bankr. E.D. Pa. Mar. 9, 2010).** The defendant requested ESI for expert analysis, and the plaintiff produced hard copy documents. The defendant moved to preclude evidence on the claim, contending that the plaintiff had failed to produce ESI as it was maintained in the ordinary course. Noting that the exclusion of evidence was an extreme sanction, the court denied the motion. However, it did reject the plaintiff's argument that hard copy production was sufficient and admonished the plaintiff for failing to explain "technological problems" and for not being "proactive." The court ordered the ESI to be produced either on a CD in searchable form or by delivery of the computer on which it was stored for inspection, at the defendant's election. The court also awarded attorneys' fees and costs to the defendant.

***In the Matter of vFinance Investments, Inc.*, Rel. No. 62448 (SEC July 2, 2010).** On appeal from an administrative judge's decision, the Securities and Exchange Commission affirmed the imposition of various sanctions against a corporate broker-dealer and its former chief compliance officer/CEO for spoliation of ESI, arising from the failure of an independent contractor to preserve ESI pertaining to his trading activities. The broker-dealer and the CCO were aware of the contractor's practice of saving instant messages on his computer (i.e., not in hard copy) and use of a "blast.net" email account (an Internet service provider email account rather than a corporate email account) but did not discipline the contractor. The contractor's trading became the subject of an investigation into price manipulation. After various communications and partial production, the contractor produced a hard drive. A forensic examiner found that blast.net email had been deleted and made non-recoverable over a period of several months. Subsequently, in

response to an SEC subpoena, the broker-trader produced the contractor's internal email without attachments as well as paper records found in the contractor's office. (In the interim, the contractor had resigned). In reviewing the administrative judge's decision, the SEC noted that broker-dealers were required to maintain "business correspondence, including electronic communications such as e-mails and IMs with outside parties and within the broker-dealer. The content, rather than the format, of a message determines whether it is covered." The SEC found the broker-dealer acted willfully when it failed to produce records in a prompt and complete manner and relied on the contractor to produce records. The SEC also found the broker-dealer acted willfully when it allowed the contractor to store instant messages on his computer and use the net.blast account, thus violating the broker-dealer's obligation to preserve communication "in an easily accessible space." The SEC rejected the argument that the contractor was responsible for the failures. The CCO/president, was found to have "substantially assisted" the broker-trader's violations and that his conduct satisfied the scienter requirement: his conduct, "particularly given his status as chief compliance officer, was extremely reckless, and often knowing."

Victor Stanley, Inc. v. Creative Pipe, Inc., 2010 WL 3530097 (D. Md. Sept. 9, 2010).

The plaintiff sued the defendant for copyright infringement alleging the defendant downloaded design drawings and specifications from its website. After years of protracted discovery involving spoliation claims and voluminous filings, motions, and evidentiary hearings, the magistrate judge found that the defendant and its president, Mark Pappas, intentionally spoliated evidence. In his Report and Recommendations the magistrate judge found: (1) Pappas instructed a business contact to destroy all emails related to the plaintiff (the emails were destroyed but Pappas' instructions to delete them were produced); (2) Pappas kept an external hard drive secret even to their ESI expert and which Pappas later returned to "Bob from Office Max" after the action was filed claiming that he did not like some of its features; (3) Pappas "stored" relevant email in a "deleted items" folder that were not transferred to a new server; (4) between the first court order to preserve relevant ESI and a discovery hearing six weeks later, 9,282 files were deleted from Pappas' work computer; (5) following the first discovery hearing and a second preservation order, Pappas deleted almost 4,000 files using a software program the defendant used software programs designed to erase files that could not be recovered; and (6) two years after the action was filed, the defendant ran a disk cleanup program that scrubbed data and eliminated Internet history files. Based on the willful, bad faith conduct of the defendant and Pappas, the magistrate judge recommended a default judgment against the defendant on the plaintiff's copyright claim. The magistrate judge also ruled that Pappas personally be found in civil contempt and ordered that he be imprisoned for a period not to exceed two years "unless and until" he paid the significant fees and costs that the magistrate judge awarded the plaintiff. In its opinion, the court recognized the concern generated by recent spoliation decisions and the lack of a uniform national standard governing the imposition of spoliation sanctions. The magistrate judge thus stated "I hope this analysis will provide counsel with an analytical framework that may enable them to resolve preservation/spoliation issues with a greater level of comfort that their actions will not expose them to disproportionate costs or unpredictable outcomes of spoliation motions."

Wells Fargo Bank, N.A., v. LaSalle Bank Nat'l Ass'n, 2009 U.S. Dist. LEXIS 70514 (S.D. Ohio July 24, 2009). The plaintiff moved to compel discovery or for sanctions after it learned from a deposition in parallel proceedings that the defendant may not have searched or maintained backup tapes. The defendant, in turn, accused the plaintiff “of the same sins” and argued that the tapes were not reasonably accessible under FRCP 26(b)(2)(B). Citing to *The Sedona Conference*[®] *Cooperation Proclamation*, the court declined to address the dispute, as it was “a mild example of the sorts of problems which result when counsel do not deal systematically with ESI problems and possibilities at the outset of litigation, instead of filing one-paragraph boilerplate statements about ESI and waiting for the explosion later.” The plaintiff had waited too long to raise the dispute. Moreover, restoration would be disproportionate and the defendant’s policy of printing hard copies made “the likelihood of additional information” small.

Whitaker Chalk Swindle & Sawyer, LLC v. Dart Oil & Gas Corp., 2009 WL 464989 (N.D. Tex. Feb. 23, 2009). A law firm sued a client in a billing dispute, and the defendants had the action removed from state to federal court. After removal, the defendants sought to stay discovery, arguing that production of privileged information in the federal proceeding would waive privilege in a related state court proceeding. The court denied the stay, recognizing that an order under FRE 502(d) would protect against waiver and that the state court should “recognize” the federal court order. The court issued a Rule 502(d) order and also protected the confidentiality of any information pursuant to a protective order under FRCP 26(c).

White v. Graceland Coll. Ctr. for Prof'l Dev. & Lifelong Learning, Inc., 2009 WL 722056 (D. Kan. Mar. 18, 2009). In this wrongful termination matter filed under the Family and Medical Leave Act (FMLA), the plaintiff’s initial review of emails produced by the defendants indicated inconsistencies between the creation and sent dates. The plaintiff requested an order compelling production of mirror images of the defendants’ hard drives, emails in native format, and the “mailboxes” that sent and received emails, for purposes of determining when the emails were drafted. The court granted the plaintiff’s request for the re-production of emails and attachments in their native format. However, the court held that it did not have sufficient information to rule on “where the ESI in question may be located” and that, in the future, counsel should provide a clearer analysis of the email systems to assist in the discovery process. The court declined to order production of the defendants’ hard drives for the purpose of mirror imaging, since the plaintiff failed to establish on what hard drives the documents could be located. The court ordered the parties to confer “regarding the location of the information pertaining to the creation or modification of the email attachment.”

Whitlow v. Martin, 2009 WL 3381013 (C.D. Ill. Oct. 14, 2009). In this wrongful termination action arising out of allegations of misconduct by former Illinois Governor Rod Blagojevich, the plaintiffs subpoenaed massive amounts of ESI related to pertaining to newly-hired Illinois Department of Transportation employees. In ruling on objections to this request, the court deemed a timeliness objection waived but issued a protective order to limit any information to use in the litigation *sub judice*. Accepting the nonparty’s

assertion that the proposed search would take some two years, the court noted that nonparty status was a significant factor under FRCP 45 (c)(3)(A)(iv) in determining undue burden, and that, under the facts, burdensome far outweighed the benefit of production. The court rejected objections to other requests, including one based on the alleged “not reasonably accessible” nature of information.

William A. Gross Constr. Assocs., Inc. v. Am. Mfrs. Mut. Ins. Co., 256 F.R.D. 134 (S.D.N.Y. Mar. 19, 2009). In this breach of contract case in which the parties sought extensive ESI from a nonparty, necessitating the identification and segregation of relevant emails from the nonparty’s other confidential business records, the nonparty complained that the plaintiff’s proposed keyword search was too narrow and that the defendant’s proposed keyword search was too broad. The court opined that it was left in an uncomfortable position of crafting a search methodology based on certain key words for the parties. Strongly endorsing The Sedona Conference[®] *Cooperation Proclamation*, the court held that parties’ attorneys should cooperate and carefully make the appropriate keyword searches for the nonparty to implement and to produce relevant emails. The court also noted that the proposed methodology must be tested to ensure accuracy.

Wilson v. Thorn Energy, LLC, 2010 WL 1712236 (S.D.N.Y. Mar. 15, 2010). In this action brought to recover on a promissory note, the plaintiff moved to hold the defendant in contempt and for FRCP 37(b) sanctions for failure to comply with discovery orders. Relevant ESI subject to the orders had been stored on a USB flash drive which allegedly failed and had been discarded. Relying on *Pension Committee of the Univ. of Montreal Pension Plan v. Banc of America Securities*, 685 F. Supp. 2d 456 (S.D.N.Y. 2010), the court found that the defendant was grossly negligent in failing to have copied the drive before it failed and also rejected the defendant’s reliance on FRCP 37(e), finding that the information was not lost due to any “routine” computer operation, but because the defendant failed to preserve it. Finally, the court found that the defendants failed to produce other information in its possession. In consideration of its findings, the court precluded the defendant from offering evidence concerning the information lost or not produced.

Wixon v. Wyndham Resort Dev. Corp., 2009 WL 3075649 (N.D. Cal. Sept. 21, 2009). In this class action, the court reviewed objections to rulings made by a special master, appointed to resolve disputes over the interpretation of an agreement between the parties to produce ESI and paper documents, and the use by one party of ESI in opposition to a class certification motion. The court upheld certain rulings, but rejected others. The court found that the party ignored significant logistical obstacles to a custodian-based search proposed by it and had then taken advantage of the problem to avoid the timely production of ESI used by its expert in opposition to class certification. As a sanction, the court refused to consider the expert’s sur-rebuttal report and awarded costs.

Zungoli v. United Parcel Serv., Inc., 2009 WL 1085440 (D.N.J. Apr. 22, 2009). An employee filed suit, claiming he was fired for objecting to his employer’s requirement that he register on the company’s internal website. The district court found sufficient evidence to support the employee’s whistleblower claim, holding he had a right to keep

his personal information confidential. Opposing the plaintiff's claims for economic damages, the employer claimed the employee intentionally destroyed evidence related to his efforts to mitigate damages by seeking employment after he was fired. The court held that "simply because the companies Plaintiff allegedly applied to have not produced documentation to show that he applied for employment does not infer that he intentionally suppressed or withheld evidence of the same."

In re Zurn Pex Plumbing Products Liab. Litig., 2009 U.S. Dist. LEXIS 47636 (D. Minn. June 5, 2009). In this multi-district litigation arising out of the defendants' design and choice of brass plumbing fittings, the court ordered bifurcated discovery and directed the parties to "focus first on the issue of class certification." The parties did so, and the defendants produced numerous documents in hard copy format. However, after the plaintiffs learned that ESI existed, they proposed search terms for the defendants to apply to the email of designated employees as well as shared servers. The defendants objected, arguing that the earlier bifurcation and direction had foreclosed discovery of ESI. The court disagreed, noting that once gaps in the hard copy production had been disclosed, consideration of e-discovery became appropriate. The court also rejected the defendants' argument that they had produced "enough" discovery for the class certification phase. The defendants then attempted to rely on FRCP 26(b)(2)(B), alleging that, even if the plaintiffs limited their requests, some 48 gigabytes of ESI would have to be searched. Although the court found that the affidavit submitted in support of the defendants' argument – that of "an attorney and not an expert on document search and retrieval" – was not compelling, the court limited the search terms in an effort to control costs and invited the defendants to renew their objections with specificity if the burden and costs issues remained.

Supplement

Selected Recent State Court E-Discovery Decisions

Beard Research, Inc. v. Kates, 2009 WL 2997984 (Del. Ch. May 29, 2009). In this dispute with a former employee and others for tortious interference and misappropriation, the plaintiff sought sanctions for the defendants' deletion of relevant ESI and installation of a new hard drive in the former employee's personal laptop after commencement of litigation. Citing to the 2004 edition of *The Sedona Principles*, the court found that the former employee had intentionally destroyed relevant ESI on several occasions and that the other defendants, with whom the former employee was associated and who shared common counsel at some point, "bore some responsibility." The court also noted that one defendant's complicity was heightened by the role played by a defense forensics consulting firm which shared common ownership with that defendant. The court concluded that default judgment was unwarranted as the relevance of the deleted ESI was marginal but imposed an adverse inference instruction and costs for the former employee's intentional or reckless destruction of ESI on the defendants as a group, who shared responsibility for the former employee's failure to preserve the marginally relevant evidence.

Brooks v. Frattaroli, No. 2008-02181 (Pa. Common P. Oct. 5, 2009). In this action arising from the defendant's alleged failure to provide the plaintiff with a classic car in the condition advertised on the defendant's website, the plaintiff sought broad access to search the defendant's computer system for ESI, including metadata. The defendant sought a protective order, arguing that the plaintiff was engaged in a fishing expedition. Absent precedent or rule from Pennsylvania, the court looked to FRCP 34 and case law, including *Williams v. Sprint United Mgmt. Co.*, 230 F.R.D. 640 (D. Kan. 2005). The court allowed the protective order, holding that the plaintiff's discovery requests were overly broad, could invade confidential or private information on the defendant's systems, and would force the defendant to retain its own consultant. The court noted that the defendant's discovery responses left much to be desired and the plaintiff needed a certain *quantum* of evidence to prove his fraud allegations, but on balance, the plaintiff "has not yet crossed the ESI discovery goal line."

Chase v. Burlington Northern Santa Fe Corp., Court File No. C4-05-1607 (Minn. 10th Jud. Dist. Oct. 15, 2009). In this civil action, the jury awarded damages on the merits in excess of \$20,000,000, and sanctions of over \$4,000,000 were imposed on the defendants for discovery misconduct. Among other things, the court found the defendants failed to preserve data from event recorders where four people were killed by an approaching train. The court found an employee had downloaded the data to his laptop and then altered it in violation of policy, on the night of the accident, before an inspection

by the plaintiffs' attorneys. The court noted that it "ha[d] lost count of the total number of misrepresentations [the defendants] made to counsel, the parties, and this Court throughout the proceedings." As a result, the court concluded that Minnesota rules and statutes (some of which impose a 21-day "safe harbor") did not readily address the discovery abuses. Instead, the court relied on its inherent authority. The court applied a six-factor test, including the degree of culpability. The court rejected the defendants' attempt to narrowly define prejudice, noting that the plaintiffs' counsel had been forced to undertake enormous work to uncover the abuses.

Einstein v. 357 LLC, Index No. 604199/07 (N.Y. Sup. Ct., Nassau Cty., Nov. 4, 2009).

In this action over the construction of a condominium unit, the plaintiff sought terminating sanctions against various defendants for discovery abuse. After the defendants were ordered to produce hard drives for inspection by a consultant, certain files could not be found. It was then determined that no one had directed the defendants to preserve relevant ESI, thus allowing routine deletion to continue. Instead, only selective ESI was produced by the defendants and the defendants' attorneys made materially false statements as to the sufficiency of their production. Noting that New York statutory law was silent on the duty to preserve, the court turned to federal law and found that the defendants had breached that duty, that their conduct had been "culpable," that the deleted ESI was relevant, and that the plaintiff was entitled to an adverse inference and an award of costs.

Lake v. City of Phoenix, 222 Ariz. 547, 218 P.3d 1004 (Ariz. 2009) (en banc). In an employment dispute, a former Phoenix police officer used the Arizona public records law to request emails from his supervisors, including metadata. The request for the metadata was denied by the City of Phoenix, which was upheld by a trial court and intermediate appellate court, holding that an electronic "public record" did not include the accompanying metadata. The Arizona Supreme Court remanded, holding that an electronic "public record" should be defined to include the accompanying metadata. Citing *The Sedona Principles* (2d ed. 2007), the court held that "[w]hen a public entity maintains a public record in an electronic format, the electronic version of the record, including any embedded metadata, is subject to disclosure under our public records law." The court did not extend its holding to external or "system" metadata and did not address "when a public entity is required to retain records in electronic format."

Magana v. Hyundai Motor America, 167 Wash. 2d 570, 220 P.3d 191 (Wash. Sup. Ct. Nov. 25, 2009) (en banc). In this products liability action, the trial court imposed a default judgment on the defendant of \$8,000,000, as measured by an earlier jury verdict that had been reversed on appeal. On remand after the reversal, discovery was conducted and the plaintiff sought sanctions for the defendant's failure to produce information about prior related claims from a database. The trial court found that the defendant, "a sophisticated multinational corporation, experienced in litigation," had an obligation to maintain a "document retrieval system." On appeal from the entry of default judgment (reversed by the intermediate appellate court), the Washington Supreme Court held that, "[a] corporation must search all its departments, not just its legal department, when a party requests information ... during discovery." The Supreme Court also held the

defendant had acted willfully, that the plaintiff had been prejudiced as he could neither prepare for nor obtain a fair trial absent the discovery, and that the amount of the award was appropriate given the defendant's "atrocious behavior."

Stengart v. Loving Care Agency, Inc., 2010 WL 1189458 (N.J. Mar. 30, 2010). The plaintiff filed an employment discrimination action against her former employer. The employer retained a forensics expert, who recovered pre-litigation emails between the plaintiff and her attorney stored, unbeknownst to the plaintiff, on the hard drive of a laptop provided by the employer and used by the plaintiff to communicate through her "personal, password-protected, web-based [Yahoo] e-mail account." The employer's attorneys reviewed and identified the email—some of which bore a confidentiality notice—in answers to interrogatories. The plaintiff demanded the return of all privileged communications and the employer refused, alleging that the plaintiff had no reasonable expectation of privacy. The New Jersey Supreme Court held that the employer's "electronic communications policy" was ambiguous "about whether personal email use is company or private property," that email exchanges can be protected by privilege, that the email in issue contained a "standard warning that their contents are personal and confidential and may constitute attorney-client communications," and that the email appeared to relate to anticipated litigation. After canvassing relevant decisions—and noting that this was a private dispute not subject to constitutional limitations-- the court held that the plaintiff had taken reasonable steps to protect the privacy of her email and thus had a subjective expectation of privacy. The plaintiff also had an objective expectation, given the ambiguity of the policy, the warning in the email, and the lack of anything "illegal or inappropriate." Concluding that the email was privileged, the court then held that there was no evidence of a knowing or reckless waiver. The court emphasized that it did not intend to prohibit employers from regulating the use of workplace computers. However, the court declared as an unenforceable violation of public policy any corporate procedure, which would allow an employer to retrieve and read the content of privileged, protected email account using an employer's systems. Finally, the court addressed the ethical obligations of the plaintiff's attorneys, finding that under the circumstances, where the email had been recovered forensically and not "simply left behind," the attorneys were held to have violated RPC 4.4(b) by not setting aside the arguably privileged email and promptly notifying adversary counsel. The Supreme Court remanded to the trial court to determine the appropriate remedy, suggesting disqualification, screening, and costs.

***In re Weekley Homes, L.P.*, 295 S.W.3d 309 (Tex. Sup. Ct. Aug. 28, 2009).** In a real estate development dispute, the Texas Supreme Court issued a conditional writ of mandamus. The trial court had ordered employees of the defendant to turn over hard drives for forensic copying and examination. The Supreme Court held the trial court had abused its discretion by failing to properly apply Texas Rule of Civil Procedure 196.4 in allowing the intrusive imaging. That rule applies to all forms of electronic information (including email and deleted email) and requires parties to expressly request deleted email. The rule also states that objections to requests on grounds of reasonable availability should be considered on a case-by-case basis but that, if information is shown to be not reasonably available, a court may nevertheless allow production. To make that

decision, a court may allow focused discovery, be mindful of the need to protect sensitive information, and *must* shift costs to the requesting party. The Supreme Court looked to the Federal Rules of Civil Procedure for guidance and set forth “the proper procedure under Rule 196.4,” including cooperation between parties.