Stop the Shredding: Document Retention after *U.S. v. Andersen*

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This brief article[2] highlights some of the broader developments since the spring of 2003 when the *Arthur Andersen* case, then not yet concluded, had been discussed at the 29th annual ABA National Conference on Professional Responsibility.[3] As this article was initially written for an ethics conference and is being reissued in a publication focusing on ethics, the start should be with the Model Rules of Professional Conduct. Unfortunately they are not particularly

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1. Appreciation is expressed to Beth E. Chiaiese, National Director of Loss Prevention at Foley & Lardner LLP and Thomas E. Spahn, who provides general counsel advice to McGuire Woods, among his many roles there representing numerous Fortune 500 companies as an expert in ethics. We three served on a panel at the 32nd ABA National Conference on Professional Responsibility on June 2, 2006, in Vancouver, British Columbia (hereafter 32nd ABA National Conference). My appreciation to them is based on the extraordinary degree of professionalism with which the panel presentation was developed and delivered, and the collegiality with which it was achieved. Beth and Tom graciously have acknowledged my role as the author of this article first written as an introduction to the panel's conference materials under the names of the three of us.

Though not on the panel, the overview brought to the panel by Lucian Pera, of the Conference Planning Committee and Art Garwin, of the Center for Professional Responsibility, the sponsor of the conference, was delivered with similar professionalism and collegiality. In addition, thanks to a private discussion with Stephen Gillers, Emily Kempin Professor of Law, New York University School of Law, at the conference, accuracy was increased in this re-issue through a correction in the summary of the status of law before Sarbanes-Oxley. Further to be noted are then third-year law students at Rutgers Law School - Camden, John Mistrot, for his general research, writing and cite-checking and Jacob Rosoff, for use of research from his seminar paper.

2. The title of this article, as modified, is borrowed from the description of a panel in the brochure and conference materials for the 32nd ABA National Conference. The description following the title stated:

"Enron, Arthur Andersen, Sarbanes-Oxley, flash drives . . . all contribute to concern about what documents to create and retain. What is the law on document retention and destruction for lawyers, during and after representation? And what kind of policies and practices make practical sense in this new environment?"

As the panel topic devolved, the subject matter focused more on a specific aspect of the general topic entitled Stop the Shredding: Document Retention and Memorializing Legal Advice after *U.S. v. Andersen*. The change in emphasis caused the need for this article as an introduction to explain an overview of the entire area captured by the title and description.

3. The article in the materials for that conference set the stage for that discussion. It was entitled "Timing Is Everything: When Document Retention Policies and Related In-house Counsel Advice Intersect with Government Investigations and Litigation," by Mark J. Fucile, Peter R. Jarvis, and Michael Roster. An article by the same title and authors may be found at ACCA Docket 20, No. 5 (May 2002): 18–31, available on ACCA OnlineSM at www.acca.com/protected/pubs/docket/mj02/timing1.php, but requires membership in the Association of Corporate Counsel for access.

helpful. Model Rule 3.4 merely precludes "unlawfully" obstructing access to evidence or "unlawfully" altering or destroying documents having a "potential evidentiary value." Quickly, ethics gives way to substantive law.

Obstruction of Justice Statutes

By the time of the 2003 conference, Arthur Andersen, the company, had become history and since then so has the case.[4] Some from that former accounting giant may feel justified in holding a grudge after the United States Supreme Court decision. But the reversal of the jury's guilty verdict was not really a vindication of the actions of the accounting firm; rather, it made a technical interpretation of a federal criminal statute that has since been supplemented.[5] The recent reversal of the conviction of banker Frank Quattrone was also a matter of an error in the jury charge.[6]

The real import is not in these high visibility cases, but in the amendments made in 2002 to the federal criminal laws governing obstruction of justice.[7] The amendments, part of the Sarbanes-Oxley Act of 2002,[8] clarified the obstruction of justice chapter of the United States Code. Even before 2002, Section 1512(b)(2)(B), the section interpreted in the Arthur Andersen case, had become the most used section in the chapter.[9] Because it eased some of the requirements of other sections, prosecution was easier using 1512(b)(2)(B). Even so, Section 1512 was a rather technical law, and it too had its problems. As an anti-witness-tampering statute, it did not apply to the person altering or destroying the "object." Rather, it focused on the person tampering with the witness, victim, or

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4. The accounting partnership, that began 2002 as a $9 billion enterprise, essentially evaporated, Kurt Eichenwald, Enron's *Many Strands: The Accountants; Miscues, Missteps and the Fall of Andersen*, N.Y. TIMES, May 8, 2002 at C1, and within two years, investor demands exceeding a billion dollars were resolved when Arthur Andersen's parent settled with Enron investors for $40 million. *Judge Approves First Settlement of An Enron Suit*, N.Y. TIMES, Nov. 8, 2003 at C4. *See also*, *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005).

5. The statute, at the time of the destruction by Andersen, applied only to "corruptly persuading" another person to destroy evidence. 18 U.S.C. §1512(b)(2) (1996). The current version added the new subsection (c), which extends the application of the statute beyond the conduct of another person and states that "whoever corruptly" destroys documents is in violation of the statute. 18 U.S.C. 1512(c) (2002).

6. The Second Circuit vacated and remanded for a new trial, based on the fact that jury instructions for the §1512(b) obstruction of justice charge failed to instruct the jury on the "nexus" requirement that Andersen had explained. Quattrone's alleged effort to tamper with documents had to have pertained to a relevant proceeding, with awareness that such conduct was likely to affect that proceeding. United States v. Quattrone, 441 F.3d 153 (2d Cir. 2006).

7. 18 U.S.C., Pt. 1, Ch. 73.

8. PL 107-204, 2002 HR 3763 (2002).

9. Dana E. Hill, *Anticipatory Obstruction of Justice: Pre-Emptive Document Destruction Under the Sarbanes-Oxley Anti-Shredding Statute*, 18 U.S.C. §1519, 89 CORNELL L.REV. 1519, 1533 (2004) (hereinafter, Hill, 89 CORNELL L.REV.). See, especially, footnote 80, and pages 1524 to 1546 for an excellent discussion of the way the obstruction sections interacted before Sarbanes-Oxley.

informant. One part of the tampering could be to cause another to alter or destroy an "object." In adding Section 1512(c), Sarbanes-Oxley made obstruction apply directly to the person tampering with the object.[10]

Next, Sarbanes-Oxley added Section 1519, making the destruction of any document an obstruction of justice if it was done with intent to impede an investigation of a matter under the jurisdiction of any department or agency of the United States.[11] Importantly, Section 1519 also included destruction "in relation to or contemplation of" any matter or case.[12] At first blush, this seemed to compliment a previously existing provision of Section 1512(f) that an official proceeding need not be pending.[13] It is not clear, however, how broadly the new term will be construed.

Some commentators believe that the "in . . . contemplation" language was not really a change of the law, but at least one law review article suggests differently.[14] The author argues that the statute should be construed to apply to "anticipatory obstruction."[15] The new provision can play "a new and significant role in prohibiting anticipatory obstruction of justice – document destruction by individuals who are savvy enough to pre-empt an investigation by acting before they have knowledge about the specific proceeding that may demand the documents."[16]

That the federal statute operated in a more limited way did not necessarily exonerate persons seeking to destroy documents; risk of prosecution depended on the jurisdiction. Roughly half the states had statutes precluding destruction of documents or other real evidence "when the evidence is about to be produced," a term applicable without necessary regard to the pendency of a litigation or an official investigation,[17] and a term that, had it applied, likely would have raised additional problems for Arthur Andersen.[18] Other states had restrictions more in line

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10. It further eliminated any potential ambiguity of the meaning of "object" found in § 1512(b)(2)(B) by applying the obstruction directly to "a record, document, or other object."

11. It also includes bankruptcy proceedings.

12. The section provides in pertinent part:

Whoever knowingly alters, destroys . . . any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation . . . of any matter within the jurisdiction of any department or agency of the United States . . . or in relation to or contemplation of any such matter or case, ...

13. The section provides in pertinent part:

(1) an official proceeding need not be pending or about to be instituted at the time of the offense; . . . .

14. Hill, 89 CORNELL L.REV.1519 (2004), *supra* note 9.

15. *Id*. at 1523.

16. *Id.*

17. Note, *Legal Ethics and the Destruction of Evidence*, 88 YALE L.J. 1665 at 1671-2 (1979).

18. The document destruction in *Andersen* stopped only when the SEC formally served Andersen with a subpoena for the production of records, on November 9, 2001, even though Andersen's counsel noted that "some SEC investigat[ion]" is "highly probable" as early as October 9, 2001, and entered it as a "potential claim" on October 12, 2001. Arthur Andersen LLP v. United States, 544 U.S. 696, 699-700 (2005).

with the federal obstruction statute, and some, through the common law, made destruction an offense if a grand jury or criminal investigation is pending.[19] Yet, a few extended the time period without regard to the timing of the litigation at all if the destruction is done "with intent to prevent its production in a trial or other legal proceeding."[20] Depending on the jurisdiction then, the "contemplation" language of the obstruction of justice provisions of the Sarbanes-Oxley Act, broadly construed, has always been the law and careful counsel has always needed to be aware of the potentially broader state law to avoid criminal exposure.

Civil Liability Implications

Much focus has been placed on the criminality issues of the Arthur Andersen case. Undoubtedly, the attention was due to the dire implications - the nuclear option exercised on a household name, a company, whose primary reason for existence was providing accounting services to multifarious publicly-traded companies and thus giving assurances of the accuracy of their financial reporting.[21] This focus ignores the fact that document destruction issues have a much broader scope and need for concern. Those involved in the improper destruction of documents have always run the risk of substantial civil damages. Through orders for sanctions,[22] an adverse inference charge and, worse, a summary judgment ruling on liability have long been remedies for such acts.

Some recent case law dramatically shows the problems of inadequate focus on preserving and producing documents. These cases involve electronic discovery,

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19. *Legal Ethics*, *supra* note 17 at 1672.

20. *Id*.

21. Several articles have been written since the *Arthur Andersen* case came to light. Some of them follow, courtesy of Lisa Lerman, Professor of Law and Director of the Law and Public Policy Program at The Catholic University of America, Columbus School of Law, and Chair of Conference Planning Committee for the 32nd ABA National Conference: Jonathan M. Redgrave, R. Christopher Cook & Charles R. Ragan, *Looking Beyond Arthur Andersen: The Impact on Corporate Records and Information Management Policies and Practices*, 52-SEP FED LAW 32 (Sept. 2005); John P. Hutchins, Document Retention Basics, 828 PLI/PAT 795 (May-June 2005); Roger C. Cramton, George M. Cohen & Susan P. Koniak, *Legal and Ethical Duties of Lawyers After Sarbanes-Oxley*, 49 VILL. L. REV. 725 (2004); Celia Goldwag Barenholtz & Lauren R. Leicht, *The Duty To Retain Documents In Civil Cases*, 145 PLI/NY (Dec. 8, 2004); Dana E. Hill, *Anticipatory Obstruction of Justice: Pre-Emptive Document Destruction Under the Sarbanes-Oxley Anti-Shredding Statute*, 89 CORNELL L. REV. 1519 (Sept. 2004); David Priebe & Diane Holt Frankle, *Five Tenets of a Written Document Retention Policy*, 18 NO. 7 INSIGHTS 2 (July 2004); Sharon D. Nelson & John W. Simek, *Law Firm Document Retention Policies*, LAW PRACTICE TODAY, (ABA July 2004), http://www.abanet.org/lpm/lpt/articles/ftr07046.html; Gary G. Grindler & Jason A. Jones, *Please Step Away From The Shredder and The "Delete" Key: § § 802 and 1102 of the Sarbanes-Oxley Act*, 41 AM. CRIM. L. REV. 67 (Winter 2004); Molly Kilmer Flood, *A Necessary Security Blanket*, 12 THE PUBLIC LAWYER No. 1 (ABA Winter 2004), http://www.abanet.org/tech/ltrc/publications/documentretention.html; Christopher R. Chase, *To Shred or Not to Shred: Document Retention Policies and Federal Obstruction of Justice Statutes*, 8 FORDHAM J. CORP. & FIN. L. 721 (2003).

22. However, as noted above, determining the ethical implications requires defining rather general words such as "unlawful." *See e.g.* MODEL RULES OF PROF'L CONDUCT, R. 3.4(a)(1)(prohibiting "unlawful" obstruction of access to evidence.)

thus occurring in a fast developing new area of legal expertise. In the firing of a $600,000 per year executive claiming gender discrimination, the court in *Zubulake v. UBS Warburg* held that the employer had failed to meet its discovery obligations when it did not preserve backup tapes containing potentially relevant e-mail correspondence of key employees.[23] The court then instructed the jury to presume that the withheld documents were harmful to the employer's interests.[24] The result was a verdict of $29 million ($9 million compensatory; the rest punitive).

But *Zubulake* is hardly the most dramatic example. By a factor of roughly 50, the *Morgan Stanley*[25] case tops the list with a total verdict of $1.45 billion ($604 million compensatory).[26] A summary judgment on liability had ultimately been granted, replacing the adverse inference ruling previously awarded. Although the subject matter of the discovery sanctions was electronic, the cause was really a traditional sanctions case: "Throughout this entire process, M S & Co. and its counsel's lack of candor has frustrated the Court and opposing counsel's ability to be fully and timely informed."[27]

Civil Litigation Holds

Another concept not new to electronic discovery is also taking on much larger significance in the post *Andersen* area – the concept of the litigation hold. The litigation hold doctrine does not require a suit to be pending. It may merely reasonably anticipate litigation. As Judge Scheindlin stated in *Zubulake IV*:

> "Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents.",[28]
> This is in accord with other case law.[29]

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23. Zubulake v. UBS Warburg, LLC, 220 F.R.D. 212 (S.D.N.Y. 2003) (hereinafter Zubulake IV).

24. Zubulake v. UBS Warburg, LLC, 229 F.R.D. 422 (S.D.N.Y. 2004) (hereinafter Zubulake V).

25. Coleman Holdings, Inc. v. Morgan Stanley, 2005 WL 679071 (Fla.Cir.Ct. 2005) (not reported in So.2d).

26. *See* Landon Thomas Jr., *Jury Tallies Morgan's Total at $1.45 Billion*, N.Y.TIMES, May 19, 2005, at C1 (noting the billion dollar verdict given in the *Morgan Stanley* case).

27. *Morgan Stanley*, 2005 WL 679071 at 5. Though long and convoluted, the essential facts leading to sanctions in the *Morgan Stanley* case are these: Coleman's initial document request to Morgan Stanley (MS) was worded broadly enough to include all email concerning the substance of the litigation, yet, MS provided very few such emails and refused to conduct extensive searches of backup tapes, even though Coleman offered to pay half the costs at one point. Eventually, and after much resistance from MS, the court ordered MS to conduct the searches, produce the results and certify full compliance with the order. MS then produced a significant amount of material but was aware that more unsearched backup tapes existed. Nevertheless, MS knowingly submitted a false certificate of full compliance. Although the false certification was later corrected, MS continued to mislead Coleman and the court about the conditions of the discovery of the additional tapes and continued to lag in their duty to process and search the tapes. 2005 WL 670971 at 1-5.

28. *Zubulake IV*, 220 F.R.D. at 218.

29. *See e.g.*, Stevenson v. Union Pac. R.R. Co., 354 F.3d 739 (8th Cir. 2004) (train accident victims obtained an adverse interest charge for failure of railroad to retain a voice message on tape, having followed its normal 90 day reuse of tape); Kronisch v. United States, 150 F.3d 112 (2d Cir.1998)(even

The *Zubulake* case specifies the obligations that go with a litigation hold and weighs in on the burdens of costs when applying the hold. While focusing itself on electronically stored documents, the obligations and the allocations of burdens it expresses are, or are likely to be found, generally applicable to all kinds of document retention and production for litigation.[30]

1. Once the duty to preserve attaches, counsel must oversee compliance with the litigation hold.

At the outset, the litigation hold requires the identification and preservation of all sources of potentially relevant information.[31] To meet this obligation effectively and properly, "counsel must become fully familiar with her client's data retention policies, as well as the client's data retention architecture."[32] This process will not just mean involving data retention personnel but also speaking with the "key players" in the litigation to understand how they personally preserved information.[33] Thus, it is "*not* sufficient to notify all employees of a litigation hold" and thereby to expect "all relevant information" will be retained and produced; to insure identification and searching of all discoverable information, counsel must "take affirmative steps to monitor compliance."[34]

2. Counsel's duty is ongoing.[35]

Counsel's identification of all of the sources of potentially relevant informa-

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though no litigation, administrative action, or congressional investigation had commenced, adverse inference allowed against CIA; full explanation provided of purposes and theory of adverse inference charge.); United States v. Koch, 197 F.R.D. 463 (N.D. Okl. 1998) (allegations made in deposition in prior lawsuit of potential future litigation triggered duty to preserve before that litigation was begun). *More generally, see*, Shira A. Scheindlin and Kanchana Wangkeo, *Electronic Discovery Sanction in the Twenty-First Century*, 11 MICH. TELECOMM. & TECH. L. REV. 71 (2004) (discussing the various standards and factors that relate to the level of sanctions appropriate to impose for discovery violations).

30. One must wonder how much outside counsel may rely on in-house counsel to meet these responsibilities. In the *Morgan Stanley* case, the client in court stated it was considering a malpractice suit against the firm that represented it in the discovery portion of the case leading to the adverse inference and summary judgment rulings. WALL STREET JOURNAL, May 16, 2005.

31. *Zubulake V*, 229 F.R.D. at 432 (S.D.N.Y. 2004). The extent of the duty, as stated in *Zubulake IV*, focused on the distinction between inaccessible backup tapes, not subject to the duty to preserve, and those that are accessible, that is, those that are actively used for information retrieval, which would be subject to the hold. An exception to the rule stated that:

> If a company can identify where particular employee documents are stored on backup tapes, then the tapes storing the documents of "key players" to the existing or threatened litigation should be preserved if the information contained on those tapes is not otherwise available. This exception applies to *all* backup tapes.

Zubulake IV, 220 F.R.D. at 218 (S.D.N.Y. 2003).

32. *Zubulake V*, 229 F.R.D. at 432

33. *Id*. "To the extent that it may not be feasible for counsel to speak with every key player . . . counsel must be more creative. It may be possible to run a system-wide keyword search; counsel could then preserve a copy of each 'hit.' . . . Counsel does not have to review these documents, only see that they are retained." 229 F.R.D. at 432.

34. *Id.* (Emphasis in original.)

35. In *Zubulake V*, Judge Scheindlin grounded the continuing duty of counsel in the duty to supplement of Rule 26(e) of the Federal Rules of Civil Procedure. 229 F.R.D. at 433.

tion, and the institution of the initial litigation hold, does not, however, fully satisfy the preservation obligation: "a party cannot reasonably be trusted to receive the 'litigation hold' instruction once and to fully comply with it without the active supervision of counsel."[36] In order to satisfy this ongoing obligation, counsel should periodically reissue the litigation hold to keep it fresh in the minds of employees and to inform new employees of its existence. Counsel should also communicate directly with the key players in the litigation so that there is no misunderstanding about the preservation duty. Similar to the requirement when issuing the general litigation hold, the key players should also be periodically reminded about the continuing nature of the hold.[37]

3. Cost shifting will be considered when the discovery imposes an "undue burden or expense" on the responding party.

Clearly, all this work can impose substantial burden and cost on the producing party. While one of the proposed amendments discussed below, the one to Rule 26(b)(2) for electronic discovery, takes such costs into account by shifting some of the burden to the requesting party, the proposed rule change seems to be a mere codification of the cost shifting analysis already employed by the courts - that cost shifting should be considered only when the discovery imposes an "undue burden or expense" on the responding party.[38]

Amendments to the Federal Rules to Account for Electronic Discovery

Pending are proposed changes to the Federal Rules of Civil Procedure to take

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36. *Zubulake V*, 229 F.R.D. at 433 (internal citations omitted).

37. *Id.* at 433-4. All employees should be instructed by counsel to produce electronic copies of the relevant active files, and the relevant back up tapes should be separated from others to prevent inadvertent destruction. *Id.*

38. *See* Zubulake v. UBS Warburg, LLC, 217 F.R.D. 309, 318, (S.D.N.Y. 2003) (hereinafter Zubulake I). As such, a discussion of *Zubulake's* cost shifting analysis for electronic discovery may be informative: Cost-shifting is employed only when electronic data is relatively inaccessible, such as in backup tapes; for accessible information the normal discovery rules regarding cost apply. 217 F.R.D. at 324. To determine what constitutes an "undue burden or expense" in the recovery of inaccessible information, and thus necessitates cost-shifting, courts have employed a multi-factored balancing test, to prevent excessive cost shifting and to reinforce the general presumption that the responding party pays for the costs of their production. *See, e.g.* Rowe Entm't v. William Morris Agency, 205 F.R.D. 421 (S.D.N.Y. 2002), modified by *Zubulake I*. The seven factor test weighs the factors in descending order: 1) the extent to which the request is specifically tailored to discover relevant information; 2) the availability of such information from other sources; 3) the total cost of production, compared to the amount in controversy; 4) the total cost of production, compared to the resources available to each party; 5) the relative ability of each party to control costs and its incentive to do so; 6) the importance of the issues at stake in the litigation; and 7) the relative benefits to the parties of obtaining the information. "[C]lose calls should be resolved in favor of the presumption." *Zubulake I*, 217 F.R.D. at 320. Furthermore, in order to ground the cost-shifting analysis in fact rather than guesswork, the responding party should restore and produce a small sample of backup tapes to see what evidence the tapes may offer (going to the first two factors), as well as the time and costs associated with restoring the tapes (going to the last five factors). *Id*. at 324.

into account the special problems created by electronic discovery.[39] Unless acted upon further, these are scheduled to go into affect on December 1, 2006. These would include amendments to Rules 16, 26, 33, 34, and 37. First, Rule 34 is to be amended to specifically include in the definition of documents, "electronically stored information." Because such informant can exist and be produced in more than one way, default production methods are described. Similarly, the rule works through the problems created by the fact that some forms may not be reasonably accessible or searchable.

Rule 26(b)(2) would further take into account the fact that some sources of electronically stored information can be accessed only with "substantial burden and cost," making that information not "reasonably accessible." While not required to be immediately produced, these sources of information must be identified in sufficient detail for the requesting party to balance both the cost of accessing them and the likelihood of finding useful information. This identification will enable the requesting party to decide how to proceed with recognition of the possibilities of cost shifting. Importantly, the identification does not relieve the responding party from its common law duties to preserve evidence. Various methods of analyzing how to go forward on such inaccessible evidence are further discussed in the Committee Report proposing the amendments to the rules.[40]

The right to produce original documents under Rule 33 as an alternative to responding to interrogatories is to be modified to meet the unusual difficulties posed by electronic records. The proposed amendments, for instance, allow a court to require the responding party to provide technical support, and even to allow the responding party to protect sensitive business secrets by ascertaining the answer itself.

Rule 37 would also be amended specifically to provide a safe harbor for "failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system." But what the rule provides, the comments limit substantially. Thus, through the comments, good faith might still require intervention to stop certain of the routine operations and to meet a preservation obligation. Importantly, the comment focuses on the function of the litigation hold and specifically includes not only pending but "reasonably anticipated litigation." As noted above, by Rule 26(b), information not reasonably accessible may never have to be produced, depending on resolving cost shifting questions. Still, the nature of such information as not easily accessible does not necessarily allow its destruction; once litigation is anticipated, it may have to be held and steps may need to be taken to preserve it.

Rules that try to anticipate discovery problems early on in litigation are also to be amended to account specifically for electronically stored information. Thus, the Rule 16 scheduling order, the initial disclosure requirements of Rule 26(a)(1),

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39. *See* http://www.lfcj.com/documents/E-DiscAWCWLFArticleJudConfConsidersNewRules0909051.pdf

40. Excerpts from the Report of the Civil Rules Advisory Committee, 733 PLI/Lit 9 (Nov.-Dec. 2005).

and the duty under Rule 26(f) to confer about discovery prior to the implementation of Rule 16 all will specifically include the necessity to consider electronically stored information.

Conclusion

When this article was first written, its purpose was not to cover thoroughly and in depth all document memorialization, preservation, retention and destruction issues, nor was any attempt made to do so in this reissuance. Hopefully, this summary provides highlights that will focus the reader on some trends, perspectives and important developments, though admittedly necessitating significant further research when such issues must be faced in practice.