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2010 YEAR-END ELECTRONIC DISCOVERY AND INFORMATION LAW UPDATE

Calls for Reform Reach Crescendo. Sanctions Granted Less Frequently. Government's Duties Clarified. No Reasonable Expectation of Privacy In Social Media.

To Our Clients and Friends:

The year just ended was an extraordinarily interesting one in the e-discovery area. Highlights included:

- There were increasing calls for reform of the discovery process as it relates to electronically stored information ("ESI").
- Competing views of the standards that should apply to sanctions and preservation clashed in the high-profile *Pension Committee*, *Rimkus*, and *Victor Stanley* decisions, which highlighted the splits among the circuits and even within the same district. In *Orbit One*, a case decided in the same district as *Pension Committee*, the magistrate judge expressly disagreed with some of the sanctions standards set forth in *Pension Committee*.
- In perhaps the most important development in the sanctions area, the overall frequency of courts granting sanctions declined substantially compared to 2009 (granting sanctions in 55% of the cases where sought in 2010 from 70% in 2009). Many courts evaluated sanctions requests more cautiously and required a showing that the missing documents would have been relevant and favorable to the party seeking sanctions.
- In response to calls for a proportionality standard in preservation, at least one court cautioned that the concept may prove too amorphous to provide much comfort to a party deciding what files it may delete in the face of a preservation obligation.
- With respect to cooperation, courts did not look kindly on parties that failed to work together reasonably, with one court describing an e-discovery dispute as "the litigation equivalent of the cafeteria food fight scene in the infamous movie *Animal House*."
- The use of computer algorithms for clustering, predictive coding, initial document culling, and other search technologies was on the rise in 2010, offering some hope for decreasing the burden and expense of review.

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- Courts clarified prosecutors' duties with regard to ESI, the government's e-discovery obligations in civil cases, and limits on the government's ability to obtain ESI in its investigative capacity.
- Several courts held that there is no reasonable expectation of privacy or confidentiality relating to social networking communications.

Introduction

Although sanctions grabbed much of the attention in the past (and, indeed, in 2010), the increasing call for reform of the discovery process as it relates to ESI was perhaps the most significant development in 2010. The Duke Conference of the federal Civil Rules Advisory Committee in May received a tremendous amount of attention and featured proposals for uniform rules regarding preservation and sanctions. The Committee met again in November and there are indications that concrete reforms may be proposed in advance of its next meeting in April 2011. At the state level, Alabama, Oklahoma, and Wisconsin passed or enacted statewide e-discovery legislation last year, bringing the total number of states with such rules to 30. As virtually all cases now include an element of e-discovery, we expect that it will not be too long before all 50 states will have adopted such rules.

There were also numerous interesting developments in e-discovery case law. This Update is based on our review of 323 decisions, which are listed in an [appendix](#). The number of decisions in this area continues to grow at a brisk pace, as the 2010 total was 60% higher than the approximately 200 cases we reviewed in our 2009 Year-End Update (which, in turn, was double the number of cases we identified in 2008). Although we have reported the trends for the entire year, we have chosen to focus our discussion on decisions rendered in the second half of the year rather than to repeat what appeared in our [2010 Mid-Year Electronic Discovery and Information Law Update](#). Some highly significant decisions from the first half of the year -- for example, *Pension Committee* -- are discussed here through the prism of later developments and reactions from the bench and bar.

In the sanctions area, the trio of *Pension Committee*, *Rimkus* and *Victor Stanley* garnered the most attention (the latter featuring a shocking but entertaining story of the "gang that couldn't spoliage straight" and a threatened two-year prison sentence). *Pension Committee* remains controversial, with a magistrate judge from the same district in the *Orbit One* case recently disagreeing with *Pension Committee's* holding that any failure to meet well-established, "contemporary standards" in e-discovery (constituting "gross negligence," according to *Pension Committee*) warrants an inference that lost information was both relevant and prejudicial to the responding party, thus justifying sanctions. The *Qualcomm* saga finally came to a close, with the court taking back its earlier referral of the "Qualcomm Six" to the State Bar of California for investigation of ethical violations in their handling of e-discovery.

But the most interesting story in e-discovery sanctions is found in the less heralded cases, where the frequency of sanctions being granted declined significantly compared to 2009, with many courts requiring a showing that information lost not only would have been

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relevant but also favorable to the requesting party, and many courts appeared to evaluate sanctions requests more cautiously.

Proportionality gained some traction, although one court cautioned that the concept may prove too amorphous to provide much comfort to a party deciding what files it may delete in the face of a preservation obligation, noting that it seems unlikely, for example, that a court would excuse the destruction of evidence merely because the monetary value of anticipated litigation was low. Cooperation remains important in e-discovery, although the number of judges endorsing The Sedona Conference® Cooperation Proclamation appears to have reached somewhat of a plateau. In the social media area, courts addressed issues such as preservation, privacy rights, and authentication of evidence. Notably, several courts held that there is no reasonable expectation of privacy or confidentiality for social networking communications. Additionally, bar associations issued ethical opinions prohibiting "trickery" in obtaining evidence from social networks. In the cross-border area, recent decisions continued the trend of compelling discovery despite foreign blocking statutes. Yet, foreign privacy interests gained a tiny bit of respect in one case, where the court in the interests of international comity and at the request of authorities in the European Union declined to order the production of "plainly relevant" documents.

We invite you to review our detailed discussions of the developments in the e-discovery topics listed below.

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E-Discovery Reform: Calls to Fix an Imperfect Process Gain Momentum

The past year featured a growing crescendo of calls for reform of a discovery process that many perceive as in need of significant repair. Critics of the *status quo* pointed to inconsistent preservation and sanctions standards, heightened fears that even well-meaning litigants undertaking good faith efforts to preserve relevant documents may be sanctioned for the slightest perceived preservation failure, and the perpetual concern about the high costs associated with e-discovery.

Efforts to reform the e-discovery process are under way at both the federal and state levels. The Civil Rules Advisory Committee of the Judicial Conference of the United States, state bar associations, courts, and legislatures nationwide in 2010 considered ways to reform the e-discovery process. Although there are various proposals for possible amendments to the federal rules--particularly with respect to preservation and sanctions--they are currently in their preliminary discussion stages. It remains to be seen in 2011 to what extent these discussions will yield concrete reform.

The Duke Conference

The most nationally prominent reform effort is being led by the Civil Rules Advisory Committee. In May 2010, it held a conference at Duke Law School to consider potential changes to the Federal Rules of Civil Procedure to address, among other things, the challenges posed by e-discovery. Following the Duke Conference, the Committee submitted a report to the Chief Justice of the United States Supreme Court, noting consensus among Duke Conference participants for new rules regarding preservation and sanctions. The Duke Conference E-Discovery Panel produced a proposal suggesting a rule addressing preservation issues, such as what events should trigger preservation obligations, the scope and duration of the duty to preserve, litigation holds, the relationship between the work product doctrine and preservation activities, and the consequences of failures to preserve. Attendees also called for a nationwide rule establishing uniform standards for sanctions.

The report also noted a consensus among Duke Conference participants that rule changes alone are not enough, but that changes in case management, best practices, and e-discovery education were called for as well. Ideas such as earlier and more active judicial involvement in discovery planning, firm and enforced discovery deadlines, and prompt resolution of discovery disputes--ideally by a judge who is familiar with the case--all have support amongst the Duke Conference participants.

After work by various subcommittees throughout 2010, the Civil Rules Advisory Committee met again in mid-November to further discuss various e-discovery reform proposals. Some Committee members supported rule changes to address the conflicting standards courts have applied regarding sanctions. Others cautioned against rules

addressing issues such as preservation obligations, where a one-size-fits-all approach may be inappropriate. Still others advocate a focus on education and guidelines rather than rule changes. Ultimately, no definitive action came out of the November 2010 Committee meeting, but there are indications that concrete reforms will be proposed in advance of the Committee's next meeting in April 2011. We will continue to follow and report on the Committee's progress.

Reform of the Stored Communications Act

Efforts have commenced to reform the Electronic Communications Privacy Act ("ECPA"), 18 U.S.C. § 2701 (1986) (also known as the "Stored Communications Act"), which prohibits providers from disclosing a communication held in "electronic storage," unless subject to a warrant or other exception. This prohibition lapses after 180 days, and the communication is then governed by the more liberal disclosure requirements for "remote computing service[s]." Classifying electronic communications has proved difficult for courts, especially given the changing technological landscape. *Compare Crispin v. Christian Audigier, Inc.*, 717 F. Supp. 2d 965, 987 (C.D. Cal. 2010) (concluding messages are only in "electronic storage" until opened), *with Jennings v. Jennings*, 697 S.E.2d 671, 678 (S.C. App. 2010) (determining that opening email is irrelevant to determining whether email is in "electronic storage").

Various constituencies have articulated support for amending the ECPA. For example, proponents of cloud computing argue that the ECPA is out of date and will prevent companies from moving to more efficient data management systems. *See Amy E. Bivins, Cloud Computing: Federal Lawmakers Seek Guidance on Keeping the ECPA Technologically Current*, BNA Digital Discovery & E-Evidence (Oct. 28, 2010). Industry leaders advocate updating the ECPA so that electronic communications are subject to well-defined privacy protections that disallow government access without probable cause. *Id.*; *see also United States v. Warshak*, ---- F.3d ----, No. 08-3997, 2010 WL 5071766, at *11 (6th Cir. Dec. 14, 2010) (noting that "email requires strong protection under the Fourth Amendment; otherwise, the Fourth Amendment would prove an ineffective guardian of private communication, an essential purpose it has long been recognized to serve").

Government officials, however, argue that such changes could threaten national security. On September 23, 2010, the House Judiciary Subcommittee on the Constitution, Civil Rights, and Civil Liberties met to address these issues, seeking input from both government officials and industry leaders. *Id.* We expect this tension between emerging cloud computing technology and ECPA to gain greater attention in 2011.

State Legislation and Court Rules

At the state level, Alabama, Oklahoma, and Wisconsin passed or enacted statewide e-discovery legislation last year, bringing the total number of states with such rules to 30. In all three of these states, the rules largely mirror the Federal Rules of Civil Procedure. Only Wisconsin, however, includes the Federal Rules' mandatory early meeting of counsel to discuss preservation and production issues--*i.e.*, the Rule 26(f) meeting. Even in

Wisconsin, however, this requirement was controversial and went against the recommendations of the state Judicial Council. *See* Order 09-01A, 2010 WI 129, 6 (Wis. Nov. 10, 2010) (Bradley, J. dissenting). Those opposed to the mandatory meet and confer provision view it as overbroad and believe that it will unnecessarily raise the cost of litigation. *Id.*

Courts in several states promulgated new e-discovery rules. In Delaware, for example, the courts implemented special e-discovery rules for complex litigation. *See* Administrative Directive No. 2010-2 (Del. May 1, 2010). New York's trial courts created a Working Group focused on e-discovery and amended their rules to ensure that attorneys are prepared to address e-discovery concerns at the preliminary conference. *See* NYCRR §§ 202.12(b), 202.70(g). And Massachusetts employed a voluntary e-discovery pilot program for 2010 for litigants in the Superior Court's Business Litigation Session ("BLS"). The program was guided by the principle of "limited discovery proportionally tied to the magnitude of the claims actually at issue" and it sought to encourage early communication between the parties as to the scope and nature of e-discovery. *BLS Pilot Project*, 1-2, available at <http://www.mass.gov/courts/press/superior-bls-pilot-project.pdf>. We expect that the report evaluating the program, which concluded on December 31, 2010, will offer guidance on the program's future in Massachusetts and perhaps be of interest to other states considering ways to manage e-discovery costs.

Meanwhile, other states' bar associations and rules committees discussed and debated amendments to their states' respective rules of civil procedure. In Florida, newly proposed rules are similar to the Federal Rules, but (echoing concerns raised in Wisconsin) the state bar's Civil Procedure Rules Committee has refused to endorse a mandatory early meet and confer provision. The Oregon Council on Court Procedures is currently considering a rule amendment to specifically recognize the discoverability of electronically stored information. *See* Council on Court Procedures Publication 9/11/11: Amendments to ORCP 43, available at <http://www.counciloncourtprocedures.org>. And in Washington, the Washington Bar Association Court Rules & Procedures Committee is developing e-discovery amendments to the Rules of Civil Procedure, which are scheduled for review in 2011-12. We will track these efforts and provide updates on future development.

Sanctions: Fewer Awards, But Can The Sanctions Insanity Be Curtailed?

An atmosphere reminiscent of the *Bonfire of the Vanities* -- the 1987 Tom Wolfe novel about ambition, justice and the media in 1980s New York City -- swirled around the most well-known e-discovery sanctions opinions in 2010. Some in the e-discovery media and even practitioners labeled certain prominent judges "e-discovery rock stars." And some of those judges by all appearances seemed to be vying to outdo one another with ambitious opinions going beyond the facts of the cases before them. There were expressions of frustration from the bench that too many lawyers just don't get it. That frustration was reflected in opinions whose language and holdings were attention-grabbing, but perhaps at times and with the benefit of hindsight too far-reaching. Lawyers and their clients (and even some judges), in turn, expressed frustration that some in the judiciary had gone too far. In at least one example, decisions within the same district outright disagreed with one

another about fundamental requirements for issuing sanctions. Nevertheless, there were glimpses of restraint in the e-discovery sanctions area, as the percentage of decisions granting sanctions was down substantially and many courts appeared to be evaluating sanctions requests more cautiously.

Pension Committee, Rimkus, and Victor Stanley

A trio of cases--*Pension Committee*, *Rimkus*, and *Victor Stanley* (all involving extreme departures by the sanctioned parties from any notion of acceptable conduct)--garnered the lion's share of attention in the discovery sanctions area last year. Judge Scheindlin's decision in *Pension Committee* was certainly the most controversial, as in some respects it appeared to go beyond the preservation standards enunciated in her influential *Zubulake* opinions. For example, although *Zubulake* had emphasized the duty to communicate with and ensure the preservation of the relevant documents of the "key players"--i.e., the people identified in the party's initial disclosures and the most likely to have relevant information--*Pension Committee* in its initial two versions stated that "the failure to obtain records from all employees (some of whom may have had only a passing encounter with the issues in the litigation), as opposed to key players, likely constitutes negligence" and could be sanctionable. Compare *Zubulake V*, 229 F.R.D. 422, 433-34 (SDNY 2004), with *Pension Committee*, No. 05-Civ-9016, Amended Opinion and Order, Slip. Op. at 10 (SDNY Jan. 15, 2010) (emphasis in original).

Judge Scheindlin later amended the opinion, clarifying that "the failure to obtain records from all those employees *who had any involvement in the issues . . . could constitute negligence.*" See *id.*, Order dated May 28, 2010, at 1-2 (emphasis added). Yet, some statements remain that suggest something approaching a strict liability standard, although it is doubtful that Judge Scheindlin intended as much. See, e.g., *Pension Committee*, 685 F. Supp. 2d 456, 461 (SDNY 2010) ("the courts have a right to expect that litigants and counsel will take *the necessary steps to ensure* that relevant records are preserved when litigation is reasonably anticipated, and that such records are collected, reviewed, and produced to the opposing party") (emphasis added); *id.* at 465 ("the failure to take *all appropriate measures* to preserve ESI likely falls in the negligence category" and therefore is subject to sanctions) (emphasis added). These statements appeared to set a higher bar than the standard articulated in *Zubulake* and other decisions requiring litigants to take reasonable steps--but not every conceivable step--to preserve relevant information, and they heightened the anxiety of parties and their counsel that they may be sanctioned if any relevant information turns up missing despite their reasonable preservation efforts.

Pension Committee was quickly followed by *Rimkus*, another high-profile opinion that many characterized (inaccurately) as a rebuke to Judge Scheindlin. Undoubtedly referring to *Pension Committee's* lengthy and almost scientific classification of preservation shortcomings into categories of negligence, gross negligence and willfulness, Judge Rosenthal complimented Judge Scheindlin for doing a "great service by laying out a careful analysis of spoliation and sanctions issues in electronic discovery." *Rimkus*, 688 F. Supp. 2d 598, 611 (S.D. Tex. 2010). Nevertheless, Judge Rosenthal correctly pointed out that unlike the Second Circuit, many circuits do not allow sanctions for negligence, thus

"limit[ing] the applicability of the *Pension Committee* approach" (*see id.* at 614) and then engaged in a survey of decisions in various circuits. Importantly, *Rimkus* also included the notion of considering proportionality in connection with preservation obligations.

Later in the year, Magistrate Judge Grimm's lengthy opinion in *Victor Stanley* generated buzz in the e-discovery world because of its sordid and almost comical story of extreme discovery abuses (referring to the defendants as the "gang that couldn't spoliator straight" for their use of various traceable document destruction methods) and its holding that the spoliator would be imprisoned if he failed to pay the monetary sanctions imposed--a remedy later reversed by the district court as inappropriate for a finding of civil contempt. Judge Grimm engaged in a thorough and scholarly survey of the sanctions standards in all of the circuits, concluding that "[u]nfortunately, in terms of what a party must do to preserve potentially relevant evidence, case law is not consistent across the circuits, or even within individual districts." *Victor Stanley*, 269 F.R.D. 497, 523 (D. Md. Sept. 9, 2010). Judge Grimm lamented not only the lack of a uniform national standard for discovery sanctions, but also judicial opinions imposing standards approaching "strict liability for loss of evidence, without adequately taking into account the difficulty--if not impossibility--of preserving all ESI that may be relevant to a lawsuit[.]" *Id.* at 516. As in *Rimkus*, Judge Grimm also advocated considering proportionality in preservation decisions, although it was not a factor in *Victor Stanley* given the intentional spoliation at issue. *See id.* For more detail on the implications of *Victor Stanley*, see Gareth T. Evans and Jenna Musselman Yott, [Court Orders Spoliator Imprisoned, Surveys Differing Preservation And Sanctions Standards: An In-Depth Look at Victor Stanley II](#), BNA Digital Discovery & E-Evidence (Oct. 14, 2010).

Qualcomm

Less heralded was the denouement of the long-running *Qualcomm* saga. In 2008, the magistrate judge found that Qualcomm intentionally withheld tens of thousands of key documents in an effort to win the case, ordered Qualcomm to pay \$8.5 million in sanctions--all of Broadcom's fees and costs through the end of trial--and, after a harshly worded discussion of the perceived failures of Qualcomm's outside counsel, referred six attorneys to the State Bar of California for investigation of ethical violations. *See Qualcomm v. Broadcom*, No. 05-CV-1958-RB (BLM), 2008 WL 66932, at *17-18 (S.D. Cal. Jan. 7, 2008) (Major, Mag. J.). Pointing to the vast quantity of withheld documents and the ease with which they were located when Qualcomm was ordered to find and produce them after trial, the judge inferred that Qualcomm could not have done so without the assistance or deliberate ignorance of its lawyers--an enormous logical leap with devastating consequences for Qualcomm's counsel. The district judge vacated the order with respect to the "Qualcomm Six," however, because they had been unable to defend themselves with information falling within the attorney-client privilege, which Qualcomm had refused to waive. *See Qualcomm*, No. 05-CV-1958-RB (BLM), Slip. Op. at 4-6 (S.D. Cal. Mar. 5, 2008). Holding that the attorneys should have been able to use privileged information pursuant to the self-defense exception to the attorney-client privilege, the court remanded the matter to the magistrate judge for further proceedings. *Id.*

On remand, the attorneys were able to provide details regarding their investigation and collection effort, and a more compelling story emerged in the briefing and at the evidentiary hearing (which is only partially captured in the magistrate judge's final order). Among other things, Qualcomm had a policy that its in-house legal team would control document search and collection in all cases, according to which the company's paralegal team would determine which custodians to search and how to conduct the search; outside counsel had to rely on the in-house team because Qualcomm had more than 10,000 employees and no organization charts; and the principal Qualcomm employees--as the judge put it--displayed an "incredible lack of candor" in falsely denying involvement in an industry standards association that waived Qualcomm's patents and in denying receiving and sending emails relating to their involvement. *See Qualcomm*, No. 05-CV-1958-RB (BLM), Slip. Op. at 6 (S.D. Cal., Apr. 2, 2010). Holding that attorneys can only be sanctioned under the court's inherent authority for bad faith conduct, the magistrate judge concluded that "[t]he evidence presented during these proceedings clarified that, although a number of poor decisions were made, the involved attorneys did not act in bad faith." *Id.*, Slip Op. at 10. While the Qualcomm Six were largely vindicated at long last, their careers were certainly damaged in the process.

Courts Tread More Carefully and Sanctions Are Granted Less Frequently

Although the drama of *Pension Committee*, *Rimkus*, *Victor Stanley*, and *Qualcomm* dominated sanctions discussions in 2010, a perhaps more important story can be found in the many less-celebrated cases decided last year. Of the 100 e-discovery sanctions decisions we reviewed, the absolute number granting sanctions in 2010 (55) was down from 2009 (62). Because the number of cases seeking sanctions increased to 100 in 2010 (from 88 in 2009), the resulting percentage of cases where sanctions were granted declined substantially to 55% in 2010 from 70% in 2009. It is still a large number, but perhaps less so when one considers the many thousands of cases pending in the federal courts during the year. Nevertheless, we believe this trend reflects, at least in part, an increasing and appropriate reluctance to impose sanctions absent a showing that the lost documents were relevant, that their absence prejudiced the requesting party, or that the producing party acted in bad faith in destroying the documents.

In one example, a magistrate judge in the Southern District of New York (the same court as *Pension Committee*'s author, Judge Scheindlin) outright disagreed with *Pension Committee*'s presumption that lost documents must have been relevant and prejudicial if their loss resulted from "grossly negligent" behavior--which would include, according to *Pension Committee*, failing to issue a written litigation hold, failing to preserve documents of key custodians, failing to suspend auto-delete, and failing to preserve backup tapes where they are the only source of the requested information. *See Orbit One Commc'ns, Inc. v. Numerex Corp.*, No. 08 CV 0905, 2010 WL 4615547, at *10-11 (S.D.N.Y. Oct. 26, 2010) (Francis, Mag. J.). The court in *Orbit One* stated, "[t]he implication of *Pension Committee* . . . appears to be that at least some sanctions are warranted as long as any information was lost through the failure to follow proper preservation practices, even if there has been no showing that the information had discovery relevance, let alone that it was likely to have been helpful to the innocent party. If this is a fair reading of *Pension*

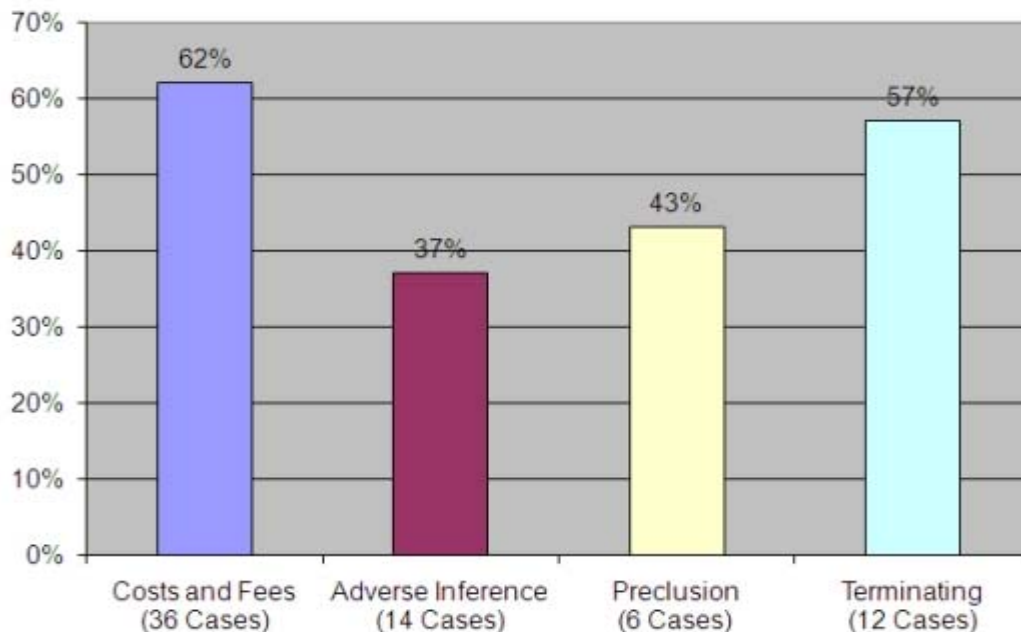
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Committee, then I respectfully disagree." *Id.* at *10. The court observed that such a presumption of relevance and prejudice could have significant consequences as it is likely that some data will be lost in virtually every case, creating "a real danger that litigation would become a 'gotcha' game rather than a full and fair opportunity to air the merits of a dispute." *Id.* at 11 (internal quotations omitted).

Other courts denying sanctions similarly required that the party seeking sanctions present admissible, specific evidence of prejudice and the alleged spoliator's improper conduct. For example, in *Gallagher v. Magner*, 619 F.3d 823, 843-45 (8th Cir. 2010), the defendant failed to place a legal hold on emails, but because the defendant was able to recover and eventually produce some of the emails, the trial court refused to impose sanctions, and the Eighth Circuit upheld that decision. *Id.* at 844. Importantly, the Eighth Circuit declined to infer from the failure to preserve that the destroyed emails were relevant or that the plaintiffs necessarily had suffered prejudice from their destruction. *Id.* Likewise, in *Siani v. State University of New York at Farmingdale*, No. CV09-407, 2010 WL 3170664, at *8-9 (E.D.N.Y. Aug. 10, 2010) (Wall, Mag. J.), the court held that although the producing party negligently had breached its duty to preserve electronic evidence, sanctions were not warranted because the requesting party had presented no extrinsic evidence that the destroyed evidence was favorable to its case, or that the producing party had acted in bad faith.

Some courts chose to wait until the close of discovery before assessing whether prejudice had occurred and determining whether sanctions were appropriate. *Davis v. Grant Park Nursing Home*, No. 1:08-CV-01764, 2010 WL 4642531, at *1 (D.D.C. Nov. 9, 2010) (Facciola, Mag. J.) ("[I]t is premature to consider the question of sanctions until discovery ends and the Court can assess accurately what prejudice, if any, the loss of the electronically stored information has caused."). By imposing these more rigorous evidentiary requirements on parties seeking sanctions, courts appear to be shying away from awarding sanctions merely because of mistakes made by producing parties.

2010 Sanctions Awarded in E-Discovery By Type and Percentage of Cases Where Sought



Monetary Sanctions

As in 2009, the most common sanctions awarded in 2010 were monetary--generally the fees and costs associated with the discovery dispute. These were granted in 62% of 2010 cases seeking such relief (36 of 58). Courts on occasion also levied monetary fines independent of attorneys' fees and costs, generally to punish or deter willful conduct. For example, in *Cenveo Corp. v. Southern Graphic Systems, Inc.*, No. 08 CV 5521, 2010 WL 3893709, at *4 (D. Minn. Sept. 30, 2010), the court levied a \$100,000 fine where the defendant intentionally destroyed evidence. Notably, one court was careful to impose monetary sanctions that covered only the movant's reasonable expenses incurred in exposing the sanctionable conduct. In *Amerisource Corp. v. Rx USA International, Inc.*, 2010 WL 2730748, at *2-4 (E.D.N.Y. July 6, 2010) (Azrack, Mag. J.), the plaintiff sought nearly \$2.8 million, the entire cost of the litigation, from the defendant company and its non-party principal based on the principal's fabrication of emails. The court, while finding the principal and company culpable, nevertheless awarded only \$50,000 payable to the plaintiff and \$50,000 payable to the Clerk of the Court. *Id.* at *7-8. The court found that the plaintiff's litigation costs were not "an appropriate measure" of sanctions, and even much of the plaintiff's costs in pursuing sanctions were "superfluous," "unnecessary, and did nothing to advance the inquiry." *Id.* at *7.

Adverse Inference and Evidence Preclusion

In 2010, litigants received some form of adverse inference instruction in 37% of cases where requested (14 of 38), and an evidence preclusion sanction in 43% of cases where requested (6 of 14). Courts continued to differ as to the level of culpability required before imposing these sanctions, with some imposing an adverse inference sanction based solely on negligent or reckless conduct, while others required bad faith. For example, in *Harkabi v. Sandisk Corp.*, No. 08 Civ. 8203, 2010 WL 3377338, at *6 (S.D.N.Y. Aug. 23, 2010), the court held that "[t]he sanction of an adverse inference may be appropriate in some cases involving the negligent destruction of evidence because each party should bear the risk of its own negligence," while *In re Global Technovations, Inc.*, 431 B.R. 739, 782 (Bankr. E.D. Mich. 2010) required "bad faith on the part of a spoliator, rather than mere negligence, before imposing an adverse inference."

Amidst this continuing split, more courts last year crafted different--and often lesser--adverse inference and preclusion sanctions than those the parties requested, tailoring the remedy more precisely to the culpable conduct. For example, in *Moore v. Napolitano*, 723 F. Supp. 2d 167, 184 (D.D.C. 2010), the district judge construed the magistrate judge's preclusion sanction to ensure "a proportional remedy to the alleged harm" and avoid an "unsupported litigation-ending sanction." And in *Rockwood v. SKF USA Inc.*, 2010 WL 3860414, at *1 (D.N.H. Sept. 30, 2010), the court stated that the defendant "is entitled to some relief, just not the relief it has requested" and imposed an adverse inference sanction rather than the requested terminating sanction for the intentional deletion of emails in violation of a discovery order. *Id.* at *5. See also *In re Oracle Corp. Sec. Litig.*, No. 09 CV 16502, 2010 WL 4608794, at *5 (9th Cir. Nov. 16, 2010) (holding that district court did not abuse its discretion by limiting adverse inference where requested broader adverse inference would have defeated defendant's challenge to insufficiency of plaintiff's *prima facie* case).

Case Terminating Sanctions

Courts continued to reserve the harshest sanction of dismissal or default judgment for cases where the culpable party violated its e-discovery obligations willfully and in bad faith. Dismissal or default judgment was granted in 57% of cases in which it was sought (12 of 21). In ten of these cases, the court found that the culpable party had violated court orders and/or lied to the court. See, e.g., *S. New England Tel. Co. v. Global Naps, Inc.*, 624 F.3d 123, 128 (2d Cir. 2010) (affirming default judgment against defendants for failure to comply with discovery orders). In eight cases, the culpable party intentionally destroyed evidence and even fabricated evidence. See, e.g., *Maggette v. BL Dev. Corp.*, No. 07 CV 181, 2010 WL 3522798, at *4, 18 (N.D. Miss. Sept. 2, 2010) (granting dispositive sanctions after defendant "repeatedly and knowingly" concealed information, acted in bad faith to prevent discovery of relevant information, and because "lesser sanctions did not have the desired effect of forcing compliance"). In *Leor Exploration & Production, LLC v. Aguiar*, Nos. 09 CV 60136/60683, 2010 WL 3782195, at *5-6 (S.D. Fla. Sept. 28, 2010), the only case granting terminating sanctions that did not involve the violation of a court

order or the destruction of evidence, the culpable party had hacked into the opposing party's email account to gain a litigation advantage.

In sum, it was certainly an interesting, albeit frustrating, year in the e-discovery sanctions area. Although some decisions fueled the collective anxiety among attorneys and their clients regarding preservation issues and sanctions, there are signs that some courts are becoming more careful about whether to impose sanctions and, if so, what those sanctions will be--a trend that we hope and expect will continue in 2011.

Preservation and Legal Holds: "Just Do It"

Many of the most significant e-discovery decisions in 2010 discussed above dealt with preservation issues, *e.g.*, *Pension Committee*, *Rimkus*, *Victor Stanley*, and *Orbit One*. Judge Scheindlin's decision in *Pension Committee* is likely to be best remembered for its declaration that failing to issue a written litigation hold is *per se* gross negligence. Yet that holding has not been met with universal acceptance. As The Sedona Conference® stated in its September 2010 update of its Commentary on Legal Holds, "[i]mportantly, while the use of a written legal hold is often appropriate, it is simply one method of executing preservation obligations, not the only one." The Sedona Conference®, Commentary on Legal Holds (Sept. 2010 Version), 11 Sedona Conference® Journal 265, 283 (Fall 2010). Rather, it states that "[i]n many instances, a written notice may not be necessary and, in fact, may be an encumbrance or source of confusion." *Id.* Examples given include where a party's information management or records retention policy already ensures that the records will be held throughout the duration of the litigation; and where sources of relevant information can be immediately secured without preservation actions by those subject to the hold. *Id.*; *see also Orbit One*, 2010 WL 4615547, at *11 ("For instance, in a small enterprise, issuing a written litigation hold may not only be unnecessary, but it could be counterproductive, since such a hold would likely be more general and less tailored to individual records custodians than oral directives could be.").

While we expect further discussion of whether a written litigation hold is required to develop in future case law, there is clearly no debate for litigants who may find themselves in Judge Scheindlin's courtroom in the short term. In response to critics of *Pension Committee's* declaration that failure to issue a written litigation hold is gross negligence, Judge Scheindlin reportedly stated at Georgetown Law Center's Advance E-Discovery Institute, "Instead of fighting with me about it--just do it. Just do it. You will have a defensible process and people will have guidance about what they have to hold on to." *See* Judge Scheindlin -- Written Legal Holds: Just Do It!, available at <http://legalholds.typepad.com/legalholds/2010/11/judge-scheidlin-written-legal-holds-just-do-it.html>.

Continuing the trend we observed in early 2010, courts in the latter half of the year focused on parties' and counsel's responsibility to implement effective preservation measures, including proper litigation holds. The trigger of the duty to preserve remained an active topic. One court held that preservation duties can be triggered before the complaint is filed, if the party is on notice of the potential litigation. *See Partminer Worldwide, Inc. v.*

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SiliconExpert Techs., Inc., No. 09-cv-00586-MSK-MJW, 2010 WL 4004164, at *2 (D. Colo. Sept. 23, 2010) (Watanabe, Mag. J.) (holding that defendants' duty to preserve ESI arose six months before complaint was filed). In a more controversial decision, another court held that if litigation against one company within a given industry is well-publicized, others in the same industry "as a whole" also may be on notice of potential litigation for preservation purposes. *Phillip M. Adams & Assocs., LLC v. Winbond Elecs. Corp.*, No. 1:05-CV-674 TS, 2010 WL 3767318, at *1, 4 (D. Utah Sept. 16, 2010). Courts also continued to stress that parties must preserve categories of ESI beyond just email. See *United States v. Suarez*, No. 09-932 (JLL), 2010 WL 4226524, at *6 (D.N.J. Oct. 21, 2010) (holding that government had duty to preserve text messages in criminal case); *Phillip M. Adams*, 2010 WL 3767318, at *3, 4 (holding that defendants had duty to preserve utility designed to test floppy disk components).

The format in which data is preserved remained a relevant topic last year. As in prior years, courts held that a litigant generally does not have a duty to preserve ESI in its native format unless that format is somehow crucial to the case. See, e.g., *United States v. Akefe*, No. 09 CR 196(RPP), 2010 WL 2899805, at *22 (S.D.N.Y. July 21, 2010). But courts last year also held that where metadata is necessary to the requesting party's case, it is subject to production. See *Brinckerhoff v. Town of Paradise*, No. CIV. S-10-0023 MCE GGH, 2010 WL 4806966, at *10-11 (E.D. Cal. Nov. 18, 2010) (Hollows, Mag. J.) (requiring defendant to produce metadata associated with a particular employee evaluation, because creation date and modification history of evaluation could result in "pivotal discovery"); *Romero v. Allstate Ins. Co.*, No. 01-3894, 2010 WL 4138693, at *12 (E.D. Pa. Oct. 21, 2010) (holding that plaintiffs were entitled to metadata where it would provide them "with crucial information and permit them to engage in a more effective and meaningful search and use of [the defendants'] extensive documentation"). Litigants should consider these issues when deciding how to preserve their ESI. For more detail on the preservation obligations for "outlier" ESI, see Farrah Pepper, "[Honey, I Forgot the Cell Phone: The 411 on 'Outlier' ESI.](#)" For more detail on the preservation obligations for ephemeral data, see Jennifer Rearden and Farrah Pepper, "[Oh No, Ephemeral Data!](#)".

One notable trend in preservation decisions last year was an increasing lenience toward preservation failures that did not result in any demonstrable prejudice to the requesting party. For example, one court held that even where a defendant was four months late in implementing a litigation hold, the failure to preserve was excused because other evidence existed to prove the requesting party's claims. *Managed Care Solutions, Inc. v. Essent Healthcare, Inc.*, No. 09-60351-CIV, 2010 WL 3368654, at *8 (S.D. Fla. Aug. 23, 2010) (O'Sullivan, Mag. J.). In a similar vein, another court refused to adopt a bright-line rule that would require a party to bear the costs associated with producing inaccessible data where the party's failure to institute a timely and effective litigation hold caused the data to become inaccessible. See *Major Tours, Inc. v. Colorel*, No. 05-3091 (JBS/JS), 720 F. Supp. 2d 587, 620-21 (D.N.J. 2010). Instead, the court held that the negligent party's culpability was just one factor to consider in determining whether to order production of the inaccessible data. *Id.*

Inaccessible Information: Just Prove It

Federal courts in 2010 continued to address whether and when data is "not reasonably accessible" under Rule 26(b)(2)(B). The Rule references "undue burden and cost" as potential indicia of inaccessibility, and courts required parties to show these elements with specificity before ruling data inaccessible. For example, in *Cartel Asset Management v. Ocwen Financial Corp.*, No. 01-cv-01644-REB-CBS, 2010 WL 502721, at *15 (D. Colo. Feb. 8, 2010) (Schaffer, Mag. J.), the court refused to conclude that data was inaccessible without "specific information" regarding storage practices, the "number" of systems to be searched, and the "capability" to retrieve information from backup or archival systems. *See also Helmert*, 2010 WL 2179180, at *8 (holding inaccessibility established where party described time necessary to construct a server, install software, and find relevant backup tape, in addition to costs of restoration); *Johnson v. Neiman*, No. 4:09-cv-00689 AGF, 2010 WL 4065368, at *1 (E.D. Mo. Oct. 18, 2010) (holding that 5,880 backup tapes, which each could require up to 2.5 hours to catalog and restore, were inaccessible).

Courts continued to apply the "good cause" exception in Rule 26(b)(2)(B), but they also required that such good cause be demonstrated with specificity. *Compare Takeda Pharm. Co. v. Teva Pharm. USA, Inc.*, No. 09-841-SLR-LPS, 2010 WL 2640492, at *1 (D. Del. June 21, 2010) (Stark, Mag. J.) (finding good cause to require restoration of inaccessible ESI, even at cost of millions of dollars, due to plaintiff's specific explanation of why requested data was relevant to case) *with Johnson*, 2010 WL 4065368, at *1-2 (finding absence of good cause for restoration of inaccessible ESI where requesting party had "no idea" what, if any, discoverable information might be restored). We expect courts in 2011 to continue to require specificity in the "not reasonably accessible" analysis, and we will monitor and report on developments as they arise.

Proportionality Gains Some Traction

As in the first half of the year, courts during the past six months have applied the proportionality concept embodied in Federal Rule of Civil Procedure 26(b)(2)(C)(iii) in cases where the responding parties adequately demonstrated that collecting, searching and producing requested ESI would be unduly burdensome. *See, e.g., United Cent. Bank v. Kanan Fashions*, No. 1:10-cv-00331, 2010 U.S. Dist. LEXIS 83700, at *3-4 (N.D. Ill. Aug. 12, 2010) (Mason, Mag. J.) (limiting temporal scope of discovery request by five years because earlier documents would be expensive to retrieve and of little relevance); *Willnerd v. Sybase, Inc.*, No. 1:09-cv-500-BLW, 2010 WL 4736295, at *3 (D. Idaho Nov. 16, 2010) (employing proportionality standard to reduce responding party's search from 30 custodians' emails to one custodian linked most directly to claim at issue); *Escue v. Sequent, Inc.*, No. 2:09-cv-765, 2010 WL 5153182, at *3 (S.D. Ohio Dec. 13, 2010) (Abel, Mag. J.) (refusing to order costly restoration of 45 backup tapes where relevant information had already been produced through "live" ESI).

Notably, when assessing proportionality, courts generally did not permit parties to rely on bare assertions of burden. Rather, courts remained firm that responding parties must specifically identify the reasons why it would be unduly burdensome to comply with the

requesting parties' demands, and support their applications for relief with evidence. *Compare FTC*, 2010 WL 4283998, at *5 (denying claim of undue burden because party failed to provide evidence of its likely costs) *with BBVA Compass Ins. Agency, Inc. v. Olson*, No. 10-cv-00528-WYD-KLM, 2010 WL 4004518, at *2-3 (D. Colo. Oct. 12, 2010) (Mix, Mag. J.) (accepting claim of undue burden where technical manager's affidavit specified that compiling requested files would take 200 to 400 hours). Continuing the trend we observed in the first half of 2010, courts in this context continued to rely on submissions by ESI consultants and experts regarding their assessments of burden. *See, e.g., Barrera v. Boughton*, No. 3:07cv1436(RNC), 2010 WL 3926070, at *2 (D. Conn. Sept. 30, 2010) (Martinez, Mag. J.) (accepting two IT experts' declarations regarding cost of proposed search to support proportionality analysis). One court went so far as to refuse to rule on a motion to compel until after the responding party first consulted an ESI expert on its undue burden claim. *See Radian Asset Assurance, Inc. v. Coll. of the Christian Bros. of N.M.*, No. 09-0885 JB/DJS, 2010 WL 4337999, at *3 (D.N.M. Oct. 2, 2010).

We also observed continued court approval for sampling when conducting proportionality analyses. Courts recognized that burden sometimes cannot be established until at least partial discovery has taken place, and thus some courts took more of a "wait-and-see" approach, reasoning that the "concept of sampling to test both the cost and the yield is now part of the mainstream approach to electronic discovery." *See Barrera*, 2010 WL 3926070, at *3 (ordering phased discovery beginning with 3 of 40 requested custodians to test cost and yield of larger search) (quotation and citation omitted); *Phillip M. Adams & Assoc., L.L.C. v. Fujitsu Ltd.*, No. 1:05-CV-64, 2010 WL 1901776, at *4 (D. Utah May 10, 2010) (Nuffer, Mag. J.) (ordering sampling of data and allowing requesting party to move for more discovery if "sampling yields something significant"); *see also Mt. Hawley Ins. Co. v. Felman Prod., Inc.*, No. 3:09-CV-00481, 2010 WL 1990555, at *11-13 (S.D.W.Va. May 18, 2010) (Stanley, Mag. J.) (approving sampling as method to test relevance and reliability of keyword search terms). Such sampling may be a prelude to a larger search. *See Makrakis v. Demelis*, No. 09-706-C, 2010 WL 3004337, at *2 (Mass. Super. Ct. July 13, 2010) (ordering sampling of emails stored on backup tapes at requesting party's expense before ordering more expansive search). We expect the use of sampling to grow in popularity in 2011, as courts and parties continue to look for methods to make e-discovery more efficient and less expensive.

The notion of proportionality as a gauge of what is reasonable at the preservation stage gained endorsements in the highly publicized *Rimkus* and *Victor Stanley* decisions. In *Rimkus*, Judge Rosenthal wrote that "[w]hether preservation or discovery conduct is acceptable in a case depends on what is *reasonable*, and that in turn depends on whether what was done--or not done--was *proportional* to that case and consistent with clearly established applicable standards." *Rimkus*, 688 F. Supp. 2d at 613 (emphasis in original). Judge Grimm observed in *Victor Stanley* that "courts have tended to overlook the importance of proportionality in determining whether a party has complied with its duty to preserve evidence" and reasoned that "this should not be the case because Fed. R. Civ. P. 26(b)(2)(C) cautions that all permissible discovery must be measured against the yardstick of proportionality." *Victor Stanley*, 269 F.R.D. at 523.

Magistrate Judge Francis retorted in *Orbit One*, however, that "[a]lthough some cases have suggested that the definition of what must be preserved should be guided by principles of 'reasonableness and proportionality,' this standard may prove too amorphous to provide much comfort to a party deciding what files it may delete or backup tapes it may recycle." *Orbit One*, 2010 WL 4615547, at *6 (citing *Rimkus* and *Victor Stanley*). He further observed that "[p]roportionality is particularly tricky in the context of preservation. It seems unlikely, for example, that a court would excuse the destruction of evidence merely because the monetary value of anticipated litigation was low." *Id.* at *6 n.10. Accordingly, he cautioned that reasonableness and proportionality "cannot be assumed to create a safe harbor for a party that is obligated to preserve evidence but is not operating under a court-imposed preservation order." *Id.*

Cooperation: No More "Animal House Cafeteria Food Fights"

Courts in 2010 continued to stress cooperation among the parties regarding e-discovery issues. In our [Mid-Year Update](#), we noted that many courts urging cooperation explicitly relied on The Sedona Conference® Cooperation Proclamation. This trend continued in the second half of 2010. For example, one court applied the principles found in the Cooperation Proclamation and other Sedona Conference® publications to order counsel to confer and reach agreement on search terms, custodians, date ranges, and any other e-discovery search methodology details, "without the court having to micro-manage" the process. *See Romero*, 2010 WL 4138693, at *13; *see also Degeer v. Gillis*, -- F. Supp. 2d --, No. 09-C-6974, 2010 WL 5096563 (N.D. Ill. Dec. 8, 2010) (Nolan, Mag. J.) (citing Cooperation Proclamation and approving of Sedona Conference®'s recommendation to agree on protocols for non-party production of ESI at outset of litigation); *Barrera*, 2010 WL 3926070, at *2 (citing *The Case for Cooperation*, 10 Sedona Conf. J. 339 (2009 Supp.), a Sedona Conference® paper setting forth the benefits of cooperation, and acknowledging counsel's "good faith effort" to resolve e-discovery issues independently, even though they ultimately failed to reach acceptable agreement); *Trusz*, 2010 WL 3583064, at *4 (ordering counsel to meet and confer to refine search terms consistent with the Cooperation Proclamation). In all, eight cases in 2010 cited the Cooperation Proclamation, two cases cited *The Case for Cooperation*, and two additional cases cited both.

The number of judges endorsing the Cooperation Proclamation appears to have reached somewhat of a plateau. As of September 30, 2010, when The Sedona Conference® last listed them, 111 judicial officers from state and federal courts in 29 states and the District of Columbia have endorsed the Cooperation Proclamation. That is somewhat higher than reported in our 2009 Year-End Update (slightly under 100), but nowhere near the growth in judicial endorsements in 2009 (it increased from 44 in 2008).

Many courts urged adherence to the principles of cooperation without expressly citing the Cooperation Proclamation. In particular, selection of the format of production is one area where courts encouraged cooperation. For example, one court in the second half of 2010 compelled a party that had initially produced documents in .pdf format to re-produce the same ESI in a fully searchable and manipulable format, even though the requesting party

had not specified a production format. The court's order was partially motivated by a concern about cooperation--*i.e.*, that the producing party had chosen the .pdf format to make it more difficult for the requesting party to use the information efficiently. *See Jannx Med. Sys., Inc. v. Methodist Hosp., Inc.*, No. 2:08-CV-286-PRC, 2010 WL 4789275, at *4 (N.D. Ind. Nov. 17, 2010) (Cherry, Mag. J.) (noting that just because defendant had not specified production in "reasonably usable" format, plaintiff should not therefore convert data to less-usable form); *Susquehanna Comm. Fin., Inc. v. Vascular Resources, Inc.*, No. 1:09-CV-2010, 2010 WL 4973317, at *13 (M.D. Pa. Dec. 1, 2010) (Carlson, Mag. J.) (recommending the Cooperation Proclamation to parties having disputes over form of production issues).

Courts in the second half of 2010 also continued to be keenly aware of counsel's efforts--or lack of efforts--to resolve e-discovery disputes independently before seeking judicial involvement. *Compare, e.g., Barrera*, 2010 WL 3926070, at *2 (noting counsel's good-faith effort to resolve their ESI production issues) *with Trusz*, 2010 WL 3583064, at *5 (noting that motion practice could have been avoided if counsel had "actually" conferred before seeking judicial action). Courts did not look kindly on parties that failed to work together. One court even went so far as to compare an e-discovery dispute to "the litigation equivalent of the cafeteria food fight scene in the infamous movie *Animal House*." *Accounting Principals, Inc. v. Solomon Edwards Group, LLC*, No. 09-2085-CM, 2010 WL 3199897, at *2 (D. Kan. Aug. 12, 2010) (O'Hara, Mag. J.); *see also Degeer*, 2010 WL 5096563, at *21 (ordering defendant to share costs of non-party's production where neither defendant nor non-party made efforts to cooperate). We expect that courts will continue to expect and demand cooperation and professionalism in 2011, and parties that fail to demonstrate good faith efforts will do so at their peril.

Search Methodologies

The use of computer algorithms for clustering, predictive coding, initial document culling, and other search technologies was on the rise in 2010. *See* eDiscovery Institute Survey on Predictive Coding, available at www.ediscoveryinstitute.org/pubs/PredictiveCodingSurvey.pdf (Oct. 1, 2010). We expect that with the increased use of computer-assisted review tools, courts will inevitably need to address these new search technologies in some fashion. Already, efforts to understand the best tasks for humans and computers in the search process are underway and may help courts and parties tell what combination of human- and computer-assisted review is appropriate for a given review project. The Text Retrieval Conference (TREC) Legal Track, an interdisciplinary, international effort to model and evaluate best practices in e-discovery, featured a "learning" component at its 2010 conference that tested different computer-assisted search technologies for increasing the efficiency of large-scale electronic review. *See* 2010 TREC Legal Track, available at <http://plg.uwaterloo.ca/~gvcormac/treclegal/>. The Sedona Conference® has endorsed TREC's efforts to facilitate evaluation of existing and emerging search technologies. *See id.* Determining the proper balance between human- and computer-assisted review is a topic we will continue to track.

Court decisions continued to focus on the use of search terms in traditional "linear review." See, e.g., *FTC v. Church & Dwight Co.*, No. 10-149 (EGS/JMF), 2010 WL 4283998, at *4 (D.D.C. Oct. 29, 2010) (Facciola, Mag. J.) (observing that search terms can "keep the burden to [a] minimum"). Confronted with parties' quarrels over selection of search terms, courts' diverged in their willingness to get involved. Consistent with what we reported in our Mid-Year Update, some courts continued to shy away from actively crafting search methodologies. See *Romero*, 2010 WL 4138693, at *13 ("Among the items about which the court expects counsel to reach practical agreement without the court having to micro-manage e-discovery are search terms . . .") (quotations and citation omitted). These courts typically ordered the parties to meet and confer regarding disagreement over search terms and keywords. See, e.g., *Trusz v. UBS Realty Investors LLC*, No. 3:09 CV 268(JBA), 2010 WL 3583064, at *5 (D. Conn. Sept. 7, 2010) (Margolis, Mag. J.) (ordering meet and confer in response to complaint that opposing party engaged in massive document dump); *Corbello v. DeVito*, No. 2:08-cv-00867-RCJ-PAL, 2010 WL 4703519 at *6, 9 (D. Nev. Nov. 12, 2010) (Leen, Mag. J.) (setting monthly hearings to monitor progress of discovery, but ordering parties to agree upon reasonable search terms).

Other courts, by contrast, stepped in to substantively evaluate and rule upon parties' proposed search terms. For example, one court held a nonparty's production "incomplete" where it failed to use "obviously relevant search terms," and ordered additional searches of the nonparty's electronic files using court-crafted keywords. *Bailey Indus. v. CLJP, Inc.*, No. 3:10mc64/MCR/EMT, 2010 WL 3860742, at *7, 10 (N.D. Fla. Sept. 30, 2010) (Timothy, Mag. J.). Another court took a similarly hands-on approach, addressing each of plaintiff's individual search term requests in turn and approving or rejecting their use. *Mosley v. Conte*, No. 110623/2008, 2010 NY Misc. LEXIS 4313, at *13-23 (N.Y. Sup. Ct. Aug. 17, 2010); see also *Hennigan v. Gen. Elec. Co.*, No. 09-11912, 2010 WL 4189033, at *3-6 (E.D. Mich. Aug. 3, 2010) (Hluchaniuk, Mag. J.) (finding plaintiff's proposed search terms "sufficiently well-defined, narrow in scope, and reasonable"); *Helmert v. Butterball, LLC*, No. 4:08CV00342 JLH, 2010 WL 2179180, at *4-6 (E.D. Ark. May 27, 2010) (editing search term categories); *Mosley*, 2010 NY Misc. LEXIS 4313 at *10-13 (limiting use of search term "Hudson" because of word's broad use).

Courts also showed a willingness to make similar determinations about which custodians' files should be searched. See *Barrera*, 2010 WL 3926070, at *3 (allowing defendants initially to search only 3 of the 40 requested custodians' files); *Helmert*, 2010 WL 2179180, at *6-7 (narrowing proposed custodian list). As courts' understanding of and experience with e-discovery issues increase, we expect this trend of interventionism to increase as well.

In 2010, litigants often sought to learn of their opponents' search methodologies and discovery efforts, a trend we have been observing since 2007. For example, in *Romero*, 2010 WL 4138693, at *14, the court rejected a party's argument that the work product doctrine protected its search methodology from being discovered, and held that search methods go to the underlying facts of which documents respond to which document requests, rather than delving into counsel's thought processes. Another court permitted such discovery about discovery, and then showed little patience when the responding party

was unable to explain its search methods. That court issued a strongly worded opinion imposing case dispositive sanctions after determining that the defendant's discovery efforts were a sham, in part because the defendant could not describe the databases searched or the search terms, methods, or parameters it used. *Maggette*, 2010 WL 3522798, at *2-4, 18. Accordingly, by now it should be no surprise that courts may allow discovery about discovery, and litigants would do well to make sure their search methods are both well-documented and defensible.

The Social Network: New Challenges for Preservation and Discovery

Social media presents interesting and new challenges for discovery, and courts last year addressed issues such as preservation, privacy rights, and authentication of evidence in this arena. Additionally, bar associations have begun to issue ethical opinions prohibiting "trickery" in obtaining evidence from social networks.

As we predicted in our Mid-Year Update, courts in the second half of last year began to order the preservation of social networking data. One court ordered a user to preserve information and posts on the user's MySpace and Facebook accounts. *See McMillen v. Hummingbird Speedway, Inc.*, 2010 WL 4403285 (Pa. Com. Pl. Sept. 9, 2010). Another court ordered a user to permit the requesting party access not only to the user's current Facebook and MySpace accounts, but also to any historical accounts, and any records previously deleted or archived by the site operators. *Romano v. Steelcase Inc.*, 907 N.Y.S.2d 650, 657 (N.Y. Sup. Ct. 2010). Such orders raise the potential that social media may serve as a "discovery equalizer" between individuals and companies engaged in litigation, as individual users of social networking are now increasingly likely to face more onerous and complicated preservation obligations. Traditionally, companies have shouldered the brunt of the discovery burden and individuals have faced a comparatively light discovery burden, in terms of volume and complexity of the data sought. Social media may force a recalibration of this imbalance in the coming year.

Another trend last year saw courts holding that there is no expectation of privacy or confidentiality for social networking communications. In *Romano*, for example, the court held that the production of information from social networking sites did not violate the plaintiff's right to privacy, regardless of her chosen privacy settings, because the social networks' terms of use and their inherent nature provide no expectation of privacy. *Romano*, 907 N.Y.S.2d at 655-57. *See also McMillen*, 2010 WL 4403285 ("[N]o person choosing MySpace or Facebook as a communications forum could reasonably expect that his communications would remain confidential."). There may be greater privacy protection for social networking communications when discovery is sought from the provider itself, as opposed to from the end user. *See Crispin*, 717 F. Supp. 2d at 976 (holding that individuals have standing under ECPA to quash subpoenas that seek their personal information from communication service providers). We expect this issue to be further developed in 2011, especially in light of the efforts to reform the ECPA, described above.

Courts in 2010 also grappled with authentication of evidence obtained from social networks. In the social media context, authenticity can be difficult to establish because

many social networks contain anonymity features. In *Griffin v. Maryland*, 995 A.2d 791, 799-807 (Md. Ct. Spec. App. 2010), the court held that testimony by a police officer identifying a profile picture, birthday, and references to a nickname provided sufficient authentication to admit a MySpace profile into evidence, despite the owner's use of a pseudonym. By contrast, another court required additional showings regarding "how secure [a MySpace] Web page is, who can access a MySpace Web page, whether codes are needed for such access, etc." before a MySpace message could be authenticated, even when the identity of the profile owner was unquestioned. *Commonwealth v. Williams*, 926 N.E.2d 1162, 1172-73 (Mass. 2010).

Finally, the growing use of evidence from social networks led some bar associations in 2010 to issue ethical opinions governing how such evidence may be obtained. For example, the New York State Bar Association opined that an attorney may access and review the public social network pages of another party, but that the attorney may not "friend" the other party or direct a third person to do so. N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 843, Sept 10, 2010. For more detail on the use of social media for legal marketing purposes, see Jessica Brown and Scott Campbell, "[Social Media Marketing](#)."

Cross Border E-Discovery: Foreign Privacy Interests Finally Get A Little Respect

Extraterritorial application of e-discovery obligations continues to be a hot topic, and recent decisions continue the trend observed in our [Mid-Year Update](#) of U.S. courts compelling cross-border discovery despite foreign statutes barring production of the requested information. *See, e.g., Devon Robotics v. DeViedma*, No. 09-cv-3552, 2010 WL 3985877, at *5-6 (E.D. Pa. Oct. 8, 2010) (denying motion for protective order because nonproduction would undermine important U.S. interests and there was no evidence disclosure would violate Italian law); *In re Air Cargo Shipping Services Antitrust Litig.*, No. 06-MD-1775, 2010 WL 2976220, at *2-3 (E.D.N.Y. July 23, 2010) (Pohorelsky, Mag. J.) (granting motion to compel because U.S. interest in enforcing antitrust laws outweighed South African interest in enforcing blocking statute, in particular where prospect of criminal sanctions for violating South African statute was "speculative at best").

Yet, one decision indicates that foreign privacy interests may finally be getting a little--or, perhaps more accurately, a tiny bit of--respect, at least where a foreign governmental entity objects to the production. The court in *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litigation*, No. 05-MD-1720, 2010 WL 3420517 (E.D.N.Y. Aug. 27, 2010), held that disclosure of documents created in connection with an investigation by the European Commission would contradict the doctrine of international comity, and it refused to order the production of two documents. The European Commission (as *amicus curiae*) opposed disclosure because of confidentiality under European law. Even though the requested documents were "plainly relevant," the court determined that the European Commission's interest in protecting the confidentiality of its own investigative and adjudicative documents outweighed the requesting party's interest in discovery. *Id.* at *5, 9-10. Although *In re Payment Card* may be an outlier due to its unique circumstances, it

could potentially portend at least some deference being given to foreign privacy interests in the future.

Data Privacy in the Employer-Employee Context

Several courts in 2010 held that in many circumstances employees using employer-owned computers and/or work email accounts for limited personal use do not relinquish their privacy rights. As reported in our [Mid-Year Update](#), the court in *Stengart v. Loving Care Agency, Inc.*, 990 A.2d 650 (N.J. 2010), held in the first half of the year that email messages sent by an employee to her attorney on her work-issued laptop through a personal, web-based email account were protected by the attorney-client privilege. Since then, a District Court in Illinois held that an employee who was ordered to turn over his work computer as part of an internal company investigation maintained privilege over emails sent to his attorney from that computer, using his personal email account. *Degeer*, 2010 WL 3732132, at *8 (noting that production of emails from employer's server was "inadvertent"). The court also held that emails between the employee and his attorney to and from his work email account were privileged, in part because the company itself believed that there was no waiver. *Id.* at *9.

Similarly, another recent case found no privilege waiver when a third party served as an intermediary in electronic communications between an attorney and client, using the client's employer-owned computer. *Shanahan v. Superior Court*, No. B220947, 2010 WL 2840254, at *6 (Cal. Ct. App. July 21, 2010). In *Shanahan*, a CEO's secretary had edited, proofread and printed emails between the CEO and his attorney. The court held the CEO's attorney-client privilege was not waived because the company's email monitoring policy did not apply to the CEO, and the secretary was personal (rather than part of a pool). *Id.* at *7-9. See also *Schill v. Wisconsin Rapids Sch. Dist.*, 786 N.W.2d 177, 182-83 (Wis. 2010) (acknowledging that employees may occasionally use work email accounts for personal business without losing their privacy interests in those communications).

Looking to the future, we expect to see decisions addressing employer-employee electronic privacy issues in the social media context. A 2010 study found that although fewer than one-third of employers had created a social media policy, it is a growing topic of interest. See *Manpower, Social Networks vs. Management? Harness the Power of Social Media* (2010). In October 2010, the National Labor Relations Board ("NLRB") filed a complaint against American Medical Response of Connecticut, Inc. alleging that two of the employer's restrictions on blogging and social networks violated the National Labor Relations Act. See NLRB Complaint No. 34-CA-12576 (Oct. 27, 2010). The complaint alleges that the employer's policy prohibited employees "from making disparaging, discriminatory or defamatory comments when discussing the Company or the employee's superiors, co-workers and/or competitors" and "depict[ing] the Company in any way" without prior written approval in blogging and internet posting. (Compl. at *2.) The NLRB's complaint appears to contradict a December 2009 Advisory Memorandum from the NLRB General Counsel approving Sears, Roebuck and Co.'s social media policy, which prohibited, among other things, "[d]isparagement of company's . . . products,

services, executive leadership, employees, strategy, and business products." This is a rapidly-changing area, and we will watch it closely.

Government and E-Discovery: Clarified Obligations and Limits

The government is a frequent player in the e-discovery field--as prosecutor, civil plaintiff, defendant, and investigator. In 2010, courts clarified prosecutors' duties with regard to ESI, the government's e-discovery obligations in civil cases, and the limits on the government's ability to obtain ESI in its investigative capacity. Additionally, the federal government itself paid special attention to its own ESI capabilities.

Trends in the Criminal Context

In the criminal context, the required scope and specificity of government ESI disclosures remained controversial in 2010. While prosecutors generally have more limited disclosure obligations than civil litigants, they are still required to produce certain information in criminal prosecutions, often causing ESI-related issues to arise in criminal cases. Given the unique issues in the criminal context, however, the government's responsibilities regarding such productions, particularly where they involve large quantities of information, are not yet well defined. For example, one court held that where the government produced "multiple gigabytes" of ESI with "pages numbering into the millions," the government was required to review and *specifically identify* for the defense any evidence that was required to be produced under *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972). See *United States v. Salyer*, 2010 WL 3036444, at *3-8 (E.D. Cal. Aug. 2, 2010) (Hollows, Mag. J.). Another court appeared to allow more leeway for government prosecutors producing large volumes of ESI, holding that while ESI "might have been produced more expeditiously" by prosecutors, any delays were attributable "to the nature of electronic discovery, the complex nature of the alleged crimes, and the necessity of coordinating various branches of government in the investigation." *United States v. Qadri*, 2010 WL 933752, at *5 (D. Haw. March 9, 2010) (denying motion to dismiss indictment based on prosecutors' e-discovery delays).

The federal government itself took steps in 2010 to address its ESI disclosure obligations in the criminal context, on the heels of some high-profile discovery debacles. Although the government encourages localized solutions, Deputy United States Attorney David Ogden issued comprehensive new guidance related to criminal ESI issues. Ogden's memorandum provided guidance to all criminal prosecutors about how to maintain proper ESI files and respond to criminal discovery requests. David W. Ogden, "Guidance for Prosecutors Regarding Criminal Discovery," U.S. Dept. of Justice Memorandum for Department Prosecutors, Jan. 4, 2010 ("Ogden Memo"). The Ogden Memo directed prosecutors to familiarize themselves with their obligations under a number of authorities, including local rules of professional conduct, and to interpret them broadly. It also outlined what materials should be reviewed, how to conduct the review, and what materials should be disclosed. Although this guidance is not legally binding, the court in *Salyer* explicitly relied on it in holding that prosecutors have an affirmative duty to identify and disclose material located anywhere in their ESI file. *Salyer*, 2010 WL 3036444, at *3.

Trends in the Civil Context

In the civil context, courts held that the government is responsible for maintaining and disclosing ESI materials like any other civil litigant. For example, in one case the governmental entity was not afforded any special consideration under the undue burden analysis. *See Gonzales v. City of Albuquerque*, No. CIV 09-0520 JB/RLP, 2010 WL 553308, at *1-2 (D.N.M. Feb. 9, 2010) (compelling defendant city to review its disclosures to ensure they include complete response to plaintiffs' request and that there are no more responsive documents in its files). Another court evaluated the sufficiency of a governmental entity's ESI retention program under the same criteria applicable to private civil litigants. *See Field Day, LLC v. County of Suffolk*, No. 04-2202, 2010 WL 1286622, at *13 (E.D.N.Y. March 25, 2010).

Additionally, as ESI has become a more integral part of both prosecuting and defending civil lawsuits, the DOJ and other agencies have increased their e-discovery resources. In its 2011 budget request, the DOJ's Civil Division specifically requested additional personnel to "meet the amendments to the Federal Rules of Civil Procedure, as well as developing case law that imposed severe sanctions upon clients and counsel not equipped to meet the challenges presented by electronically-stored information." U.S. Department of Justice, FY2011 Budget Request, available at www.justice.gov/jmd/2011factsheets/pdf/defend-interests-unitedstates.pdf

Trends in the Investigative Context

The ability to access ESI in a governmental investigation continued to expand in 2010. Utilizing the broad obstruction of justice provisions in the Sarbanes-Oxley Act, 18 U.S.C. §1519 (2002), the federal government initiated aggressive prosecutions against corporate officials who destroyed or failed to preserve ESI. *See United States v. Wolff*, 08-CR-00417, at *12 (E.D. Ill. Aug. 31, 2010) (holding that deleting emails and falsifying records could be basis for obstruction of justice charge). One court held that the government's authority to request ESI during an investigation is greater than its authority once the litigation has commenced, and that a Federal Trade Commission subpoena seeking ESI would only be quashed upon proof that the government's request was "unreasonable." *FTC*, 2010 WL 4283998, at *4. With both legislative and judicial support, the federal government is likely to continue aggressively seeking the ESI it deems necessary to ongoing investigations. *See* Lanny A. Breuer, Assistant Attorney General, Criminal Div., Dept. of Justice, Address at Compliance Week 2010 (May 26, 2010) (discussing a "new era of heightened white-collar crime enforcement").

That said, the Fourth Amendment does of course limit the government's ability to obtain ESI, by prohibiting "unreasonable searches and seizures." But with technology constantly evolving and information regularly being shared online, courts in 2010 continued to struggle to maintain traditional Fourth Amendment standards. While there appears to be a general consensus that no reasonable expectation of privacy exists in files accessed from peer-to-peer file sharing networks, *see, e.g., United States v. Abston*, No. 10-5091, 2010 WL 4367124, at *6 (10th Cir. Nov. 5, 2010), it remains unclear whether individuals have a

reasonable expectation of privacy in email accounts maintained on cloud-computing networks. In mid-December 2010, the Sixth Circuit became the first circuit court to hold that individuals do, in fact, maintain a reasonable expectation of privacy in email messages "that are stored with, or sent or received through" commercial internet service providers. *See Warshak*, 2010 WL 5071766, at *14 ("The government may not compel a commercial ISP to turn over the contents of a subscriber's emails without first obtaining a warrant based on probable cause."). This holding may compel the conclusion that the ECPA is, in part, unconstitutional because it arguably allows governmental searches in violation of the Fourth Amendment. *Id.* Accordingly, we expect the reverberations of *Warshak* will be felt well into 2011, as other courts address its holding.

There are other limits on the government's investigative powers as well, and concerns about over-seizing recently have caused federal courts to carefully scrutinize the execution of computer search warrants. As we discussed in our Mid-Year Update however, the manner in which computers store information can make it difficult for law enforcement to define the necessary scope of such searches. A recent move by the Ninth Circuit exemplifies this issue. In 2009, the Ninth Circuit called for mandatory requirements limiting the authority of law enforcement agencies when conducting computer searches. In 2010, however, the court revised this opinion, demoting the "requirements" to mere "guidelines." *See United States v. Comprehensive Drug Testing, Inc.*, 579 F.3d 989, 1006 (9th Cir. 2009), *rev'd en banc*, 621 F.3d 1162 (9th Cir. 2010) (retaining original holding, because government exceeded its authority under warrant, but giving magistrate judge discretion regarding proper scope of computer search). The Fourth Circuit in 2010 took a more government-friendly view of this issue, holding that a computer search warrant "must, by implication, authorize, at least a cursory review of each file on the computer." *United States v. Williams*, 592 F.3d 511, 522 (4th Cir. 2010). Similarly, the Seventh Circuit determined that a "plain view" exception exists when forensic software is used to execute computer search warrants. *United States v. Mann*, 592 F.3d 779, 785-86 (7th Cir. 2010) (rejecting Ninth Circuit's guidelines but recognizing threat posed by expansive digital searches). We expect the law on ESI search warrants to continue to develop in 2011.

Conclusion

In 2010, the number and sophistication of e-discovery cases continued to grow, and there were significant developments in several areas -- particularly in calls for reform, sanctions, discovery from social media and privacy. Gibson Dunn will continue to track the latest developments and trends. Look for our updates whenever a major opinion is issued, and watch next summer for our 2011 Mid-Year E-Discovery Update.

Please see [Appendix](#) of Cases Reviewed.



Gibson Dunn & Crutcher's lawyers are available to assist in addressing any questions you may have regarding the issues discussed in this update. The Electronic Discovery and Information Law Practice Group brings together lawyers with extensive knowledge of electronic discovery and information law. The group is comprised of seasoned litigators

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with a breadth of experience who have assisted clients in various industries and in jurisdictions around the world. The group's lawyers work closely with the firm's technical specialists to provide cutting-edge legal advice and guidance in this complex and evolving area of law. For further information, please contact the Gibson Dunn lawyer with whom you work or any of the following Chairs of the Electronic Discovery and Information Law Practice Group:

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