ETHICS: THE OTHER “E” IN E-DISCOVERY

I. Introduction: Ethics and E-Discovery’s Relevant Rules

A. Sources for E-Ethics Dilemmas

- Ethics advisory opinions serve as guidelines but in many states are non-binding.
- Case law, if it exists, is jurisdiction-specific.
- Existing ethics rules do not specifically address e-discovery.

B. Relevant Rules & Guidelines

- Federal Rules 26(b)(1), 26(b)(2)(B), 26(b)(5), 26(f), 37(b)(2) and 37(f).
- Model Rules: 1.1, 1.6, 1.7, 3.2, and 3.4; and state local rules.

II. Ethical Concerns for Lawyers Related to E-Discovery

Banker’s boxes vs. Electronically stored information (“ESI”):

A. Counsel’s Duty to be Technically Competent

- Model Rule 1.1: “lawyer shall provide competent representation to a client,” which requires the “legal knowledge, skill thoroughness and preparation necessary for the representation.”
• Lawyer's ethical duty: keep up-to-date with technology and the law regarding e-discovery. See Professional Ethics of the Florida Bar Ethics Opinion 06-2 (2006) (specifically applying Rule 1.1 to technology education in relation to metadata and finding the need for a lawyer’s continued education in the use of technology); see also, The ABA Website, http://www.abanet.org/tech/ltrc/research/ethics/competence.html, (stating that “[c]ompetence in using a technology can be a requirement of practicing law. Requirements for technological competence may appear as part of rules for professional conduct, continuing legal education (CLE) programs”).

B. Managing ESI

• Lawyer’s ethical duty: understand preservation of documents; knowledge about ESI; and client’s technology capabilities to comply with pre-litigation preservation and ESI discovery requests.

• Model Rule 3.4(d): requires that a lawyer make a “reasonably diligent effort to comply with a legally proper discovery request” by opposing counsel.

• Federal Rule 26(b)(1): all potentially relevant evidence must be preserved (ESI).

III. Ethics of a Retention Policy & Preservation of Documents

Nearly 90 percent of potentially discoverable information is generated and stored electronically. See Christopher D. Wall, Ethics in the Era of Electronic Evidence, 41 TRIAL 56, 56 (Oct. 2005).

A. A Company’s Document Retention Policy Status

• Lawyer’s ethical duty: establish as soon as possible and before litigation is filed; understand organization obligations and needs (preservation and possible production of e-data generated by the corporation).

B. Developing a Document Retention Policy & Preservation Plan

1. Who Has an Ethical Duty to Implement a Plan?

An attorney’s ethical obligations during e-discovery include making sure that the documents that are likely to be discoverable are preserved.
Zubulake decisions recognize that “at the end of the day…the duty to preserve and produce documents rests on the party,” but courts have held that counsel must involve themselves in the preservation and production of ESI. See Zubulake v. UBS Warburg LLC, 229 F.R.D. 422, 218 (S.D.N.Y. 2004) (“Zubulake V’); see also Cardenas v. Dorel Juvenile Group, Inc., 2006 WL 1537394 (D. Kan. 2006) (court stated that it was counsel’s duty to ensure compliance with discovery); Bratka v. Anheuser-Bush Co., Inc., 164 F.R.D. 448, 461 (S.S. Ohio, 1995) (stating that it was outside counsel’s duty to “exercise some degree of oversight over their clients’ employees” to ensure compliance).

2. What Should Retention Policies Contain?

- Retention policy goals and procedures: (1) preserve active business records; (2) provide clear explanation as to why documents may or may not have been kept; (3) limit areas to be searched in preparation for preservation and include technical ways to identify and organize the e-data for easy accessibility; (4) have a litigation hold procedure; and (5) retention (or deletion) periods for recorded communications (electronic mail, instant messaging, text messaging and voice-mails). See Working Group on Electronic Document Retention & Production (WG1), The Sedona Conference Working Group Series, The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production, Cmt. 1.c. at 14 (2d ed. June 2007), available at http://www.thesedonaconference.org/content/miscFiles/TSC_PRINCP_2nd_ed_607.pdf.; Marin D. Beirne, David A. Pluchinsky, and Donald W. Towe, Controlling the Cost of E-discovery Through Preparation and an Organized Response, http://www.bmpllp.com/publications/articles.php?action=display_publication&publication_id=6, (December 2005).

3. When Should They be Implemented? Retention Policies & Preservation of Documents

- Preservation plan should be implemented once a company’s duty to preserve evidence triggers; when it knows or reasonably should know ESI will be relevant in future litigation, even though a discovery request or order to preserve the evidence has not been made. See Convolve, Inc., v. Compaq Computer Corp., 223 F. R. D. 162, 175 (S.D.N.Y. 2004), citing Fujitsu Ltd. v. Federal Express Corp., 247 F. 3d 423, 436 (2d Cir. 2001).

• **Litigation hold letter:** Circulated at the outset of litigation (or when litigation is reasonably anticipated) instructing that all document retention policies and procedures relevant to all possible discoverable data, automatic or not, cease.

  - Lawyer’s ethical duty: ensure that letter is distributed to appropriate personnel (IT department & key players in the case); personally interview key players and IT personnel to gather relevant information (possible sources of ESI); explain letter/importance; and regularly remind client of litigation hold letter. *See* Preservation - Implementation of Preservation/Litigation Hold, http://edrm.net/wiki/index.php/Preservation - Implementation_of_Preservation/Litigation_Hold.

  - *Zubulake v. UBS Warburg,* LLC, 229 F.R.D. 422 (S.D.N.Y. 2004) (finding that UBS had failed to take all necessary steps to guarantee that relevant data was both preserved and produced, and granting the plaintiff’s motion for sanctions). “A party’s discovery obligations do not end with the implementation of a ‘litigation hold’ - to the contrary, that’s only the beginning. Counsel must oversee compliance with the litigation hold, monitoring the party’s efforts to retain and produce the relevant documents.”

4. **Attorneys Face Possible Sanctions When Fail to Fulfill Ethical Duty to Implement Hold**

• Preservation/Litigation Hold Letters likely considered privileged communications if from counsel. To avoid need to waive privilege, attorney can have client create memo replicating litigation hold letter and distribute so no privilege attaches.
IV. Ethics Relating to Automatic Disclosure Requirements

A. Duty to Meet & Confer

Federal Rules Rule 26(f): “meet and confer” rule requires parties to meet to confer at an early stage about any issues related to preserving discoverable information, disclosures and specifics about ESI. Lawyer’s ethical duties: have knowledge and understanding about ESI. See Advisory Comm. Notes to Rule 26(f) (2006 Amendment).

B. What Data Must be Disclosed & When?

- Federal Rule 26(a)(1): parties, without awaiting a discovery request, provide the other parties a copy or description by category and location of ESI, as well as tailor the information that is relevant in support of its claims or defenses, eliminating production of irrelevant materials.

- Federal Rule 26(b)(2)(B): production of electronic information is limited to information that is “accessible” absent a showing of good cause in the face of the burdens and costs involved. However, even if preserving the requested ESI would cause undue burden, the opposing party may still be entitled to it. See Zabulake v. UBS Warburg LLC, 217 F. R. D. 309, 318 (S.D.N.Y. 2003) (if party is entitled to the ESI that is not “reasonably accessible,” then the cost of retrieving such information may be shifted to the requesting party).

C. How Far Does Counsel Have to Investigate?

- Counsel should identify current and former employees of the company and departments that may have relevant information; interview all key players and identify any additional information that should be preserved and determine whether any additional sources of information exist. See Marin D. Beirne, David A. Pluchinsky, and Donald W. Towe, Controlling the Cost of E-discovery Through Preparation and an Organized Response, http://www.bmpllp.com/publications/articles.php?action=display_publication&publication_id =6, (December 2005).

V. Ethics Implications of Discovery That Documents Were Wrongly Withheld or Have Been “Destroyed”

Counsel faces serious ethical issues when they discover that documents have been wrongly withheld and/or destroyed in the process of e-discovery.
Model Rule 3.4 and Federal Rule 26(b)(1): a lawyer shall make a “reasonably diligent effort to comply with” discovery requests by another party and ensure that all potentially relevant evidence is preserved.

A. Wrongly Withheld Documents

Counsel must immediately produce the withheld documents; sanctions likely imposed.

*Zubulake* rulings: Counsel must explore the reason why the documents were withheld; might lead to more documents that were inadvertently left out of the production; expose holes in the company’s e-discovery plan that can be improved on in future cases.

1. **What Can be Held Back**
   a) Documents that are privileged or irrelevant to the claims.

2. **Possible Sanctions for Wrongly Withholding Documents**
   - Federal Rule 37: court may impose sanctions for the late production of documents; Rule 37(b)(2): court may order parties to produce documents if a party fails to obey an order to provide discovery.
     - Reproduction of lost ESI from other sources - unclear if this considered destruction of the original data and whether a party has a duty to disclose.
   - Possible court orders and/or sanctions: (1) confined to limited defenses to claims; (2) rendering of a default judgment against the disobeying party; and (3) payment of expenses and attorneys' fees by the disobedient party or that party's counsel resulting from the failure to comply with a discovery order.
   - *CNA Holdings, Inc. v. Kaye Scholer LLP* (N.D.Tx.) 3:08-CV-0132-B. Lawsuit against plaintiff's former counsel seeking to recover for the $107 million settlement plaintiff was forced to make allegedly because of sanctions, including payment of $114,000, for discovery violations allegedly caused by counsel's failure to produce called-for documents.

When Documents are “Destroyed”

3. **Spoliation Doctrine**
• Lost and/or purposefully destroyed ESI during preservation or production phase of discovery falls under *doctrine of spoliation*.


• **Spoliation Sanctions:** the "trial court has discretion to pursue a wide range of responses both for the purpose of leveling the evidentiary playing field and for the purpose of sanctioning the improper conduct." See Allison O. Van Laningham, *Navigating in the Brave New World of E-Discovery: Ethics, Sanctions and Spoliation*, Federation of Defense & Corporate Counsel, Inc., http://findarticles.com/p/articles/mi_qa4023/is_200707/ai_n21099704/print, n. 50 (Summer 2007), citing Vondusek v. Bayliner Marine Corp., 71 F.3d 148, 156 (4th Cir. 1995); see also Phoenix Four, Inc. v. Strategic Resources Corp., No. 05 Civ. 4837(HB), 2006 WL 14094 13, at *3 (S.D.N.Y. May 23, 2006).

  o Court will consider: (1) the degree of fault of the party who destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) whether a different sanction is appropriate to eliminate any unfairness to the opposing party and deter such conduct by others in the future. See Allison O. Van Laningham, *Navigating in the Brave New World of E-Discovery: Ethics, Sanctions and Spoliation*, n. 50 (citations omitted).

  a) **Case Law Analyzing Requests for Spoliation Sanctions**

• Party requesting sanctions may ask for an adverse inference from the spoliation of the documents; monetary sanctions, attorney’s fees, dismissal of the claims, and preclusion of certain testimony or evidence.

• *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003) (*Zubulake IV*)("When evidence is destroyed in bad faith (i.e., intentionally or willfully), that fact alone is sufficient to demonstrate relevance. By contrast, when the destruction is negligent, relevance must be proven by the party seeking the sanctions.").

• Cases analyzing what to consider willful, negligent and grossly negligent in determining the conduct of the party and to the extent it is relevant, the attorney, in the spoliation:
  o *Zubulake IV:* refused to issue an adverse inference instruction, but did require UBS to pay for depositions dealing with the issues related to the spoliation documents.
- **Zubulake V**: determined that UBS willfully destroyed evidence by allowing back-up tapes to be overwritten, found that the lost evidence was relevant and granted an adverse inference all because plaintiff found further evidence after *Zubulake IV* that more emails were destroyed and not recoverable. *Zubulake V*, 229 F.R.D. at 434 (The court outlined three preservation obligations for counsel: (1) issuing and periodically reissuing a litigation hold; (2) directly communicating with "employees likely to have relevant information."; and (3) instructing "all employees to produce electronic copies of their relevant active files" and ensuring "that all backup media which the party is required to retain is identified and stored in a safe place.").

- **DaimlerChrysler Motors v. Bill Davis Racing, Inc.**, No. Civ. A. 03-72265, 2005 WL 3502172, at *3 (E.D. Mich. Dec. 22, 2005) (Although party did not willfully destroy emails that were automatically erased by the computer systems existing retention policy, court found sanctions were warranted and ordered that the affected party be able to present evidence of the spoliation, instructions to the jury to draw an adverse inference based on the spoliation, and the payment to the affected party of reasonable attorney fees and the costs incurred in bringing the motion for sanctions.).

- **Qualcomm Inc. v. Broadcom Corp.**, No. 05-CV-1958-B (BLM), 2008 WL 66932 (S.D. Cal. Jan. 7, 2008), *rev’d*, No. 05-CV-1958-RMB (BLM), 2008 WL 638108 (S.D. Ca. March 5, 2008): Qualcomm’s outside counsel was found to have deliberately concealed evidence from Broadcom Corp. that led to the late production of more than 200,000 emails and other documents pertaining to the case four months after the jury trial was over. Corporate counsel and outside counsel could not agree as to who had the ethical duty to preserve and produce the undisclosed documents. Papers filed by outside counsel stated that they never had direct access to the client’s files or electronic devices, but the client stated that the client was not asked the proper questions that would have highlighted the undisclosed documents as being relevant. In response to Broadcom’s sanction motion, the court ordered Qualcomm to pay Broadcom $8,568,633.24 and sanctioned six attorneys for discovery violations as well as referring them to the State Bar for disciplinary action. *Qualcomm Inc. v. Broadcom Corp.*, No. 05-CV-1958-B (BLM), 2008 WL 66932 (S.D. Cal. Jan. 7, 2008), *rev’d*, No. 05-CV-1958-RMB (BLM), 2008 WL 638108 (S.D. Ca. March 5, 2008) (reversing decision because court had improperly refused to allow law firms to disclose confidential information to
defend themselves); see also, Mary Mack, Qualcomm- Broadcom: Let the finger pointing begin (October 4, 2007), http://soundevidence.discoveryresources.org/cases-170-qualcomm-broadcom-let-the-finger-pointing-begin.html.

- Court’s considerations when evaluating sanctions: (1) importance of the ESI; (2) surprise to the party against whom the evidence would be offered; (3) ability of that party to cure the surprise; (4) effect on trial; and (5) explanation of the non-disclosing party regarding its failure to provide the documents. See Thompson v United States Dept. of Housing and Urban Dev., 219 F.R.D. 93, 101 (D. Md. 2003) (quoting Zubulake IV); United States v. Philip Morris USA Inc., 327 F. Supp. 2d. 21 (D.D.C. 2004).

b) What Must Counsel Do After Spoliation

- Lawyer’s ethical duty: Undergo a serious investigation to find out what happened: interview persons involved in spoliation (IT department and in-house counsel); notify opposing counsel of the spoliation and try to remedy if possible.

4. Safe Harbor Rule

- Federal Rule 37(f) ("safe harbor rule"): absent “exceptional circumstances”, a court may not impose sanctions under the rules on a party for failing to provide ESI lost as a result of the “routine” and “good faith” operation of an electronic system.
- Attorneys should ensure that retention policies are suited for the needs of the corporation and that it is defensible in litigation.
- Note that courts are willing to impose sanctions on a party even if the destruction/loss of ESI was a direct result of the client’s existing retention policy. See, e.g., Residential Funding Corp., v. DeGeroge Financial Corp., 306 F. 3d 99 (2d Cir. 2002); Stevenson v. Union Pacific Railroad Co., 354 F. 3d 739 (8th Cir. 2004).

VI. Ethics of Receiving Electronic Information by Accident or in Error: Privileged Information and Metadata

A. Documents That Are Considered Privileged

- The issue as to what documents are considered privileged is usually a state matter. See Steven C. Bennett, Special Series: Ethics in E-Discovery, Parts 1-3, Ethics Guidance Needed, Has Information Technology Raised the Level of Professional Competency?, http://law.lexisnexis.com/litigation-
Proposed Federal Rules of Evidence Rule 502 (sent to Congress for approval on October 5, 2007): “inadvertent disclosure” of information made in a federal case is not considered a waiver if the disclosure was inadvertent, and the holder of the protection took reasonable steps to prevent disclosure and rectify the error, including following Federal Rule 26(b)(5)(B). See New Evidence Rule 502 Sent to Congress: 10/5/07, http://www.uscourts.gov/rules/index2.html, (last visited December 4, 2007); see also, Fed. R. Civ. P. 26(b)(5)(B).

Advisory Committee’s explanatory note on Evidence Rule 502 states two major purposes for the rule: (1) to settle “longstanding disputes in the courts...involving inadvertent disclosure and subject matter waiver”; and (2) to resolve the “complaint” of high litigation costs due to the protection of privilege result in waiver of subject matter “specially...in cases involving electronic discovery” (emphasis added). New Evidence Rule 502.

1. Claw Back Agreement

Amendment to Federal Rule 26(b)(5)(B) (“Claw back Provision”): procedure for resolving claims of privilege a party makes to a communication that it has inadvertently disclosed to another during discovery; producing party must assert its claim of privilege before the recipient incurs any obligation; after being notified, party is required to “return, sequester or destroy” the information, including any copies made; receiving party may not use or disclose the information until the claim is resolved.

Rico v. Mitsubishi Motors Corp., No. S123808 (BTK), 2007 WL 4335934, *1 (Cal. Dec. 13, 2007) (affirming lower court’s holding granting a motion to disqualify plaintiffs’ entire legal team finding that plaintiffs’ counsel had a duty, once he discovered that the document he was reviewing contained confidential notes by opposing counsel, to notify opposing counsel immediately and try to resolve the situation instead of using the document to his client’s advantage).

Model Rule 4.4: a “lawyer who receives a document relating to the representation of the lawyer’s client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.”

ABA Formal Opinion 05-437: Requires disclosure of inadvertently disclosed information to opposing counsel.
Lawyer’s ethical duty: If there is no ethics advisory opinion/case on point in specific jurisdiction, counsel should immediately stop reading the documents he/she believes were inadvertently disclosed, contact opposing counsel and notify opposing counsel of the inadvertent production, and return the documents to opposing counsel.

Victor Stanley, Inc. v. Creative Pipe, Inc. No. MJ6-06-2662, 2008 U.S. Dist. LEXIS 42025 (D.Md. May 29, 2008). Court refused to order return of 165 documents where the producing party withdrew its request for a clawback agreement in return for an extension of time to produce the documents, the lawyers refused to disclose the key word searches performed to identify the privileged documents, and no sampling was undertaken to verify the accuracy of the key word search.

2. Quick Peek Agreement

Federal Rules 26(f) and 16(b)(5)&(6) (“quick peek” agreement”): allows for production without a complete privilege review and an agreement that production of privileged documents does not constitute a waiver and purposefully allows the party requesting discovery to have access to all documents and files with the purpose of identifying the documents it deems relevant. See Computer Forensics/Electronic Discovery: New Electronic Discovery Rules Are Coming, http://www.fulcruminquiry.com/New_Electronic_Disclosure_Rules.htm. (October 2005).

Risks: third party, not subject to the agreement, can claim waiver of the privileged information.

B. Electronic Documents Containing Metadata


1. Ethical Duties of Counsel & Metadata

Federal Rule 26(f): essential that the counsel discuss and come up with a specific plan to deal with metadata during meet and confer: (1) should it be produced; 2) if produced, in what form; 3) if not produced, an agreement to deal with inadvertent production (claw back agreement).
Become aware of metadata ethical opinions in respective jurisdiction. If none exists, counsel should not mine the metadata, should notify opposing counsel and try to resolve the issue. If not resolved, file motion to have the court rule and refrain from using the metadata until the court rules.

2. Court Rulings and Ethics Opinions on Metadata

If fail to agree/discuss in pre-trial conference, can an attorney assume that the production on the metadata was intentional and go ahead and “mine” the data and review the information which is not apparent on the face of the document or must the attorney assume it was an inadvertent production and refer to the procedures set out above related to inadvertent productions?

a) Federal

- Williams v. Sprint/United Management Company, 230 F.R.D. 640 (D. Kan. 2005) (holding that electronic documents must be produced in their “native format” and “with their metadata intact” and failing to impose sanctions on defendants for lack of precedent, but admonished them for producing excel spreadsheets that had been stripped of their metadata prior to production without notice that they had done so to opposing counsel).

b) State

No coherent guidance regarding issue from state court rulings.

c) Ethics Opinions

- ABA Formal Ethics Opinion 06-442 (August 6, 2006): Model Rules did not contain any specific prohibition against lawyers reviewing and using embedded information in electronic documents, the use of metadata complied with ethical standards. Metadata contained in documents reflecting comments or revisions to a document and transmitted to an opposing counsel electronically is not protected by the attorney-client privilege and may be used by opposing counsel in litigation. The ABA therefore suggests that producing lawyers take steps to “scrub” metadata before the ESI is produced.

- Maryland State Bar Association Committee on Ethics Docket No. 2007-092 (November 2006): An attorney receiving metadata in a state court matter need not notify the sending
attorney. However, the opinion did not address whether this would be true if the metadata contained privileged information.

- **New York State Bar Association, Committee on Professional Ethics Opinion 749 (December 14, 2001):** A lawyer may not make use of computer software applications to surreptitiously "get behind" visible documents or to trace email.

- **Professional Ethics of the Florida Bar, Ethics Opinion 06-2 (September 15, 2006):** An attorney who inadvertently receives information via metadata should notify the sender and should not attempt to obtain information from the metadata that the lawyer knows or should know is not intended for the receiving party.

- **The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics, Formal Opinion 2003-04:** As an “ethical matter,” a lawyer who receives a “misdirected communication containing confidences or secrets should promptly notify the sender and refrain from further reading or listening to the communication, and should follow the sender’s directions regarding destruction or return of the communication.”

- **Alabama Office of the General Counsel Formal Opinion RO-2007-02 (March 17, 2007):** A lawyer who is sending electronic documents to opposing counsel must use reasonable care not to disclose metadata containing client confidences or secrets. It is ethically impermissible for an attorney to “mine” metadata from an electronic document inadvertently received from the producing party absent express authorization from the court.

- **Arizona State Bar Association Formal Opinion 07-03 (November 2007):** Lawyers must use reasonable care to “scrub” metadata from electronic documents being produced. A lawyer who receives documents containing metadata must avoid “mining” the metadata and must notify the sender.

- **DC Bar Ethics Opinion 341 (September 2007):** A receiving attorney is “prohibited from reviewing metadata sent by an adversary only where he has actual knowledge that the metadata was inadvertently sent.”

- **Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility Formal Opinion 2007-500 (January 23, 2008):** The committee found that as a result of the difficulty in establishing a hard line rule, the discretion as to how to handle inadvertently received metadata was left to the receiving attorney using his or her judgment based on the particular factual situation.

- **Colorado Bar Association Ethics Committee Formal Opinion 119 (May 17, 2008):** A lawyer transmitting electronic documents has a duty to guard against the disclosure of metadata.
containing confidential client information. An attorney receiving electronic documents may 
search for metadata, but should assume that if it contains confidential information, 
information was inadvertently produced and must promptly notify the sending lawyer about 
the discovery of the confidential information.

VII. Ethical Issues Relating to an Employee's Personal Records on Company 
Computers

A. Ethical Duty to Develop a Relevant Company Policy

- Create a clear policy delineating limitations of work email use, work document retention, and 
  use of personal email to conduct company business absent specific circumstances (maintain 
  that all information contained in the company's computer is company property regardless of 
  the content).

- Risk of not having a policy: If company allows an employee to conduct company business 
on a personal email account, over which it has no control, then there is no direct access to that 
employee’s email account over which to invoke a litigation hold and prevent the 
destruction/deletion of relevant emails leading to a possible spoliation claim.

B. To Whom do Personal Records Belong - Employer or Employee?

- Lawyer's ethical duty: Review all relevant ESI, including personal emails, without violating 
  the privacy of the employee. Not at issue if company has relevant policy:
  - Scott v. Beth Israel Medical Center Inc., 2007 WL 3053351, *5 (N.Y. Sup., Oct. 17, 
    2007) (finding that an employee’s e-mail communications with his attorney, using 
    employer’s e-mail system, were not made in confidence because employee had 
    “actual and constructive knowledge” of employer’s electronic communications 
    policy which prohibited personal use of company's e-mail system and reserved the 
    right to “access and disclose” communications transmitted on the company’s e-mail 
    server at any time without prior notice).
  - Quon v. Arch Wireless Operating Co., _F.3d_ 2008 WL 2440559 (9th Cir. 2008) 
    (finding that police department search of text messages sent and received by police 
    officer stored at third-party provider was improper where there was no clear policy as 
    to the department’s right to such information and the police officer was orally told 
    the records would not be audited if he paid the overcharges.).
Sidell v. Structured Settlement Investments LP (lawsuit challenging employer’s rights to access employee’s Yahoo account from link on employer’s computers and to read employee’s communications with his lawyer).


C. When There is a Policy and When There is None: Preserving and Examining Records

- Implement a clear company policy regarding the use of work computers, personal email for work purposes, and specify if the company has ownership and control over this material or if the company affords the employee some kind of privacy related to this material.
- If need to preserve but do not have an existing policy, preserve but do not review ESI until court makes decision on documents.

VIII. Ethical Duty to Preserve Relevant Documents of a Bankrupt Company

- Under Federal case law, the cost burden of preserving, collecting and producing e-discovery is the responsibility of the party being asked to produce the documents. See Fed. R. Civ. P. 26(b)(2)(B).
- Lawyer’s ethical duty: Preserve and produce relevant information even if company bankrupt. Parties required to continue to preserve any relevant information barring an order from the court stating otherwise. See In re NTL, Inc. Sec. Litig. v. Blumenthal, 244 F.R.D. 179 (S.D.N.Y. 2007).
- Company should sell off all other inventory first and preserve computers.
- Rule 26(f) conference: attempt to resolve with opposing counsel or file a motion requesting that this discovery issue be addressed immediately. Until motion is heard, use good faith efforts to preserve possibly discoverable data.

IX. Ethics of Outsourcing E-Discovery Reviews

Many corporations have set up in-house legal departments abroad; General Electric has outsourced an estimated $3 million dollars a year in legal work to India and the Associated Chambers of Commerce and Industry of India has forecast that India’s legal process outsourcing business will grow at 6-7 percent per year. EnterpriseOne Focus, Sector Highlight: Professional & Business Services, January 2007, www.business.gov.sg/NR/rdonlyres/OFAB20B9-814C-4BBA-9808-3B9A1B631E3E/13495/EnterpriseOneFocusIssue0107.pdf.

A. Process:

- Law firm enters into contract either directly or through an intermediary with foreign lawyers, paralegals or even laypersons to perform services that include document review, legal research and drafting of pleadings and memorandum routinely done by junior associates at outside firms.

B. Ethical Implications:

- Attorneys must deal with the ethical implications of work conducted by non-lawyers abroad, often with minimal supervision by US lawyers.

  1. Ethics Opinions

- American Bar Association’s Standing Committee on Ethics and Professional Responsibility (the “ABA Ethics Committee”) has not addressed this issue, but it has dealt with the use of contract attorneys to outsource legal work domestically. See ABA Ethics Committee Opinion 88-356 (1988)(stating that attorneys should implement and apply reasonable care to eliminate conflicts and follow the relevant provisions of the Model Rules when outsourcing legal work domestically to contract attorneys).

- The San Diego County Bar Association Legal Ethics Committee (the “SDCBA Ethics Committee”) opinion addressing the overseas outsourcing overseas of drafting legal documents: California attorney is ethically and legally permitted to outsource this type of work as long as the attorney properly supervises the work and is ultimately responsible for the work produced. SDCBA Ethics Committee, Opinion 2007-1 (2007).

- Florida State Bar expected to issue a final opinion on international outsourcing in the second half of 2008: advising that there is no ethical violation in overseas outsourcing of legal work, such as document preparation for closings, as long as there is adequate supervision by the US attorney. See The Florida Bar website, Proposed Advisory Opinion 07-2 Adopted,
The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics (the “ABCNY Ethics Committee”): It is ethically and legally acceptable for a New York attorney under the conditions set forth in the New York Code of Professional Responsibility to outsource legal support services overseas to a foreign lawyer not admitted to practice in New York or in any other jurisdiction in the U.S. or to a layperson. Association of the Bar of the City of New York Committee on Professional and Judicial Ethics, Op. 2006-3 (Aug. 2006).

C. ABCNY Ethics Committee’s Ethical Obligations:

1. Supervision of Non-Lawyer

• Outside counsel has an ethical duty to supervise the foreign attorney or nonlawyer to ensure that they are providing work that is not violating the law and are contributing to the lawyer’s competent representation of the client.

2. Preservation of Client Confidences & Secrets

• According to attorney-client privilege law and the Model Rules, a lawyer has a duty to preserve the confidences and secrets of clients and shall not reveal information relating to the representation of a client. See Model Rule 1.6(a). Ethical duty of lawyer to ensure that foreign personnel conducting outsourced legal work know and understand the confidentiality obligations that they and the attorney’s hiring them have towards the client.

  o Lawyer should limit the exposure of confidences to what is necessary for the foreign personnel to conduct the work; include clause in contract with the foreign personnel specific to confidentiality, provide memorandum explaining confidentiality and the consequences of breaking it; and obtain the consent of the client prior to sharing any confidential information with the foreign personnel.

  o Corporate counsel ethically bound to inquire about and know what confidential information is being provided in outsourcing and ensure that the corporation understands the risk of outsourcing.

3. Avoid Conflicts of Interest

• Model Rule 1.7: lawyer prevented from representing a client if there is a concurrent conflict of interest existing from the representation of a client adverse to the potential
client or if there is significant risk that the representation will be materially limited by the lawyer's duty to another client, personal interest or a third person.

- Duty to check for conflicts of interest does not extend to the hiring of non-lawyers, but advisable when there is the possibility of sharing confidences and secrets. See ABCNY Ethics Committee Op. 2006-3.

- Lawyer should inquire from overseas workers about the conflict-checking procedures in place; specifically ask if they have performed or are performing any services for any adverse parties to the client.

4. **Bill Appropriately for Outsourced Work**

- Corporate counsel's ethical duty: know if any work is being outsourced by outside counsel.

- A foreign lawyer or layperson performing legal support services is not performing legal services: unless outside counsel has entered into a structured hourly rate or special arrangement with the client, they should charge only the amount that was paid for the outsourcing person, plus a reasonable allocation of overhead expenses directly associated with providing that service.

- ABA Opinion 00-420 (2000): Law firms may bill for work that was outsourced as a disbursement or at a structured hourly rate and if the firm bills in the latter form, it need not disclose profits, if any, to the client.

5. **Obtain Client Consent Before Outsourcing Work**

- Lawyer's ethical duty: obtain consent of client in advance when using contract attorneys, but only when the contract attorney "makes strategic decisions or performs other work that the client would expect of the senior lawyers" on the case. See The Committee on Professional Ethics of the New York State Bar Association, NY State Opinion 715 (1999); but see, N.Y. City Formal Opinion 1982-2; N.Y. City Formal Opinion 1988-3 (stating that in the context of contract attorneys, the law firm has a duty to disclose fully its use to the client and obtain the client's consent to their participation).