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An Electronic Discovery Primer

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AN ELECTRONIC DISCOVERY PRIMER

Minnesota E-Discovery Working Group 1[†]

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^{††} The views expressed herein do not necessarily reflect the view of the firms and companies listed, or the Minnesota State Judicial Branch. Working Group 1 wishes to acknowledge committee members Kate Chafee, attorney at Chafee Law; Kimberly Myrdahl, attorney at Supervalu Inc.; and Bridget Sullivan, attorney at Shepard Data Services, Inc., for their contributions to the Working Group.

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OVERVIEW

This paper discusses the basics of e-discovery from a Minnesota perspective. It is divided into seven sections, beginning in Part I with an introduction that addresses why knowledge of the issues surrounding e-discovery is important. Part II addresses what is discoverable and must be preserved. Part III addresses the types of sanctions that can be imposed for e-discovery misconduct and the types of misconduct generating those sanctions. Part IV addresses

the concept of proportionality and Part V addresses cooperation. Part VI focuses on competent representation on e-discovery matters; and lastly, Part VII addresses malpractice issues.

I. INTRODUCTION

While the Information Age arrived more than forty years ago, and “data compilations” have been discoverable since the 1970 amendments to the Federal Rules of Civil Procedure, a significant portion of the bar is still on the learning curve to understanding how to handle electronically stored information (ESI) in litigation or investigation. The purpose of this article is to help demystify the subject for Minnesota practitioners. It is also the goal of the groups comprising the Minnesota E-Discovery Working Group, through this primer and other related articles, to establish a set of best practices for handling ESI.

The Minnesota Rules of Professional Conduct, in particular Rule 1.1, require that all practitioners have the requisite legal knowledge, skill, thoroughness, and preparation to undertake the representation.¹ Since virtually every document today is an e-document, or generated through the use of an electronic system, the knowledge required by Rule 1.1 includes knowledge about how to handle ESI.

Three fundamental points serve as a gateway to understanding the challenges of ESI. First, ESI has characteristics that differ from paper documents in several important respects. These differences include: vastly greater volumes of information, which are easily transmitted (increasingly on mobile devices); information maintained on systems that dynamically update or modify the information; and increased costs and logistical challenges associated with accessing and exporting relevant information.²

Second, technologies that generate information are ubiquitous and constantly changing, so it is imperative to continually refine and update one’s understanding. It is no longer assumed to be

1. MINN. RULES OF PROF’L CONDUCT R. 1.1 (2012).

2. *See generally* THE SEDONA CONFERENCE, THE SEDONA PRINCIPLES ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 2–5 (Jonathan M. Redgrave et al. eds., 2d ed. 2007) (listing volume and duplicability; persistence; dynamic, changeable content; metadata; environment-dependence and obsolescence; and dispersion and searchability).

enough to collect e-mail from a few custodians. We must now endeavor to create active data maps that identify the systems most likely to hold relevant data. Technology continues to evolve to meet these changing systems.

Third, because virtually all information is now electronically generated, a lawyer must either acquire sufficient knowledge of ESI issues and practices, or retain the requisite talent if one is to fulfill his or her ethical obligation to represent clients competently. Thus, it is essential for all attorneys to have a basic understanding of electronic discovery and the need to engage technical electronic discovery experts when appropriate.³

As courts began to decide ESI cases, there were undoubtedly instances of bad facts making for bad law. However, as the judiciary has gained experience and understanding, several basic principles have emerged and gained currency not only in individual court precedents, but also in pilot rules projects.⁴ For example, it is now widely recognized that a party's obligations in discovery do not extend to producing every shred of potential evidence. Rather, leading cases and respected commentators alike emphasize that electronic discovery requires reasonableness and good faith, just as is the case with paper document discovery.⁵ Nevertheless, as technology continues to evolve, what is actually recoverable and therefore potentially discoverable also continues to evolve. The ease with which digital information may be altered, destroyed, and

3. See COMM'N ON ETHICS 20/20 ET AL., AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES, RESOLUTION 105A (REVISED) 3 (2012), available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120808_revised_resolution_105a_as_amended.authcheckdam.pdf (revising Comment [6] to Rule 1.1 on Competence to state that "a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology" (emphasis added)).

4. See Press Release, S.D.N.Y. Office of the Dist. Court Exec., SDNY Implements Innovative Pilot Program to Improve the Quality of Judicial Case Management in Complex Civil Cases (Nov. 4, 2011), http://www.nysd.uscourts.gov/file/news/complex_civil_case_pilot; [Model] Order Regarding E-Discovery in Patent Cases, E.D. TEX., http://www.txed.uscourts.gov/cgi-bin2/view_document.cgi?document=22218 (last visited Jan. 13, 2014) (clean version of the Model Order).

5. See *Boeynaems v. LA Fitness Int'l*, 285 F.R.D. 331, 335–36 (E.D. Pa. 2012); *Rimkus Consulting Grp. v. Cammarata*, 688 F. Supp. 2d 598, 632 n.30 (S.D. Tex. 2010); *Zubulake v. UBS Warburg*, 220 F.R.D. 212, 216–18 (S.D.N.Y. 2003); THE SEDONA CONFERENCE, *supra* note 2, at 28.

hidden has given rise to the need for courts to demand that data be preserved, identified, and produced. What this means in practice is that courts will be less likely to tolerate either “any and all” requests for information or boilerplate objections to production requests.⁶

In aid of this rule of reason, the courts and the bench-bar groups promulgating local rules and standards have reinvigorated the proportionality standards that have been in the rules since 1983.⁷ Accordingly, courts will become more sensitive to (and resist) requests that a party do everything possible to locate potentially relevant information, especially if the cost of complying with the request is disproportionate to the potential benefit.⁸

Another critically important principle that has emerged is that because some information storage systems are dynamic, and ESI may be lost through the systems’ normal operation, the location and identification of ESI should be addressed early in a case. Both federal and many states’ rules (including Minnesota’s) require that counsel be prepared to discuss ESI issues during an early “meet-and-confer” session with opposing counsel, as well as with the court or supervising agency.⁹ Moreover, in accord with the foregoing, the discovery rules and the courts also expect parties to discuss ESI issues with a level of transparency sometimes missing in the earlier days of paper discovery. Indeed, judicial reactions to “hide the ball” and delay tactics appear as root causes for the overwhelming majority of the harsher sanctions that have been awarded in electronic discovery cases.¹⁰ Thus, it is now well established that

6. See *infra* Part V (discussing *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 358–59 (D. Md. 2008), and characterizing boilerplate objections as “an obvious violation” of the Federal Rules of Civil Procedure).

7. See, e.g., *Default Standard for Discovery, Including Discovery of Electronically Stored Information (“ESI”)*, D. DEL., <http://www.ded.uscourts.gov/sites/default/files/Chambers/SLR/Misc/EDiscov.pdf> (last visited Jan. 13, 2014) (discussing cooperation and proportionality); *[Proposed] Standing Order Relating to the Discovery of Electronically Stored Information*, SEVENTH CIRCUIT ELECTRONIC DISCOVERY PILOT PROGRAM, http://www.discoverypilot.com/sites/default/files/StandingOrde8_10.pdf (last visited Nov. 18, 2013) (emphasizing proportionality, cooperation and early meet and confers).

8. See generally The Sedona Conference, *The Sedona Conference Commentary on Proportionality in Electronic Discovery*, 14 SEDONA CONF. J. 155 (2013) (explaining the proportionality rule requirements).

9. See FED. R. CIV. P. 26(b); MINN. R. CIV. P. 26.06(d).

10. See *Mancia*, 253 F.R.D. at 364–65; Steven S. Gensler, *A Bull’s-Eye View of*

courts view cooperation between the parties as a key component to any litigation.¹¹

A final principle that is fundamental to sound resolution of ESI issues is that all discovery is bound by relevancy limitations. Thus, under the federal rules since 2000,¹² unless otherwise ordered, parties may obtain information regarding the *claims and defenses* asserted in the action. This rule is narrower than it was previously, and the amendment signaled that parties “have no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings.”¹³ The court may expand the scope of discovery “for good cause” to any matter relevant to the subject matter in the action.¹⁴ Absent such an order or modification of the pleadings, however, it would appear reasonable to confine discovery (and logically, preservation) to information that is potentially relevant under the pleadings. Therefore, as the matter continues to evolve, the scope of a litigation hold may need to be expanded or contracted to effectively address preservation of potentially relevant information.¹⁵

Cooperation in Discovery, 10 SEDONA CONF. J. 363 (2009); The Sedona Conference, *The Sedona Conference Cooperation Proclamation*, 10 SEDONA CONF. J. 331 (2009). *The Sedona Conference Cooperation Proclamation* has now been endorsed by more than 100 judges and has been specifically embraced by Minnesota courts. See MINN. SUPREME COURT CIVIL JUSTICE REFORM TASK FORCE, FINAL REPORT 35 (Dec. 2011), available at http://www.mncourts.gov/Documents/0/Public/Court_Information_Office/Civil_Justice_Ref_Task_Force_Dec_2011_Rpt.pdf. The Sedona Conference has also published a series of resources on cooperation for different constituencies. See, e.g., *The Sedona Conference Cooperation Guidance for Litigators & In-House Counsel*, SEDONA CONF. (Mar. 2011), <https://thesedonaconference.org/download-pub/465>; *The Sedona Conference Cooperation Proclamation: Resources for the Judiciary*, SEDONA CONF. (public comment version Aug. 2011) [hereinafter *Resources for the Judiciary*], <https://thesedonaconference.org/download-pub/425>.

11. See *Aguilar v. Immigration & Customs Enforcement Div.*, 255 F.R.D. 350, 358–59 (S.D.N.Y. 2008); *Mancia*, 253 F.R.D. at 356–58; Bd. of Regents of the Univ. of Neb. v. BASF Corp., No. 4:04CV3356, 2007 WL 3342423, at *5 (D. Neb. Nov. 5, 2007).

12. See FED. R. CIV. P. 26(a)(1).

13. FED. R. CIV. P. 26(b) advisory committee’s note (2000 amendment).

14. See *id.*

15. See, e.g., The Sedona Conference, *The Sedona Conference Commentary on Legal Holds: The Trigger & The Process*, 11 SEDONA CONF. J. 265, 284 illus. iii (2010).

II. WHAT IS DISCOVERABLE (AND MUST BE PRESERVED)?

The 2006 Amendments to the Federal Rules of Civil Procedure sought to address the reality that information is now digital in nature and must be addressed in its digital form within the context of litigation. As discussed herein, effective July 1, 2013, the Minnesota Rules of Civil Procedure have been amended to also address this concept.¹⁶ The most significant change in the Federal Rules, which addresses the concept of accessibility of digital information, is set forth in Rule 26(b)(2). Specifically, Rule 26(b)(2)(B) provides that “[a] party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost.”¹⁷ The rule further provides that a party may make a motion to compel or for a protective order and that the party opposing production must then prove their contention that the information is not reasonably accessible due to undue burden or cost.¹⁸ The court may still order discovery of such information upon a showing of good cause.¹⁹ In addition, Rule 26(b)(2)(C) further provides that the court may limit discovery upon a finding that “the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; . . . the party seeking discovery had ample opportunity to obtain the information by discovery in the action”; or the burden of the discovery outweighs its benefits (applying a five-factor test).²⁰

In Minnesota, the state courts have sought to coordinate their approach to e-discovery with that taken by the federal judiciary, and the Minnesota discovery rules were amended, effective July 1, 2007, to adopt electronic discovery provisions similar to those added to the Federal Rules.²¹

16. The relevant sections of the Federal Rules are provided in the appendix (as are the changes in the Minnesota Rules). *See infra* Appendix A.

17. FED. R. CIV. P. 26(b)(2)(B).

18. *Id.*

19. *Id.*

20. FED. R. CIV. P. 26(b)(2)(C)(i)-(ii).

21. *See* MINN. R. CIV. P. 26.02. The revised MINN. R. CIV. P. 34.01 provides in pertinent part:

Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the

To address the continuing evolution of discovery, the Minnesota Rules of Civil Procedure were amended again, effective July 1, 2013, and now more closely follow the federal rules on early disclosure. Rule 26.01 now requires initial disclosures by the parties within sixty days of the original date when an answer is due. These initial disclosures include a description of all documents, including those that are electronically stored.²²

Likewise, Rule 26.06(c) requires that the parties develop a discovery plan that includes “any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced.”²³ Further, the court may direct a conference be held with the judge pursuant to Rule 26.06(d), which would also include a discussion of any issues

requesting party’s behalf, to inspect and copy, test, or sample any designated documents or electronically stored information— (including writings, drawings, graphs, charts, photographs, sound recordings, images, phono records, and other data or data compilations stored in any medium from which information can be obtained—, translated, if necessary, by the respondent through detection devices into reasonably usable form)

Likewise, MINN. R. CIV. P. 34.02 provides:

The request may, without leave of court, be served upon any party with or after service of the summons and complaint. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. The request may specify the form or forms in which electronically stored information is to be produced.

. . . .

Unless the parties otherwise agree, or the court otherwise orders:

(a) A party who produces documents for inspection shall produce them as they are kept in the usual course of business at the time of the request or, at the option of the producing party, shall organize them to correspond with the categories in the request;

(b) If a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable; and

(c) A party need not produce the same electronically stored information in more than one form.

22. MINN. R. CIV. P. 26.01.

23. MINN. R. CIV. P. 26.02(c).

relating to disclosure or discovery of electronically stored information.²⁴

It is important to note that when dealing with electronically stored information, perfection is not required. What is required is that counsel conducts an early and methodical survey of their client's electronic information systems to enable them to accurately assess the ESI available and to ensure its preservation, availability, and ultimate collection.²⁵ The methodical survey should be conducted early in the representation, performed in a reasonable manner, and in good faith, so that counsel may participate intelligently in "meet and confer" conferences and thereafter address the court in an informed manner concerning electronically stored information that is potentially relevant to the claims and defenses in the matter.²⁶

In conducting the initial survey of the client's electronic information systems, counsel should consider many factors, including that client's technological landscape. In considering whether or not potentially relevant electronically stored information is reasonably accessible and subject to production, counsel may consider the approaches described by the Sedona commentators.²⁷

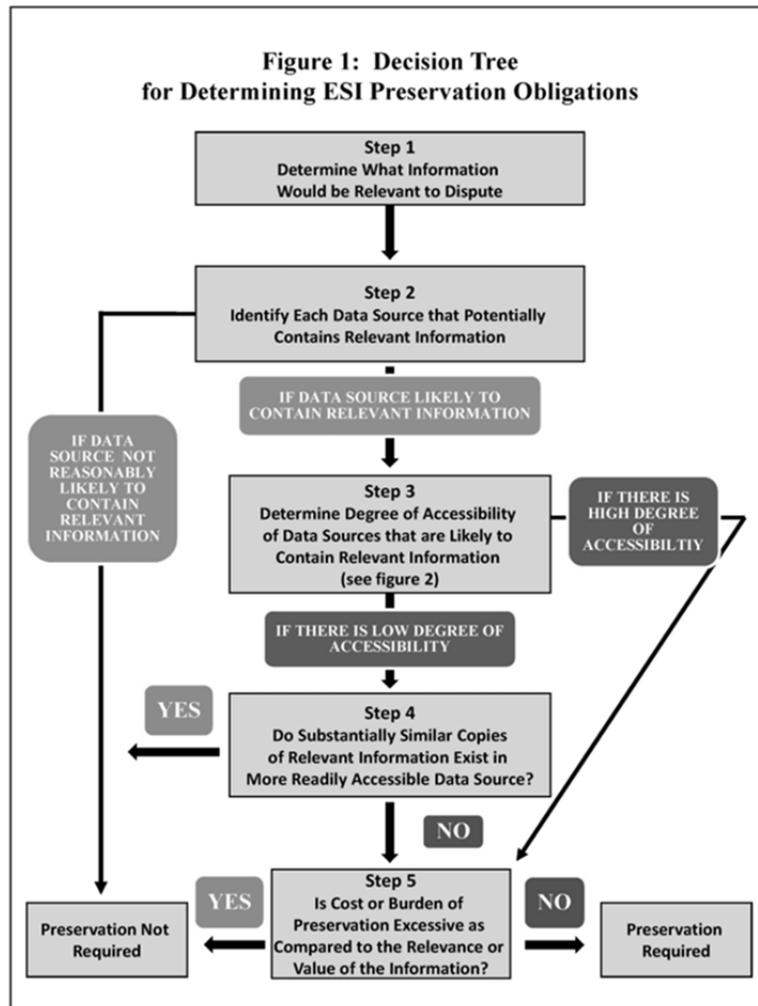
What follows is a diagram illustrating a decision-tree to aid in determining what should be preserved (and potentially produced):

24. MINN. R. CIV. P. 26.06(d).

25. See, e.g., *Phx. Four, Inc. v. Strategic Res. Corp.*, No. 05 Civ. 4837 (HB), 2006 WL 1409413, at *5-6 (S.D.N.Y. May 23, 2006).

26. See *Zubulake v. UBS Warburg L.L.C.*, 230 F.R.D. 290, 291-93 (S.D.N.Y. 2003) (denying plaintiff's motion for permission to disclose confidential transcript because basis for request was not tied to claims or defenses in case and plaintiff had no independent duty to produce it).

27. See *The Sedona Conference Commentary on Inactive Information Sources*, SEDONA CONF. (July 2009), <https://thesedonaconference.org/download-pub/64>; *The Sedona Conference Commentary on: Preservation, Management and Identification of Sources of Information That Are Not Reasonably Accessible*, SEDONA CONF. (July 2008) [hereinafter *Commentary on Preservation*], <https://thesedonaconference.org/download-pub/66>.

Figure 1: Decision Tree²⁸

The list of the typical sources of ESI and devices on which it may reside continues to evolve rapidly. The routine e-mail sources (desktop computer, e-mail servers) have now been joined by a plethora of mobile devices (smart phones, tablets, etc.) and the document types that are created using these ever-evolving tools for creating data and sharing information. It is important to note that information currently considered reasonably accessible may not

28. *Sedona Conference Commentary on Preservation*, *supra* note 27, at 6 fig.1.

have been deemed accessible a mere few months prior, and the same holds true for information that is not deemed reasonably accessible currently. For example, restoration of a standard format backup tape was once a complex and expensive endeavor but in many situations is now considered routine and significantly less expensive. It is important to remember that as technology continues to progress at an ever-accelerating pace, the standards applied must continuously be assessed and adjusted.

III. SANCTIONS

As lawyers continue to struggle with ESI and their obligations under the Federal and Minnesota Rules, it is imperative to recognize that courts are increasingly refusing to permit parties to disregard the rules regarding e-discovery.²⁹ This section first addresses some examples of litigation tactics that have resulted in sanctions in other jurisdictions and then addresses and describes the leading cases on sanctions at both the state and federal level in Minnesota.

A. *Examples of Sanctionable Conduct*

The issuance of sanctions as a result of e-discovery misdeeds are on the rise and are becoming increasingly common when a party chooses to utilize a system of recordkeeping that seeks to conceal rather than disclose relevant records, or makes it unduly difficult to identify or locate them, rendering a production of documents and ESI an excessively burdensome and costly expedition. Indeed, as one federal court in Utah noted when considering allegations by Dell: “To allow a defendant whose business generates massive records to frustrate discovery by creating an inadequate filing system, and then claiming undue burden, would defeat the purposes of the discovery rules.”³⁰ Thus, it

29. *Orbit One Commc'ns, Inc. v. Numerex Corp.*, 271 F.R.D. 429, 437 (S.D.N.Y. 2010) (citing *Quinby v. WestLB AG*, 245 F.R.D. 94, 104 (S.D.N.Y. 2006)); *Micron Tech., Inc. v. Rambus, Inc.*, 255 F.R.D. 135, 148–50 (D. Del. 2009), *aff'd in part, vacated in part*, 645 F.3d 1311 (Fed. Cir. 2011); *Starbucks Corp. v. ADT Sec. Servs., Inc.*, No. 08-CV-900-JCC, 2009 WL 4730798, at *7 (W.D. Wash. Apr. 30, 2009); *Phillip M. Adams & Assocs., L.L.C. v. Dell, Inc.*, 621 F. Supp. 2d 1173, 1193 (D. Utah 2009).

30. *Phillip M. Adams & Assocs. L.L.C.*, 621 F. Supp. 2d at 1193 (quoting

appears that the more electronically sophisticated a party is, the less leeway it can expect to receive from the court on matters of e-discovery.

It is also unwise to exaggerate the difficulty involved in retrieving information sought by the opposing party. An example of how this tactic can backfire is found in *Starbucks Corp. v. ADT Security Services, Inc.*,³¹ a case in which the district court noted that a defendant's representative "provided exaggerated reasons and exaggerated expenses as to why [the defendant] allegedly cannot and should not be ordered to comply with its discovery obligations."³² The *Starbucks* court found that the plaintiff should not be disadvantaged because the defendant, a "sophisticated" company, chose not to migrate their e-mails to a much more functional archival system, and thus the court determined that the e-mails were reasonably accessible and needed to be produced.³³

In addition to tactics intended to make collection and production more difficult, or exaggerating the difficulty of production, parties must analyze whether potentially relevant ESI is in the possession of a third party. If so, special analysis may be necessary. For example, if a party has contracted for a cloud-based e-mail service, counsel will want to understand how accessible the data are, where they are stored, the time involved in the extraction, what metadata may be available (if the opponent is seeking metadata), and what procedures are available for extracting the e-mail. In addition, as cloud computing resources continue to expand and become commonplace in the business environment, this causes an increase in the difficulty of identifying and isolating relevant data. While courts have yet to address spoliation of electronic information stored in the cloud, it is likely only a matter of time before this relatively new data storage option forms the basis for sanctions.

As noted in Part II above, when dealing with ESI, courts should not and generally do not expect perfection, and it is inevitable that sometimes relevant information may be lost through the routine functions of a computer system.³⁴ On the other hand, when

Kozlowski v. Sears, Roebuck & Co., 73 F.R.D. 73, 76 (D. Mass. 1976)).

31. *Starbucks Corp.*, 2009 WL 4730798 (W.D. Wash. Apr. 30, 2009).

32. *Id.* at *5.

33. *Id.* at *6.

34. *See, e.g.,* *Stepnes v. Ritschel*, 663 F.3d 952, 965 (8th Cir. 2011) (holding

information is destroyed during litigation through culpable conduct (be it through destruction resulting from bad faith, intentional conduct, or gross negligence), and the destruction results in prejudice to the requesting party, sanctions are likely.³⁵ When there is a showing of culpable conduct, sanctions may range from issuance of an adverse inference to even, in the most egregious of cases, terminating sanctions (i.e., dismissal or default judgment).³⁶

Where there is no such showing of culpability or extreme prejudice, the court may enter a remedial order that is not intended to punish, but rather is intended to correct the imbalance that may result from the data spoliation, such as additional discovery, cost-shifting, or other remedies. Not surprisingly, if a sanction is given, the nature of the sanction is case and fact dependent.

In *Pension Committee of University of Montreal Pension Plan v. Banc of America Securities, L.L.C.*,³⁷ a district court ordered sanctions against the plaintiffs resulting from their negligent and grossly negligent failure to properly conduct discovery (including failure to institute a proper litigation hold), which resulted in destruction of electronic and other records.³⁸ The *Pension Committee* court

that spoliation sanctions were unwarranted because “CBS’s general policy was to reuse tapes” and “[n]othing in the record indicate[d] that CBS intentionally destroyed the tape or acted with bad faith or gross negligence in respect to it”); *Yath v. Fairview Clinics, N.P.*, 767 N.W.2d 34, 41–42 (Minn. Ct. App. 2009) (holding that spoliation sanctions were not appropriate where Yath provided insufficient support to the claim that the browser history and temporary files had been intentionally deleted); *see also Chin v. Port Auth.*, 685 F.3d 135, 162 (2d Cir. 2012) (holding that the “district court did not abuse its discretion in concluding that an adverse inference instruction was inappropriate” due in part to “the limited role of the destroyed folders in the promotion process”); *Miller v. Lankow*, 801 N.W.2d 120, 129 (Minn. 2011) (concluding that a party with a legitimate need to destroy evidence may do so under certain limited circumstances).

35. *See, e.g., Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., L.L.C.*, 685 F. Supp. 2d 456 (S.D.N.Y. 2010), *abrogated by Chin*, 685 F.3d 135; *Cenveo Corp. v. S. Graphic Sys., Inc.*, No. 08-5521 (JRT/AJB), 2010 WL 3893680, at *15 (D. Minn. June 18, 2010) (awarding \$100,000 in sanctions).

36. *See In re Hecker*, 430 B.R. 189, 197 (Bankr. D. Minn. 2010) (granting plaintiff’s motion for sanctions and holding that part of plaintiff’s judgment against defendant was not dischargeable).

37. 685 F. Supp. 2d 456.

38. *Id.* at 497.

ordered the issuance of an adverse instruction and monetary sanctions, required certain specific additional discovery to be produced, and explained that “the failure to issue a *written* litigation hold constitutes gross negligence because that failure is likely to result in the destruction of relevant information.”³⁹

Reliance on *Pension Committee*, however, should be tempered in view of the contrary result in *Chin v. Port Authority*.⁴⁰ The *Chin* court found that the defendant had failed to implement a document retention policy and as a result, a significant number of highly relevant documents had been destroyed.⁴¹ The plaintiff accordingly sought an adverse inference due to spoliation; however, the *Chin* court denied the motion, reasoning that the defendant’s spoliation was “negligent, but not grossly so.”⁴²

Other courts have also emphasized the need for proactive preservation.⁴³ The district court in *Green v. Blitz U.S.A., Inc.*,⁴⁴ in response to a party’s pattern of lackadaisical discovery practices, issued substantial monetary sanctions, civil contempt fees, and issued an order requiring the offending party to notify every plaintiff in future suits for five years of its past discovery transgressions.⁴⁵

B. Discussion of Leading Cases

In Minnesota, deliberate spoliation (substantiated either through forensic methods or admission) can result in adverse inference instructions and exclusion of evidence.⁴⁶ For example,

39. *Id.* at 465.

40. 685 F.3d at 161–62.

41. *Id.*

42. *See id.* at 143 (finding that failure to implement a litigation hold is not gross negligence per se).

43. *See Orbit One Commc’ns, Inc. v. Numerex Corp.*, 271 F.R.D. 429, 441 (S.D.N.Y. 2010); *Wilson v. Thorn Energy, L.L.C.*, No. 08 Civ. 9009(FM), 2010 WL 1712236, at *3 (S.D.N.Y. Mar. 15, 2010); *Dong Ah Tire & Rubber Co. v. Glasforms, Inc.*, No. C 06-3359 JF (RS), 2008 WL 4298331, at *6–7 (N.D. Cal. Sept. 19, 2008); *Super Future Equities, Inc. v. Wells Fargo Bank Minn., N.A.*, No. 3: 06-CV-0271-B, 2008 WL 3261095, at *10–11 (N.D. Tex. Aug. 8, 2008); *In re Intel Corp. Microprocessor Antitrust Litig.*, 258 F.R.D. 280, 284–87 (D. Del. 2008).

44. No. 2:07-CV-372 (TJW), 2011 WL 806011 (E.D. Tex. Mar. 1, 2011).

45. *Id.* at *10–12.

46. *See, e.g., Frazier v. Burlington N. Santa Fe Corp.*, 811 N.W.2d 618 (Minn. 2012).

the court in the Minnesota federal bankruptcy case *In re Hecker*⁴⁷ issued a terminating sanction due to the behavior of the defendant and his counsel, finding that they acted with a “blatant disregard of the Court’s orders and the discovery rules.”⁴⁸

Generally, courts will look to impose the minimum sanction necessary to restore balance to the parties. By way of example, the district court in *Cenveo Corp. v. Southern Graphic Systems, Inc.*,⁴⁹ awarded a party injured by spoliation \$100,000 in monetary sanctions, rather than issue an adverse instruction.⁵⁰

It is important to note that the Eighth Circuit established in *Morris v. Union Pacific Railroad* that a finding of more than mere negligence is required before a court issues an adverse inference instruction.⁵¹ The *Morris* court found that the severity of the adverse inference instruction sanction requires a finding of bad faith based on evidence of intent to destroy documents for the purpose of suppressing evidence.⁵² The Eighth Circuit in *Morris* further cautioned against the indiscriminate use of adverse inference instructions and held that to justify the issuance of an adverse inference instruction there must first be a finding of intentional destruction of data “indicating a desire to suppress the truth.”⁵³ In so holding, the Eighth Circuit explained that “[t]he adverse inference instruction, when not warranted, creates a substantial danger of unfair prejudice.”⁵⁴

In *Escamilla v. SMS Holdings Corp.*,⁵⁵ the district court ordered sanctions in the form of additional discovery as well as cost shifting. The *Escamilla* court found that prejudice was presumed as the spoliation resulted in evidence being irretrievably destroyed.⁵⁶ It is notable that the *Escamilla* court ordered the spoliation sanction based upon its inherent disciplinary powers,⁵⁷ and therefore the

47. 430 B.R. 189 (Bankr. D. Minn. 2010).

48. *Id.* at 195 (quoting another source) (internal quotation marks omitted).

49. No. 08-5521 (JRT/AJB), 2010 WL 3893680 (D. Minn. June 18, 2010).

50. *Id.* at *15.

51. *Morris v. Union Pac. R.R.*, 373 F.3d 896, 900–02 (8th Cir. 2004).

52. *Id.*; see also *Hallmark Cards, Inc. v. Murley*, 703 F.3d 456, 460 (8th Cir. 2013); *Stevenson v. Union Pac. R.R.*, 354 F.3d 739, 746 (8th Cir. 2004).

53. *Morris*, 373 F.3d at 901 (quoting *Stevenson*, 354 F.3d at 746).

54. *Id.* at 903.

55. No. 09-2120 ADM/JSM, 2011 WL 5025254 (D. Minn. Oct. 21, 2011).

56. *Id.* at *5.

57. *Id.*

sanction was not predicated upon a finding of bad faith, as found in *Morris*.⁵⁸

More recently, in *Hallmark Cards, Inc. v. Murley*,⁵⁹ decided in 2013, the Eighth Circuit has made clear that in order to give an adverse inference instruction, the district court must make two specific findings: (1) bad faith on the part of the party destroying evidence, and (2) prejudice to the other party.⁶⁰

In *Miller v. Lankow*,⁶¹ the Minnesota Supreme Court established a three-factor test to determine whether an adverse inference instruction should be given.⁶² The court held that the three factors to consider are:

- (1) the degree of fault of the party who altered or destroyed the evidence;
- (2) the degree of prejudice suffered by the opposing party; and
- (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party and, where the offending party is seriously at fault, will serve to deter such conduct by others in the future.⁶³

In *Frazier v. Burlington Northern Santa Fe Corp. (BNSF)*,⁶⁴ the Minnesota Supreme Court held that a district court has considerable latitude in the choice of language used in an adverse inference instruction. In that case, the district court had stated that missing blueprints were an “example” of BSNF’s failure to preserve evidence.⁶⁵ Thus, BNSF argued that this instruction unjustifiably expanded the inference that could be drawn beyond just the missing blueprints.⁶⁶ The *Frazier* court affirmed the district court’s denial of a new trial based on the spoliation instruction, noting that admissions BSNF’s counsel made indicated that the defendant had “bungled evidence, engaged in sloppy evidentiary maintenance and preservation, and that there [had] been a clear and convincing

58. *Morris*, 373 F.3d 896, 900 (8th Cir. 2004).

59. 703 F.3d 456 (8th Cir. 2013).

60. *Id.* at 461.

61. 801 N.W.2d 120 (Minn. 2011).

62. *See id.* at 132.

63. *Id.* (quoting *Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76, 79 (3d Cir. 1994)).

64. 811 N.W.2d 618 (Minn. 2012).

65. *Id.* at 629.

66. *Id.*

showing of negligence.”⁶⁷ Thus, the court did not address the threshold for issuing an adverse inference instruction, but rather only dealt with the considerable latitude of a district court in choosing the language to be used in such a jury instruction.

In dealing with a spoliation sanction issue in another case, the Minnesota Supreme Court found in *Patton v. Newmar Corp.*⁶⁸ that a trial court did not abuse its discretion in excluding expert testimony due to the destruction of evidence.⁶⁹ The *Patton* court cited to the inherent power of the trial court to impose sanctions.⁷⁰ Once the expert testimony was excluded, the trial court granted summary judgment, and that ruling was affirmed by the Minnesota Supreme Court.⁷¹

The decision to issue an adverse inference instruction when faced with spoliation resulting in significant prejudice to a party is within the discretion of the court. Recently in the case *Multifeeder Technology, Inc. v. British Confectionery Co.*,⁷² the district court affirmed the magistrate judge’s finding that spoliation had occurred and that the parties had suffered significant prejudice resulting therefrom. The district court judge further held that the magistrate judge’s ordered sanction of \$500,000 was insufficient and raised the sanction to \$625,000.⁷³ The magistrate judge had also ordered the issuance of an adverse inference instruction based upon the finding of bad faith.⁷⁴ However, the district court judge did not specifically address that issue in his subsequent ruling.

At times, the court finds it necessary to issue more severe sanctions. In the case of *Aviva Sports, Inc. v. Fingerhut Direct Marketing, Inc.*,⁷⁵ the court found that one of the defendants (Manley Toys) had failed to obey court orders on numerous occasions related to discovery issues. In light of those violations, the court not only entered judgment for \$362,438 in sanctions, but also

67. *Id.* (internal quotation marks omitted).

68. 538 N.W.2d 116 (Minn. 1995).

69. *Id.* at 119.

70. *Id.* (citing *Dillon v. Nissan Motor Co.*, 986 F.2d 263 (8th Cir. 1993)).

71. *Id.* at 120.

72. No. 09-1090 (JRT/TNL), 2012 WL 4135848 (D. Minn. Sept. 18, 2012).

73. *See id.* at *8–10.

74. *Id.* at *3.

75. No. 09-1091 (JNE/JSM), 2013 WL 449838 (D. Minn. Feb. 6, 2013).

ordered a default judgment on certain counts in the complaint.⁷⁶ The court went on to hold that Aviva would submit proof of its damages, but Manley Toys was not permitted to oppose that submission.⁷⁷

It remains important to note that not every deletion of electronic information will result in sanctions.⁷⁸

IV. PROPORTIONALITY

Courts are endorsing the need for proportionality within the discovery and litigation process.⁷⁹ The Federal Rules also speak explicitly on the need for proportionality and establish a five-part test.⁸⁰ Simply stated, discovery requests should be proportional to the needs of the case, including the importance of the information sought to resolving the dispute, the dollar amount in controversy, the resources of the parties, and the importance of the issues at stake.⁸¹ With the exception of the award of costs per Federal Rule of Civil Procedure 54(d)(1) or Minnesota Rule of Civil Procedure 54.04, each party bears its own costs of litigation unless there is a court order or agreement between counsel regarding cost shifting or cost sharing.

The amended Minnesota Rules of Civil Procedure, effective July 1, 2013, require that factors of proportionality be considered with respect to the scope and limits of discovery. Rule 26.02(b) of the Minnesota Rules of Civil Procedure identifies the factors to be considered when assessing proportionality and provides:

Discovery must be limited to matters that would enable a party to prove or disprove a claim or defense or to impeach a witness and must comport with the *factors of*

76. *Id.* at *1.

77. *Id.*

78. *See, e.g.*, *Stepnes v. Ritschel*, 663 F.3d 952 (8th Cir. 2011); *Yath v. Fairview Clinics, N.P.*, 767 N.W.2d 34, 50 (Minn. Ct. App. 2009); *see also Miller v. Lankow*, 801 N.W.2d 120, 133 (Minn. 2011) (concluding that a party with a legitimate need to destroy evidence may do so *under certain limited circumstances*).

79. *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 364–65 (D. Md. 2008); *see Kipperman v. Onex Corp.*, 260 F.R.D. 682, 689–90 (N.D. Ga. 2009); *Conveo Corp. v. Slater*, No. 06-CV-2632, 2007 WL 442387, at *1–2 (E.D. Pa. Jan. 31, 2007).

80. *See* FED. R. CIV. P. 26(b)(2)(C).

81. The Sedona Conference, *supra* note 8, at 160.

proportionality, including without limitation, the burden or expense of the proposed discovery weighed against its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action,⁸² and the importance of the discovery in resolving the issues.

The principles of cost shifting and proportionality arise out of the application of, and interplay between, Federal Rules of Civil Procedure 26(b)(2)(B) and (C) and their corresponding state rules applicable to electronic discovery issues and disputes.⁸³ In addition, Federal Rule of Civil Procedure 26(g) and Minnesota Rule of Civil Procedure 26.07 further underscore the obligation that attorneys have to ensure that discovery requests are not promulgated solely to harass, unduly delay, or needlessly increase the cost of the litigation. These latter provisions also give courts the authority to issue sanctions for discovery abuses.⁸⁴

Proportionality is a principle that appears to have been neglected by litigators until recently when the costs of e-discovery have made many wonder, "Is this case worth it?" As earlier stated herein, the applicable discovery rules allow courts to place limits on discovery according to the proportionality factors specified in the rules. In addition, the Sedona Conference developed the following "Principles of Proportionality" to increase uniformity in how courts make proportionality determinations:

1. The burdens and costs of preserving of potentially relevant information should be weighed against the potential value and uniqueness of the information when determining the appropriate scope of preservation.
2. Discovery should generally be obtained from the most convenient, least burdensome and least expensive sources.
3. Undue burden, expense, or delay resulting from a party's action or inaction should be weighed against that party.
4. Extrinsic information and sampling may assist in the analysis of whether requested discovery is sufficiently

82. MINN. R. CIV. P. 26.02(b) (emphasis added).

83. See e.g., MINN. R. CIV. P. 26.02(b)(2), (3).

84. FED. R. CIV. P. 26(g)(3); MINN. R. CIV. P. 26.07; *Resources for the Judiciary*, *supra* note 10, at 35.

important to warrant the potential burden or expense of its production.

5. Nonmonetary factors should be considered when evaluating the burdens and benefits of discovery.
6. Technologies to reduce cost and burden should be considered in the proportionality analysis.⁸⁵

There are few cases discussing the application of proportionality principles to discovery matters, which may be a reflection of the neglect of the adoption of this principle until the Minnesota Rules did so. Recently, in *Escamilla*, the Federal District Court for the District of Minnesota cited proportionality without much elaboration as the basis for a cost-shifting determination.⁸⁶ In *Escamilla*, the plaintiff alleged a hostile working environment, constructive discharge, and retaliation.⁸⁷ She served document requests specifically seeking the accused supervisor's ESI.⁸⁸ When such information was not produced, she filed a motion to compel and sought an order requiring the supervisor and the company to make the supervisor's home and work computers available for forensic copying.⁸⁹

The plaintiff argued that ESI on the computers would show that the supervisor had fabricated documents that had been produced in paper form during discovery.⁹⁰ However, one of the supervisor's two home computers had been sent to a relative in Mexico.⁹¹ Since the start of litigation, the second computer's operating system had been reinstalled and the computer had never been searched for relevant evidence on the argument that the computer belonged to the supervisor's wife.⁹² Unfortunately, the company had also failed to search the supervisor's laptop and a later forensic analysis by the company's forensic analysis vendor had not located any relevant documents.⁹³ The plaintiff then claimed spoliation of evidence.

85. The Sedona Conference, *supra* note 8, at 157.

86. See *Escamilla v. SMS Holdings Corp.*, No. 09-2120 (ADM/JSM), 2011 WL 5025254, at *5-6 (D. Minn. Oct. 21, 2011).

87. *Id.* at *1.

88. *Id.*

89. *Id.* at *1-2.

90. *Id.* at *2.

91. *Id.*

92. *Id.*

93. See *id.* at *2-3.

The magistrate judge in *Escamilla* was faced with a number of discovery issues, including whether to allow the plaintiff's forensic expert to perform his own search of the supervisor's work laptop and his wife's computer, and whether to allow a second deposition of the supervisor after the forensic analysis of the computers.⁹⁴ The magistrate judge granted all three requests and defendants objected on the basis of proportionality, specifically arguing that the burden and expense of the additional discovery outweighed the benefit of the additional deposition and the expert forensic analyses of the two computers.⁹⁵ Upon review of the magistrate judge's order, the district court determined, citing *The Sedona Conference Commentary on Proportionality in E-Discovery*, that the supervisor had "self-inflicted" the burden by reinstalling the operating system and, therefore, was not entitled to shift the cost of restoring and searching the computer's data.⁹⁶

V. COOPERATION

Cooperation and proportionality go hand in hand and are often discussed together. In a more fulsome analysis of the proportionality principle in e-discovery, Magistrate Judge Paul Grimm, a frequent lecturer and writer on e-discovery issues, wrote a lengthy decision expounding on the centrality of cooperation and proportionality in *Mancia v. Mayflower Textile Services Co.*⁹⁷ The plaintiff in *Mancia* had served extensive document requests seeking everything related to the relationship between the plaintiffs and the defendant.⁹⁸ The defendant provided boilerplate objections. The *Mancia* court stated that these objections were "an obvious violation" of Federal Rules of Civil Procedure Rule 33(b)(4), which requires that grounds for objecting to discovery requests be stated with specificity, or else they are waived.⁹⁹ The *Mancia* court then

94. *Id.* at *2.

95. *Id.* at *3.

96. *See id.* at *5–6 (citing The Sedona Conference, *The Sedona Conference Commentary on Proportionality in Electronic Discovery*, 11 SEDONA CONF. J. 289, 298 (2010)).

97. 253 F.R.D. 354 (D. Md. 2008).

98. *Id.* at 355–56.

99. *Id.* at 356.

expounded at length on the topics of cooperation and proportionality in discovery, explaining:

One of the most important, but apparently least understood or followed, of the discovery rules is Fed. R. Civ. P. 26(g), enacted in 1983. The rule requires that every discovery disclosure, request, response or objection must be signed by at least one attorney of record, or the client, if unrepresented. Fed. R. Civ. P. 26(g)(1). . . . If a lawyer or party makes a Rule 26(g) certification that violates the rule, without substantial justification, the court (on motion, or *sua sponte*) must impose an appropriate sanction, which may include an order to pay reasonable expenses and attorney's fees, caused by the violation. Fed. R. Civ. P. 26(g)(3).¹⁰⁰

In the *Mancia* decision, Judge Grimm went on to identify several rules that should guide the manner in which discovery was to be conducted, as well as ensure cooperation. He articulated the rules as follows:

First, the rule is intended to impose an “affirmative duty” on counsel to behave responsibly during discovery, and to ensure that it is conducted in a way that is consistent “with the spirit and purposes” of the discovery rules, which are contained in Rules 26 through 37. It cannot seriously be disputed that compliance with the “spirit and purposes” of these discovery rules requires cooperation by counsel to identify and fulfill legitimate discovery needs, yet avoid seeking discovery the cost and burden of which is disproportionately large to what is at stake in the litigation. Counsel cannot “behave responsively” during discovery unless they do both, which requires cooperation rather than contrariety, communication rather than confrontation.

Second, the rule is intended to curb discovery abuse by requiring the court to impose sanctions if it is violated, absent “substantial justification,” and those sanctions are intended to both penalize the noncompliant lawyer or unrepresented client, and to deter others from non-compliance. As the Advisory Committee's Notes state, “Because of the asserted reluctance to impose sanctions

100. *Id.* at 357; *see* FED. R. CIV. P. 26(g) advisory committee's notes (1983 amendment).

on attorneys who abuse the discovery rules, Rule 26(g) makes explicit the authority judges now have to impose appropriate sanctions and requires them to use it. This authority derives from Rule 37, 28 U.S.C. § 1927, and the court's inherent authority."

Third, the rule aspires to eliminate one of the most prevalent of all discovery abuses: kneejerk discovery requests served without consideration of cost or burden to the responding party. . . . The rationalization for this behavior is that the party propounding Rule 33 and 34 discovery does not know enough information to more narrowly tailor them, but this would not be so if lawyers approached discovery responsibly, as the rule mandates, and met and conferred before initiating discovery, and simply discussed what the amount in controversy is, and how much, what type, and in what sequence, discovery should be conducted so that its cost—to all parties—is proportional to what is at stake in the litigation.¹⁰¹

By signing pleadings, counsel agrees to abide by the rules of proportionality and cooperation, as the act of signing is meant to certify that the pleadings are "neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action."¹⁰²

The *Mancia* court then reordered the parties to cooperate to determine what was "at stake," i.e., what the maximum amount was that the plaintiffs could recover in wages and attorney's fees.¹⁰³ With this number, the court would then be able to determine the "amount in controversy" in order to perform a Rule 26(b)(2)(C) proportionality analysis and to "quantify a workable 'discovery budget' that [was] proportional to what [was] at issue in the case."¹⁰⁴

Courts have explicitly endorsed the doctrine of cooperation within discovery. Cooperation is predicated upon both parties understanding the relative value of the case as balanced against the costs of litigation. With discovery being the single largest expense

101. *Mancia*, 253 F.R.D. at 357–58 (citations omitted).

102. *Id.* at 358 (citing FED. R. CIV. P. 26(g)(1)(B)(iii)).

103. *Id.* at 364.

104. *Id.*

within litigation, it is essential that all parties acknowledge the importance of undertaking an early consideration of the issues involving proportionality.¹⁰⁵ One of the jurisdictions in which district court judges have been the most prolific in their rulings in the area of electronic discovery is the United States District Court for the Southern District of New York.¹⁰⁶ In an effort to further refine their treatment of electronic discovery issues, the Southern District of New York created a framework for the treatment of discovery issues.¹⁰⁷

In September 2011, the Federal Circuit Advisory Counsel, led by Federal Circuit Court of Appeals Chief Judge Randall Rader, adopted a Model Order governing e-discovery in patent cases in order to “aid trial courts in the exercise of their discretion in crafting orders tailored to the facts and circumstances of each case.”¹⁰⁸ The Federal Circuit Advisory Council explained that its goal was “to promote economic and judicial efficiency by streamlining e-discovery, particularly email production, and requiring litigants to focus on the proper purpose of discovery—the gathering of material information—rather than permitting unlimited fishing expeditions.”¹⁰⁹ Some of the more significant provisions of the Model Order include:

- Limitations on when and how e-mail productions can be requested including only after the parties have engaged in “core” discovery.

105. *Resources for the Judiciary*, *supra* note 10, at 18–19.

106. *See, e.g.*, *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., L.L.C.*, 685 F. Supp. 2d 456 (S.D.N.Y. 2010), *abrogated by* *Chin v. Port Auth.*, 685 F.3d 135 (2d Cir. 2012); *Wilson v. Thorn Energy, L.L.C.*, No. 08 Civ. 9009(FM), 2010 WL 1712236 (S.D.N.Y. Mar. 15, 2010); *Aguilar v. Immigration & Customs Enforcement Div.*, 255 F.R.D. 350 (S.D.N.Y. 2008); *In re Veeco Instruments, Inc. Sec. Litig.*, No. 05 MD 1695(CM)(GAY), 2007 WL 983987 (S.D.N.Y. Apr. 2, 2007); *Quinby v. WestLB AG*, 245 F.R.D. 94 (S.D.N.Y. 2006); *Treppel v. Biovail Corp.*, 233 F.R.D. 363 (S.D.N.Y. 2006); *Zubulake v. UBS Warburg L.L.C.*, 216 F.R.D. 280 (S.D.N.Y. 2003).

107. *See* Press Release, S.D.N.Y. Office of the Dist. Court Exec., *supra* note 4.

108. *See Model E-Discovery Order Adopted by the Federal Circuit Advisory Counsel*, FED. CIR., <http://www.cafc.uscourts.gov/2011/model-e-discovery-order-adopted-by-the-federal-circuit-advisory-counsel.html> (last visited Jan. 13, 2014).

109. Fed. Circuit Advisory Council, *An E-Discovery Model Order*, FED. CIRCUIT 2, http://www.cafc.uscourts.gov/images/stories/announcements/Ediscovery_Model_Order.pdf (last visited Jan. 13, 2014).

- Presumptive limitations for e-mail production requests, including on the number of custodians (up to five), keyword search terms for each custodian (up to five), and the relevant time frame for culling purposes.
- Cost shifting to the party requesting disproportionate production requests.
- Limitations on the production of certain metadata in the absence of a showing of good cause.¹¹⁰

Following the lead of the Federal Circuit Advisory Council, in February 2012, the Eastern District of Texas amended its local rules to include as Appendix P its own Model Order Regarding E-Discovery in Patent Cases.¹¹¹ The Eastern District of Texas's Model Order is a modification of the Federal Circuit Advisory Council's Model Order, and the General Order includes a redline strikeout version that depicts and explains the specific changes made to the Federal Circuit Advisory Council's Model Order.¹¹²

Below is a list of some recommended strategies for courts to consider in order to encourage the concepts of cooperation and proportionality in connection with e-discovery:

- Direct the parties to discuss proportionality in the meet-and-confer process and to include in the discovery plan estimates of the cost of responding to particular requests for discovery of ESI in comparison with the reasonable ranges of outcomes of the action.
- Require attorneys to develop discovery budgets with the approval of their clients.
- Issue scheduling orders with the assistance of counsel (and, as appropriate, the parties) that allow only discovery proportionate to the reasonable range of outcomes.

110. *Id.* add. at 2–4 (discovery model order).

111. *See* General Order 12-6: General Order Amending Local Rules, app. at 15–20 (E.D. Tex. Feb. 27, 2012), *available at* http://www.txed.uscourts.gov/cgi-bin/view_document.cgi?document=22217.

112. *See id.* app. at 15–19; [Model] Order Regarding E-Discovery in Patent Cases, *supra* note 4 (clean version of the Model Order). For a detailed discussion of the two Model Orders, see Gilbert Andrew Greene & Daniel Scott Leventhal, *Eastern District of Texas Addresses E-Discovery in Local Rules Update*, NORTON ROSE FULBRIGHT (Mar. 12, 2012), <http://www.nortonrosefulbright.com/us/knowledge/publications/93481/eastern-district-of-texas-addresses-e-discovery-in-patent-cases-in-local-rules-update>.

- Limit e-discovery in the first instance to ESI that can be produced by least expensive means and that is most likely to produce relevant information.
- Use the judicial management strategies described above to determine whether and when further discovery should be allowed.
- Appoint third parties such as neutral experts or special masters to assist the court, if necessary, given the nature of a particular action or as agreed by the parties, to monitor discovery and ensure that proportionate discovery is conducted.
- Consider phasing discovery to encourage cooperation and reasonable disclosure.

There are a myriad of other cases and articles addressing these issues. Obviously, there is no hard and fast rule, and the inquiry remains factually based involving a case-by-case determination.¹¹³

VI. COMPETENT REPRESENTATION IN E-DISCOVERY

As noted at the outset of this article, the issues that arise in electronic discovery are evolving as rapidly as the technology. Nonetheless, the basic rules of civil procedure and conduct of discovery still control the landscape, as well as consideration of all ethical mandates. It is no longer acceptable to abdicate all responsibility for electronic discovery to litigation support staff. The decisions that are inherent in the process of electronic discovery require the expertise and judgment of attorneys. By taking an active and meaningful role in the process, attorneys can best protect and represent the interests of their clients and ensure that their handling of electronic discovery conforms to all applicable rules of professional conduct. Minnesota Rule of Professional Conduct 1.1 provides that “[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.”¹¹⁴

It is important to note that the competency requirement is held by counsel and cannot be abdicated to support staff. Counsel must possess enough knowledge to be able to effectively supervise

113. See *infra* Appendix B for further resources.

114. MINN. RULES OF PROF'L CONDUCT R. 1.1 (2012).

those that they oversee. This obligation has also been explicitly extended to the handling of metadata in documents by the Minnesota Lawyers Professional Responsibility Board Opinion No. 22.¹¹⁵

The ABA's recently adopted comment to Rule 1.1 regarding competence states, "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with technology, engage in continuing study and education* and comply with all continuing legal education requirements to which the lawyer is subject."¹¹⁶

Further, Minnesota Rule of Professional Conduct 3.4 establishes similar, although not identical obligations to those established under ABA Rule 3.4 regarding access to evidence and documents. Minnesota Rule 3.4 states that a lawyer shall not "unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act."¹¹⁷

The clear mandate as articulated by both the Federal and the Minnesota Rules establishes that counsel can no longer take a passive approach to e-discovery. The rules require that all counsel understand technology to the extent necessary to effectively advance their clients' interests.

VII. MALPRACTICE ISSUES

The law regarding malpractice cases for e-discovery missteps is just beginning to develop. We can expect to see cases, however, as more decisions are issued about the failure to issue litigation holds and preserve relevant data. Cases addressing an attorney's failure to properly supervise preservation of ESI and properly respond to requests for e-discovery could, under the right circumstances, be negligent and conceivably could form the basis for a malpractice claim.¹¹⁸ Professional negligence may result from acts of

115. See Minn. Lawyers Prof'l Responsibility Bd., Op. 22 (2010), *available at* 2010 WL 7378367 (discussing a lawyer's ethical obligations regarding metadata).

116. MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 8 (2011) (emphasis added).

117. MINN. RULES OF PROF'L CONDUCT R. 3.4(a).

118. See, e.g., Complaint at 4-5, J-M Mfg. Co. v. McDermott Will & Emery, No. BC462832 (Cal. Super. Ct. June 2, 2011), 2011 WL 2296468 (providing an

commission as well as acts of omission. Actions such as instructing a client to alter their social media site, failing to handle data in a manner that insures preservation of metadata, exaggerating the costs of collection of data,¹¹⁹ and many other actions could well give rise to claims of malpractice. Failing to give a client clear direction to preserve data can be just as culpable as advising a client to destroy data, and both acts may leave counsel vulnerable to claims of malpractice.¹²⁰ Thus, it is important for practitioners to be well versed in the ever-changing world of e-discovery.

VIII. CONCLUSION

E-discovery is technology driven, and as technology evolves, so does e-discovery. Nevertheless, and despite the ever-changing landscape, every lawyer handling litigation must have a familiarity and skill in dealing with ESI and e-discovery. Courts are less and less willing to be sympathetic to the tired refrain that a lawyer or party did not understand what was required. And courts in Minnesota have imposed a variety of sanctions in various cases in their efforts to force parties and litigants to learn the e-discovery basics. Thus, the establishment of and adherence to best practices in this area will aid both the bench and the bar.

example of where a client asserted claims for legal malpractice and breach of fiduciary duty regarding improper production of privileged electronic documents).

119. See *Starbucks Corp. v. ADT Sec. Servs., Inc.*, No. 08-cv-900-JCC, 2009 WL 4730798, at *5 (W.D. Wash. Apr. 30, 2009).

120. See, e.g., *Micron Tech., Inc. v. Rambus, Inc.*, 255 F.R.D. 135 (D. Del. 2009) (“[B]ecause the document retention policy was discussed and adopted within the context of Rambus’ litigation strategy, the court [found] that Rambus knew, or should have known, that a general implementation of the policy was inappropriate because the documents destroyed would become material at some point in the future.”), *aff’d in part, vacated in part*, 645 F.3d 1311 (Fed. Cir. 2011); *Hynix Semiconductor, Inc. v. Rambus, Inc.*, 591 F. Supp. 2d 1038 (N.D. Cal. 2006) (noting that “Attorney Johnson advised Rambus to initiate” a document retention policy that required Attorney Vincent to conform outside counsel’s patent files in a way that resulted in the destruction of some of the prosecuting attorney’s documents without providing Vincent “with guidelines . . . as to what sorts of documents to discard”), *vacated*, 645 F.3d 1336 (Fed. Cir. 2011).

APPENDIX A

MINN. R. OF PROF'L CONDUCT R. 1.1 (2012) (Competence):

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

FED. R. CIV. P. 26(b)(2)(B–C):

(B) *Specific Limitations on Electronically Stored Information.* A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(C) *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

FED. R. CIV. P. 26(g) advisory committee's note (1983 amendment) (emphasis added) (citations omitted):

Rule 26(g) imposes an affirmative duty to engage in pretrial discovery in a *responsible manner* that is consistent with the *spirit and purposes* of Rules 26 through 37. In addition, Rule 26(g) is *designed to curb discovery abuse* by explicitly encouraging the imposition of sanctions. The subdivision provides a *deterrent* to both *excessive discovery* and *evasion* by imposing a certification requirement that

obliges each attorney to *stop and think about the legitimacy of a discovery request, a response thereto, or an objection. . . .*

If primary responsibility for conducting discovery is to continue to rest with the litigants, they must be obliged to *act responsibly and avoid abuse*. With this in mind, Rule 26(g), which parallels the amendments to Rule 11, requires an attorney or unrepresented party to sign each discovery request, response, or objection. . . .

Although the *certification duty requires the lawyer to pause and consider the reasonableness of his request, response, or objection*, it is not meant to discourage or restrict necessary and legitimate discovery. The rule simply requires that the attorney make a reasonable inquiry into *the factual basis* of his response, request, or objection.

The duty to make a “reasonable inquiry” is satisfied if the investigation undertaken by the attorney and the conclusions drawn therefrom are reasonable under the circumstances. It is an objective standard similar to the one imposed by Rule 11. . . .

. . . .

Concern about discovery abuse has led to widespread recognition that there is a need for more aggressive judicial control and supervision. Sanctions to deter discovery abuse would be more effective if they were diligently applied “not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.”

MINN. R. CIV. P. 26.02 (emphasis added):

Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

. . . .

(b) *Scope and Limits. . . .*

. . . .

(2) . . . A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause,

considering the limitations of Rule 26.02(b)(3). The court may specify conditions for the discovery.

(3) . . . The frequency or extent of use of the discovery methods otherwise permitted under these rules shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. *The court may act on its own initiative after reasonable notice or pursuant to a motion under rule 26.03.*

On February 4, 2013, the Minnesota Supreme Court issued an order adopting amendments to the Minnesota Rules of Civil Procedure and the General Rules of Practice relating to the Civil Justice Reform Task Force. These changes were effective on July 1, 2013 and are available at: Order Nos. ADM10-8051, ADM09-8009, ADM04-8001, Order Promulgating Corrective Amendments to the Rules of Civil Procedure (Minn. Feb. 12, 2013), *available at* http://www.mncourts.gov/Documents/0/Public/Clerks_Office/Rule%20Amendments/2013-02-12%20Order%20Corrective%20Amendments%20Civ%20Proc%20pdf.

The Sedona Conference Commentary on: Preservation, Management and Identification of Sources of Information That Are Not Reasonably Accessible, SEDONA CONF. 12 tbl.2 (July 2008), <https://thesedonaconference.org/download-pub/66>:

Accessibility Factors

	<i>Factors</i>	<i>Examples</i>
1	<i>Active on-line data</i>	Hard drives, PDAs, network storage
2	<i>Near-line data</i>	Robotic storage devices such as optical disks
3	<i>Offline storage/archives</i>	Removable optical disks or magnetic tape media which can be labeled and stored in a shelf or rack
4	<i>Backup tapes</i>	Sequential access devices typically not organized for retrieval of individual documents or files
5	<i>Physically damaged media</i>	Damaged CDs or DVDs that cannot be read by an ordinary drive or damaged hard drives and tapes
6	<i>Legacy media</i>	Difficult or impossible to locate a compatible drive or device to read the typically “orphaned” legacy media
7	<i>Transient complexity</i>	Web pages constantly being deleted and overwritten to make room for further storage
8	<i>Hidden complexity</i>	Deleted files after recycle bin has been emptied which cannot be viewed without specialized knowledge or tools
9	<i>Extraction complexity</i>	Data fragments found in the slack space which are difficult to copy
10	<i>Preservation complexity</i>	Cache and temp files created by a PC difficult to preserve without disabling operating system
11	<i>Search complexity</i>	Static graphical images not OCR’d
12	<i>Dispersion complexity</i>	Numbers of PDA devices needed to be reviewed for preservation of data from a central synchronized location

APPENDIX B

Cases:

- *Cost shifting:* *Zubulake v. UBS Warburg, L.L.C. (Zubulake III)*, 216 F.R.D. 280 (S.D.N.Y. 2003).
- *Spoilation:* *Zubulake v. UBS Warburg, L.L.C. (Zubulake IV)*, 220 F.R.D. 212 (S.D.N.Y. 2003).
- *Sanctions for spoliation:* *Zubulake v. UBS Warburg, L.L.C. (Zubulake V)*, 229 F.R.D. 422 (S.D.N.Y. 2004).
- *Document preservation:* Compare *Chin v. Port Auth.*, 685 F.3d 135, 161–62 (2d Cir. 2012), which found that the approach in *Orbit One Commc’ns, Inc. v. Numerex Corp.*, 271 F.R.D. 429, 441 (S.D.N.Y. 2010) to consider the failure to adopt good preservations practices was one factor in determining whether sanctions should issue is “the better approach,” with *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., L.L.C.*, 685 F. Supp. 2d 456, 464–65 (S.D.N.Y. 2010), which held that the sanctions were justified because the plaintiffs failed to “act diligently and search thoroughly after they reasonably anticipated litigation” and the duty to preserve electronic records had been triggered. *See also Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598 (S.D. Tex. 2010).

Resources:

- The Sedona Conference, <https://thesedonaconference.org/publications>.
- *The Sedona Conference Commentary on: Preservation, Management and Identification of Sources of Information That Are Not Reasonably Accessible*, SEDONA CONF. (July 2008), <https://thesedonaconference.org/download-pub/66>.
- The Sedona Conference, *The Sedona Conference Commentary on Proportionality in Electronic Discovery*, 14 SEDONA CONF. J. 155 (2013).
- *The Sedona Canada Commentary on Proportionality in Electronic Disclosure & Discovery*, SEDONA CONF. (Oct. 2010), <https://thesedonaconference.org/download-pub/468>.

- *The Sedona Conference Cooperation Proclamation: Resources for the Judiciary*, SEDONA CONF. (Aug. 2011), <https://thesedonaconference.org/download-pub/425>.
- Dan H. Willoughby, Jr. et al., *Sanctions for E-Discovery Violations: By the Numbers*, 60 DUKE L.J. 789 (2010).
- Robert E. Altman & Benjamin Lewis, Note, *Cost-Shifting in ESI Discovery Disputes: A Five Factor Test to Promote Consistency and Set Party Expectations*, 36 N. KY. L. REV. 569 (2009).