

RECENT DEVELOPMENTS AND TRENDS IN DISCOVERY

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State Bar of Texas

35th ANNUAL

ADVANCED CIVIL TRIAL COURSE 2012

San Antonio – July 25-27

Dallas – August 22-24

Houston – October 17-19

CHAPTER 18

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RECENT DEVELOPMENT AND TRENDS IN DISCOVERY

I. INTRODUCTION.

It is impossible to discuss recent developments and trends in discovery without devoting considerable time to the evolution of the law and mechanics of electronic discovery. That is not just because of the challenges electronic data presents, but also because electronic data has increasingly become the central—and often the only—non-testimonial data in just about every lawsuit. Even traditional “hard copy” documents are now typically stored electronically. As a result, it is difficult to conceive of any case that will not involve the production of *something* that is generated by or stored on an electronic device. And many cases involve staggering volumes of potentially discoverable data.

Nonetheless, electronic discovery is really just “discovery.” Neither the scope of permissible discovery nor the fundamental manner in which discovery may be taken has changed. Instead, federal and state rules of civil procedure specifically address issues pertaining to electronic discovery, while acknowledging the continued need for reasonable limits on the discovery process.

This paper addresses a range of recent developments and trends in discovery with a focus on the struggle courts and litigants face in making the discovery process fruitful, fair, and cost-effective.

II. THE GROWING FOCUS ON PROPORTIONAL DISCOVERY.

The costs associated with the increasingly complex discovery process present serious concerns for litigants who seek a just and expeditious resolution of their legal troubles. Discovery can be expensive, time-consuming, and fraught with peril, even in cases in which the amount in controversy is fairly modest. As a result, many litigants and legal scholars have begun urging a “proportional” approach to discovery that balances the costs associated with the requested discovery against its perceived benefits in the case.¹

A. Proportionality under the Federal Rules of Civil Procedure.

The proportionality doctrine has its roots in several long-standing provisions of the Federal Rules of Civil Procedure that, for whatever reason, have only recently garnered considerable

attention—perhaps as a direct result of the Sedona Conference devoting considerable attention to proportionality principles in recent years.² The proportionality analysis flows primarily from two distinct—and often competing—goals enshrined in the federal rules. On the one hand, the federal rules encourage litigants to seek full discovery of all relevant but non-privileged information, and require a party responding to written discovery to certify that, to the best of its knowledge, it is providing “complete” discovery responses.³ On the other hand, the rules require a court to limit discovery when the burdens and costs of responding to the requests exceed its likely benefit, and require each party by signing a discovery request to certify that to the best of their knowledge the request is “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 litigation.”⁴ Applying these two competing principles requires an assessment of the proportionality of each discovery request to the specifics of the case to determine whether the requested discovery is indeed warranted under the rules.

Indeed, this “proportionality analysis” is required by Federal Rule of Civil Procedure 26(b)(2)(C)(i), which expressly requires a court to impose limitations on the discovery process where “the discovery sought . . . can be obtained from some other source that is more convenient, less burdensome, or more expensive.” Rule 26(b)(2)(C)(iii) requires a court to consider whether “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.” Taken together, these rules mandate that both the parties and the court consider the proportionality of any discovery request in determining whether the proposed written discovery should issue. In making this determination, the trial court is afforded considerable discretion in balancing the often competing goals of providing liberal access to information against deterring disproportionate or duplicative discovery.⁵

² See The Sedona Conference, *The Sedona Conference Commentary on Proportionality in Electronic Discovery*, 11 SEDONA CONFERENCE J. 289, 293 (Fall 2010) (available at: <https://thesedonaconference.org/download-pub469>)

³ See FED. R. CIV. P. 37(a)(4) (“[A]n evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.”)

⁴ See FED. R. CIV. P. 26(b)(2)(C)(iii); 26(g)(1)(B)(iii).

⁵ See The Sedona Conference, *The Sedona Conference Commentary on Proportionality in Electronic Discovery*, 11 SEDONA CONF. J. 289, 294 (2010); see also *Explanatory Statement Accompanying the 1999*

¹ See John L. Carroll, Proportionality in Discovery: A Cautionary Tale, 32 CAMPBELL L. REV. 455, 455-56 (2010); Theodore C. Hirt, The Quest for Proportionality in Electronic Discovery—Moving From Theory to Reality in Civil Litigation, 5 FED. COURTS L. REV. 171, 176-99 (2011).

B. Proportionality under the Texas Rules of Civil Procedure.

The proportionality doctrine is not limited to federal court practice and procedure, and can also be seen in many state court rules. The Texas Rules of Civil Procedure require a similar analysis to determine whether a particular discovery request or protocol is reasonable in the case at hand. Like Federal Rule of Civil Procedure 26(b)(2)(C), Texas Rule of Civil Procedure 192.4 requires a court, on its own motion or initiative, to limit the discovery methods permitted by the Texas rules if the court determines that:

- (a) The discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; or
- (b) 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.

In recent years, the focus on proportionality under the Texas Rules of Civil Procedure has become even more pronounced in the context of electronic discovery. In 2009, in the seminal case of *In re Weekley Homes, L.P.*, 295 S.W.3d 309, 322 (Tex. 2009), the Texas Supreme Court articulated the appropriate protocol for the discovery of electronically stored information under Texas Rule of Civil Procedure 196.4. The Court established an eight-step procedure that should generally be followed in seeking the production of electronically stored information:

The requesting party must make specific requests for information and specify the form of production;

- (1) The responding party must produce responsive electronic information that is reasonably available to it in its ordinary course of business;

- (2) If the responding party cannot retrieve or produce the requested information through reasonable efforts, it must object on those grounds;
- (3) After such an objection is raised, the parties should confer in an effort to resolve the dispute without court intervention;
- (4) If the parties are unable to resolve the dispute through informal conference, either side may request a hearing with the court on the objection and the responding party must present evidence to support its objection that the requested information is not reasonably available to it because of either an undue burden or cost;
- (5) If the responding party satisfies its burden of demonstrating that the retrieval and production of responsive information would be overly burdensome, the court may nonetheless order targeted production of responsive information upon a showing by the requesting party that the benefits of ordering production outweigh the costs;
- (6) If the court determines that targeted production is warranted, the court should choose the least intrusive means of retrieval, provide for the protection of sensitive information, and order the requesting party to pay the reasonable expenses of the process;
- (7) In ordering targeted production, the court should remain mindful that direct access to a party's electronic storage device is particularly intrusive and should be generally discouraged.⁶

In crafting this procedure, the Court reiterated that the proportionality principle "require[s] trial courts to weigh the benefits of production against the burdens imposed when the requested information is not reasonably available in the ordinary course of business."⁷ The Court also emphasized the importance of early cooperation between the parties, and noted that the rules establish a procedure by which the parties and their attorneys should endeavor early on to "share relevant information concerning electronic storage systems and storage methodologies so that agreements regarding protocols may be reached or, if not, trial courts have the information necessary to craft discovery orders that are not unduly intrusive or overly burdensome."⁸ Every case, the Court noted, is different and the relative burdens and benefits of locating and retrieving electronically stored

Amendments to the Rules of Civil Procedure Governing Discovery, Order of Approval of the Revisions to the Texas Rules of Civil Procedure, Misc. Dkt. No. 98-9196 (Tex. Nov. 9, 1998), printed at 61 Tex. Bar J. 1140 (Dec. 1998) ("As any litigant on a budget knows, the benefits to be gained by discovery in a particular case must be weighed against its costs. The rules of procedure must provide both adequate access to information and effective means of curbing discovery when appropriate to preserve litigation as a viable, affordable, and expeditious dispute resolution mechanism.").

⁶ *In re Weekley Homes, L.P.*, 295 S.W.3d 309, 315-17, 322 (Tex. 2009).

⁷ *Id.* at 317.

⁸ *Id.* at 322.

information may vary dramatically depending on the parties' systems and resources. For this reason, the proportionality principle is best served by early communication and cooperation between the parties to reach agreement on the meaning of proportional discovery and foster an understanding of the relative benefits and burdens of proposed discovery.

The protocol established by *Weekley Homes* confirms that the doctrine of proportionality applies to virtually all aspects of the discovery process, and requires thoughtful consideration and cooperation between the parties in a meaningful effort to balance the benefits of the requested discovery against the burdens imposed by it. As the case law illustrates, when the doctrine of proportionality is effectively invoked, it is a powerful tool in reducing the time and expense associated with boilerplate, and often needless, discovery.

C. Proportionality in the Courtroom.

In recent years, the proportionality doctrine has made its way into the courtroom as a practical method of reigning in the costs associated with discovery. In *Bottoms v. Liberty Life Assurance Company of Boston*, the United States District Court for the District of Colorado made clear that a proportionality analysis was not simply a mechanical exercise to be reflexively performed by litigants.⁹ The court cautioned, "Counsel does not satisfy their obligations under Rule 26(g) by robotically recycling discovery requests propounded in earlier actions. Indeed, that approach would be antithetical to the 'stop and think' mandate underlying Rule 26(g)."¹⁰ Instead, Rule 26(g) requires the parties to carefully consider the substance of the case and the scope of discovery in relation to what must be established at trial. The court observed that many of plaintiff's discovery requests were not limited in time, to the type of claim at issue, or even the specific decision-makers at issue in the litigation, and the definitions and instructions contained within the requests purported to cast an even broader net to include documents with no plausible bearing on the litigation.¹¹ Drawing on the proportionality standards in Rule 26, the court declared the plaintiff's proposed discovery "patently overbroad" and unlikely to carry any marginal benefit relative to the burden and expense imposed by the requests.

In *Larsen v. Coldwell Banker Real Estate Corporation*, the United States District Court for the Central District of California invoked the proportionality doctrine to address alleged imperfections in a defendant's electronic data

production.¹² There, the plaintiffs contended that certain discrepancies in the defendant's data production called into question the integrity of the data produced, and asked the court to order the defendant to reproduce its data through a third party vendor and answer additional questions under oath regarding the completeness and integrity of its existing production.¹³ The court rejected the plaintiffs' request on the grounds that any benefit resulting from reproduction of the data was far outweighed by the burden on the defendant.

The court noted that the plaintiffs had identified only a few isolated examples of incomplete data out of a document production of over 9,000 documents. These few instances, the court reasoned, were insufficient to call into question whether defendants acted reasonably and in good faith in producing the responsive data set.¹⁴ Further, invoking a proportionality analysis, the court concluded that "the burden and expense to Defendants in completely reproducing its entire ESI production far outweighs any possible benefit to Plaintiffs. . . . To require Defendants to repeat this labor merely because Plaintiffs have identified a few alleged discrepancies in the ESI production is simply unreasonable."¹⁵

These cases suggest that a proportionality analysis is quickly becoming an indispensable tool in evaluating and resolving discovery disputes. The influence of the proportionality doctrine can be seen in virtually every subset of discovery, as evidenced from the discussion below.

III. MANAGING ELECTRONIC DISCOVERY: WHAT ARE PARTIES REQUIRED TO DO AND WHEN?

Despite the growing focus on proportional discovery, many litigants may nonetheless struggle in effectively managing the scope and attendant costs of electronic discovery in the early stages of litigation. Several recent cases illustrate the practical pitfalls that litigants face in managing electronic discovery from the initial stages of litigation.

A. The Importance of Understanding the Relevant Data Sources in Making a Specific Request for Production.

Electronic discovery is not a monolithic and uniform practice. Not all companies employ the same type of technology or protocols to manage and preserve their electronic data. And not all data management systems are created equal. For

⁹ *Bottoms v. Liberty Life Assurance Co. of Bos.*, No. 11-CV-01606-PAB-CBS, 2011 WL 6181423, at *3 (D. Colo. Dec. 13, 2011).

¹⁰ *Id.* at *5.

¹¹ *Id.* at *6.

¹² *Larsen v. Coldwell Banker Real Estate Corp.*, No. SACV 10-00401-AG, 2012 WL 359466, at *6 (C.D. Cal. Feb. 2, 2012)

¹³ *Id.* at *7.

¹⁴ *Id.*

¹⁵ *Id.* at *8.

example, some data management systems are more easily searchable and accessible (and at a lower cost) than others. For this reason, it is imperative that litigants communicate to understand where the opposing party stores its data, how it may be accessed, and what methods are available to search for responsive information and at what cost.

Indeed, the discovery rules themselves contemplate that a party will become familiar with the data custodians at issue and the type of information sought *before* serving written discovery. Rule 26(f) contains a list of items that counsel should discuss at the “meet and confer” conference to formulate a discovery plan, including “the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues,” and “any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced.”¹⁶

Under the Texas Rules of Civil Procedure, a party seeking electronic discovery must specifically identify the electronic media from which it is seeking discovery. Texas Rule of Civil Procedure 196.4 provides:

To obtain discovery of data or information that exists in electronic or magnetic form, the requesting party must *specifically* request production of electronic or magnetic data and *specify the form* in which the requesting party wants it produced. The responding party must produce the electronic or magnetic data that is responsive to the request and is reasonable available to the responding party in its ordinary course of business. If the responding party cannot—through reasonable efforts—retrieve the data or information requested or produce it in the form requested, the responding party must state an objection complying with these rules. If the court orders the responding party to comply with the request, the court must also order that the requesting party pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information.¹⁷

Texas case law makes clear that a requesting party must explicitly request the specific electronic or magnetic data sought.¹⁸ The Texas Supreme Court confirmed in *Weekley Homes* that a responding

party has no obligation to object or show that the requested items are not reasonably available in its ordinary course of business *until* it is served with a discovery request that specifically identifies the precise type of items being sought. In *Weekley Homes*, the court held that because the written requests did not specifically request deleted emails—as required by Texas Rule of Civil Procedure 196.4—Weekley had no obligation to object in its responses that deleted emails were not reasonably available in its ordinary course of business.¹⁹ The Supreme Court rejected the argument that the requesting party could not specifically identify deleted emails because it was not yet familiar with Weekley’s data storage policies because “it is a simple matter to request emails that have been deleted.”²⁰ The Court further noted that the requesting party should have undertaken to learn about Weekley’s relevant electronic systems early in the litigation process, and that its failure to do so contributed to the subsequent discovery dispute about which it now complained.²¹

Following *Weekley Homes*, Texas courts have confirmed that broadly defined requests—such as requests for all “computer generated” or “electronically stored” data—are insufficient to satisfy the specificity requirement of Texas Rule of Civil Procedure 196.4. For example, in *MRT, Inc. v. Vounckx*, the Dallas Court of Appeals held that appellants’ request for “documents,” which was defined to include “any computer-generated, computer-stored, or electronically-stored matter . . . relevant to the subject matter of this lawsuit” and “responsive data or information that exists in electronic or magnetic form,” was not sufficiently specific to place a responding party on notice that backup tapes were included in the request for production.²² As a result, the responding party was not required to object to the request to search and produce responsive materials from its backup tapes.²³

Likewise, in *In re Harris*, the Houston Court of Appeals held that a party’s motion to compel the production of electronic media was improper because the party had failed to specifically request its production in the written discovery.²⁴ The court observed that the plaintiff’s written discovery sought production of emails and other electronic communications in their native format. The request did not specify the production of the hard drives themselves and, as a result, the defendant was not

¹⁹ *Weekley Homes*, 295 S.W.3d at 315–17.

²⁰ *Id.*

²¹ *Id.* at 315–17, 32122.

²² *MRT, Inc. v. Vounckx*, 299 S.W.3d 500, 506 (Tex. App.—Dallas 2009, no pet.).

²³ *Id.*

²⁴ *See In re Harris*, 315 S.W.3d 685, 698 (Tex. App.—Houston [14th Dist.] 2010, no pet.).

¹⁶ FED. R. CIV. P. 26(f)(3)(B)–(C).

¹⁷ TEX. R. CIV. P. 196.4.

¹⁸ *See* Kenneth J. Withers & Monica Wiseman Latin, *Living Daily with Weekley Homes*, 51 *The Advocate* 23, 27 (Summer 2010).

obligated to object to their production. Accordingly, the court reasoned, ordering production of the hard drives in the absence of a specific request for their production was in error.

These cases demonstrate the importance of not only crafting specific discovery requests identifying the electronic information sought, but also demonstrate the importance of conducting an early conference with opposing counsel to identify the potential sources of electronically stored information. Texas courts have emphasized that the purpose of Rule 196.4's specificity requirement is to "ensure that requests for electronic information are clearly understood and disputes avoided."²⁵ This central purpose is best served by the parties sharing relevant information concerning electronic storage and communication systems *before tendering discovery requests*, so that agreements regarding protocols and scope may be reached and, where needed, guidance obtained from the trial court before a discovery dispute arises.²⁶ A party who fails to conduct such a conference does so at its own peril, as Texas courts have exhibited a lack of sympathy for the litigant who pleads ignorance as an excuse for failure to specifically request production of a particular type of electronic data.

B. Developing An Adequate Search Methodology: the Move Toward Predictive Coding Searches as a Proportional Method of Conducting Electronic Discovery?

One issue that is rapidly developing in both the case law and legal commentary concerns the methods by which attorneys, paralegals, and third-party vendors review electronic data for relevant information. A common method of locating responsive or relevant information is to use search terms. However, this method is far from perfect and is inherently both over- and under-inclusive. Recognizing the imperfections associated with the typical keyword search protocol, legal practitioners and discovery vendors have sought alternative search methodologies. In the past year, several courts and legal scholars have approved the use of technology-assisted data review as a more accurate and efficient method of reviewing extensive electronic information. One method in particular—known as "predictive coding" review—has received considerable attention in recent months.²⁷

Predictive coding is "a combination of technologies and processes in which decisions pertaining to the responsiveness of records gathered or preserved for potential production purposes . . . are made by having reviewers examine a subset of the collection and having the decisions on those documents propagated to the rest of the collection without reviewers examining each record."²⁸ Predictive coding relies on sophisticated algorithms to enable the *computer* to determine the responsiveness of a document to a particular production request, or to identify those documents that should be withheld on the basis of an asserted privilege.²⁹ For predictive coding to work, a partner or member of the trial team must review and code a "seed set" of documents. The *computer* then identifies the relevant properties of the seed documents to code additional documents. The human reviewer continues to code more seed documents, which permits the computer to refine its analysis and apply a more accurate prediction of the reviewer's coding against future documents. Once the *computer's* ability to predict the reviewer's coding becomes sufficiently aligned and accurate, the *computer* is able to complete the remaining review in a more efficient (and cost-effective) manner. As a result, human reviewers only personally review a fraction of the document collection before production. Proponents of predictive coding argue that the process results in a more accurate review at considerably less expense.³⁰

At least two courts have approved the use of predictive coding to identify responsive documents. In *Da Silva Moore v. Publicis Grp. & MSL Grp.*, the United States Magistrate Judge for the Southern District of New York approved the parties' use of predictive-coding technology to search approximately three million electronic documents from the agreed-upon and identified data

CONF. J. 189, 199 (2007)) (available at <http://jolt.richmond.edu/v17i3/article11.pdf>)

²⁵ Jason R. Baron, *Law in the Age of Exabytes: Some Further Thoughts on 'Information Inflation' and Current Issues in E-Discovery Search*, 17 RICH. J.L. & TECH. 9 (2011); see also Daniel B. Garrie & Siddhartha Rao, *Using Technology Experts for Electronic Discovery*, 38 ABA Journal on the Section of Litigation 13, 13 (Winter 2012).
²⁶ See *Da Silva Moore v. Publicis Grp. & MSL Grp.*, No. 11-CV-1279, 2012 U.S. Dist. LEXIS 23350, at *3 (S.D.N.Y. Feb. 22, 2012)(Peck, Magistrate J.); Grossman & Cormack, 17 RICH. J.L. & TECH. at p. 8-9.

²⁷ See Maura R. Grossman & Gordon V. Cormack, *Technology-Assisted Review in E-Discovery Can Be More Effective and More Efficient Than Exhaustive Manual Review*, 17 RICH. J.L. & TECH. 11, at 3 (2011) (citing The Sedona Conference, *The Sedona Conference Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery*, 8 SEDONA

²⁵ *Id.* at 508.

²⁶ See *In re Weekley Homes, L.P.*, 295 S.W.3d at 313-15; *MRT, Inc.*, 299 S.W.3d at 508.

²⁷ See Maura R. Grossman & Gordon V. Cormack, *Technology-Assisted Review in E-Discovery Can Be More Effective and More Efficient Than Exhaustive Manual Review*, 17 RICH. J.L. & TECH. 11, at 3 (2011) (citing The Sedona Conference, *The Sedona Conference Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery*, 8 SEDONA

custodians.³¹ The court observed that, although the parties had initially agreed to the use of predictive coding, that agreement fell apart when it came to reaching an agreement on the protocol to be adopted. The court rejected the plaintiffs' objection that the use of predictive coding precludes the defendants from certifying the completeness of their document production, and observed that Rule 26(g)(1)(B) does not require a party responding to a quest for production to certify that its discovery response is "complete."³² Rather, the court found, a party must employ a reasonable methodology in searching for responsive documents, and is not required to achieve perfection in reviewing and producing responsive documents.

The court rejected the plaintiffs' assertion that the use of predictive coding protocol is subject to Federal Rule of Evidence 702, which addresses the admissibility of expert testimony at trial.³³ The court observed that Rule 702 and *Daubert* do not apply to how information is searched for in discovery. The court observed that no method of reviewing documents is itself perfect, and noted widespread criticism of both manual human review and keyword searching. The court likened the traditional approach of keyword searches to a child's game of "Go Fish," and cited empirical evidence suggesting that keyword searches are both over-inclusive and highly ineffective.³⁴

The court concluded that the use of predictive coding was appropriate given: "(1) the parties' agreement, (2) the vast amount of ESI to be reviewed (over three million documents), (3) the superiority of computer-assistant reviewed to the available alternatives (i.e., linear manual review or keyword searches), (4) the need for cost effectiveness and proportionality under Rule 26(b)(2)(C), and (5) the transparent process proposed by [the defendant]."³⁵ The court observed that any deficiencies noted in the predictive coding process could be addressed by the court in light of the staging of discovery in phases that permitted period quality control reviews.

Similarly, in *Global Aerospace Inc. v. Landow Aviation, LP*, the Virginia trial court approved the use of predictive coding, ordering that "Defendants

shall be allowed to proceed with the use of predictive coding for purposes of the processing and production of electronically stored information."³⁶ The court instructed the parties that its order "is without prejudice to a receiving party raising with the Court an issue as to completeness of [f] the contents of the production or the ongoing use of predictive coding."

These opinions have generated substantial controversy over the acceptability of predictive coding as a means of conducting document review. Proponents of the use of predictive coding contend that it is not only a more cost-effective method of conducting electronic discovery, but that it is more accurate as well.³⁷ A recent study conducted by the RAND Corporation suggests that 73 percent of the costs associated with electronic discovery are associated with the review phase of document production.³⁸ That same study cited evidence that predictive coding is at least as effective—if not more so—than traditional "eyes-on review" and has the capability of saving "about 80 percent in attorney review hours."³⁹

It is important to recognize that the use of predictive coding is still in the early stages and the research documenting its benefits and risks is still ongoing. Nonetheless, its cost savings may be considerable in relation to the costs typically incurred by attorney review of large-scale document production, and its accuracy may be improved over the results typically obtained by keyword searching. And the relevant technology can only be expected to improve. Among the major open questions is whether and how to confirm the reliability of the particular tool being utilized in a given case.

C. Seeking the Production of Electronic Storage Devices: Demonstrating Proportionality and Ensuring Proper Safeguards

One of the most difficult issues courts face in the discovery process today is determining when—and under what circumstances—it may order the production of an electronic storage device to determine whether it contains relevant information beyond that produced by a responding party.

Texas state and federal courts employ similar procedures to determine whether direct access to a party's electronic storage device is warranted. There are two distinct circumstances under which a court may order the production of an electronic storage

³¹ See *Da Silva Moore*, 2012 U.S. Dist. LEXIS 23350, at *3.

³² *Id.* at *21–22.

³³ *Id.* at *23–24.

³⁴ *Id.* at *31; see also *United States v. O'Keefe*, 537 F.Supp.2d 14, 24 (D.D.C. 2008) (observing that the efficacy of certain keyword searches is difficult to assess and "for lawyers and judges to dare opine that a certain search term or terms would be more likely to produce information than the terms that were used is truly to go where angels fear to tread"); *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 260 (D. Md. 2008).

³⁵ *Da Silva Moore*, 2012 U.S. Dist. LEXIS 23350, at *35–36.

³⁶ *Global Aerospace Inc. v. Landow Aviation, LP*, No. CL 61040 (Va. Cir. Ct. April 23, 2012) (slip op.).

³⁷ See Grossman & Cormack, 27 RICH. L. REV. at 43–44.

³⁸ See Nicholas M. Pace & Laura Zakaras, *Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery* (2012) (available at www.rand.org/content/dam/rand/pubs/monographs/2012/RAND_MG1208.pdf).

³⁹ *Id.* at p. xviii; pp.62–70.

device. First, a court may order production of an electronic storage device where a party has demonstrated a reasonable basis to believe the other side is not in compliance with its discovery obligations. Second, a court may order production of an electronic storage device where the device itself contains relevant physical or forensic evidence—for example, in a theft or misappropriation of trade secrets case where the device in issue may demonstrate the misappropriation or theft.

In the first circumstance, the party seeking access to the electronic storage device “must show that the responding party has somehow defaulted in its obligation to search its records and produce the requested data.”⁴⁰ The requesting party must also show that the documents produced by the responding party are inadequate and/or incomplete, and that a search of the electronic storage device could recover deleted or omitted relevant materials.⁴¹ It is insufficient for the requesting party to rely on mere innuendo or skepticism to show that the responding party has failed to comply with its obligation to search and produce responsive information. Further, the requesting party must demonstrate that the retrieval of the data sought is feasible. If the requesting party demonstrates that the responding party has defaulted on its discovery duties and that recovery of the data sought is feasible, Texas courts may order the production of electronic storage media to a qualified expert after a protocol is established to protect and safeguard privileged and confidential information while conducting targeted discovery.⁴²

The Fifth Court of Appeals in Dallas recently confirmed the importance of strict compliance with these procedural requirements. In *In re Jordan*, a mandamus proceeding, the court of appeals reviewed the trial court’s order compelling employment-discrimination plaintiff Misty Jordan to allow her former employer’s “forensic computer examiner” to have access to her personal computer and hard drive. The appellate court found on several grounds. First, the court noted that the requests for production failed to specifically identify the exact nature of the information sought.⁴³ Second, the court observed that the employer had failed to demonstrate the particular characteristics of the devices involved, the familiarity of its forensic examiner with those characteristics, a search methodology, or a reasonable likelihood that the

proposed search methodology would retrieve the specific information sought.⁴⁴

Moreover, the court held that the trial court failed to consider the highly intrusive nature of the computer storage search and failed to develop any appropriate safeguards to protect against the disclosure of sensitive or privileged information. The trial court should have considered, “at the very least, a protective order addressing matters that might be revealed, especially where, as here, the person who will perform the search is retained by and under the control of the party seeking the information.”⁴⁵ Because these procedural requirements were not satisfied, the court conditionally granted a writ of mandamus.

Likewise, the Beaumont Court of Appeals recently held that a trial court erred as a matter of law when it ordered production of an electronic storage device without first imposing limits to prevent the disclosure of privileged and non-relevant information.⁴⁶ In *In re Clark*, the trial court ordered Vicki Clark, a former employee of Texas Citizens Bank (“TCB”), to produce her personal computer, electronic storage devices, and records relating to that equipment.⁴⁷ Clark was previously employed by TCB as a Senior Vice President and Relationship Manager and, in that capacity, had access to TCB’s confidential and proprietary information. During her employment with TCB, Clark executed a non-solicitation, non-competition, and non-disclosure of confidential information agreement.⁴⁸ After Clark resigned her employment with TCB, TCB conducted a forensic examination of her work computer. TCB discovered that, in the final months of her employment, Clark had communicated with a competitor regarding opening a branch office in the same town where Clark had been working for TCB and that Clark had communicated about at least one current TCB customer.⁴⁹

In the ensuing litigation, TCB sought production of all communications between Clark and any person who was a TCB customer during the relevant time period, as well as all documents that Clark downloaded from a TCB computer, and all communications reflecting her involvement in the creation of the competitor’s new branch office.⁵⁰ TCB also requested production of any and all computers used or accessed by Clark in the six months prior to her resignation. Clark objected, and TCB moved to compel production.⁵¹ At the hearing

⁴⁰ *Weekley Homes*, 295 S.W.3d at 317; see also *In re Stern*, 321 S.W.3d 828, 845 (Tex. App.—Houston [14th Dist.] 2010, no pet.).

⁴¹ *Id.*

⁴² *Id.* at 318.

⁴³ *In re Jordan*, No. 05–12–00240–CV, 2012 WL 1098275, at *1 (Tex. App.—Dallas April 3, 2012, no pet.).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ See *In re Clark*, 345 S.W.3d 209 (Tex. App.—Beaumont 2011, no pet.).

⁴⁷ *Id.* at 210–11.

⁴⁸ *Id.* at 211.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

on the motion to compel, TCB presented evidence suggesting that Clark had retained a TCB customer's confidential information, and presented an affidavit from a computer expert opining that Clark had exported data and removed information from TCB.⁵² TCB also argued that although Clark had testified she deleted relevant emails from her personal email account, she accessed her personal email account from her personal computer, and artifacts of those emails would be recoverable from her personal computer.⁵³ TCB suggested to the court that if Clark was ordered to produce her personal computer, TCB's forensic analysts would carve out the surnames of Clark's attorneys, as well as other key words, to omit any attorney-client communications from their search results.⁵⁴ Based upon this evidence and the representations from counsel, the trial court ordered Clark to turn over her personal computer to TCB.⁵⁵

The court of appeals affirmed the trial court's finding that a forensic analysis of Clark's personal computer would produce relevant information that was specifically requested but not produced by Clark. The court also found that the record evidence supported the conclusion that Clark failed to produce this information because she did not perform an adequate search for the relevant deleted emails. Accordingly, the court of appeals held that the trial court did not err by ordering production of the electronic information stored on Clark's personal electronic storage devices.

However, the court of appeals concluded that the trial court failed to impose adequate limits to prevent TCB from accessing personal and confidential information which TCB was not entitled to access.⁵⁶ The court held that "the trial court must provide a mechanism through which Clark can withhold from discovery any documents or information that is privileged or confidential and provide instead a privilege log subject to in camera review by the trial court."⁵⁷ At a minimum, the court noted, the procedure for screening privileged information cannot depend on the opposing party doing the screening. And if it is not possible for the trial court to describe a search protocol that safeguards against the production of privileged or non-relevant information, the trial court may instead order the examination to be done by an independent forensic examiner.⁵⁸ But such a task may not simply be left in the hands on one's adversaries. Accordingly, the court of appeals conditionally granted mandamus relief, pending entry of a new

order compelling production with adequate safeguards against the disclosure of privileged information.⁵⁹

Likewise, federal courts in Texas recognize that production of a party's hard drive may be warranted in certain circumstances, which require the implementation of appropriate limits and protocols. In *M-I L.L.C. v. Stelly*, the United States District Court for the Southern District of Texas ordered the production of the defendant's hard drives.⁶⁰ In *Stelly*, the plaintiff presented forensic evidence that Defendant Stelly had transferred its confidential information from his work computer to a USB device. Plaintiff sought production of Stelly's new employer's computers to determine whether the information allegedly taken by Stelly had been transferred to his new employer. The court found that, based on the evidence presented, the plaintiff was entitled to discovery to determine whether any of its confidential or proprietary information had been transferred to its competitor's computers.⁶¹

However, the court declined to permit plaintiff direct access to the computers, concluding that doing so would unnecessarily jeopardize defendant's own trade secrets or privileged information.⁶² Instead, the court chose to appoint an independent expert to examine the devices for the limited purposes of determining (1) whether the USB devices at issue were connected to defendants' computers; and (2) whether any of plaintiff's files on the USB drives were transferred to the computers.⁶³ As an added measure of protection, the court ordered the expert to sign a confidentiality agreement and to direct his reports to the court.⁶⁴

The appointment of an independent forensic investigator to handle issues arising from the production of electronic storage devices can generate its own pitfalls and perils. A recent case out of the Houston Court of Appeals illustrates the important role that an independent expert must play in this process. In *Chevron Phillips Chem. Co. v. Kingwood Crossroads, L.P.*, the Fourteenth District Court of Appeals upheld an award of sanctions against a party for violating a court order by (1) refusing to perform a search of its backup tapes pursuant to a valid court order; and (2) usurping the independent expert's role by preventing the expert from supervising the court-ordered search.⁶⁵

⁵² *Id.*

⁵³ *Id.* at 212.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 213.

⁵⁷ *Id.*

⁵⁸ *Id.* at 213.

⁵⁹ *Id.* at 214.

⁶⁰ *MI-LLC v. Stelly*, No. H-09-1552, 2011 U.S. Dist. LEXIS 134300, at *5 (S.D. Tex. Nov. 21, 2011).

⁶¹ *Id.* at *5.

⁶² *Id.* at *7.

⁶³ *Id.* at *8.

⁶⁴ *Id.*

⁶⁵ *Chevron Phillips Chem. Co. v. Kingwood Crossroads, L.P.*, 346 S.W.3d 37, 74 (Tex. App.—Houston [14th Dist.] 2011, pet. filed).

Addressing the defendant's failure to search its own backup tapes, the court observed that plaintiff's counsel had sent a preservation letter to the defendant approximately one week before filing suit, seeking preservation of all internal and external emails relating to the subject matter of the suit. After deposition testimony suggested that the defendant had failed to search for or produce certain emails, or perhaps had deleted them after the litigation hold letter issued, the court ordered the defendant to conduct a search of its emails under the supervision of an independent third-party expert, including all emails that may be stored on servers, back-up tapes, or otherwise. The court of appeals found that the defendant resisted the plaintiff's efforts to establish a protocol for searching the backup tapes by flatly refusing to do so, notwithstanding the trial court's order. The court rejected the defendant's complaints concerning alleged ambiguities in the trial court's order, noting that any such claims should have been raised in the trial court. Because the defendant did not raise its complaints about the breadth or ambiguity in the trial court's order compelling the search of the backup tapes, the court concluded that the defendant violated the trial court's order and the trial court did not err by awarding sanctions.

Turning to the role the independent forensic expert played in supervising the search, the appellate court affirmed the trial court's finding that the defendant usurped the independent expert's role. The appellate court noted that, although there was ambiguity in the trial court's order concerning who was physically required to perform the search, the trial court's order was unambiguous that the expert must play a supervisory role with respect to the search terms used. The court found that defendant's counsel insisted that the search be done on the company's terms and by the company's preferred method, which the trial court had already declared inadequate. By relegating the court-appointed expert to a mere passive observer, the defendant improperly violated the trial court's order and usurped the stated role of the independent forensic expert. The court accordingly affirmed the trial court's award of \$637,612.50 in sanctions.

D. Crafting and Proving Objections: What is Required?

Despite the repeated admonishments from the judiciary that every case requires careful consideration of the proper scope of discovery in fashioning a protocol, many litigants appear unable to forego reliance on recycled drafts of written discovery requests and prophylactic objections complaining of the scope and burden of each request. Recent cases confirm that more is required of defendant faced with an allegedly improper

discovery request than a one-sentence form objection.

1. Demonstrating that a Particular Request Poses an Undue Burden

Numerous courts have recognized that whether a particular discovery request imposes an undue burden on a responding party often depends on the responding party's ease of access to the requested information, the difficulties associated with retrieving the information, and any costs associated with such a production. For this reason, the federal and state rules of civil procedure afford a trial court substantial discretion in determining whether a particular request poses an undue burden on the responding party when compared with the potential benefits of full discovery.

The United State District Court for the District of Colorado has reiterated that "a party objecting to a discovery request as 'unduly burdensome' cannot rest on that self-serving or conclusory statement."⁶⁶ Rather, a party asserting that a particular request imposes an undue burden must demonstrate "not only undue burden or expense, but that the burden or expense is unreasonable in light of the benefits to be secured from the discovery," and must "provide an affidavit or other evidentiary proof of the time or expense involved."⁶⁷

Likewise, Texas courts require a party objecting to a discovery request as overly burdensome to demonstrate *how* the request imposes a particular burden on the responding party. The responding party must present evidence demonstrating the burden imposed and may not rely on a generic prophylactic objection.

2. Demonstrating that a Particular Request is Overbroad in Relation to Reasonable Discovery.

One of the most common prophylactic objections is that the request is overly broad in some fashion. Parties often lodge a cursory, and formulaic, objection to each discovery request, reiterating that the request is overbroad, and declining to respond further. Under the Federal Rules of Civil Procedure, such a response is as improper as an overbroad request.

As the United States District Court for the District of Kansas recently observed, "one of the purposes of Rule 26(g) was to bring an end to the [] abusive practice of objecting to discovery requests reflexively—but not reflectively—and without a factual basis."⁶⁸ The rules require a party to tailor its

⁶⁶ *Bottoms*, 2011 WL 6181423, at *7.

⁶⁷ *See Cardenas v. Dorel Juvenile Grp., Inc.*, 232 F.R.D. 377 (D. Kan. 2005).

⁶⁸ *Linnebur v. United Tel. Ass'n*, 2011 WL 5103300, at *7 (D. Kan. Oct. 27, 2011) (quoting *Mancia v. Mayflower*

objection to the specific facts of the case, and demonstrate why a particular request is overbroad in light of the issues raised in the case. Nonetheless, boilerplate objections to breadth and burden—unaccompanied by factual support—persist in written discovery to the continued ire of numerous judges.

In *Bottoms*, the United States District Court for the District of Colorado took a defendant to task for asserting a form objection to the plaintiff's interrogatories and requests for production, blanketly proclaiming the requests "overly broad, burdensome, unduly costly, [and] not designed to lead to the discovery of admissible evidence outside the administrative record in this case."⁶⁹ The court observed that an objection challenging a request as overbroad is an implicit concession that the request, in part, includes some properly discoverable materials. The Rules, the court continued, require the responding party to construe the discovery requests to be reasonable, and a party "cannot evade its obligations under Rules 33 and 34 by summarily dismissing an interrogatory or request for production as 'overbroad.'"

Likewise, the Texas rules require a party objecting to a discovery request to comply with any portion of the request to which no objection is made.⁷⁰ Texas courts have recognized that discovery requests seeking document production from an unreasonably long time period, from distant and unrelated locales, and/or concerning attenuated subjects are impermissibly overbroad. In determining whether a particular request is overbroad, courts give considerable weight to "whether the request could have been more narrowly tailored to avoid including tenuous information and still obtain the necessary, pertinent information."⁷¹ Some Texas courts have held that an overbroad request is improper regardless of whether the request poses an undue burden on the responding party, and evidence is not required to support an objection to the breadth of a request if it is apparent as a matter of law.⁷²

However, the standard employed by Texas courts is not rigid and unforgiving in determining whether a particular request is overbroad, and "a reasonably tailored discovery request is not overbroad merely because it may include some information of doubtful relevance."⁷³

Textile Servs. Co., 253 F.R.D. 354, 358 (D. Md. 2008)) (quotation marks omitted).

⁶⁹ 2011 WL 6181423, at *7.

⁷⁰ See TEX. R. CIV. P. 193.2(b) and cmt. 2.

⁷¹ See *In re Waste Mgmt. of Tex., Inc.*, No. 13–11–00197, 2011 WL 3855745, at *8 (Tex. App.—Corpus Christi Aug. 31, 2011, no pet.).

⁷² *Id.*

⁷³ *Id.*

IV. SPOILIATION AND THE DUTY TO PRESERVE EVIDENCE.

Spoilation is the destruction of the significant and meaningful alteration of evidence.⁷⁴ To sustain a finding of spoliation, the party seeking relief from the court must first demonstrate: (1) that a duty existed to preserve the information at issue; (2) a culpable breach of that duty; and (3) prejudice as a result of that breach.⁷⁵ Because electronically stored information is often routinely deleted or altered as a matter of course, a party with a duty to preserve evidence often is required to take affirmative steps to prevent the destruction or alteration of potentially-relevant evidence.⁷⁶

In the Fifth Circuit, a court may not impose sanctions based upon a finding of spoliation unless there is evidence of bad faith.⁷⁷ Similarly, Texas state courts require some showing of intent for a spoliation finding to be sustained.⁷⁸ As a general matter, it is insufficient to show mere negligence to establish spoliation.⁷⁹

In *Gaalla v. Citizens Medical Center*, the United States District Court for the Southern District of Texas rejected a request for sanctions based on a defendant's failure to preserve emails stored on its back up tapes or disaster recovery system, which were—as a matter of course—continually overwritten on a seven or fourteen day basis, including during the pendency of the subject lawsuit.

The court began by observing that it "is doubtful that [the defendant] had any duty to preserve its 'back-up tapes' or 'disaster recovery system.'" The court reasoned that, as a general matter, litigation holds do not apply to "inaccessible backup tapes (e.g., those typically maintained solely for the purpose of disaster recovery), which may continue to be recycled on the schedule set forth in the company's policy."⁸⁰ Although the court recognized that, under certain circumstances where the company is capable of identifying where particular key employee information is stored on backup tapes, the court found that the plaintiffs had failed to prove the applicability of that particular exception or otherwise demonstrated why the backup tapes should have been preserved.⁸¹

⁷⁴ See *Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F.Supp.2d 598, 612 (S.D. Tex. 2010).

⁷⁵ See *Trevino v. Ortega*, 969 S.W.2d 950, 954–55 (Tex. 1998) (Baker, J., concurring).

⁷⁶ *Rimkus Consulting Grp.*, 688 F.Supp.2d at 612.

⁷⁷ See *Condrey v. SunTrust Bank of Ga.*, 431 F.3d 191, 203 (5th Cir. 2005).

⁷⁸ See *Aguirre v. S. Tex. Blood & Tissue Ctr.*, 2 S.W.3d 454, 457 (Tex. App.—San Antonio 1999, pet. denied).

⁷⁹ *Gaalla v. Citizens Med. Ctr.*, No. V–10–14, 2011 WL 2115670, at *1 (S.D. Tex. May 27, 2011).

⁸⁰ 2011 WL 2115670, at * 2 (quoting *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003)).

⁸¹ *Id.*

Further, the court held that, even if the defendant had a duty to preserve the backup tapes and breached that duty, an award of sanctions was nonetheless improper because the plaintiffs had failed to demonstrate that the defendant acted in bad faith. The court noted that the defendant took other steps to preserve relevant evidence, and there was no suggesting that the parties had even discussed retaining or searching the backup tapes until the discovery dispute arose. The court found that, although it was possible the defendant could have done more to preserve evidence, there was no indication that its steps were unreasonable under the circumstances of the case. Accordingly, the court denied the imposition of sanctions. It is important to note, however, that the standard for spoliation in federal courts varies widely by district.⁸²

Likewise, Texas state courts have observed that litigation holds do not generally apply to backup tapes, which exist for the sole purpose of disaster recovery.⁸³ In *MRT, Inc. v. Counckx*, the Dallas Court of Appeals rejected a plaintiff's request for a spoliation instruction based on the defendant's destruction of certain backup tapes. The court observed that, under Texas law, a duty to preserve evidence arises "only when a party knows or reasonably should know (1) there is a substantial chance that a claim will be filed; and (2) the evidence in the party's possession or control will be material and relevant to that claim."⁸⁴ Because there was no evidence that the defendant anticipated litigation at the time the backup tapes were destroyed, and there was no indication that the contents of the backup tapes were material or relevant to the claims at issue, the court rejected the request for a spoliation instruction and held the defendant had no duty to preserve the tapes.⁸⁵

On a different note, the Tyler Court of Appeals recently affirmed the trial court's decision to instruct the jury on spoliation where the defendant in a slip-and-fall case preserved only a small portion of the videotape evidence relating to the plaintiff's injury.⁸⁶ In *Brookshire Brothers, Ltd. v. Aldridge*, Aldridge slipped on a liquid substance and fell while shopping at a Brookshire Brothers store, sustaining a substantial spinal injury. Aldridge notified Brookshire Brothers of his injury, and Brookshire Brothers began paying for Aldridge's medical care. Brookshire Brothers preserved small segments of a surveillance video recording of the store on the day

in question, which showed Aldridge entering the store, falling, and leaving, but allowed the remainder of the videotape to be recorded over. After Aldridge brought suit, he sought a spoliation instruction based on Brookshire Brothers' failure to preserve portions of the original recording that could have shown the spill of the liquid substance, employees that may have encountered the substance before the accident, the length of time that the spill was present, and the amount of effort required to clean up the spill.⁸⁷ Brookshire Brothers argued that the spoliation instruction was improper because it had no duty to preserve the remainder of the video recording, it had a reasonable explanation for failing to do so, and Aldridge was not prejudiced as a result.

The trial court rejected Brookshire Brothers' arguments, and instructed the jury that if it found that Brookshire Brothers "knew or reasonably should have known that such portions of the store video not preserved contained relevant evidence to the issues in this case, and its non-preservation [was] not [] satisfactorily explained, then [it could] consider such evidence would have been unfavorable to Brookshire Brothers."⁸⁸ The court of appeals affirmed, observing that Brookshire Brothers was on notice of Aldridge's injury and had begun paying for his treatment at the time it destroyed the remainder of the videotape, and that Aldridge had already asked to see part of the videotape at that time. The court rejected Brookshire Brothers' argument that it had a reasonable explanation for deleting the remainder of the evidence, and concluded that its duty to preserve the videotape evidence was firmly established at that time it destroyed the evidence. Accordingly, the court of appeals affirmed the trial court's decision to instruct the jury on spoliation, and affirmed the jury's award of damages in favor of the plaintiff. The Texas Supreme Court granted Brookshire Brothers' petition for review on May 18, 2012, and it remains to be seen what error, if any, the Court finds with the lower court's holding.

Indeed, a party's obligation to preserve evidence is not a black and white issue. In February of 2012, the United States District Court for the Southern District of Texas ordered KPMG to preserve more than 2,500 hard drives in connection with a lawsuit brought under the Fair Labor Standards Act and New York law.⁸⁹ KPMG sought a protective order from the court that would require it to only preserve a random sample of approximately 100 hard drives from among those at issue in the litigation, from which KPMG argued the plaintiffs

⁸² See *Gaalla*, 2011 WL 2115670, at *2.

⁸³ See *MRT, Inc. v. Counckx*, 299 S.W.3d 500 (Tex. App.—Dallas 2009, no pet.).

⁸⁴ *Id.* at 510.

⁸⁵ *Id.* at 510–11.

⁸⁶ *Brookshire Bros., Ltd. v. Aldridge*, No. 12–08–00368–CV, 2010 Tex. App. LEXIS 6065, at *1 (Tex. App.—Tyler July 30, 2010), *pet. for review granted*, 2012 Tex. LEXIS 435 (Tex. May 18, 2012).

⁸⁷ *Id.* at *2.

⁸⁸ *Id.* at *24.

⁸⁹ See *Pippins v. KPMG, LLP*, No. 11–CV–377, 2011 WL 4701849 (S.D.N.Y. Oct. 7, 2011) (Cott, Magistrate J.) *aff'd*, No. 11–CV–277, 2012 U.S. Dist. LEXIS 17681 (S.D.N.Y. Feb. 3, 2012).

could perform keyword searches. The plaintiffs attempted to reach agreement with KPMG regarding a protocol for obtaining discovery into the contents of the hard drives in an effort to determine whether preservation is necessary and to develop an appropriate methodology for searching the contents of the proposed sample hard drives. KMPG declined to do so and instead sought relief from the court.

The court began by observing that KPMG's motion requires the court to balance the company's interest in avoiding undue burden or expense in connection with preserving the hard drives against the plaintiffs' concern that potentially relevant information be preserved.⁹⁰ The court noted that a proportionality inquiry is warranted under the rules, but expressed skepticism at its use in these circumstances where its application gives little guidance to litigants attempting to determine the scope of their preservation obligations. Instead, to determine whether KPMG had a duty to preserve the evidence, the court adopted a three-pronged inquiry into (1) the relevance of the information; (2) whether the information was created by or for key players in the litigation; and (3) whether the preservation request is duplicative of other discovery materials subject to preservation.

The court observed that, as a threshold matter, it was difficult to determine whether the material plaintiffs seek to preserve is relevant to the litigation because KPMG had stymied all efforts to obtain discovery into the contents of the hard drives. As a result, the court concluded that the record favored preservation because KPMG had failed to demonstrate that the hard drives were not relevant and did not relate to key players in the litigation or that the materials could be obtained adequately elsewhere. Consequently, the court concluded that KPMG had a duty to preserve the hard drives pending further discovery.

Conversely, in *Tracy v. NVR, Inc.*, the United States Magistrate Judge for the Western District of New York denied the plaintiffs' motion to compel the defendant to produce its litigation hold letters on the ground that the plaintiffs failed to demonstrate the defendant had destroyed relevant evidence.⁹¹ In *Tracy*, the plaintiffs filed a class-action lawsuit against NVR seeking damages relating to an alleged failure to pay overtime under the Fair Labor Standards Act. The plaintiffs later sought to compel NVR to produce its litigation hold notices, as well as a list of employees who received the notices, to demonstrate that NVR had failed to preserve evidence that would show how numerous other similarly-situated opt-in plaintiffs spent their time.

The court observed that there was no question the defendant had a duty to preserve documents at the time in question, including "documents and information relating to the named plaintiff and his claims." However, the court expressed skepticism that NVR had a duty at the inception of the lawsuit to preserve documents and information relating to *potential* opt-in plaintiffs—in part because the named plaintiff waited over two years after filing suit to move for conditional class certification.⁹² The magistrate judge observed that "[a]s in any case raising issues of spoliation, the court's determination of the scope of the duty to preserve is a highly fact-bound inquiry that involves considerations of proportionality and reasonableness." The court concluded that, even if NVR had a duty to preserve documents relating to potential opt-in plaintiffs from the inception of litigation, the plaintiffs failed to demonstrate that the documents that allegedly should have been preserved were lost or destroyed, or even relevant to the litigation.⁹³ In contrast, the court did grant NVR's motion for spoliation sanctions against an opt-in plaintiff who shredded original documents after she joined the lawsuit.⁹⁴ Concluding that the opt-in plaintiff was grossly negligent in destroying the evidence in question, the court concluded that the appropriate sanction was to preclude the opt-in plaintiff from testifying about her daily work activities.⁹⁵

These cases demonstrate that, as the emphasis on proportional discovery grows, courts may apply a proportionality analysis in determining whether a party has a duty to preserve evidence. Although the *Pippins* court expressed some skepticism over its application on the record before it, the court did acknowledge the fundamental role the concept of proportionality plays in the Federal Rules of Civil Procedure. The lesson that perhaps can be garnered from *Pippins* and *Tracy* is that litigants are best positioned to make a proportionality argument with respect to their preservation obligations if they are able and willing to present particular evidence demonstrating that the preservation request is excessive, duplicative, and unnecessarily costly.

V. THE DISCOVERABILITY OF SOCIAL MEDIA—ENTERING THE REALM OF FACEBOOK, MYSPACE, AND TWITTER.

In recent years, significant attention has been devoted to the discoverability of information contained on social media websites such as Facebook or MySpace. Courts have typically opted to treat information stored on social media sites the same as any other type of electronically-stored

⁹⁰ *Id.* at *5.

⁹¹ *Tracy v. NVR, Inc.*, No. 04-CV-6541L, 2012 US Dist. LEXIS 44350 (W.D.N.Y. Mar. 26, 2012).

⁹² *Id.* at *25.

⁹³ *Id.* at 26–29.

⁹⁴ *Id.* at *40–46.

⁹⁵ *Id.* at 47.

information—meaning, if you can demonstrate that discovery into a litigant’s social media profile is reasonably calculated to lead to the discovery of admissible evidence, you are likely entitled to the requested discovery.

In *EEOC v. Simply Storage Management, LLC*, the EEOC brought suit on behalf of numerous women seeking damages for the creating of a hostile work environment due to alleged sexual harassment by a supervisor. The defendant sought production of the named plaintiffs’ social media communications on the ground that it was relevant to any claimed emotional distress damages. The United States District Court for the Southern District of Indiana held that the claimant’s communications on social networking sites were relevant and must be produced.⁹⁶ The court rejected the plaintiffs’ assertion of a privacy interest in any such communications, and held that any individual’s expectation or belief that her social networking communications are private is insufficient to shield those materials from discovery. However, the court observed that the existence of social media communications alone does not imply that all such communications are discoverable or relevant to the claimant’s mental or emotional health.⁹⁷ Rather, the court concluded, it is the substance of the communications that determines their relevance to the question of damages. Accordingly, the court ordered limited production of “any profiles, postings, or messages (including status updates, wall comments, causes joined, groups joined, activity streams, blog entries) and SMS applications for claimants [] for the period from April 23, 2007, through the present that reveal, refer, or relate to any emotion, feeling, or mental state, as well as communications that refer, reveal, or relate to events that could reasonably be expected to produce a significant emotion, feeling, or mental state.”⁹⁸ The court also ordered the production of any third-party communications to the named claimants that place the claimants’ own communications into context, as well as pictures of the claimant taken during the relevant time period and posted by the claimant on her profile.

Similarly, in *Zimmerman v. Weis Markets, Inc.*, the plaintiff brought suit against his employer to recover damages he allegedly suffered as a result of an injury to his left leg that occurred while the plaintiff was working on his employer’s property.⁹⁹ The plaintiff sought damages for lost wages, lost earning capacity, pain and suffering, and scarring and ‘embarrassment.’ After reviewing the public aspects of the plaintiff’s Facebook profile, his

employer discovered that Zimmerman’s interests or hobbies including riding a motorcycle and performing bike stunts, and observed recent photographs of Zimmerman with his leg exposed with his motorcycle. Weir then sought discovery into the non-public aspects of Zimmerman’s social media profiles on the grounds that such information refuted Zimmerman’s claim that he was too embarrassed of his leg scars to wear shorts or enjoy the same activities. Zimmerman contended that his privacy interests outweighed Weis Markets’ right to discover such information.

The court rejected Zimmerman’s argument and ordered production of the nonpublic portions of his Facebook and MySpace pages on the basis that Zimmerman had “placed his physical condition in issue” by seeking damages for embarrassment and loss of enjoyment. The court found that the social media was plainly relevant to the case:

Based on a review of the publicly accessible portions of his Facebook and MySpace accounts, there is a reasonable likelihood of additional relevant and material information on the non-public portions of these sites. Zimmerman voluntarily posted all of the pictures and information on his Facebook and MySpace sites to share with other users of these social network sites, and he cannot now claim he possesses any reasonable expectation of privacy to prevent Weis Markets from access to such information. By definition, a social networking site is the interactive sharing of your personal life with others; the recipients are not limited in what they do with such knowledge. With the initiation of litigation to seek a monetary award based upon limitations or harm to one’s person, any relevant non-privileged information about one’s life that is shared with others and can be gleaned by defendants from the internet is fair game in today’s society.¹⁰⁰

In *Romano v. Steelcase, Inc.*, a New York court permitted discovery into a plaintiff’s Facebook and MySpace pages, concluding that such information is discoverable where the plaintiff had placed her condition at issue in the lawsuit by seeking damages for the loss of enjoyment of life’s activities.¹⁰¹ The court rejected the plaintiff’s assertion that she had a privacy interest in her social media pages, concluding that “when Plaintiff created her Facebook and MySpace accounts, she consented to

⁹⁶ 270 F.R.D. 430, 436 (S.D. Ind. 2010).

⁹⁷ *Id.* at 435.

⁹⁸ *Id.* at 436.

⁹⁹ No. CV–09–1535, 2011 Pa. Dist. & Cnty. Dec. LEXIS 187 (Pa. D&C Northumberland Cnty. May 19, 2011).

¹⁰⁰ *Id.* at *10; see also *Romano v. Steelcase, Inc.*, 907 N.Y.S.2d 650, 657 (Suffolk Co. 2010).

¹⁰¹ *Romano v. Steelcase, Inc.*, 907 N.Y.S.2d 650, 657 (Suffolk Co. 2010).

the fact that her personal information would be shared with others, notwithstanding her privacy settings Since Plaintiff knew that her information may become publicly available, she cannot now claim that she had a reasonable expectation of privacy.”¹⁰²

In contrast, in *Mackelprang v. Fidelity National Title Agency of Nevada, Inc.*, the court denied a motion to compel production of private messages the plaintiff transmitted over MySpace, holding that the defendant’s ability to compel such communications should be limited to only those messages that directly related to Mackelprang’s employment.¹⁰³ Mackelprang had filed suit under Title VII for sexual harassment. Fidelity subpoenaed MySpace to learn the identity and profile contents of two MySpace accounts that it believed belonged to Mackelprang—one that listed her as single with no children and one that listed her as married with six children. Fidelity alleged that Mackelprang used the first MySpace account to communicate sexually-explicit messages to colleagues she later claimed sexually harassed her. MySpace refused to produce the private messages without a search warrant or a letter of consent from Mackelprang.

The court denied Fidelity’s motion to compel production on the basis that Fidelity was engaging in a “fishing expedition” that was not narrowly tailored to the case at hand. However, the court did invite a more limited request if it could be based on more than mere speculation that the plaintiff had engaged in the conduct alleged.

VI. PROTECTING PRIVILEGE: AVOIDING THE PITFALLS OF WAIVER.

A. Using the Company Email System to Transmit Privileged Communications.

As communications are increasingly conducted via email, courts have struggled with whether privilege may be waived when an employee transmits or receives otherwise privileged communications on the employer’s network or computer hardware. This issue typically turns on whether the employer’s electronic communications policy—which often contains a statement that any communications transmitted on the employer’s computer network are company property and may be accessed and read at the company’s discretion—is sufficient to vitiate any reasonable expectation of privacy.

In determining whether an employee destroys any privilege he may have in personal communications transmitted or received on the company network, the majority of courts have focused on the employee’s reasonable expectation of

privacy. Courts frequently examine whether (1) the corporation maintains a policy banning personal use of the computer network; (2) the corporation monitors the employee’s use of the employer’s computer or email; (3) third parties have a right of access to the computer or emails; and (4) the corporation notified the employee or the employee was otherwise aware of the company’s monitoring and use policies.¹⁰⁴

Several courts have found that an employee did not have a reasonable expectation that his or her emails would remain confidential when the email was transmitted on the company server, and have accordingly ruled that the attorney-client privilege was waived.¹⁰⁵ In *Long v. Marubeni America Corporation*, the United States District Court for the Southern District of New York held that communications transmitted and received by several civil-rights plaintiffs were not protected from disclosure by the attorney-client privilege because the emails were transmitted and received on their company computers.¹⁰⁶ The court focused on the employer’s policy, which stated clearly and unambiguously that employees were to have no expectation of privacy in electronic information stored, sent, or received on company property, and the company could monitor any such information at any time.¹⁰⁷ The court held that the plaintiff’s disregard of the employer’s policy “stripped” their emails of the confidential cloak of the attorney-client privilege.¹⁰⁸

In *Aventa Learning, Inc. v. K12, Inc.*, the United States District Court for the Western District of Washington addressed whether two former high-level executives had any reasonable expectation of privacy with regard to attorney-client communications saved on their company-owned laptops.¹⁰⁹ The court found that one executive had returned his company-issued laptop upon termination of his employment without asserting privilege or taking any precautions to protect the asserted privacy of the communications stored on the laptop.¹¹⁰ The court quickly determined that this executive had waived any privilege that might have

¹⁰⁴ See *In re Asia Global Crossing, Ltd.*, 322 B.R. 247, 257 (S.D.N.Y. Bankr. 2005); *In re Royce Homes, LP*, 449 B.R. 709, 735 (S.D. Tex. Bankr. 2011).

¹⁰⁵ See *In re Royce Homes, LP*, 449 B.R. 709, 733 (S.D. Tex. Bankr. 2011) (“Accordingly, the Court finds that Speer waived the attorney-client privilege as to any e-mails he sent and received via the Debtor’s computer system, as any communications between Speer and his personal counsel were not confidential.”).

¹⁰⁶ *Long v. Marubeni America Corporation*, No. 05–CV–639, 2006 WL 2998671, at *1 (S.D.N.Y. Oct. 19, 2006).

¹⁰⁷ *Id.* at *3.

¹⁰⁸ *Id.*

¹⁰⁹ *Aventa Learning, Inc. v. K12, Inc.*, No. C10–1022JLR, 2011 WL 5438960 (W.D. Wash. Nov. 8, 2011).

¹¹⁰ *Id.* at *17.

¹⁰² *Id.*

¹⁰³ No. 2:06–CV–00788, 2007 WL 119149, at *8 (D. Nev. Jan. 9, 2007).

been applicable at the time he returned his company laptop.¹¹¹ In contrast, the court noted that the second executive had refused to relinquish his company laptop without first asserting the attorney-client privilege over certain materials stored on it and securing a sequestration agreement from the company.¹¹² Nonetheless, the court held that the act of saving those communications onto his company laptop effectively waived any privilege that may have existed with respect to the attorney-client communications.¹¹³ The company policy, the court observed, expressly reserved the company's right to access and disclose any file or stored communication contained on the company laptop at any time.¹¹⁴ As a result, the executives could not have had a reasonable expectation of privacy in any communication or other materials created, received, or stored on the company laptop or server.¹¹⁵ The fact that neither executive acknowledged receiving a copy of the company policy was of no consequence, the court held, because the executives were senior level employees charged with constructive knowledge of all company policies.¹¹⁶

Other courts have extended the waiver of privilege beyond the attorney-client context and held that marital privilege may be waived by conducting otherwise privileged communications on a company server. In *United States v. Etkin*, the United States District Court for the Southern District of New York held that a former employee waived the marital communications privilege by virtue of the company's flash-screen notice that appeared during the login process warning employees that their emails were subject to monitoring by the company.¹¹⁷ The court rejected the defendant's claim that the waiver was ineffective because he never read the computer notices, and held that, by "virtue of the log-on notices, Defendant is properly charged with knowledge of the fact that any email he sent to his wife from his work could be read by a third party."¹¹⁸

In contrast, in *Curto v. Medical World Communications, Inc.*, the United States District Court for the Eastern District of New York found an employee's personal communications to his or her personal attorney on the company's computer to be protected from disclosure by the attorney-client privilege even where the employer maintained a policy that all communications were subject to monitoring and considered property of the

company.¹¹⁹ The court held that the employee took reasonable precautions in maintaining the confidentiality of her communications, including by sending the communications through her personal email account on her home network (from which she worked).¹²⁰ Further, the court found that the company failed to regularly enforce its computer usage policy, which generated a false sense of security that lulled employees into believing that the policy would not be enforced.¹²¹

Texas courts have not extensively addressed whether the attorney-client privilege is waived when an employee transmits, receives, or stores the allegedly confidential communication on the employer's property; however, recent case law suggests that an employee's reasonable expectation of privacy may be vitiated by an employer's acceptable use policy. A bankruptcy court in the Southern District of Texas recently rejected an employee's assertion of privilege regarding communications transmitted by the employee on a company computer. The court adopted the four-pronged inquiry into whether the claimant had waived any privilege associated with the communications, and held that the employee had. The court noted that the "Debtor's guidelines on monitoring were so explicit and straightforward that no employee could reasonably believe the Debtor would not or could not view his or her personal emails."¹²² The court concluded that "the Debtor's explicit notification in its Electronic Communications Policy that all personal communications were corporate property overrode [the employee's] false and unreasonable sense of security."¹²³ The court concluded by rejecting the debtor's assertion that he did not have actual or direct notice, and held that the debtor did not adequately prove the absence of waiver since he failed to appear to testify regarding his perception or awareness of the policy and the evidence suggested that he should have known of its terms.¹²⁴

B. Using the Company Computer to Transmit Emails Through a Private Email Account.

In *Stengart v. Loving Care Agency, Inc.*, the New Jersey Supreme Court held that an employee "could reasonably expect that e-mail communications with her lawyer through her personal email account would remain private, and that sending and receiving them via a company

¹¹¹ *Id.* at *17.

¹¹² *Id.* at *18.

¹¹³ *Id.* at *18.

¹¹⁴ *Id.* at *19.

¹¹⁵ *Id.* at *19.

¹¹⁶ *Id.* at *18.

¹¹⁷ *United States v. Etkin*, No. 07-CR-913, 2008 U.S. Dist. LEXIS 12834, at * 16 (S.D.N.Y. Feb. 20, 2008).

¹¹⁸ *Id.*

¹¹⁹ *Curto v. Med. World Commc'ns, Inc.*, No. 03-CV-6327, 2006 WL 1318387, at *1 (E.D.N.Y. May 16, 2006).

¹²⁰ *Id.* at *3-4.

¹²¹ *Id.* at *3, 8.

¹²² *In re Royce Homes, LP*, 449 B.R. 709, 739 (S.D. Tex. Bank. 2011).

¹²³ *Id.* at 740.

¹²⁴ *Id.* at 741.

laptop did not eliminate the attorney-client privilege that protected them.”¹²⁵ The *Stengart* court expressed skepticism that a waiver of attorney-client privilege could ever be affected by the use of a personal, password-protected email account on a company’s computer system: “Because of the important public policy concerns underlying the attorney-client privilege, even a more clearly written company manual—that is, a policy that banned all personal computer use and provided unambiguous notice that an employer could retrieve and read an employee’s attorney-client communications, if accessed on a personal, password-protected email account using the company’s computer system—would not be enforceable.”

But in a similar context, the Dallas Court of Appeals held that an employee did not have a reasonable expectation of privacy in the personal communications stored on his company laptop notwithstanding the fact that the employee stored the communications in a password-protected personal folder.¹²⁶ In *McClaren v. Microsoft Corporation*, a former employee sued his employer for invasion of privacy after the employer disclosed to a third party the contents of the employee’s personal folders stored on the company’s computer in connection with an investigation into allegations that the employee was engaged in sexual harassment. The court held that the contents of the computer were the company’s property, and the employee lacked a reasonable expectation of privacy in any information stored on it.

C. Protecting Privilege Through the Creation of a Privilege Log.

Under the federal common law, courts strictly construe the attorney-client privilege to promote liberal discovery and the investigation of the truth. As a result, the claimant of the privilege bears the burden of proving each and every element required to invoke the attorney-client privilege and that the privilege applies to each document that he or she seeks to withhold from discovery.¹²⁷

One way in which a claimant of privilege may satisfy his or her burden is by supplying the court with an adequate privilege log from which the court may evaluate whether the privilege was properly invoked.¹²⁸ Federal Rule of Civil Procedure 26(b)(5) provides that a party withholding

information otherwise discoverable on the basis of privilege must:

- (i) Expressly make the claim; and
- (ii) Describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

Fed. R. Civ. P. 26(b)(5).

Several recent federal court decisions suggest that a claimant’s burden is not satisfied when the privilege log contains only a brief, short, or general description of the subject matter of each communication.¹²⁹

In *NLRB v. Jackson Hospital Corp.*, the United States District Court for the District of Columbia ordered the NLRB to produce certain documents alleged to be privileged to chambers for an *in camera* inspection.¹³⁰ The court observed that Federal Rule of Civil Procedure 26(b)(5) imposes an exacting standard on litigants asserting a privilege. Where a privilege log fails to satisfy the required standard, the court may (1) afford the party an opportunity to correct the deficiencies by submitting a more detailed log; (2) deem the inadequate log a waiver of the privilege asserted; (3) conduct an *in camera* inspection of the withheld documents; or (4) conduct an *in camera* inspection of a sample of withheld documents.¹³¹ *In camera* inspection requires the greatest expenditure of judicial resources, and runs the risk of prejudicing the holder of the privilege by disclosing sensitive information to the presiding judge.¹³² In contrast, the court noted, deeming the inadequate log a waiver of privilege is the harshest result contemplated by the rules.

Turning to the case at bar, the court observed that agencies asserting privileges such as the deliberative process privilege typically do so through a combination of a detailed privilege log and a declaration from an agency official explaining what the withheld documents are and how they relate to the decision made.¹³³ Reviewing several categories of documents claimed to be privileged,

¹²⁵ *Stengart v. Loving Care Agency, Inc.*, 990 A.2d 650, 655 (N.J. 2010).

¹²⁶ See *McClaren v. Microsoft Corp.*, No. 05–97–00824–CV, 1999 WL 339015 (Tex. App.—Dallas, May 28, 1999, no pet.).

¹²⁷ See, e.g., *United States v. El Paso Co.*, 682 F.2d 530, 438 (5th Cir. 1982).

¹²⁸ See *In re Royce Homes, LP*, 449 B.R. 709, 727 (S.D. Tex. Bankr. 2011).

¹²⁹ See *In re Royce Homes, LP*, 449 B.R. 709, 728 (S.D. Tex. Bankr. 2011) (“[B]rief, short, or general descriptions of the subject matter of each communication are insufficient, as they in no way provide competent evidence of each and every element of the attorney-client privilege.”).

¹³⁰ *NLRB v. Jackson Hosp. Corp.*, 257 F.R.D. 302, 308 (D.D.C. 2009) (Facciola, J.)

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 309.

the court closely scrutinized whether the NLRB had satisfied its burden of establishing the applicability of the asserted privileges. The court concluded that it could not tell from the description of several documents whether the claimed privilege applied, and ordered the production of those documents to chambers for an *in camera* inspection. The court observed that the NLRB had not been dilatory in discovery and found that *in camera* inspection was the appropriate remedy for the inadequate privilege log given the particular circumstances of the case.¹³⁴

In *In re Royce Homes, LP*, the United States Bankruptcy Court for the Southern District of Texas confirmed the exacting standard that must be satisfied to preserve a claim of privilege through a privilege log. The court observed that a claimant's privilege log must "not only identify the date, the author, and all recipients of each document listed therein, but should also describe the document's subject matter, the purpose of its production, and a specific explanation of why the document is privileged or immune from discovery."¹³⁵ The court held that a privilege log, which contained the date, nature of the communication at issue (email), author, addressee(s), other recipients, privilege claimed, capacity in which it was sent, and the number of pages was "grossly deficient" because it failed to adequately describe each and every email's subject matter and why each email should be considered a privileged attorney-client communication.¹³⁶ The court rejected the claim that an affidavit declaring that each subject email was created for the purpose of obtaining privileged legal advice was sufficient to cure the deficient privilege log, and order production of all of the subject emails.

In demonstrating why the claimant's privilege log was inadequate, the court offered guidance regarding what type of entry might satisfy his or her burden. The court observed that the claimant could have "easily stated the following, or a version of the following, for each entry:

This was an e-mail transmitted to my attorney [name of attorney] on [set forth specific date]. This communication involved certain questions and comments that I wanted my attorney to focus on in preparation for an upcoming hearing in the Kopecky litigation. I was asking my attorney for advice about this litigation in my personal capacity. No third parties were present and I have not shared this email with any third party.

¹³⁴ *Id.* at 315.

¹³⁵ *Royce Homes*, 449 B.R. at 728 (quoting *Cashman Equip. Corp. v. Rozel Operating Co.*, No. 08-363-C-M2, 2009 WL 2487984, at *2 (M.D. La. Aug. 11, 2009)).

¹³⁶ *Id.* at 729-30.

Although this standard may not seem onerous at first glance, problems may arise when the standard for demonstrating privilege collides with the large amounts of data being created. The traditional way of documenting privilege claims may become incompatible with the growing volume of data stored by a company.

VII. RECOVERING COSTS: TAXING ELECTRONIC DISCOVERY FEES AS A COST OF LITIGATION.

An often overlooked issue in discovery disputes is the possible recovery of expenses by the prevailing party at the conclusion of litigation. In the past year, significant attention has been devoted to whether a party may recover the costs of conducting electronic discovery as a cost of litigation.

Federal Rule of Civil Procedure 54(d) provides that costs, other than attorney's fees, should be awarded to a prevailing party unless a statute, rule, or court order provides otherwise.¹³⁷ Congress has limited the litigation expenses that qualify as taxable "costs" to only those specifically enumerated by statute.¹³⁸ Title 28 U.S.C. § 1920 provides that a judge or clerk of any court of the United States may tax the following as costs of litigation:

- (1) Fees of the clerk and marshal;
- (2) Fees for printed or electronically recorded transcripts necessarily obtained for use in the case;
- (3) Fees and disbursements for printing and witnesses;
- (4) Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case;
- (5) Docket fees under section 1923 of this title;
- (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

28 U.S.C. § 1920. Under Fifth Circuit precedent, a district court may, in its discretion, decline to award statutory costs, but it may not award costs beyond those categories provided for by statute.¹³⁹

Courts have struggled with whether and to what extent the costs associated with electronic discovery

¹³⁷ See FED. R. CIV. P. 54(d) ("Unless a federal statute, these rules, or court order provides otherwise, costs—other than attorney's fees—should be allowed to the prevailing party.").

¹³⁸ See 28 U.S.C. § 1920.

¹³⁹ See *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 441-42 (1987).

may be taxed under § 1920. The dispute centers on whether the costs of electronic discovery represent “fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case” under § 1920(4).

The trend among federal district courts, including federal courts in Texas, is to permit a prevailing party to recover the costs of converting responsive documents or data to produce the responsive items in the requested format. So, for example, if a party is served with discovery requesting production of responsive documents in searchable TIFF format, and that party incurs costs converting responsive documents into the requested format, that party may recover its costs if it prevails.¹⁴⁰ As one court put it:

It strikes the Court as clear that, when starting with an electronic document, the process of burning the document onto a CD to turn over in discovery is “copying.” And it likewise seems clear that where the document copied is responsive to a discovery request, it is “necessarily obtained for use in the case.” See 28 U.S.C. § 1920(4). Thus, having carefully reviewed Defendant’s *production* costs in this case, this Court finds that they qualify as “copying” for purposes of § 1920(4), and therefore will tax \$1,561.34.¹⁴¹

In contrast, the Third Circuit recently limited the type of electronic discovery costs that may be taxed at the conclusion of litigation.¹⁴² Analyzing the language of § 1920(4), the Third Circuit concluded that Congress has not authorized the taxation of all electronic discovery costs “merely because today’s technology requires technical expertise not ordinarily possessed by the typical legal professional.”¹⁴³ Rather, § 1920(4) authorizes only the cost of making copies. The Court observed:

It may be that extensive “processing” of ESI is essential to make a comprehensive and intelligible production. Hard drives may need to be imaged, the imaged hard drives may need to be searched to identify

relevant files, relevant files may need to be screened for privileged or otherwise protected information, file formats may need to be converted, and ultimately files may need to be transferred to different media for production. But that does not mean that the services leading up to the actual production constitute “making copies.”¹⁴⁴

The Court distinguished between the costs associated with converting electronic information to an agreed-upon production format from other electronic discovery tasks. Lkening the conversion of electronic information to a producible format to “the functional equivalent of making copies,” the court held that such costs are taxable under § 1920(4). However, costs associated with other typical electronic discovery activities such as searching, culling, and de-duplicating data, are not taxable because they are not akin to making copies.

The Third Circuit noted that the onerous costs of electronic discovery may be dealt with under Federal Rule of Civil Procedure 26(c), which permits the district court to grant orders protecting a party from “undue burden or expense” in complying with discovery requests, including by conditioning the taking of discovery on the requesting party’s payment of the costs of discovery.¹⁴⁵ But, if a party fails to obtain a cost-shifting protective order, the Third Circuit held that its authority to award the costs of electronic discovery is statutorily limited to only those costs explicitly enumerated in § 1920.

Other courts, however, have taken a more expansive approach in interpreting whether electronic discovery costs may be taxed under § 1920.¹⁴⁶ These courts have concluded that the taxation of electronic discovery costs is authorized under § 1920(4) because the services incurred are “indispensable” to the ultimate act of producing intelligible electronic documents.¹⁴⁷ Because the

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 171 (citing *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978)).

¹⁴⁶ See *In re Online DVD Rental Antitrust Litig.*, No. M 09–2029, 2012 WL 1313111, at *1 (N.D. Cal. April 20, 2012) (“[A]lthough the court takes note of the Third Circuit’s well-reasoned opinion in *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.* . . . the court concludes that in the absence of directly analogous Ninth Circuit authority, and in view of the court’s prior order in connection with the Blockbuster subscriber plaintiffs’ motion for review of the clerk’s taxation of costs, broad construction of section 1920 with respect to electronic discovery production costs—under the facts of this case—is appropriate.”) (citation omitted).

¹⁴⁷ See *CBT Flint Partners, LLC v. Return Path, Inc.*, 676 F.Supp.2d 1376, 1380 (N.D. Ga. 2009), *vacated on other grounds*, 654 F.3d 1353, 1361 (Fed. Cir. 2011) (holding that defendant was entitled to recover fees charged by its

¹⁴⁰ See *Fast Memory Erase, LLC v. Spansion, Inc.*, No. 3:10–CV–0481–M–BD, 2011 WL 5093945, at *5 (N.D. Tex. Nov. 10, 2010) (“Under these circumstances, the Intel Defendants are entitled to recover \$197,637.72 in costs for creating TIFF/OCR images of documents responsive to plaintiff’s discovery requests.”).

¹⁴¹ See *Mann v. Heckler & Koch Defense, Inc.*, No. 1:08–CV–611, 2011 WL 1599580, at *8 (E.D. Va. April 28, 2011).

¹⁴² See *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 674 F.3d 158, 169 (3d Cir. 2012).

¹⁴³ *Id.*

services required for producing electronically stored information differ from those required for hard copies, these courts have reasoned that “[i]t is appropriate to taken into account the costs associated with these additional services in assessing costs for exemplification and copying of materials.”¹⁴⁸

In *In re Aspartame Antitrust Litigation*, the United States District Court for the Eastern District of Pennsylvania granted, in part, the defendants’ bill of costs seeking an award of almost \$500,000 in costs associated with electronic discovery.¹⁴⁹ The court agreed with the defendants that its electronic discovery methods ultimately saved a significant amount of costs by permitting discovery to occur in an expeditious and cost-effective manner. Pursuant to Federal Rule of Civil Procedure 54(d), the court awarded defendants the costs associated with the creation of the litigation database, storage of electronic data, imaging of certain hard drives, performance of keyword searches, data extraction and processing, de-duplication of data, and other costs associated with the production and creation of load files that allowed electronic documents to be loaded into review platforms. The court did, however, decline to award the defendants their full costs associated with conducting their review.

The possibility that electronic discovery costs may be assessed against an unsuccessful party should cause litigants to exercise caution in seeking extensive electronic discovery. As one federal district court put it:

The services are certainly necessary in the electronic age. The enormous burden and expense of electronic discovery are well known. Taxation of these costs will encourage litigants to exercise restraint in burdening the opposing party with the huge cost of unlimited demands for electronic discovery.¹⁵⁰

However, courts have uniformly rejected efforts by prevailing parties to recover the costs associated with reviewing electronic document on the grounds

electronic discovery vendor to collect, search, identify, and help produce electronic documents from the defendant’s network and hard drive in response to plaintiff’s discovery requests).

¹⁴⁸ See *In re Scientific-Atlanta, Inc. Secs. Litig.*, No. 1:01–CV–1950–RWS, 2011 WL 2671296, at *1 (N.D. Ga. July 6, 2011).

¹⁴⁹ *In re Aspartame Antitrust Litigation*, No. 2:06–CV–1732, 2011 U.S. Dist. LEXIS 118226 (E.D. Pa. Oct. 5, 2011).

¹⁵⁰ See *CBT Flint Partners, LLC*, 676 F.Supp.2d at 1381.

that the costs of a paper document review have never been recoverable under § 1920.¹⁵¹

These cases demonstrate that savvy litigants may seek to offset the costs associated with electronic discovery by seeking to recover such costs under § 1920. However, it is worth noting that the party seeking to recover its costs bears the burden of establishing their entitlement under § 1920. Litigants must be prepared to explain and justify the nature of the costs incurred.¹⁵²

VIII. OTHER NOTEWORTHY TEXAS CASES

- *Tex. Gen. Land Office v. Porretto*, No. 01–09–00520, 2011 WL 6282354, at *11 (Tex. App.—Houston [1st Dist.] Dec. 15, 2011, no pet.) (“Much as a trial court cannot compel a party to create indices or reduce information to tangible form in response to a request for production, a trial court cannot sanction a party for failing to organize responsive materials according to the method its opponent prefers when the discovery response complies with an alternate method permitted under the rules.”)
- *In re Family Dollar Stores of Tex., LLC*, No. 09–11–00432–CV, 2011 WL 5299578, at * (Tex. App.—Beaumont Nov. 3, 2011, no pet.) (“We conclude that requiring a party to reduce raw data from an electronic database to a paper report or to a list in an electronic form requires Family Dollar to make a list that does not currently exist. Because Rule 196.1 does not allow one party to require that others make lists, the trial court’s amended discovery order is broader than the scope of discovery permitted by the Texas Rules of Civil Procedure.”) (internal citations omitted).
- *In re Badgerow*, No. 14–12–00239–CV, 2012 WL 1253273, at *3 (Tex. App.—Houston [14th Dist. April 12, 2012, no pet.) (“Evidence is not necessary to support an objection if the discovery requests themselves demonstrate overbreadth as a matter of law. The objections in this case, on grounds of relevance and overbreadth, can be determined from the face of the pleadings without evidence.”).
- *Valdez v. Progressive Cnty. Mut. Ins. Co.*, No. 04–11–00254–CV, 2011 WL 6208702, at *4 (Tex. App.—San Antonio Dec. 14, 2011, no

¹⁵¹ See *In re Scientific-Atlanta, Inc. Secs. Litig.*, No. 1:01–CV–1950–RWS, 2011 WL 2671296, at *1 (N.D. Ga. July 6, 2011).

¹⁵² See *In re Scientific-Atlanta, Inc. Secs. Litig.*, No. 1:01–CV–1950–RWS, 2011 WL 2671296, at *2 (N.D. Ga. July 6, 2011) (excluding certain costs because defendants failed to provide adequate information for the court to determine their taxability under § 1920).

pet.) (“A party seeking to exclude any matter from discovery must likewise assert any objection or privilege to a request for production in writing within that response. A failure to timely assert a proper objection or privilege waives the objection or claim of privilege.”).

- *Lucas v. Clark*, 347 S.W.3d 800, 804 (Tex. App.—Austin 2011, pet. denied) (holding that an overbroad deemed admission cannot by itself constitute legally sufficient evidence to uphold a trial court’s verdict in the absence of other evidence).